119th Session **Judgment No. 3446**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. Y. B. against the International Labour Organization (ILO) on 10 August 2012 and corrected on 27 September and 12 November 2012, the ILO's reply of 26 February 2013, the complainant's rejoinder of 6 May and the ILO's surrejoinder of 5 August 2013;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant joined the ILO on 1 August 2007 as National Coordinator for a technical cooperation project based in Addis Ababa, Ethiopia. He was employed under a fixed-term contract financed by Technical Cooperation funds, which was due to expire on 30 April 2010. By a letter of 10 March 2010, he was informed that his contract would not be renewed beyond its expiry date.

On 24 March 2010 he suffered a severe injury as a result of an accident that took place within the compound of his residence, as he

was making his way to work. The circumstances of the accident were the following: the complainant got into his car and reversed towards the open gate of the compound, but this started to close. He left his car with the engine running to reopen the gate, but as he did so the car rolled backwards toward the gate. He ran to the driver's side and opened the door but, as he tried to reach for the brake, he was crushed between the moving car and the gate.

On 26 March 2010 he submitted a compensation claim for injury attributable to the performance of official duties, under Article 8.3 of the Staff Regulations. The Compensation Committee examined the complainant's claim on 17 and again on 27 August 2010 but it considered that it needed additional information regarding the location of the accident. A plan and photos of the compound where the accident took place were provided by the Regional HR Partner in October 2010. The Compensation Committee resumed its examination of the complainant's claim on 11 January 2011 and concluded that, since the accident had occurred while the complainant was still at home, it could not be considered as a commuting accident and it was, therefore, not an accident attributable to the performance of official duties. It thus recommended that the complainant's claim for compensation be rejected. The complainant was informed by a letter of 15 March 2011 that the Director-General had endorsed this recommendation.

In June 2011 the complainant filed a grievance with the Human Resources Development Department (HRD) but this was rejected by the Director of HRD on 23 September 2011. On 11 October 2011 he filed a grievance with the Joint Advisory Appeals Board (JAAB) against this decision, asking that it be set aside, that his accident be recognised as a commuting accident and that he be compensated accordingly. The JAAB issued its report on 19 March 2012. It concluded that, due to the absence of a definition of a commuting accident in the Staff Regulations and the lack of clarity and awareness of the "narrow statistical definition" applied by the Office, it was not able to determine whether the accident suffered by the complainant was attributable to the performance of official duties. Nevertheless, it

unanimously recommended that the complainant be paid two months' salary in compensation on the grounds that, contrary to its normal practice, the Office had not given him at least two months' notice of the non-renewal of his contract. Moreover, the JAAB considered that the Office had breached its duty of care by not properly informing the complainant of his rights with respect to health insurance coverage upon the expiry of his contract, and for this reason it recommended that he be notionally reinstated with full salary, allowances and other benefits, including pension and health insurance contributions, for a period equivalent to the period of sick leave to which he would have been entitled under Article 8.6(b)(1) of the Staff Regulations if his contract had been extended. The JAAB also recommended that the complainant be retroactively affiliated to the Staff Health Insurance Fund (SHIF) for the entire duration of his notional reinstatement.

On 11 April 2012, the Officer-in-Charge of the Management and Administration Sector wrote to the Secretary of the JAAB, criticizing the JAAB's recommendations as *ultra petita* and requesting that it provide the Director-General with a recommendation on the issue that had been put before it, namely whether the complainant's accident was service-incurred. Having received no reply from the JAAB, he notified the complainant by a letter of 18 May 2012 of the Director-General's decision to dismiss his grievance on the grounds that the JAAB had failed to provide an informed recommendation on the only issue referred to it for review, i.e. whether the complainant's accident was a commuting accident giving rise to compensation under Annex II to the Staff Regulations, and that the recommendations it had actually made were beyond its authority and contrary to the applicable procedures and time limits. That is the impugned decision.

B. The complainant submits that his accident must qualify as service incurred and his injury as one attributable to the performance of official duties. He asserts that, despite the absence of a definition of a commuting accident in its Staff Regulations, the ILO has recognised in its practice the entitlement to compensation for a commuting accident and has used for this purpose the definition contained in the Protocol of 2002 to the Occupational Safety and Health Convention.

This relevantly provides that "the term 'commuting accident' covers an accident resulting in […] personal injury occurring on the direct way between the place of work and […] the worker's principal or secondary residence".

He argues that, as his accident occurred on his way to work, it clearly falls under the above definition. He believes that there is no ambiguity in his case, given that he started his car with the firm intention to go to work, a fact which is not contested by the Administration, and that his accident would not have happened had he not made his way to work that day.

The complainant also contends that the ILO did not give him adequate notice of non-renewal of his contract, in breach of its duty of care. According to him, notwithstanding the terms of Article 4.6(d) of the Staff Regulations, the ILO's practice is to give at least two months' notice of non-renewal of a fixed-term appointment. He argues that, in light of his particular circumstances, i.e. the fact that he suffered a serious injury from an accident just a few days before the end of his contract, the ILO should have given him ample notice of non-renewal so as to allow him to make alternative arrangements. In fact, the ILO should have extended his contract while placing him on sick leave so as to enable him to receive adequate social protection in line with its Conventions and Recommendations. He adds that, after the expiry of his contract, the ILO's processing of his claim for compensation was extremely slow, confusing and misleading.

The complainant asks the Tribunal to set aside the impugned decision and to recognise that the accident he sustained on 24 March 2010 was a commuting accident. He claims compensation for the damage he suffered and he also claims costs.

C. In its reply the ILO submits that the complainant's claim for compensation for the alleged damage he suffered due to the inadequate notice of non-renewal and the failure by the ILO in its duty of care is irreceivable for failure to exhaust internal remedies. Indeed, the complainant never raised these matters in his grievance to the JAAB. Had the complainant raised before the JAAB the argument

regarding the notice period, this would have been rejected as time-barred. As to the argument that his contract should have been extended beyond its expiry, in addition to being irreceivable for failure to exhaust internal remedies, it is unfounded in light of the Tribunal's case law.

On the merits, the Organization contends that the complainant's accident cannot be considered as a commuting accident, and hence as attributable to the performance of official duties, because it occurred within the private compound of his residence. In determining the location of the accident, the ILO relied on the complainant's statement and that of his wife, who confirmed that the accident had occurred "inside residential house", as well as on the plan and photos of the compound obtained by the Regional HR Partner. The definition of a commuting accident used by the ILO was that adopted by the Sixteenth International Conference of Labour Statisticians held in 1998, according to which a commuting accident is "an accident occurring on the habitual route, in either direction, between the place of work or work-related training and […] the worker's principal or secondary residence […] which results in death or personal injury". Pursuant to this definition, the test was whether the accident occurred inside or outside the complainant's residential property whilst on his habitual route to work. The worker's residence is determined according to the characterisation of "home" contained in the World Health Organization's Statistical Classification of Diseases and Related Health Problems. The ILO concludes that in light of the above, the Director-General's decision not to consider the complainant's accident as a commuting accident attributable to the performance of official duties was legally sound.

D. In his rejoinder the complainant maintains all his arguments and claims.

E. In its surrejoinder the ILO reiterates that the complainant's accident could not be considered as a commuting accident attributable to the performance of official duties.

CONSIDERATIONS

1. In the impugned decision of 18 May 2012, the Director-General rejected the recommendations of the JAAB on the complainant's grievance to pay the complainant two months' salary as compensation because he was not given two months' notice of the non-renewal of his fixed-term technical cooperation project contract. That contract was due to expire on 30 April 2010. The complainant received notice of its non-renewal on 10 March 2010. The Director-General also rejected the JAAB's recommendation to award a notional re-instatement, with full salary and all other benefits, to the complainant for a period equivalent to the period of sick leave to which the complainant would have been entitled under Article 8.6(b)(1) of the Staff Regulations had his contract been extended. The JAAB stated that this was compensation for a lack of duty of care by the Administration towards the complainant. The JAAB further recommended that the complainant be retroactively affiliated to the SHIF for the duration of his notional reinstatement to receive the related benefits. The Director-General rejected these recommendations on the ground that they were not related to the "conclusions" that were submitted to the JAAB for consideration.

2. The Tribunal observes that the JAAB's recommendations did not arise from issues that were before the Compensation Committee when it reviewed the underlying application by the complainant on 11 January 2011. They were not therefore either within the Committee's contemplation or the subject of its recommendations which the Director-General endorsed on that application on 15 March 2011. They were not contained in the complainant's subsequent grievance which was rejected by the letter of 23 September 2011, nor were they contained in his grievance to the JAAB. In short, these recommendations, which the Director-General rejected in the impugned decision, were raised of the JAAB's own volition without the benefit of the prior consideration of the Compensation Committee, the Director-General or of dispassionate canvassing in the JAAB. These matters are therefore irreceivable under Article VII, paragraph 1, of the Tribunal's

Statute for failure to exhaust the internal means of appeal in relation to them.

3. The JAAB failed to resolve the receivable issue that was before it. That issue was whether the complainant had, on 24 March 2010, sustained injuries as a result of a commuting accident which were attributable to the performance of his official duties entitling him to compensation under Article 8.3 of the Staff Regulations. Under this provision, an ILO official is entitled to compensation as prescribed in Annex II. The JAAB stated that it could not determine whether or not the complainant's injuries were sustained in such an accident, first, because the Staff Regulations provided no definition of the term "commuting accident". Second, because it (the JAAB) did not accept the ILO's submission that the definition adopted in 1998 by the Sixteenth International Conference of Labour Statisticians, which was relied upon by the Organization, provided an applicable definition. In the impugned decision, the Director-General confirmed the decisions of 15 March 2011 and 23 September 2011, which had rejected the complainant's application for compensation on the ground that the accident was not a commuting accident.

4. The ILO asserts that the accident was not a commuting accident because it occurred within the premises of the complainant's private home rather than on the route between his home and his place of work. The ILO cites in support a definition which, as noted above, was adopted in October 1998 by the Sixteenth International Conference of Labour Statisticians, which states as follows: "an accident occurring on the habitual route, in either direction, between the place of work or work-related training and: (i) the worker's principal or secondary residence; (ii) the place where the worker usually takes his or her meals; or (iii) the place where he or she usually receives his or her remuneration; which results in death or personal injury".

The ILO submits that this definition excludes an accident which occurs on the premises of an employee. The ILO then refers to the World Health Organization's International Statistical Classification of Diseases and Related Health Problems and the definition of "home"

therein for the purpose of determining places of occurrence of external causes of injury. "Home" is there defined as: "home premises", "private driveway to home", "private garden to home", "private yard to home".

These submissions merely mirror the difficulty that is created by the absence of a specific definition for what constitutes "a commuting accident" under Article 8.3 of the Staff Regulations. The suggested definitions from disparate provisions were not intended for this purpose. They are intended for the determination of criteria for statistical collation.

5. However, if one accepts, as the ILO does, that the duty to pay compensation for injury attributable to the performance of official duties extends to circumstances where the staff member was commuting to and from work, then the issue of what is commuting should be approached in a principled way. It is too narrow an approach to ask what are the boundaries of the staff member's house, in a physical sense, in order to determine where and thus when she or he left the house to travel to work. Rather the question is whether the staff member was engaged in, at the time of the accident, an activity which had the direct objective and effect of transporting (by whatever means, including walking) the staff member to her or his place of work to perform her or his duties. Or, put slightly differently, whether the staff member was engaged in an activity of this type which she or he would not have engaged in but for the need to travel to her or his place of work.

6. Accordingly, the Tribunal does not accept the ILO's submission that the circumstances of the present case, objectively, merely suggest that the complainant had an intention to go to work because he had not exited his premises. The complainant had actually commenced the drive to work albeit that he had not yet exited his gate. The accident that occurred there was therefore a commuting accident that was attributable to the performance of his official duties. He was accordingly entitled to compensation under Article 8.3 of the Staff Regulations.

7. In the foregoing premises, the impugned decision is set aside on the issue of the complainant's entitlement to compensation under Article 8.3 of the Staff Regulations and the ILO shall compensate the complainant accordingly for the injuries that he sustained in the accident of 24 March 2010. The complainant is also entitled to costs in the amount of 1,500 United States dollars.

DECISION

For the above reasons,

1. The impugned decision of 18 May 2012 is set aside to the extent that it dismissed the complainant's grievance against the rejection of his claim for compensation under Article 8.3 of the Staff Regulations.
2. The ILO shall compensate the complainant accordingly for the injuries that he sustained in the accident of 24 March 2010.
3. It shall pay him costs in the amount of 1,500 United States dollars.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ