MUSLEH

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Anna Segall (DLA)
Introduction

1. This is an application by Abdulkarim Musleh (the "Applicant") against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the "Respondent"), adopting the conclusions of a medical board that he was fit for service and returning him to duty.

Facts

2. Effective 19 December 2001, the Applicant was employed by the Agency as a Laundry Supervisor at the Amman Training Centre.

3. On 13 May 2010, while on duty, the Applicant fell and injured his left hand. He went on sick leave.

4. By memorandum dated 22 February 2011, the Human Resources Services Officer, Jordan Field Office ("HRSO/JFO") notified the Deputy Chief, Field Health Programme (the "D/CFHP") that the Applicant was to be referred to a medical board to determine his fitness for continued service with the Agency.

5. By memorandum dated 6 March 2011, the D/CFHP requested that a medical board be convened and be comprised of three doctors.

6. On 22 March 2011, the medical board convened at the Amman Town Health Centre to examine the Applicant and determine his fitness for continuation of service with the Agency.

7. On 5 June 2011, the medical board concluded that the Applicant was "fit for continued service with the Agency. However reevaluation after one year is recommended".

8. On 13 June 2011, the Chief, Field Health Programme concurred with the conclusion of the medical board.
9. By memorandum dated 15 June 2011\(^1\), the HRSO/JFO conveyed to the Officer in Charge of the Amman Training Centre ("OiC/ATC") the conclusion of the medical board. The OiC/ATC added that the Applicant should be informed "in writing that any private medical report he obtains should be authenticated by the Senior Medical Officer of Amman Town Health Centre before proceeding on sick leave, and that he should not approach any other UNRWA Health Centre for this purpose". A translation of this paragraph into Arabic is handwritten on the bottom of the document as produced in Annex 1 of the Applicant’s application. The Respondent produces this letter as Annex 7 to his reply. The Respondent’s production does not include the Arabic translation and instead notes that the typist at the ATC was notified that the Applicant was fit for continued service.

10. The Applicant returned to duty on 19 June 2011.

11. On 26 July 2011, the Applicant submitted a request for decision review to the Director of Human Resources. The Applicant never received a response.

12. By letter dated 18 August 2011, the D/CFHP referred the Applicant to Dr. Al Khdoor requesting him to examine the Applicant and to focus on "the diagnosis, prognosis and impairment, and the need for any future surgical treatment as a result of this accident".

13. On 20 September 2011, at a meeting between the Applicant, his counsel (who was then Hala Abu Hijleh) and an UNRWA Health Department Officer, Dr. Ishtewi Abu Zayed, it was agreed that the Applicant would be referred to a medical board consisting of two doctors. The Applicant was to select one doctor and the Health Department was to select the second doctor. The doctors were to be given a copy of the Applicant’s job description and upon examination determine if he was fit for service for his current job. The Applicant selected Dr. Kamil Afifi.

14. On 23 September 2011, the Chief, General Legal Division wrote to the Director of UNRWA Operations, Jordan ("DUO/JFO") the following:

\(^1\) The Tribunal notes that in the original letter produced by the Respondent as Annex 7 there is an obvious typographical error in the date of the letter. While Annex 7 is dated "15 June 2010", a reading of the content of the letter makes it clear that the correct year is 2011.
I refer to your memorandum referenced SA/J/22/2010-2962, including attached materials, concerning the injury sustained by Mr. Abdulkarim Musleh.

On the basis of our review of the materials provided, Mr. Musleh’s injuries appear to be attributable to the performance of official duties on behalf of the Agency.

15. On 19 October 2011, the Applicant acknowledged receipt of 330.00 Jordanian Dinars\(^2\) in full satisfaction of all claims and demands relating to the injury. In relevant part, the release reads as follows:

I [the Applicant] ... [I]n consideration there of [sic] do hereby release and forever discharge the United Nations Relief and Works Agency for Palestine Refugees in the Near East and its Officials, employees and successors and assigns from any and all liability for damages arising or resulting from the injuries received by me in connection with the above mentioned accident, including all known and unknown injuries, and disabilities of whatsoever nature.

16. As the Agency never appointed a second doctor to examine the Applicant per the agreement of 20 September 2011, the Applicant filed an application with the Tribunal on 22 November 2011 contesting the decision of 15 June 2011 that he was fit and to return him to duty.

17. By letter dated 13 March 2012, the HRSO/JFO informed the Applicant that another medical board would be convened on 29 March 2012 to determine his fitness for continued service with the Agency. The Applicant was unable to attend the 29 March 2012 medical board and it was rescheduled for 17 April 2012.

18. On 17 April 2012, the second medical board found the Applicant “fit for service”.

19. By memorandum to the DUO/JFO, dated 26 August 2012, the Chief, Field Health Programme/Jordan (“CFHP/J”) summarised the medical board’s findings on the Applicant’s condition and noted that:

Mr. Musleh was evaluated by a medical board on 22/3/2011 after which he was referred to two external orthopedic

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\(^2\) This sum converts to approximately USD 466.00.
consultants to evaluate his condition separately, the two consultants concluded that he can work his normal job [sic].

The CFHP/J concluded that, upon “reviewing the petition of Mr. Musleh, the medical reports and medical board proceedings and the fact that Mr. Musleh has been doing his normal job since the medical board of 2011”, he concurred with the board conclusion that the Applicant was fit for continued service and would be subject to re-evaluation after one year, i.e. in 2013.

20. On 23 October 2012, the Applicant filed a request for decision review against the decision of the second medical board dated 28 August 2012 to declare him fit for continued service and to be reevaluated in April 2013.

21. By letter dated 16 December 2012, the HRSO/JFO wrote to the Applicant informing him that the Agency had no objection to allowing him to have the surgery related to his service incurred accident at the expense of the Agency, adding that, as agreed with the HRSO/JFO, the Applicant would withdraw his request for decision review.

22. On 7 February 2013, the Applicant withdrew his request for decision review.

23. By motion dated 11 April 2013, the Respondent requested extension of time to submit a reply to the application. On 15 April 2013, the Tribunal granted his request.

24. On 27 May 2013, the Respondent filed his reply.

Applicant’s contentions

25. The Applicant contends the following:

   (i) the Agency erred when it returned him to duty while his injury had not yet healed;

   (ii) the Agency did not take into consideration the medical reports submitted indicating his injury had not yet healed and needed surgery;
(iii) the Agency did not provide him with a copy of his work injury file or with the opinions of the specialists it referred him to;

(iv) the medical board did not inform him of the reasons for its refusal of the medical reports he submitted;

(v) the medical board did not allow him to see his medical file and rejected his request to see it;

(vi) the Agency ordered him to report to duty and deducted all the balance of his sick and annual leave;

(vii) the Agency suspended his salary.

26. The Applicant requests the following relief:

(i) to be transferred to a post that suits his medical condition;

(ii) to be given back the balance of his sick and annual leave;

(iii) to be reimbursed his suspended salaries;

(iv) to be compensated for the physical and psychological effects of being forced to return to work while still suffering from his injury.

Respondent’s contentions

27. The Respondent contends that:

(i) the pleas relating to compensation are not receivable because the Applicant released the Agency from all liability for damages arising from his injury;

(ii) the decision of the Agency adopting the conclusions of the medical board was properly made;

(iii) the relief sought by the Applicant has no basis.

28. The Respondent requests that the Tribunal dismiss the application.
Procedural Issues

Applicant’s motions

29. On 3 April 2012, the Tribunal received from the Applicant a motion for the suspension of the decision finding him fit to return to duty. He also requested reassignment to “a post that suits (his) medical condition…” and reimbursement of leave and salary entitlements.

30. By Order No. 008 (UNRWA/DT/2012) dated 2 May 2012, the Tribunal stated that the Agency’s apparent failure to provide the Applicant with a copy of the 22 March medical board’s findings, as required by Article 10.3 of Area Staff Personnel Directive PD/A/6/Amend.72 Part VI (“PD A/6”), was a prima facie unlawful element of the decision finding that the Applicant was fit to return to work. The Tribunal also found, however, that the Applicant had failed to demonstrate that the request was urgent or that the implementation of the decision would cause him irreparable harm. Therefore, the Tribunal denied the Applicant’s request for suspension of action.

31. On 28 May 2012, the Applicant filed a motion to preclude the Respondent from participating in the proceedings and from filing a reply.

32. On 15 June 2012, the Respondent filed his response to the Applicant’s request to preclude the Respondent from participating in the proceedings. In his response the Respondent requested leave to participate in the proceedings and an extension of time to file the reply.

33. By Order No. 013 (UNRWA/DT/2012) dated 19 June 2012, the Tribunal denied the Applicant’s request to preclude the Respondent from participating in the proceedings and from filing his reply to the application. The Tribunal granted leave to the Respondent to participate in the proceedings and file a late reply.

34. On 10 October 2012, the Tribunal received from the Applicant a motion seeking expedited consideration of his application. The reasons put forward by the Applicant were that one doctor concluded that surgery to his hand was necessary
and he “suffer[ed] from extreme pain in his hand due to his service incurred accident and the aggravation of continued use”.

35. The Respondent did not file a reply to the Applicant’s motion.

36. On 23 October 2012, the Tribunal denied the motion by Order No. 050 (UNRWA/DT/2012) on the basis, inter alia, that the Applicant had failed to demonstrate that “his case should be considered with particular urgency and should be prioritised for resolution over the significant number of pending cases before the Tribunal, many of which were transferred from the Joint Appeals Board abolished in 2009 and pre-date the application in the present case”.

Respondent’s motion

37. On 11 April 2013, the Respondent filed a motion for extension of time to file a reply.

38. On 15 April 2013, the Tribunal granted the motion and gave the Applicant 14 calendar days to file a response to the motion if he so wished. The Applicant did not file a response to the Respondent’s motion.

39. The Tribunal recalls that by Order No. 013 (UNRWA/DT/2012) dated 19 June 2012, the Tribunal granted leave to the Respondent to participate in the proceedings and file a late reply. By Order No. 065 (UNRWA/DT/2013) dated 11 July 2013, the Tribunal affirmed its previous decision to accept the late filing of the Respondent’s reply.

40. On 4 November 2013, the Registry requested that the Respondent produce the original Arabic document of the “Minutes of Meeting” dated 29 April 2013. On the same day the Respondent produced the requested document and also included several additional emails never before seen by the Tribunal. The emails relate to Annex 12 of the Respondent’s reply. The Tribunal received these documents and transmitted them to the Applicant on the same day.
Case Management Hearing

41. On 6 November 2013, the Tribunal held a case management hearing in Amman and addressed questions to the parties. It soon became obvious that both the Respondent’s counsel and the Applicant’s counsel, the Legal Officer (Staff Assistance) (the “LOSA”), had come to the hearing unprepared and proved to be unable to answer questions relating to some important issues in the case. The Respondent’s counsel admitted that his file was “messy” and could not explain why he produced on 4 November 2013 important emails dating back to December 2012 or why they were not filed with his reply of 27 May 2013. As for the Applicant’s counsel, he produced at the hearing an important piece of evidence (the third medical board’s conclusion dated 27 October 2013) that the Applicant had sent him days earlier with no justification as to why he produced it on the very day of the hearing. The Tribunal is displeased with the lack of preparation of counsel of both parties and their lack of due diligence in producing relevant evidence.

42. The Tribunal took into consideration the testimony of the Applicant, the explanations given by the Respondent and by the LOSA at the hearing, and took into evidence documents it subsequently ordered the Respondent to produce (Order No. 109 dated 7 November 2013).

Considerations

Did the Applicant waive his right to file an application with the Tribunal?

43. It is important to look at Area Staff Rule 106.4 ("COMPENSATION FOR DEATH, INJURY OR ILLNESS ATTRIBUTABLE TO SERVICE") which provides in relevant part the following:

PRINCIPLES OF AWARD AND ELIGIBILITY

1. Compensation shall be awarded, in the event of death, injury or illness of a staff member which the Agency determines to be attributable to the performance of official duties on behalf of the Agency,…

* * *
SOLE COMPENSATION

9. The compensation payable under this rule shall be the sole compensation to which any staff member or his/her dependents shall be entitled from the Agency in respect of any claim falling within the provisions of this rule.

RELEASE

10. A person entitled to compensation under this rule shall furnish the Agency with a receipt and release prior to final payment.

44. As noted in paragraph 14 above, on 23 September 2011, the Chief, General Legal Division wrote to the DUO/JFO the following:

I refer to your memorandum referenced SA/J/22/2010-2962, including attached materials, concerning the injury sustained by Mr. Abdulkarim Musleh.

On the basis of our review of the materials provided, Mr. Musleh’s injuries appear to be attributable to the performance of official duties on behalf of the Agency.

There is no evidence in the file to explain this excessive delay by the Agency - from May 2010 to 23 September 2011 – in confirming that the injury suffered by the Applicant was attributable to his duties. However, the Tribunal notes that the Agency soon followed its confirmation of the Applicant’s work-related injury with an offer of compensation to the Applicant in exchange for the Applicant signing a release, as per Area Staff Rule 106.4.

45. As it is at the core of the issue, the Tribunal quotes in full the “Release of Liability” (Annex 10), which the Applicant signed in its English version.

Amendment No. 73

To Personnel Directive A/6 Part Three

ANNEX ‘A’ TO PART THREE OF PERSONNEL
DIRECTIVE NO. A/6

RELEASE OF LIABILITY

Name of Staff Member: Abdulkarim Musleh
Date, Time and Place of Accident: 13/5/2010

Nature and Description of Personal Injuries: Fell Down

Amount of Compensation Paid: Salaries and Allowances During the period from 13/05/2010 through 19/04/2011

I, the undersigned, ...........................................

ABDULKARIM MUSLEH E/NO (5Z0462)

(In BLOCK letters)

Do hereby acknowledge receipt of JD (330,000) In [sic] full satisfaction of all claims and demands relating to the above mentioned accident and in consideration there of [sic] do hereby release and forever discharge the United Nations Relief and Works Agency for Palestine Refugees in the Near East and its Officials, employees, successors and assigns from any and all liability for damages arising or resulting from the injuries received by me in connection with the above mentioned accident, including all known and unknown injuries, and disabilities of whatsoever nature.

I have read the foregoing release and fully understand it.

The foregoing release has been read and explained to me and I fully understand it.

Emp. Name (in Arabic) Signature (Signed)

Date 19/10/2011 (in Arabic)

(Witness)

Name (witness 1) Signature (Signed)

Date 19.10.2011

Name (witness 2) Signature (Signed)

Date 19.10.2011

46. The Respondent submits that the pleas relating to compensation are not receivable because the Applicant released the Agency from all liability for
damages arising from the injuries he suffered while exercising his duties with the Agency.

47. At the hearing on 6 November 2013, when shown the “Release of Liability” dated 19 October 2011, the Applicant confirmed that he had indeed signed it and had done so under no pressure. In response to the Tribunal’s questions, the Applicant testified that he was not given an Arabic translation of the release and there was no translator in the office to interpret the contents of the release into Arabic for him. The Applicant mentioned that a staff member (whom he named) from Human Resources who was present had explained to him that the sum of 330,000 Jordanian Dinars (approximately USD 466.00) he would be receiving upon signing the document titled “Release of Liability” was compensation for the medical expenses he had already incurred (Annex 10). Had it been otherwise, he added, he would not have signed the release. The Tribunal notes that at the hearing the Applicant spoke only in Arabic, and an interpreter was required in order to translate the Arabic into English for the Respondent.

48. The Tribunal found the testimony of the Applicant to be credible and also found it significant that, throughout the Case Management Hearing, the Respondent did not challenge any part of the Applicant’s testimony. Nor did the Respondent offer to produce the staff member from Human Resources to testify and refute the Applicant’s assertion that he was informed the amount of 330,000 Jordanian Dinars was for medical expense he had already incurred. Taking this as an acknowledgment of the truth of the Applicant’s testimony, the Tribunal is troubled by the practice of the Agency to deny a staff member the right to read and understand in his language, which is the predominant language of the Agency, a document he is asked to sign and worse, to provide him – intentionally or unintentionally – with false information about the document he is signing. The Tribunal finds that this is a denial of due process.

49. At the hearing, the Applicant further explained that Annex 10 (Release of Liability) was presented to him after he refused to sign another document titled
“Release (determination of leave)”. The unsigned and undated release of leave is reproduced in relevant part below:

**Release**

**(determination of leave)**

Name of Staff member: Abdul Karim Musleh E/No5Z0462

Date, Time and Place of Accident: 13/05/2011

Nature and Description of Personal Injuries: Fell down

Determination: Salaries and Allowances During the period from 13/05/2011 through 19/04/2011

I, the undersigned **ADUL KARIM MUSLEH E/NO E/No5Z0462**

do hereby acknowledge that my leave attributable to a service accident will be considered by the Agency as special leave with full pay. As result I hereby release and forever discharge the United Nations Relief and Works Agency for Palestine Refugees in the Near East and its officials, employees, successors and assigns from any and all liability from damages arising or resulting from the injuries received by me in connection with the above mention accident, including all known and unknown injuries, and disabilities of whatsoever nature.

50. The Tribunal notes that the date on the release of leave in two places incorrectly lists the accident date as 13 May 2011, instead of 13 May 2010. The Tribunal understands the mistake in the date to be a typographical error given that Annex 10 and the undated and unsigned release of leave both appear to have originated from the same template -- P/D A/6. Nevertheless, the Applicant did not sign the release of leave and the Tribunal accepts this as evidence that he never intended to release the Respondent from liability (Annex 10) as claimed by the Respondent. It is clear to the Tribunal that the Applicant did not understand Annex 10 to be a release of liability or to extinguish his right to future payments. The Tribunal notes that JD 330.00 (or approximately USD 466.00) is hardly a sum that one would agree to as being the complete payment for a chronic injury.

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3 This document is attached as Annex 11 to the Applicant’s motion for suspension of action dated 2 April 2012. The Tribunal notes, however, that the Arabic original states 1 April 2012; therefore, there appears to be an error in the translation.
51. As for the Respondent’s submission that the “Applicant has neither referred nor called into question the agreement of 19 October 2011”, the Tribunal rejects this submission, as discussed in paragraphs 47-48 above, based on the fact that the form was in English and the unchallenged testimony that the contents were misrepresented to the Applicant.

52. The Tribunal concludes that the Applicant has not waived his right to seek compensation or other relief.

_Was the decision of the Agency adopting the conclusion of the medical board properly made?_

53. The Tribunal would like to refer to the jurisprudence of the former United Nations Administrative Tribunal Judgement No. 917, _Ali_ (1999), paragraph V, cited by the Respondent with regard to the review of expert advisory bodies:

> ... the findings of a medical board, as an expert advisory body, are subject to a more limited review, since such findings are based on the technical medical knowledge of the Board’s members. ... The Tribunal can only review such a decision if it is tainted by abuse of discretion, and can only review a medical board’s recommendation if there is evidence of improper motive or some substantive or procedural irregularity.... Procedural irregularities include undue delay or lack of due process. (emphasis added)

54. The Tribunal finds that the handling of the Applicant’s case abounds with procedural irregularities, the first being the release of liability pointed out above.

_Lack of transparency_

_Failure to disclose medical reports and conclusion of medical board_

55. Although the Tribunal concurs with the Respondent’s submission that the medical board was properly constituted, it nevertheless finds a procedural irregularity with the fact that the Agency did not communicate to the Applicant the report of Dr. Al-Maliti, an orthopedist to whom the Applicant had been referred by the Agency on 19 April 2011.
56. The Applicant was only made aware of the above-mentioned medical report when the Agency sent him to Dr. Afifi, an orthopedic and hand surgeon. When Dr. Afifi opened the Applicant's medical file, he mentioned the contents of Dr. Al-Maliti’s report which stated that the Applicant did not require surgery, however, he should be re-examined after three months.

57. There is no evidence in the file that the Applicant had a follow-up appointment with Dr. Al-Maliti three months after his examination on 19 April 2011. Nor is there any evidence that the Applicant was provided with Dr. Al-Maliti’s 19 April 2011 medical report in a timely fashion. At the hearing, the Respondent’s counsel stated that the Agency had rejected Dr. Al-Maliti’s 19 April 2011 report. However, the Agency’s decision to reject the report does not excuse its failure to disclose it to the Applicant.

58. On 10 May 2011, the Applicant was referred to another orthopedist, Dr. Al-Khoder, who also sent his report to the Agency. Yet, the report of Dr. Al-Khoder was not disclosed to the Applicant.

59. The Tribunal finds another serious procedural irregularity in that the findings of the medical board of 29 March 2012 were not communicated to the Applicant, in violation of Article 10.3 of Area Staff PD/A/6. When the Applicant requested to see his medical file, his request was rejected. At the hearing, the Respondent’s counsel did not contest the Applicant’s contention that the Agency had not given him copies of the doctors’ reports or the conclusion of the second medical board.

60. The Agency was engaged in making a determination of whether or not the Applicant was fit for duty after suffering a work-related injury, and the Applicant was entitled to receive all reports and records pertaining to this determination – regardless of whether or not the Agency agreed with the report or records. This goes to the very heart of transparency in the process and due process for the Applicant, and the Agency failed in this regard.
Three divergent medical opinions equal fit for duty?

61. The Respondent submits that the second medical board took into consideration the opinion of the three specialists who reported on the condition of the Applicant. The Tribunal finds this submission unsubstantiated. Indeed one specialist (Dr. Afifi) reported that the Applicant is still suffering and his injury has not healed; the second specialist (Dr. Al-Maliti) reported in 2012 that the Applicant needs surgery; the third specialist (Dr. Al-Khoder) stated that the Applicant was fit for duty. It is clear that the medical board did not take into consideration the opinion of all three specialists but only considered the opinion of Dr. Al-Khoder and disregarded the other two. Although not a medical expert, the Tribunal is wondering how the medical board could find the Applicant fit for duty when it was faced with three divergent medical opinions, two of which were contrary to his being fit for duty.

Fit for duty but surgery required?

62. The Respondent asserts that “[t]he suggestion that the Applicant was ‘returned […] back to duty although the injury did not heal’ is without basis. Indeed, the Applicant resumed duty shortly after the [m]edical [b]oard issued its report”. The Tribunal finds it somewhat dismissive for the Respondent to conclude that the fact that the Applicant resumed his duties (on 19 June 2011) meant that his injury had healed and he could return to his work. The Respondent seems to forget that the Applicant was told by his employer to report to duty and if he had not complied, it would have been insubordination not to mention that the Applicant had a family to feed and the Respondent had suspended his salaries in April, May and June 2011 and deducted sick and annual leave. The Applicant had no viable option but to report for duty.

63. In Annex 12 dated 26 August 2012 of the Respondent’s reply, the CFHP/J wrote to the DUO/JFO that “… the [second] medical board found out that Mr. Musleh has no complaints related to the injury he had on 13/5/2010,…”. At the hearing, however, the Applicant testified that this was untrue. Indeed, if the Applicant had no complaints with regard to the injury he suffered, why would he go through (unsuccessful) mediation and two medical boards? In fact, just months
after the CFHP/J’s allegation that the Applicant had no complaints related to his injury, the Applicant filed a request for decision review dated 23 October 2012, contesting the decision of the 28 August 2012 medical board to declare him fit for continued service with the Agency. Indeed, the FHR&D/JFO indicated to the Applicant in her letter of 16 December 2012 that the Agency agreed to pay for surgery, in exchange for the Applicant’s withdrawal of his request for decision review dated 23 October 2012. The Applicant withdrew his request for decision review on 7 February 2013. Yet, the Applicant has not undergone surgery. At the hearing, the Respondent’s counsel was unable to provide an explanation with regard to these discrepancies.

64. Furthermore, if the Agency was of the belief that the Applicant was fit to return to duty after the second medical board’s conclusion in 2012, why did it feel the need to have the Applicant reevaluated one year later in April 2013, i.e. three years after his initial service-incurred accident? The Tribunal finds that the plethora of contradictions demonstrate that the Agency was uneasy with the conclusion of the medical board, but at the same time it felt compelled to defend the decision and require the Applicant to return to his former duties.

65. The Tribunal finds that the series of procedural irregularities discussed above led to an obvious denial of due process. The Tribunal would like to recall the jurisprudence cited at paragraph 53 above – upon which the Respondent relies – which states in effect that the Tribunal can review the Commissioner-General’s decision to accept the recommendation of the medical board if there is evidence of procedural irregularity, and that procedural irregularities include undue delay or lack of due process. The Tribunal finds that the process of handling the Applicant’s case was replete with both undue delay and lack of due process.

66. Consequently, the Tribunal finds that the decision of the Agency adopting the conclusions of the medical board was tainted by procedural irregularities including lack of due process.

Does the relief sought by the Applicant have any basis?

67. The Tribunal would like to recall the relief sought by the Applicant:
a. to be assigned to a post that suits his medical condition;
b. to be given back the balance of his sick and annual leave;
c. to be reimbursed his suspended salaries;
d. to be compensated for the physical and psychological effects of being forced to return to work while suffering from his injury.

Transfer to a post better suited to his hand injury

68. At the hearing, the Applicant was asked to describe his job as Laundry Supervisor at the Amman Training Centre. He testified that he receives the laundry of 250 students, and has to carry heavy blankets and sheets to be washed in old washing machines, and then carry these wet items – which are much heavier when wet – to be ironed. The Applicant explained that washing machines are so old that sometimes he has to wash some items by hand. It is clear that his responsibilities as Laundry Supervisor involve plenty of manual work.

69. The Applicant also testified that he has been assigned by the Acting Dean of the Amman Training Centre the duties of Foreman at the Centre as of 8 November 2012, in addition to his usual duties as Laundry Supervisor, as confirmed by a Circular dated 12 November 2012. The Applicant had objected verbally, however, he complied as was requested. The Applicant appears to be a hard-working staff member, as attested by several Performance Evaluation Reports, who in spite of his injured hand will implement instructions from his superior even if it means taking on additional duties. Indeed, while working as Laundry Supervisor and Foreman, the Applicant also worked in the Registration Department of the Centre for a total of six months (three months in 2011 and three months in 2013). The Applicant testified that although carrying heavy files at the Registration Department was not easy, he found the work less painful for his injured hand than his duties as Laundry Supervisor. The Tribunal noted at the hearing that the Applicant was wearing a brace on his injured hand.

70. The Tribunal is trying hard to reconcile the Agency’s decision that the Applicant was fit for service and the Agency’s offer to pay for his surgery should he decide to go that way. Why would the Agency pay for surgery if the Applicant
is fit for service? More importantly, why would the Agency offer to pay for surgery of a service-incurred injury when the Applicant had allegedly signed a release of liability extinguishing his right to such care? Why not transfer him to a different post where duties are less harsh on his injured hand? This is what the Applicant had requested right from the beginning so as to allow his injured hand to heal, yet the Agency refused his request and instead assigned him additional duties.

Reimbursement of sick and annual leave

71. Following the accident of 13 May 2010, the Applicant was placed on sick leave from 15 May 2010 to 19 June 2011. In April, May and June 2011, while the medical board was examining his case – over three months – the Applicant's annual and sick leave days were deducted and his salary for April, May and June 2011 was suspended, as testified by the Applicant and unchallenged by the Respondent's counsel.

New evidence received by the Tribunal

72. Two weeks following the Case Management Hearing, the Tribunal received from the Applicant (not his counsel) a document issued by the Agency that indicated how the Applicant's period of incapacity would be categorised for purposes of attendance and leave. The Tribunal sent it to the counsel for the Applicant and noted that as per Practice Direction No. 02, the attorney of record should always submit documents to the Tribunal on behalf of his client. Despite attaching the relevant Practice Direction in an email to the counsel for the Applicant, the counsel (LOSA) never filed anything. Nevertheless, in the interests of justice and fairness, the Tribunal will not exclude the evidence on the grounds of negligence of the LOSA, but rather will accept the Applicant’s submission into evidence. The relevant part of the document states that:

the period for incapacity from:

13/05/2010 through 12/011/2010 should therefore be considered as Special Leave with Full Pay, from 13/11/2012 through 07/03/2011 as sick leave, from 08/03/2011 through 19/04/2011 as
annual leave, and from 20/04/2011 through 18/06/2011 as Special Leave without pay any day charged to his sick leave entitlements should be credited thereto.

Compensation for physical and psychological injury

73. Although the Applicant filed evidence and testified credibly as to how his present work as Laundry Supervisor is affecting his injured hand and causing him physical pain, he did not file any evidence about psychological injury. The Applicant is reminded that where there is no evidence of injury or harm, there can be no ground for compensation.

74. The Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached (Frohler 2011-UNAT-141, Appellant 2011-UNAT-143, Kaddoura 2011-UNAT-151).

75. The Tribunal orders the Respondent to transfer the Applicant to a post better suited to his hand injury at the same grade and level or with grade and salary protection. The Tribunal also orders the Respondent to pay the Applicant for all salaries and entitlements that were withheld from him in April, May and June 2011, and to restore to the Applicant any sick and annual leave that was deducted from his balance between 13 November 2010 through 18 June 2011. An additional six months’ net base salary will be paid to the Applicant as adequate compensation for violations of his due process.

76. The Tribunal hereby orders that the payment of these sums and the reimbursement of the annual and sick leave days deducted shall be made within 60 days from the date the Judgment becomes executable, during which period interest at the US prime rate applicable as at that date shall apply. If the sum is not paid within the 60 day period, an additional five per cent shall be added to the US prime rate until the date of the payment.
Conclusion

77. The application is allowed.

Judge Bana Barazi
Dated this 26th day of May 2014

Entered in the Register on this 26th day of May 2014

Laurie McNabb, Registrar, UNRWA DT, Amman