

115th Session

Judgment No. 3222

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. R. B.B. against the United Nations Industrial Development Organization (UNIDO) on 15 March 2011 and corrected on 21 June, UNIDO's reply of 3 October 2011, the complainant's rejoinder of 16 January 2012 and the Organization's surrejoinder dated 23 April 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are to be found in Judgment 3160, delivered on 6 February 2013, concerning the complainant's first complaint. Suffice it to recall that the complainant joined UNIDO in February 1995 as Head of the Agro-based Industries Branch at the D-1 level. In December 2006 the Director-General informed him that he had decided to reassign him to Algeria. However, this reassignment did not take place because the complainant was taken ill in March 2007 and never returned to work thereafter. His doctors considered that his illness was service-incurred; therefore on 2 July 2007

he submitted a claim for compensation to the Secretary of the Advisory Board on Compensation Claims (ABCC) in accordance with Appendix D to the Staff Rules.

In September 2007, as he had been on sick leave for a prolonged period, he was asked to undergo a medical examination by an independent medical practitioner – Dr G. – to ascertain whether he was fit to work. Dr G. examined him in October and concluded that he was incapacitated for further service. Consequently, the Human Resource Management Branch (PSM/HRM) referred his case to the Staff Pension Committee (SPC) for a recommendation on his eligibility for a disability benefit. On 25 April the Secretary of the SPC, Ms N., who was also Secretary of the ABCC, informed the complainant that the SPC had met on 20 March and had recommended that he should receive a disability benefit as of the date following exhaustion of paid leave entitlements, i.e. 19 September 2008, and that the United Nations Joint Staff Pension Fund (UNJSPF) had endorsed the recommendation. The complainant separated from service on 19 September 2008.

Acting in her capacity as Secretary of the ABCC, Ms N. notified the complainant on 5 December 2008 that the Board had reviewed his Appendix D claim and had concluded, on the basis of the opinion of UNIDO's Medical Adviser, that his illness was not service-incurred. It had therefore recommended that the Director-General reject his claim. She added that the Managing Director of the Programme Support and General Management Division (PSM), acting with delegation of authority from the Director-General, had approved the ABCC's recommendation.

On 9 January 2009 the complainant sent an e-mail to Ms N. requesting copies of various documents which he deemed necessary to prepare an appeal against the rejection of his Appendix D claim. The requested documents included correspondence relating to the proceedings before the SPC and the ABCC, respectively. Ms N. replied on 28 January that, except for the minutes of the Board's meeting and the decision of the Managing Director of PSM on the Board's recommendations, copies of which were attached to her reply,

all other requested documents were either internal working documents or private records of the SPC that could not be provided to him.

On 26 March the complainant wrote to the Director-General requesting that he instruct the Secretary of the ABCC and the SPC to communicate to him immediately all the documents he had requested. The Director of PSM/HRM, acting on behalf of the Director-General, informed the complainant on 18 May that his request was rejected because, according to the Regulations, Rules and Pension Adjustment System of the UNJSPF, the records and all correspondence of the SPC are private and kept in the care of its Secretary. She added that the requested documents concerning his Appendix D claim and the correspondence with the Vienna International Centre (VIC) Medical Service were internal working documents that could not be communicated to him.

On 17 June the complainant filed an appeal with the Joint Appeals Board (JAB) asking to be provided with all the documents he had requested and to be awarded 3,700 euros in costs.

On 8 September 2009 Ms N. forwarded to the complainant the memorandum of 1 December 2008 by which she had provided the Managing Director of PSM with the minutes of the ABCC's meeting and its recommendations for a decision on his case. This memorandum had been sent through the Director of PSM/HRM.

In his rejoinder of 12 November 2009 before the JAB, the complainant sought moral damages on the grounds that Ms N. and the Director of PSM/HRM had acted in breach of applicable procedures as neither of them had brought his request for disclosure of documents to the attention of the SPC. He also alleged conflict of interest and breach of confidentiality on the part of Ms N. He asked to be provided with the original memorandum showing that the Managing Director of PSM had received a delegation of authority from the Director-General to deal with his case, as well as the original memorandum by which the Secretary of the ABCC and the SPC had been informed of the delegation of authority; in the event that these documents were not communicated to him he sought additional moral damages. He sought

further moral damages for the “mental and physical stress” he had suffered because of UNIDO’s violation of established procedures.

On 19 October 2010 the Director-General – who had been asked by the complainant on 14 January 2009 to review his initial decision to reject his Appendix D claim – decided to modify his initial decision and to allow the complainant’s claim, considering that his illness was attributable to service.

In its report of 2 December 2010 the JAB recommended that the complainant be given copies of SPC and ABCC-related documents as it was imperative for any staff member to receive all documents pertaining to his or her case. It also found that there was a conflict of interest and breach of confidentiality insofar as the Secretary of the ABCC had sent the memorandum of 1 December 2008 – which was addressed to the Managing Director of PSM – through the Director of PSM/HRM, whereas the Secretary should report only to the Director-General or the Managing Director of PSM acting on his behalf. However, it rejected the complainant’s allegations concerning the failure of the Secretary of the ABCC and the Director of PSM/HRM to inform the SPC of his request for disclosure of certain documents, explaining that the two bodies operated separately and objectively. It added that it believed that the memoranda showing that the Managing Director of PSM had received a delegation of authority from the Director-General had been communicated to the complainant and that there was therefore no need to send him the originals or to award him moral damages in that respect. The JAB did not recommend an award of costs.

By a memorandum of 22 December 2010 the Director-General asked the Secretary of the JAB to inform the complainant that his appeal was dismissed. In his view, the request for disclosure of documents concerning the proceedings before the SPC was governed by the Regulations, Rules and Pension Adjustment System of the UNJSPF, and the JAB was not competent to review his appeal in that respect. Regarding his request for documents in relation to his Appendix D claim, the Director-General noted that he had been provided with the minutes of the meeting of the ABCC and the

Director-General's decision on the ABCC's recommendations on 28 January 2009 and the report of the Medical Adviser to the ABCC on 14 August 2009. Hence he had received all the documents that were used as a basis for the ABCC's recommendations and the contested decision. He added that the complainant's request for other documents was "overbroad" and could not be entertained. Lastly, he found no irregularity in the communication of the memorandum of 1 December 2008, explaining that the administration of social security matters, including ABCC claims, was under the responsibility of the Director of PSM/HRM, whose involvement could consequently not be excluded. That is the impugned decision.

B. The complainant submits that, according to the Tribunal's case law, he has a right to disclosure of any items of evidence – including medical reports – that were material in reaching the decision on his Appendix D claim. The case law also provides that in order to ensure due process, both in the internal appeal proceedings and before the Tribunal, a staff member must be provided with any documents material to the outcome. According to the complainant, this includes so-called "internal working documents". He contends that his request for disclosure was therefore justified, as the documents he sought were material to the outcome of his claim. He explains that, in December 2008, he was informed that the Managing Director of PSM had decided to endorse the ABCC's recommendation to reject his Appendix D claim because, according to UNIDO's Medical Adviser, the origin of his illness was not his reassignment. However, Dr G., the independent medical expert appointed at UNIDO's request, had concluded the opposite. He was therefore confused and had to determine whether he had grounds for appealing the decision to reject his claim. In particular, he needed to establish whether the Administration had interfered with or attempted to influence inappropriately the independence of the ABCC, and whether confidentiality had been maintained in dealing with his case. He adds that, after he had made his request for disclosure of documents, the Director-General decided, in October 2010, to allow the appeal he had filed against the rejection of his claim and to accept

that his illness was service-incurred, thereby endorsing Dr G.'s opinion which he had initially rejected.

In his view, UNIDO showed a lack of good faith and committed a breach of due process in refusing to produce the vast majority of the requested documents until he filed his appeal. He submits that he suffered emotional stress due to the Organization's actions, and that the Administration's decision finally to provide him with some of the requested documents does not mitigate the material and moral injury he suffered.

The complainant also alleges breach of confidentiality insofar as the Secretary of the ABCC communicated the memorandum of 1 December 2008 containing the minutes of the ABCC's meeting to the Managing Director of PSM through the Director of PSM/HRM. Paragraph 7 of the Administrative Circular of 28 January 1991 concerning the submission of Appendix D claims provides that the ABCC shall review such a claim with the assistance of the medical and legal advisers; no reference is made to the Director of PSM/HRM.

Lastly, he submits that the JAB erred in concluding that he had been provided with a copy of the delegation of authority given by the Director-General to the Managing Director of PSM, as he never received that document.

The complainant asks the Tribunal to set aside the impugned decision and to award him 50,000 euros in material and moral damages. He also claims interest at the rate of 8 per cent per annum on any material damages awarded to him, and costs.

C. In its reply UNIDO indicates that the new claims submitted by the complainant in his rejoinder before the JAB and reiterated before the Tribunal must be dismissed for failure to exhaust internal means of redress. It stresses that the complainant's original claim before the JAB was merely for disclosure of documents and not for damages for breach of confidentiality, conflict of interest and procedural irregularities.

The Organization denies any breach of due process or bad faith with regard to the disclosure of documents. It explains that the initial

decision to reject the complainant's Appendix D claim was based on the minutes of the ABCC's meeting and on its recommendations, which were sent to him in January 2009; thus, he had all the necessary documents to prepare his appeal. It submits that the other documents the complainant requested were internal working documents that were immaterial to the outcome of his case. In its view, the complainant's insistence on being provided with those documents shows that his intention was to "fish" for some basis upon which to threaten the Organization with legal action. It adds that the decision to grant a disability benefit is taken by the UNJSPF, and not the Director-General of UNIDO; consequently, any request for documents relating to that matter is governed by the UNJSPF rules, according to which the records and all correspondence of the SPC are private. It notes in that respect that the complainant did not request the SPC to review the Secretary's decision of 28 January 2009 rejecting his request for documents.

With regard to the alleged breach of confidentiality, UNIDO asserts that the Director of PSM/HRM did not participate in the meeting at which the ABCC considered the complainant's claim, that the ABCC considered the claim anonymously, without interference, and that no medical data was disclosed to the Director of PSM/HRM. It also asserts that the Managing Director of PSM acted with a delegation of authority from the Director-General and provides a memorandum dated 26 August 2002 by which the then Director-General informed the Chairman of the ABCC that the Managing Director of the Division of Administration – who was subsequently referred to as Managing Director of PSM – would approve compensation claims on his behalf when they involved compensation in excess of 10,000 United States dollars.

D. In his rejoinder the complainant submits that no objection to the receivability of his claims was raised in the impugned decision and that, according to the Tribunal's case law, the Organization should not now adopt an "excessively formalistic approach" which would deprive him of his right of appeal. He reiterates that, given Dr G.'s opinion that his illness was work-related, he suspected a serious error when he

received the Organization's decision to reject his Appendix D claim. In his view, there was *prima facie* evidence that the decision was tainted with bias, prejudice, and misuse of authority, or was taken in breach of due process. Consequently, he sought documents to show that UNIDO had seriously infringed his rights. Lastly, with respect to the alleged breach of confidentiality, he indicates that in Judgment 3004 the Tribunal rejected the argument put forward by UNIDO to justify the communication of confidential documents to the Director of PSM/HRM, i.e. that she was responsible for social security matters.

E. In its surrejoinder the Organization maintains its position.

CONSIDERATIONS

1. Much of the complainant's employment history with UNIDO is discussed by the Tribunal in Judgment 3160. The issues raised by the complainant in these proceedings relate to how the complainant's claim that he had been incapacitated for work as a result of a service-incurred injury was dealt with by the Organization. The defendant has raised a threshold issue concerning the receivability of elements of the complainant's complaint.

2. The issue of receivability arises in the following way. In early 2007 the complainant was diagnosed with reactive depression. The complainant had received medical advice that his condition was service-incurred. In the result, he lodged, on 2 July 2007, a compensation claim under Appendix D of the Staff Rules with Ms N., who was both the Secretary to the ABCC and also Secretary to the SPC. At a meeting on 20 March 2008 the SPC recommended that the complainant receive a disability benefit after he had exhausted his paid leave entitlements which was due to occur on 19 September 2008. This recommendation was accepted by the UNJSPF on 17 April 2008. It was based on medical evidence which included the opinion of Dr G. An extract of his report before the Tribunal indicates he was generally

supportive of the complainant's claim that his depressive illness was causally linked to his work.

3. Later in 2008 the ABCC considered the complainant's Appendix D compensation claim. By a letter dated 5 December 2008, the complainant was advised by Ms N. that the ABCC had recommended the rejection of the compensation claim and that this recommendation had been accepted by the Managing Director of PSM. The decision of the ABCC was substantially based on the opinion of Dr D., UNIDO's Medical Adviser, who did not accept that the complainant's illness was causally linked to the decision to reassign him to a position in Algeria. The Secretary indicated that the Managing Director was acting under a delegation of authority from the Director-General. On 9 January 2009 the complainant wrote to Ms N. requesting he be provided with 17 classes of documents. He indicated that he planned to appeal the rejection of his Appendix D claim and that he needed the requested documents "in order to prepare [his] appeal". On 14 January 2009 the complainant wrote to the Director-General requesting him to review the decision concerning his Appendix D claim. On 28 January Ms N. advised the complainant that all but two of the requested classes of documents would not be provided either because they were the private records of the SPC (as provided for in its Rules of Procedure) or were internal working documents.

4. On 26 March 2009 the complainant wrote to the Director-General requesting him to instruct Ms N. to forward to him immediately all requested documents. In a letter of 18 May 2009 the Director of PSM/HRD responded to this request by, in substance, rejecting it. She pointed out that the complainant's letter to the Director-General requesting the documents had been forwarded to her by the the latter for reply. The response was said to be "[o]n behalf of the Director-General". On 17 June 2009 the complainant lodged an appeal with the JAB. The appeal took the form of a brief letter to the Secretary of the JAB together with a six-page document (not including

annexes) setting out the background, the facts, the legal argument and the relief sought. The subject matter of the appeal was identified in the brief letter as “the decision of the Director-General refusing to provide requested pertinent documents”. The sole focus of the six-page document was the events leading up to and surrounding the refusal to provide the documents.

5. The Director-General responded to the complainant’s argument to the JAB and, in turn, the complainant replied to this response. He did so in a rejoinder dated 12 November 2009. The majority of the complainant’s rejoinder addressed the question of whether the requested documents should have been provided. However, at various points in his rejoinder the complainant alleged a breach of confidentiality (allegedly because the Director of PSM/HRD had been informed of the complainant’s medical condition and the recommendation of the ABCC), a conflict of interest (on the part of one of the members of the ABCC) and other procedural irregularities. The last section of the complainant’s rejoinder (headed Conclusions) contained 12 numbered paragraphs (67 to 78). Paragraphs 67 to 69 addressed the request for the documents. In paragraph 70, the complainant said: “Taking [UNIDO’s] advice [I] will not submit yet another appeal but [ask] for redress on [the] new grievances in this present appeal” (repeating a submission he had made in paragraphs 16 and 17 of his rejoinder). Paragraphs 71 and 72 contained a claim for 30,000 euros for moral damages arising from an alleged procedural breach involving his request for disclosure of documents not being drawn to the attention of the SPC. Paragraph 73 also contained a claim of 30,000 euros for moral damages for “procedural irregularities, conflict of interest and/or breach of confidentiality”. Paragraphs 74 to 77 concerned the complainant’s challenges to the exercise of ostensibly delegated authority by Ms N. and the Managing Director of PSM and contained a further claim for moral damages in two amounts of 30,000 euros.

6. In its report of 2 December 2010 the JAB referred to and rejected the claims in paragraphs 71 and 72, 74, and 75 to 77. The

JAB recommended that all requested documents should be provided (dealing with paragraph 67 of the complainant's rejoinder) and expressed the view that there had been a procedural irregularity as claimed in paragraph 73. In his decision of probably 22 December 2010 (the impugned decision in these proceedings – the IOM setting out the decision is dated 22 December 2010 but it is date-stamped 21 December 2010), the Director-General rejected the recommendation concerning the provision of documents and also disagreed with the conclusion that there had been a procedural irregularity. In the result, the Director-General dismissed the appeal in its entirety.

7. Before considering the arguments concerning receivability, one further aspect of the history of the matter should be noted. After requesting the Director-General on 14 January 2009 to review his decision to reject his Appendix D claim, the complainant's circumstances were reviewed by a medical board. This led to a decision of the Director-General on 19 October 2010 that the complainant's illness was attributable to his service with UNIDO. So by October 2010 the complainant's Appendix D claim had been resolved in his favour and the adverse conclusions and recommendation of the ABCC together with the acceptance of the recommendation by the Managing Director of PSM in late 2008 no longer had any practical or legal significance for the complainant.

8. In his brief to the Tribunal, the complainant appears, in substance, to acknowledge that the claims raised in his rejoinder before the JAB (other than the claim concerning the provision of documents) expanded the scope of the claims in the internal appeal. The complainant anticipated an argument on receivability saying that any objection on the part of the Organization would involve a lack of good faith, referring to Judgment 1897. As anticipated, UNIDO does raise the question of receivability in its reply. The argument is based on the requirement of Article VII(1) of the Tribunal's Statute that the complaint is not receivable unless the impugned decision is a final decision and the person concerned has exhausted such other means of resisting it as are open to her or him under the applicable Staff

Regulations. UNIDO refers to Judgments 1149, 2100 and 2808. In his rejoinder the complainant refers to Judgment 2965 in which the Tribunal indicated it would not allow an organisation to take an “excessively formalistic approach” in depriving a staff member of the right to appeal. UNIDO repeats its argument on receivability in its surrejoinder.

9. Article VII(1) of the Tribunal’s Statute serves several related purposes. One is to ensure that grievances are, before they are considered by the Tribunal, considered in internal appeals. It is commonplace for Staff Regulations to provide detailed procedures for the prosecution of internal appeals. Those procedures ordinarily serve a multiplicity of purposes. One is to provide a fair hearing process both for the benefit of a complainant and also the benefit of the organisation to resolve the dispute. Another is to ensure that the subject matter of the grievance and internal appeal is identified with some particularity. If the subject matter of the internal appeal is an administrative decision, the appellant would be required to identify the decision which would ordinarily include by whom it was made, when it was made and the content or effect of the decision. Yet another purpose is to ensure that the issues raised in the internal appeal are properly identified, relevant evidence concerning the issues presented and the issues and evidence appropriately addressed by the parties and properly considered by the internal appeal body. Yet another is to ensure that, in appropriate cases, the ultimate decision-maker will have the considered views of the internal appeal body that will have been informed by the coherent presentation of evidence and argument.

10. Another purpose of Article VII(1) of the Statute is to ensure that the Tribunal does not become, *de facto*, a trial court of staff grievances and to ensure it continues as a final appellate tribunal. The Tribunal is ill-equipped to act as a trial court and its workload could, potentially, become intolerable or unmanageable if its role was not confined in this way. From the perspective of the parties, Article VII(1) should ordinarily operate to protect the parties against

the cost and administrative demands of litigating issues, for the first time, before the Tribunal.

11. In the present case, the claims (other than the claim regarding the disclosure of documents) arose as a subsidiary matter in an appeal concerning the non-disclosure of documents. Insofar as the additional claims involved claims for moral damages (in very significant amounts) nothing of substance was advanced by way of argument by the complainant to the JAB as to why moral damages should be awarded at all and, if they were, why the amounts claimed were justifiable or appropriate. It is true that the JAB considered those additional claims though it must be said that their discussion of the issues was brief in the extreme. In addition, the JAB did not have the benefit of argument from the Director-General on those additional claims before reaching its conclusions. It is also true that the Director-General, as the ultimate decision-maker, briefly addressed these additional claims when rejecting the JAB's affirmative recommendation and conclusion favouring the complainant. But the fact that they were briefly addressed by the JAB and the Director-General does not have the consequence that the complainant has exhausted internal appeal procedures. As earlier discussed, these procedures demand more than the mere consideration of the issue at a late stage in the internal appeal process. While the Tribunal's case law recognises a need to apply Article VII(1) of its Statute with some flexibility (see, for example, Judgments 2360 and 2457), there are no decisions which support the view that a claim about a discrete subject can be introduced at a late stage in an internal appeal about an entirely different subject and the fact that it has been satisfied the requirement that internal appeals have been exhausted before a complaint about the different subject matter can be litigated in the Tribunal.

12. It must be borne in mind that the complainant's appeal to the JAB was to seek the disclosure of documents as a prelude to prosecuting an appeal against the decision of the ABCC to reject his Appendix D claim. The Tribunal should not permit the prosecution of

an appeal before the Tribunal on a miscellaneous range of claims, at best only partially considered in the internal appeal proceedings, in circumstances where a complainant had initially set out only to create a firm footing to prosecute his appeal against the rejection of his Appendix D claim. Moreover, by the time the impugned decision in these proceedings was made (22 December 2010) and necessarily by the time the proceedings were commenced in this Tribunal (15 March 2011), the principal issue vexing the complainant (the rejection of his Appendix D claim) had been resolved in his favour. The complainant's claims, insofar as they concern matters other than the disclosure of documents, are not receivable.

13. It is now necessary to discuss the documents or classes of documents requested by the complainant. The documents initially requested by the complainant were:

- (1) correspondence from UNIDO's Administration to the Medical Service asking for the appointment of an independent physician to examine him;
- (2) correspondence from the Medical Service transmitting Dr G.'s report to the Administration;
- (3) any other correspondence dealing with points (1) and (2);
- (4) correspondence from the Administration requesting a report from the Medical Adviser for the SPC;
- (5) the Medical Adviser's report for the SPC;
- (6) correspondence from the Medical Service transmitting the report for the SPC to the Administration;
- (7) the minutes of the SPC relating to his case;
- (8) correspondence from the SPC to the Director-General;
- (9) the Director-General's written decision;
- (10) any other correspondence dealing with his disability case which was not copied to him;
- (11) correspondence from the Administration requesting a report from the Medical Adviser for the ABCC;

- (12) the Medical Adviser's report for the ABCC;
- (13) correspondence from the Medical Service transmitting the report for the ABCC to the Administration;
- (14) the minutes of the ABCC relating to his case;
- (15) correspondence from the ABCC to the Director-General;
- (16) the Director-General's further written decision; and
- (17) any other correspondence dealing with his claim which was not copied to him.

14. As alluded to earlier, some of these documents or classes of documents were provided to the complainant and some were not. Indeed, on 28 January 2009 Ms N. provided the complainant with documents referred to in consideration 13 at points (14) and (16). After the complainant filed his appeal with the JAB in June 2009, UNIDO conceded (in its statement to the JAB) that the complainant should be provided with documents mentioned at points (5), (12) and (15). This occurred. In the Tribunal's opinion, this concession was properly made and, in addition, the documents provided by Ms N. should have been provided. These various documents were directly relevant to the ABCC's consideration of the complainant's Appendix D claim. While the document referred to in consideration 13, point (5), was a report to the SPC, that report had been provided to the ABCC. The complainant was entitled to this material in order to understand the basis upon which the ABCC reached the conclusions it did and the terms upon which those conclusions were communicated to the primary decision-maker (the Managing Director of PSM). Thus, by the time the matter was being finally considered by the JAB, the documents or classes of documents then in issue were those referred to in consideration 13, points (1) to (4), (6) to (11), (13) and (17).

15. It is to be recalled that the complainant's original request on 9 January 2009 to Ms N. was "in order [for the complainant] to prepare [his] appeal" and that the complainant, in his subsequent request to the Director-General on 26 March 2009, repeated that the

requested documents “pertained to [his] case and [were] necessary in order to prepare a meaningful appeal”. Moreover, the complainant challenged the proposition that “documents such as medical reports dealing with [his] case [could] be classified as confidential or private and withheld from [him]”.

16. In the present case, the complainant’s right to be provided with copies of documents and the Organization’s obligation to provide them should be measured against the purpose for which the documents were sought. The claims before the Tribunal have not been contested on the basis that there is some overarching right of a staff member to see any document concerning her or him which is in the custody or control of the employing organisation. Ultimately, UNIDO was obliged to provide the complainant with such of the requested documents and classes of documents that may have been of some forensic assistance to the complainant in prosecuting his appeal against the rejection of his Appendix D claim. Documents referred to in consideration 13, points (1) to (10), all concerned the consideration by the SPC of the question of whether the complainant was entitled to a disability benefit. *Prima facie* these documents are irrelevant to the complainant’s appeal concerning his Appendix D claim. An exception to this general comment is the document referred to in consideration 13 under point (5), which was a relevant medical report that had been before the ABCC. No submission was made by the complainant in these proceedings which demonstrated to the Tribunal that the requested documents concerning the SPC’s deliberations may have been relevant to his appeal, and on that basis he should have been provided with copies. The Tribunal’s conclusion, in this respect, does not depend on whether the documents were “confidential” by operation of a normative document ascribing them that status.

17. Documents referred to in consideration 13 under points (11), (13) and (17) are documents that were possibly, but not necessarily, of forensic relevance to the complainant in prosecuting his appeal. The documents are, in substance, correspondence ancillary to the deliberations of the ABCC. The only possible relevance to the complainant’s appeal would have been if they enabled him to make

some collateral attack on the ABCC's conclusions and recommendation based on a failure to follow procedure, bias or pre-judgement to name some possible grounds on which such an attack might have been made. In his complaint, the complainant alludes to this possibility in paragraphs 51 to 53 of his brief. He refers to the difficulty in understanding why the opinion of Dr G. would have been rejected and alludes to the possibility of inappropriate influence on the ABCC being exercised by HRM. This theme was amplified in the complainant's rejoinder in which he said that "[t]here was thus prima facie evidence that the decision [of the ABCC] was tainted by bias and prejudice or misuse of authority". This contention was based on the assertion that Dr D. misled, intentionally or negligently, the members of the ABCC.

18. This assertion is challenged by UNIDO in its surrejoinder. Central to the complainant's assertion is what was recorded in the minutes of the ABCC's meeting of 25 September 2008 when considering his Appendix D claim. The ABCC recorded that Dr D. referred to Dr G.'s report noting the purpose for which the report was obtained. The ABCC also noted that Dr D. observed that Dr G. "had identified other reasons for the [complainant's] illness". That is, reasons other than his reassignment to Algeria. It is to be recalled that Dr G.'s report was before the ABCC. The complainant, in these proceedings before the Tribunal, has only provided an extract of Dr G.'s report (an attachment to his appeal lodged with the JAB on 17 June 2009 which, in turn, is an annex to his brief) and not the whole report. Accordingly, there is no evidence that the statement that there are "other reasons" is wrong, let alone that Dr D. intentionally or negligently misled the ABCC. What is clear from the minutes is that the ABCC accepted the opinion of Dr D. in relation to causation. That it did so, is unexceptionable.

19. In the result, there is not a scintilla of evidence to support the complainant's assertion that there was a basis, let alone *prima facie* evidence, to maintain a collateral attack against the decision of the ABCC. Accordingly, UNIDO was not obliged to provide

the complainant with documents referred to in consideration 13, under points (11), (13) and (17) (see Judgment 2510, consideration 7). The Tribunal should not be taken as indicating that in a case such as the present, a complainant would have to establish a positive case of bias, prejudice or misuse of authority. Often it would be extremely difficult for a complainant to do so and it would often be necessary for a complainant to obtain documents of the type presently being discussed, to establish actually such a case. However, in the absence of any evidence that the ABCC, in this case, did more than prefer one medical opinion over another, the Tribunal is not satisfied that UNIDO was obliged to provide the aforementioned documents.

20. The complainant was therefore provided with the documents he was entitled to see and he has not made good an argument that he should have been provided with other documents. However, it took UNIDO nearly seven months to provide him with the documents he was entitled to see. There is no reason why these last-mentioned documents should not have been provided when first requested in January 2009. Had UNIDO done so, the complainant's challenge to the rejection of his Appendix D claim could have proceeded with greater expedition and the complainant could have been spared the stress of contesting with the Administration at least some of what he could or could not obtain. While the complainant has failed to establish that he was not provided with documents he was entitled to obtain, he has established that he was not provided with documents which he was entitled to obtain in a timely manner. For this, he is entitled to modest moral damages.

21. The Tribunal will also award costs but, as the complainant only succeeds in part, the costs will be 1,000 euros.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant moral damages in the amount of 2,000 euros for failing to provide documents the complainant was entitled to in a timely manner.
2. It shall also pay him 1,000 euros in costs.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet