

111th Session

Judgment No. 3004

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Miss H. G. against the United Nations Industrial Development Organization (UNIDO) on 27 July 2009, UNIDO's reply of 19 November, the complainant's rejoinder of 15 December 2009 and the Organization's surrejoinder of 19 March 2010;

Considering Article II, paragraph 5, 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 2659, delivered on 11 July 2007. Suffice it to recall that, after being informed of the Director-General's decision to reassign her, the complainant suffered shock and as a result was absent on sick leave from 1 March to 4 June 2004. She then returned to work on a part-time basis and in July 2004 she resumed full-time duties.

In a meeting of 28 June 2004 with the Secretary of the Advisory Board on Compensation Claims (ABCC) and her assistant, the complainant stated her intention to submit a claim for compensation in

accordance with Appendix D to the Staff Rules, that is the “Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on Behalf of the Organization”. After the meeting she wrote a Note to the Secretary of the ABCC, backdated to 25 June 2004, in which she indicated that she had called her on that day “to enquire about the procedures to claim medical expenses which [she] consider[ed] work-related” but, as the Secretary was out of the office, she had agreed to meet with her to discuss the matter. In a Note for the file regarding the meeting of 28 June, the Secretary of the ABCC noted that the complainant had “mentioned [...] her intentions to claim under the provisions of Appendix D”.

On 24 February 2005 the complainant submitted her claim for compensation in connection with the illness she had suffered following her reassignment. Attached to the claim were a medical report, medical certificates and copies of medical bills. The Secretary of the ABCC acknowledged receipt of the claim on 7 March and the case was presented to the ABCC at its meeting of 21 October 2005. The ABCC debated as to whether the claim was receivable in light of the provision in Appendix D to the Staff Rules and in Administrative Circular UNIDO/DA/PS/AC.75 that a claim for compensation shall be submitted within four months of the onset of the illness. The ABCC again considered the case at its meeting of 19 April 2006 and recommended that the complainant be asked to give reasons for the late submission of her claim. A request to that effect was addressed to the complainant, who explained, in a memorandum of 19 June 2006, that the Secretary of the ABCC had assured her at the meeting of 28 June 2004 that, since she had stated her intention to submit a claim for compensation in connection with service-incurred illness, she merely needed to send to the Secretary a note – which she did, hence the Note of 25 June 2004 – and could then submit her medical expenses at any time thereafter. In a memorandum of 24 August 2006 the Secretary of the ABCC disagreed with the complainant’s account. The ABCC discussed the case for a third time at its meeting of 26 April 2007. As it was unable to reach a consensus, it did not make a recommendation on the receivability of

the complainant's claim, but decided to submit the case to the Director-General for his decision. The complainant was informed of this on 25 May.

By a memorandum of 27 July 2007 the Secretary of the ABCC notified the complainant of the Director-General's decision to deny her claim for compensation under Appendix D, on the grounds that there were no exceptional circumstances justifying its late submission. On 9 August the complainant requested a review of that decision, but she was informed on 3 October 2007 that the Director-General had decided to maintain it. She filed an appeal with the Joint Appeals Board (JAB) on 30 November 2007, requesting that her claim be accepted. She also sought damages for the delay in reviewing her claim and for the continued harassment to which she considered she was being subjected and costs. The Director-General's statement on the appeal was submitted by the Director of the Human Resource Management Branch (HRM) on 29 January 2008. Along with other supporting documents, the Director of HRM forwarded to the JAB the complainant's claim of 24 February 2005, together with all its attachments, i.e. the medical report, medical certificates and copies of medical bills which the complainant had submitted in support of her claim. In her reply to the Director-General's statement, the complainant accused the Secretary of the ABCC and the Director of HRM of disclosing confidential information regarding her identity and her medical condition, and also alleged a potential conflict of interest on the part of the latter. She thus added to her original appeal claims for breach of due process, procedural irregularities, breach of confidentiality and lack of procedural fairness.

In its report of 2 April 2009 the JAB found that there had been a breach of due process because the complainant had not been properly informed of the deadline for submitting her claim. With regard to the procedure before the ABCC, it held that there had been a violation of the rule of anonymity and that confidential information concerning the complainant's identity had been disclosed by the Director of HRM and the Secretary of the ABCC. It also held that there had been excessive delays. It found no evidence of harassment but noted an "inconsistency of conduct" in that both the staff representative

and the Director of HRM had a potential conflict of interest, yet only the former had withdrawn from the ABCC review. The JAB recommended that the complainant be awarded the relief provided for in Appendix D as well as moral damages for breach of due process. It also made recommendations regarding the role of the Secretary of the ABCC in informing staff of their rights and the duty of the ABCC to ensure full confidentiality, fairness and timeliness in its consideration of cases.

By a memorandum of 23 April 2009, which constitutes the impugned decision, the complainant was notified of the Director-General's decision to accept the JAB's recommendations to the extent that they concerned the disclosure of confidential information and the delay in reviewing her claim, and to award her on these grounds 7,500 euros in moral damages. In a memorandum of 10 June 2009 the complainant informed the Director-General that she disagreed with that decision.

B. The complainant argues that she is fully entitled to the relief provided for in Appendix D to the Staff Rules, given that her claim for compensation was initiated in good time and was thus receivable. She points out that the Secretary of the ABCC was informed within the four-month time limit laid down in Appendix D, both orally and in writing, of her intention to file a claim. She refers in this regard to the meeting of 28 June 2004 and the Note she prepared in accordance with the Secretary's instructions. She contends that the Secretary had a duty to inform her immediately upon reviewing her Note as to whether or not it met the procedural requirements. In her opinion, the Secretary's failure to give her unambiguous information and proper guidance regarding the procedures for submitting a claim under Appendix D amounts to a breach of due process.

The complainant asserts that the Secretary of the ABCC disclosed her identity to the Director of HRM who, in turn, disclosed it to Mr S. – a representative of the staff on the ABCC – and to the members of the JAB. She further contends that by forwarding to the members of the JAB her claim under Appendix D, together with all its attachments,

the Director of HRM divulged sensitive information on her medical condition, in breach of her right to confidentiality.

Furthermore, there was a lack of procedural fairness in the ABCC's review of her case. Whereas Mr S. withdrew from the review of her case when her identity became known, the Director of HRM placed herself in a situation giving rise to a conflict of interest by remaining on the ABCC panel dealing with the claim. The complainant alleges that her request for review of the decision to reject her claim was considered by the Secretary of the ABCC and the Director of HRM, rather than the Director-General, and that she was therefore not afforded a fair and unbiased review. She considers the delay in reviewing her claim for compensation unacceptable and argues that, through its rejection of her claim, the Administration subjected her to continued and unnecessary mental and physical stress.

The complainant asks the Tribunal to set aside the impugned decision and to find that the claim she submitted on 24 February 2005 is receivable, thus entitling her to the relief provided for in Appendix D to the Staff Rules. She requests moral damages in the global sum of 90,000 euros, including 10,000 euros for breach of due process, 40,000 euros for violation of her right to anonymity and confidentiality, and 20,000 euros respectively for the lack of procedural fairness and the mental and physical stress she suffered. She also seeks 10,000 euros in damages for the delay in reviewing her claim and a further 10,000 euros in costs.

C. In its reply UNIDO submits that the complainant's claim for compensation under Appendix D to the Staff Rules was not receivable because it was submitted on 24 February 2005, i.e. beyond the four-month time limit stipulated in Appendix D and in Administrative Circular UNIDO/DA/PS/AC.75. It explains that, as a matter of law, the submission of the complainant's Note dated 25 June 2004 did not amount to a submission of a claim under the said rules, which provide that a claim for compensation must be submitted through the staff member's supervisor to the Secretary of the ABCC, that it must fully and clearly state the facts regarding the circumstances of illness, including the reasons why the claimant considers it to be attributable to

the performance of official duties, and that it must be accompanied by pertinent documentary evidence.

The Organization rejects the allegation of breach of due process, arguing that the Secretary of the ABCC properly briefed the complainant on the procedures for the submission of claims under Appendix D and also provided her with copies of all relevant documents. It denies that the Secretary ever gave the complainant any assurances to the effect that the Note dated 25 June 2004 satisfied the procedural requirements and asserts that, in view of her experience in such administrative matters, the complainant knew full well that the submission of a claim for compensation is subject to a mandatory deadline.

With regard to the breach of confidentiality attributed to the Secretary of the ABCC and the Director of HRM, the Organization argues that the rule of anonymity relied upon by the complainant does not address the use of records held by the Secretary of the ABCC in the context of adversarial proceedings and hence may not be invoked in connection with the proceedings before the JAB. Moreover, the complainant chose not to submit her claim for compensation to the JAB, although it was material and probative. Consequently, the Director of HRM, as the designated representative of the Director-General, correctly obtained and used the information necessary for defending the latter's decision. Nevertheless, in an attempt to correct the erroneous disclosure of the medical information attached to the claim submitted on 24 February 2005, the Director-General offered the complainant appropriate moral damages, taking into account the fact that she had voluntarily disclosed to the JAB the nature of her illness and the prescribed treatment. The defendant contends that in light of the potential conflict of interest, the Director of HRM was justified in objecting to the complainant's participation in the JAB panel that had been constituted to consider Mr S.'s appeal. In fact, the Director of HRM only revealed the minimum information that was required to convince the JAB of the correctness of her objection.

UNIDO dismisses as unfounded the assertion that there was a lack of procedural fairness in the ABCC's review of the complainant's

claim. It argues that there is no rule requiring that an ABCC member withdraw in the event that he or she becomes aware of a claimant's identity and that at no point did the complainant seek the recusal of the Director of HRM. In its opinion, there was nothing biased or unfair about the manner in which the Director-General replied to the complainant's request for review.

The Organization submits that the Director-General's decision to reject the JAB's recommendations is not a sufficient ground for the award of moral damages for mental and physical stress, and it notes that the complainant was offered appropriate moral damages for the delay in the ABCC's review of her case. It invites the Tribunal, in the event that the complainant's claim is found to be receivable, not to award her the relief provided for in Appendix D, but to refer the matter back to the ABCC for a review of the merits of the claim.

D. In her rejoinder the complainant presses her pleas. She states that Appendix D does not require a staff member to submit a claim for compensation through his or her supervisor and that she saw no reason to provide the JAB members with a copy of her submission of 24 February 2005, which contained personal medical information. She maintains that the Director of HRM had a conflict of interest, particularly because she had played an active role in the litigation arising from the decision to reassign her. She explains that she did not seek the latter's recusal from the ABCC review because she was only informed of its membership on 6 June 2008. She asks that the Tribunal set strict deadlines in the event that it decides to refer the matter back to the ABCC for a review of the merits of her claim.

E. In its surrejoinder UNIDO observes that the complainant's rejoinder contains no evidence to support a finding that there were exceptional circumstances justifying the late submission of her claim. It otherwise maintains its position.

CONSIDERATIONS

1. The complainant had filed an appeal against the decision of 3 October 2007 by the Director-General to maintain his decision to deny her claim for compensation under Appendix D on the grounds of its late submission. She now impugns the Director-General's decision of 23 April 2009 to reject in part the JAB's recommendations contained in its report of 2 April 2009. The Director-General rejected in particular the recommendations that the complainant be awarded the relief stipulated by Appendix D and moral damages for breach of due process. He did not agree with the JAB's conclusions that the ABCC had violated the rule of anonymity, that there had been a disclosure of confidential information concerning the identity of the complainant, save for the disclosure to the JAB of her claim for compensation under Appendix D, together with the attached medical report, medical certificates and copies of medical bills, or that there had been an "inconsistency of conduct applied when dealing with a potentially conflicting situation". However, the Director-General concurred with the conclusion that there was no evidence of harassment and no grounds to award the complainant costs for the internal appeal. Consequently, he decided to award her 7,500 euros as compensation for moral damages sustained on account of the aforementioned incorrect disclosure of medical information and for the delay in the ABCC's consideration of her claim.

2. The complainant submits that her claim for compensation under Appendix D was receivable; that there was a breach of due process in that she had been ill-informed by the Secretary of the ABCC about the filing of her claim; that there was a breach of confidentiality on the part of the Secretary of the ABCC and the Director of HRM; that there was a lack of procedural fairness; that there were egregious delays in dealing with her claim; that she was subjected to continued and unnecessary mental and physical stress; and that she is entitled to legal costs for the internal appeal proceedings.

3. She asks the Tribunal to set aside the Director-General's decision of 23 April 2009 and to find that her claim for compensation under Appendix D is receivable, entitling her to the relief stipulated therein. She wants 10,000 euros in moral damages for breach of due process; 20,000 euros in moral damages for violation of her right to anonymity and for the disclosure of confidential medical information to the Director of HRM; and another 20,000 euros in moral damages for violation of her right to anonymity and divulged confidential medical information to the JAB members. She also asks the Tribunal to order the Organization to award her 20,000 euros in moral damages for the lack of procedural fairness and another 20,000 euros for subjecting her to continued and unnecessary mental and physical stress. She further seeks 10,000 euros for the egregious delay in reviewing her claim for compensation under Appendix D and 10,000 euros in costs, i.e. 5,000 euros for the internal appeal and 5,000 euros for the proceedings before the Tribunal.

4. Regarding the first two points under consideration 2 above, the Tribunal considers that the claim for compensation submitted by the complainant under Appendix D was receivable. The complainant's Note of 25 June 2004 did not follow the precise rules of procedure as outlined in Administrative Circular UNIDO/DA/PS/AC.75. Paragraphs 3(b), 4 and 5 of that circular provide that:

"3. Two important considerations in making a claim are:

(a) [...]

(b) Timeliness. A claim must be submitted within four months of the death or injury or onset of an illness. While the Director-General may accept a claim later, in practice this procedure is limited to exceptional circumstances. A claim may be submitted even when there are no immediate reimbursable expenses involved.

4. A claim under appendix D must be submitted in writing and addressed through the staff member's supervisor to the Secretary of the Advisory Board on Compensation Claims, established in accordance with article 16 of appendix D.* The facts regarding the circumstances of the death, injury or illness, including the reasons why the claimant considers that it is attributable to the performance of official duties, should be fully and clearly stated.

5. Whenever possible, all pertinent documentary evidence should accompany the initial claim. The annex to the present circular lists the type of evidence required. However, should some of it not be available immediately, the claim should still be initiated in order to avoid the possibility of it being rejected because of late submission. The missing evidence should be furnished to the Secretary of the Advisory Board on Compensation Claims as soon as it is available. The claim will not be presented to the Board until all the evidence required has been received and evaluated.

*See UNIDO/DG/B.4/Add.1/Amend.3 of 19 December 1990.”

5. The Secretary of the ABCC accepted the complainant’s Note without comment or correction. The Secretary also recorded the complainant’s intention to file a claim for compensation under Appendix D in a Note for the file, in which she summarised the discussion she had with her at the meeting of 28 June 2004. The deadline for the filing of the claim was set for 30 June 2004 (i.e. four months from the date of the onset of the complainant’s illness, 1 March 2004). Considering these three facts together, as well as the fact that there was no other apparent or reasonable justification for accepting the Note dated 25 June, the Tribunal concludes that the Secretary of the ABCC either considered the Note sufficient to qualify as a timely claim under Appendix D, or she improperly accepted it, leading the complainant to believe that she had initiated the proceedings. In either case, the result was that the complainant reasonably believed that her claim for compensation had been submitted and would be considered by the ABCC. It follows that the complainant’s memorandum of 24 February 2005, together with its attachments, namely a medical report, medical certificates and copies of medical bills, is to be considered an addendum to her initial claim, initiated with her Note of 25 June 2004, in accordance with paragraph 5 of the aforementioned circular. Therefore, the Tribunal finds that the complainant’s claim for compensation under Appendix D is receivable and holds that as such it must be sent back to the ABCC in order for it to consider its merits, in accordance with the provisions of Appendix D, within six months from the publication of the present judgment.

In her Note dated 25 June 2004 to the Secretary of the ABCC the complainant states:

“On 25 June 2004 I called you to enquire about the procedures to claim medical expenses which I consider work-related. Since you were away, Ms. [S.-K.] answered the phone. As discussed with her, she indicated that I should discuss this matter with you and gave me [an] appointment to see you on Monday, 28 June 2004. Therefore, I look forward to meeting you on Monday at 10:30 to further discuss this matter. Thank you for your assistance.”

6. The Tribunal agrees with the JAB’s finding that the ABCC violated its own rule of anonymity in the complainant’s case and that both the Secretary of the ABCC and the Director of HRM disclosed confidential information concerning the complainant’s identity and her medical condition. It is to be noted that according to the minutes of the first meeting of the ABCC on 28 February 1986 “the rules of procedure adopted by the [UNIDO Staff Pension Committee] should apply *mutatis mutandis*”. Paragraph B.2 of the Rules of Procedure of the UNIDO Staff Pension Committee, which is entitled “Record keeping”, provides that:

“According to rule C.8 the meetings of the Committee shall be confidential and are conducted in private. The record and all correspondence of the Committee shall be private and kept in the care of the Secretary of the Committee.

Participants are not identified by name but are referred to by their [Joint Staff Pension Fund] number. Since all cases are considered by the Committee anonymously, participants should communicate with the Committee only through its secretary.

[...]”

There was indeed no excuse for the Secretary of the ABCC to provide confidential information regarding the complainant’s claim for compensation to the Director of HRM. With regard to the latter’s objection to the complainant’s participation in a JAB panel constituted to examine an appeal filed by Mr S. – who was a member of the ABCC – it should be noted that the Director of HRM was not justified in revealing to that panel that the complainant had submitted a claim which was still pending before the ABCC. Had she refrained from revealing this particular information, there could have been no conflict

of interest considering that the ABCC proceedings are conducted anonymously.

7. Moreover, the Director of HRM, being involved in the complainant's case leading to Judgment 2659, which in turn led to the claim for compensation, should have removed herself from the ABCC as she already knew the claimant's identity and the details of her case. By failing to do so, the Director of HRM violated the complainant's right to anonymity during the consideration of her claim. As it is unproven that the complainant knew the final composition of the ABCC prior to 6 June 2008, the Tribunal considers that she was unable to object to the participation of the Director of HRM in the ABCC's review of her claim. Although this procedural flaw is already absorbed by the annulment of the decision and the reconsideration of the complainant's claim for compensation under Appendix D, it is relevant to determining the amount of moral damages to be awarded to the complainant.

8. As the complainant has not substantiated the claim that she has been subjected to continued and unnecessary mental and physical stress, it is therefore unfounded. It must also be pointed out that the impugned decision, while flawed, was made in good faith and the reasons for that decision were provided.

9. In light of the above, the decision of 23 April 2009 must be set aside, as well as that of 3 October 2007, to the extent that they did not find the complainant's claim for compensation under Appendix D receivable. The complainant's claim must be sent back to the ABCC for consideration on its merits by a newly composed panel, in accordance with the provisions of Appendix D, and a decision on her claim must be taken within six months from the publication of the present judgment. The impugned decision must also be set aside to the extent that the Director-General awarded the complainant moral damages for the delay in the ABCC proceedings and for the disclosure to members of the JAB of the complainant's claim for compensation under Appendix D and its attachments, i.e. the medical report, medical

certificates and copies of medical bills, but did not award her costs for the internal appeal.

10. The Tribunal will award the complainant moral damages in the amount of 5,000 euros for the wrongful decision regarding her claim for compensation under Appendix D taking into consideration all the reasons for which that decision should be set aside. In its opinion, the amount of 7,500 euros which was awarded by the Director-General for the delay in the ABCC proceedings and for the disclosure of confidential medical information to the JAB is appropriate. The Tribunal will also award 8,000 euros for all other breaches of confidentiality. It will further award 1,500 euros in costs for the internal appeal and the present proceedings.

DECISION

For the above reasons,

1. The decision of 23 April 2009 as well as that of 3 October 2007 are set aside to the extent that they did not find the complainant's claim for compensation under Appendix D receivable and that they awarded moral damages only for the delay in the ABCC proceedings and for the incorrect disclosure of medical information.
2. The complainant's claim for compensation under Appendix D must be sent back to the ABCC, as detailed in consideration 9 above.
3. UNIDO shall pay the complainant moral damages in the amount of 5,000 euros.
4. It shall pay her 8,000 euros for all other breaches of confidentiality, as listed above.
5. It shall also pay the complainant 1,500 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet