R. (No. 2)

v.

UNIDO

129th Session **Judgment No. 4210**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr F. A. R. against the United Nations Industrial Development Organization (UNIDO) on 13 March 2018 and corrected on 14 April, UNIDO's reply of 5 July, the complainant's rejoinder of 16 October 2018 and UNIDO's surrejoinder of 22 January 2019;

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

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

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

The complainant challenges the decision to dismiss as irreceivable his claim for compensation for injury or illness attributable to service.

The complainant was placed on sick leave as from 23 June 2015. Upon the expiration of his fixed-term contract, on 17 October 2016, he was separated from service and, as from 18 October 2016, he was awarded a disability benefit.

On 31 October 2016 the complainant submitted a claim for compensation for injury or illness attributable to service under Appendix D to the Staff Rules. At its meeting of 24 May 2017 the Advisory Board on Compensation Claims (ABCC) found that his claim had not been submitted "within four months of the death or injury

or onset of illness" as required by paragraph 3(b) of Administrative Circular AC.75 on the submission of claims for compensation in the event of death, injury or illness attributable to service (hereinafter "Circular AC.75"). Paragraph 3(b) also provides that: "While the Director-General may accept a claim later, in practice this procedure is limited to exceptional circumstances." As the onset of his illness was found to have been at the latest in June 2015 and given that he had been in contact with the Administration on different issues during his absence, the ABCC was not convinced that there were exceptional circumstances justifying a recommendation to the Director-General to accept a claim made outside the time limit. The ABCC therefore recommended rejecting his claim as irreceivable. The complainant was informed on 29 May 2017 of the Director-General's decision to follow that recommendation.

The complainant lodged an appeal against that decision with the ABCC in June 2017. The ABCC met in December 2017 to review his case and unanimously agreed to reconfirm its earlier recommendation to dismiss his claim as irreceivable, because the information provided in his appeal did not include any new evidence or facts.

By a letter of 14 December 2017 the ABCC Secretariat informed the complainant that the Director-General had decided to approve the recommendation of the ABCC on 13 December and that that decision constituted a final decision which could be challenged before the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to refer the matter back to UNIDO for further consideration of his Appendix D claim. Alternatively, he requests that the Tribunal itself should decide his claim on the merits. He claims material damages, 20,000 euros in moral damages and 10,000 euros in costs.

UNIDO submits that the complainant's claim was correctly rejected as irreceivable and asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant was a member of staff of UNIDO who separated from service on 17 October 2016 when his contract expired without renewal. He had been, since 23 June 2015, on sick leave. On 31 October 2016 the complainant submitted a claim for compensation under Appendix D to the Staff Rules. On 24 May 2017 the ABCC concluded the claim for compensation was time-barred and, accordingly, recommended that the claim was irreceivable. It did so on the basis that a claim for compensation should be submitted within four months of the onset of the illness as required by Article 12 of Appendix D and paragraph 3(b) of Circular AC.75 and that, in this case, the onset of the illness was at the latest in June 2015. The Director-General accepted this recommendation on 26 May 2017 and this decision was communicated to the complainant by letter dated 29 May 2017.

2. By e-mail dated 23 June 2017, the complainant appealed against the decision. At a meeting on 11 December 2017, the ABCC reaffirmed its conclusion that the claim had not been lodged within the specified four-month period, that there were no exceptional circumstances warranting departure from compliance with that requirement and, in substance, recommended that the claim was not receivable. On 13 December 2017 the Director-General decided to approve this recommendation and this decision was communicated to the complainant by letter dated 14 December 2017. This is the decision impugned in these proceedings.

3. In a recent judgment the Tribunal addressed the effect and purpose of the provisions creating time limits in relation to claims under Appendix D. It is convenient to repeat what was said. The Tribunal said in Judgment 3949 at considerations 2 and 3:

> "2. Pursuant to Staff Rule 108.5, a staff member is entitled to compensation in the event of death, injury or illness attributable to the performance of official duties under Appendix D. Article 12 of Appendix D, entitled 'Time limit for entering claims', provides that claims for compensation shall be submitted within four months of, relevantly, the onset of the illness, provided, however, that in exceptional circumstances the Director-General

> may accept for consideration a claim made at a later date. Circular AC.75 specifies the procedures for making a claim and adverts to the need for it to be made within four months of, amongst other things, the onset of an illness, though it also adverts to the discretionary power of the Director-General to exceptionally accept a claim submitted beyond that period.
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> 3. The Tribunal has accepted that it is not always necessary for there to be strict compliance with the requirements of Circular AC.75 (see, for example, Judgments 3668, consideration 13, and 3004, consideration 5). This is appropriate having regard to the purpose and object of Appendix D, namely to provide benefits to staff members whose work has negatively impacted on their health including, in the most extreme case, causing the death of the staff member. Nonetheless, those requirements, and in particular the time limit derived from Appendix D itself, exist for a purpose. They enable the Organization to be made aware, in a timely way and with some detail, that a claim is being made and therefore its liability, potentially, is being enlivened. The time limit serves several purposes. One is that it enables an investigation to be made about the cause of the death, injury or illness and to examine whether it is work-related at a point in time when the facts are not stale. Medical opinions can be obtained at a time proximate to the time of alleged causation and, if relevant, information can be obtained from those who may have observed an event or events said to have caused the death, injury or illness when memories are fresh. Another is that it enables an organization and, if relevant, its insurance broker to monitor over time potential financial and related liability arising from claims that might succeed."

4. In these proceedings, the complainant seeks, amongst other relief, that the impugned decision be set aside and that the matter be remitted to UNIDO for further consideration of his Appendix D claim or, alternatively, that UNIDO be ordered to pay the compensation claimed.

5. The complainant advances six arguments in support of his case. The first is that there had been a fundamental breach of good faith and due process that vitiated the impugned decision. The second is that the expression "onset of the illness" concerns the date on which the complainant received notice that a medical professional had diagnosed the illness causing the disability and, as a matter of fact, that date was much later than the date relied on by the ABCC. The third and related argument is that the interpretation of the expression adopted by the ABCC resulted in arbitrary decision-making. The fourth argument is

that there had been procedural irregularities attending the ABCC's consideration of his case on 24 May 2017 and 11 December 2017. The fifth argument is that UNIDO did not act in good faith. The sixth and final argument is that there was another time limit specified in the Staff Rules that was applicable. The Tribunal deals with each of these arguments in turn.

6. The first argument that there had been a fundamental breach of good faith and due process which vitiated the impugned decision, is unfounded. UNIDO's Medical Adviser was present at the ABCC's meeting of 24 May 2017 and not its meeting of 11 December 2017. In his pleas, the complainant speculates that the Medical Adviser's absence at the second meeting was somehow contrived to achieve a particular result. But this is nothing more than speculation and there is no objective evidence to support, in any way, an inference that this was so. In his rejoinder, the complainant advances a different argument concerning good faith contending that Judgment 3949 establishes that UNIDO was required to provide him with information concerning the need to file a claim in a timely way. No such general principle was established by Judgment 3949 and, on the facts of this case, the conduct of UNIDO was unexceptionable. No breach of good faith and mutual trust is established.

7. The second argument is that the expression "onset of the illness" concerns the date on which the complainant received notice, as expressed in the pleas, "that a medical professional [had] diagnosed the illness causing the disability" and, as a matter of fact, that date was much later than the date relied on by the ABCC. The third and related argument is that the interpretation of the expression adopted by the ABCC resulted in arbitrary decision-making. It is to be recalled that Article 12 of Appendix D provides that claims for compensation shall be submitted within four months of, relevantly, the "onset of the illness". The language of the Article is, in this respect, clear as is the purpose of the time limit as discussed in Judgment 3949 in the quotation set out above. There is no warrant for reading into the provision a qualification of the type advanced by the complainant. It is clear from the evidence

that the complainant was aware or believed that the illness from which he suffered which led him to take sick leave in June 2015 was work-related. There is no reason to doubt that the ABCC was correct in concluding that the onset of the illness was, at the latest, June 2015. The related argument that a too narrow construction of the expression "onset of the illness" would give rise to arbitrary decision-making is unfounded. Ultimately whether the time limit has been met will depend on the facts of any particular case and it has to be borne in mind that there is an overriding discretion invested in the Director-General by Article 12 itself to accept for consideration a claim lodged out of time in exceptional circumstances.

8. The fourth argument is that there had been procedural irregularities attending the ABCC's consideration of his case on 24 May 2017 and 11 December 2017. This is founded on the fact that all members of the ABCC did not sign the minutes of the May and December 2017 meetings. The complainant does not point to any case law or staff rule or regulation that requires all members to sign. Moreover the mere fact that all members did not sign does not even arguably sustain an inference that the decisions actually made were not unanimous (see, for example, Judgments 1763, consideration 13, and 810, consideration 2).

9. The fifth argument again raises the issue of good faith and is a variant of the argument raised by the complainant in his rejoinder discussed in consideration 6 above. The essence of the argument is that UNIDO's Medical Adviser was aware of the complainant's medical condition and should have advised him to make a claim. The failure to do so had the result that UNIDO did not act in good faith. Certainly on the facts of this case, there is no justification for concluding that the Medical Adviser was obliged to take the step suggested. The material before the Tribunal does not establish that the complainant was unaware of the connection between the illness for which he commenced taking sick leave in June 2015, and the performance of his duties at work. Indeed, as UNIDO points out, an inference can reasonably be drawn from the statements made by the complainant in his Appendix D claim, that he was aware when he commenced the sick leave in June 2015 of

the connection between his illness and work. Even accepting that the complainant may not "have [had] knowledge of Appendix D" until August or September 2016 (a fact advanced in the complainant's rejoinder), this was not a matter raised in his Appendix D appeal and the ABCC cannot, on the facts of this case, be criticised for not exploring whether or not the complainant had such knowledge.

10. The sixth and final argument was that there was another time limit specified in the Staff Rules that was applicable. The complainant relies on Staff Rule 106.10(a). But this general rule permitting the retroactive receipt of an allowance, grant or payment in certain circumstances must yield to the specific provisions in Article 12 of Appendix D. It is unnecessary to dwell on this argument as it is manifestly untenable.

11. Each of the arguments of the complainant is unfounded and, accordingly, his complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ