



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/069

Judgment No.: UNDT/2012/094

Date: 27 June 2012

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

CHRISTENSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Miles Hastie, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Marcus Joyce, ALS/OHRM

Introduction

1. The Applicant was a staff member of various United Nations entities, on a series of fixed-term appointments, before she was employed by the International Criminal Tribunal for Rwanda (ICTR) in Kigali, Rwanda in October 1996. In May 1997, the Applicant was transferred to Arusha, Tanzania, where she served as Training and Staff Welfare Assistant ultimately at the FS-4 level before her separation in 2003.

2. On Sunday, 13 December 1998, the Applicant visited Mount Meru, just outside Arusha. She fell ill with a fever on Monday, 21 December 1998 whilst at work. She saw a local medical practitioner and after her condition worsened, she was evacuated to Nairobi, Kenya on 29 December 1998. The Applicant was admitted to Nairobi Hospital and diagnosed with tick typhus. The Applicant subsequently returned to Arusha and resumed her duties with ICTR.

3. On 16 April 1999, the Applicant submitted a compensation claim to the Advisory Board on Compensation Claims (ABCC) in accordance with art. 11.1 of Appendix D to the Staff Rules and Regulations (“Appendix D”). The Applicant’s claim was premised on the basis that her illness resulted in a permanent disability. Appendix D provides for the payment of compensation in the event of death, injury or illness of a staff member, which is attributable to the performance of official duties on behalf of the United Nations.

4. In early April 2002, the Applicant’s symptoms worsened considerably. As a result, on 30 April 2002, the Applicant was medically evacuated to Johannesburg, South Africa, to seek treatment from a specialist in Rickettsia, Dr. Cecile Jadin. The Applicant was placed on extended sick leave from 19 April 2002. Prior to the Organization’s authorization for medical clearance to South Africa, the Applicant had purchased a return plane ticket for herself and her eight-year-old daughter to South Africa.

5. On 7 May 2003, the Applicant was informed that the United Nations Staff Pension Committee had determined that she was incapacitated for further service and that she was consequently entitled to a disability benefit under art. 33(a) of the Regulations of the United Nations Joint Staff Pension Fund. On 23 June 2003, the Applicant separated from service and has been receiving a disability benefit since this time.

6. On 22 June 2004, the ABCC considered the Applicant's claim for compensation in accordance with Appendix D. On 26 July 2004, the ABCC concluded that her illness could not be recognized as attributable to the performance of her official duties on behalf of the United Nations and recommended to the Secretary-General that her claim for compensation be denied.

7. On 26 July 2004, the Controller approved the recommendation of the ABCC on behalf of the Secretary-General (the "ABCC decision"). By memorandum dated 9 August 2004, the Secretary of the ABCC informed the Applicant of the ABCC decision. The Applicant received the letter on 25 September 2004.

8. By letter dated 16 January 2006, the Applicant filed an appeal with the Joint Appeals Board (JAB), which became JAB Case No. 2006-004 (the "Salary case") in which she contested a decision of 13 August 2005 taken by ICTR Administration rejecting her request for payment of salary and compensation under art. 11.1 of Appendix D.

9. On 19 June 2006, the Applicant filed a second appeal before the JAB, which became JAB Case No. 2006-053 (the "Entitlements case") in which she challenged several ICTR decisions not to pay her entitlements relating to her medical evacuation in 2002 and separation from service in June 2003.

10. The Applicant appealed against the ABCC decision to the former UN Administrative Tribunal, following the grant of an extension of time to file her appeal, on 22 June 2006.

11. On 28 November 2006, the Presiding Officer of the New York JAB informed the Applicant's then Counsel that the appeal in the Salary case was not receivable as the JAB lacked jurisdiction to entertain it.

12. On 10 July 2007, the Panel of the JAB issued its report in the Entitlements case. The JAB noted that the ABCC Decision was under appeal before the former UN Administrative Tribunal and made no recommendation regarding the appeal.

13. By letter dated 31 October 2007, the Deputy Secretary-General informed the Applicant that the Secretary-General had decided not to accept the conclusion of the JAB in the Entitlements case and, noting that the different heads of her claim were not necessarily dependent on the outcome of her appeal to the former UN Administrative Tribunal, had decided to remand the case to the JAB for an expedited review.

14. In Judgment No. 1427 of 30 January 2009 (the "ABCC case"), the former UN Administrative Tribunal dismissed the Applicant's case as not being receivable. It held that it could not rule on the issue unless or until the Applicant had asked the Secretary-General to convene a Medical Board to review the ABCC's decision under art. 17 of Appendix D to the Staff Rules and Regulations. With respect to her appeal against the decisions regarding her entitlements, the former UN Administrative Tribunal held that the appeal was not receivable as the issues were still pending before the JAB in the Entitlements case.

15. On 4 September 2009, the Dispute Tribunal in New York held a directions hearing in these proceedings. The Tribunal noted that the Applicant wished to challenge the decision not to reopen or review the ABCC decision, however she had failed to request for management evaluation. The Applicant then requested management evaluation of the decision. The management evaluation was set out in letters dated 23 and 29 October 2009.

16. On 21 October 2009, the Dispute Tribunal issued Order No. 131, which ordered that the cases be transferred from the Registry in New York to the Registry in Nairobi.

17. On 28 May 2010, the Tribunal issued Order No. 101 (NBI/2010) which dealt with case management in respect of the present case. The Applicant filed her response to the said Order on 30 July 2010 in which she advised the Tribunal that she was canvassing the possibility of consolidating her two cases which had been transferred from the New York Registry.

18. The Respondent filed a response to Order No. 101 (NBI/2010) on 30 June 2010 in which he, *inter alia*, challenged the receivability of the Applicant's claims.

19. The Parties attended a case management hearing on 30 November 2010, following which the Tribunal issued Order No. 240 (NBI/2010) directing:

- a. The Applicant to file a Motion for Consolidation by Wednesday, 22 December 2010.
- b. The Respondent to file his Reply to the said Motion by Wednesday, 29 December 2010.
- c. The Applicant to file her Observations on the Reply, if any, within three days from the date of service of the Reply.
- d. That the matter was adjourned to Wednesday, 2 March 2011 for the hearing of the Motion for Consolidation.

20. The Applicant filed her "Motion for Consolidation, Waiver of Time Limits" ("the Motion") on 22 December 2010.

21. The Respondent filed a Motion requesting for extension of time for compliance with Order No. 240 (NBI/2010) on 23 December 2010. On 29 December 2010, the Tribunal informed the Parties that the Respondent's request for extension of

time for compliance with Order No. 240 (NBI/2010) had been granted. The Respondent's response to the Motion was subsequently filed on 19 January 2011.

22. On 18 May 2011, the Tribunal issued Order No. 041 (NBI/2011) where it was determined, *inter alia*, that:

- a. That the ABCC Case was not receivable.
- b. The two Applications which were transferred to the New York Registry of the Tribunal namely: File Number UNDT/NY/2009/105 (the "Salary case") and former JAB case 2006-053, which was transferred to the New York Registry of the UNDT, with File Number UNDT/NY/2009/106 (the "Entitlements case") be consolidated.

23. The consolidated Salary and Entitlements case was heard from 14-15 September 2011. During the hearing the Tribunal received live evidence from the Applicant herself and two witnesses for the Applicant, Dr. Mauro Saio and Dr. Lieve Lynen via teleconference. A third witness for the Applicant, Dr. Cecile Jadin was unable to testify in person and gave evidence in writing which was submitted to the Tribunal on 4 October 2011.

24. The Applicant filed an appeal against Order No. 041 (NBI/2011) and on 16 March 2012, the UN Appeals Tribunal published Judgment No. 2012-UNAT-218. In its judgment, UNAT found that while the Dispute Tribunal correctly decided that it could not waive a deadline for the review of a decision taken by the MEU, it erred when it considered that the Applicant's application consisted of a request for the waiver of the time limit with respect to the decision taken in 2004 by the ABCC. UNAT held that the correct issue to be determined was whether the Applicant's case presented exceptional circumstances that would have warranted the reopening of her case by the Secretary-General under arts. 9 and 17 of Appendix D to the Staff Rules.

25. UNAT further held that the appeal was not receivable as, notwithstanding her illness, the Applicant did not demonstrate any exceptional circumstances that would

have required the waiving of the applicable time limits for the Secretary-General to reopen or reconsider the decision in the ABCC case.

Applicant's Case

26. The Applicant's principal contentions are:

a. It is not in dispute that she contracted a rickettsial infection in December 1998. The sources of rickettsial illness are present in Arusha and therefore the basis for the ABCC's decision was unfounded.

b. She would not have contracted the infection had she not been working for the ICTR. She should therefore be compensated under art. 11 of Appendix D to the Staff Rules as "attributable to the performance of official duties on behalf of the United Nations".

c. Her illness would not have been as severe had the UN properly performed or processed her medical treatment in 1998 and 2002. This is compensable under art. 11 of Appendix D to the Staff Rules as "attributable to the performance of official duties on behalf of the United Nations" and a failure of the UN to protect its staff.

d. Her rickettsial illness was debilitating, at least by 2003 and resulted in "total disability". She is therefore eligible for all benefits under art. 11.1 of Appendix D.

e. She incurred significant expenses between 1999 and 2004 directly related to medical treatment for her illness, including travel expenses, living expenses in Nairobi (DSA), cost of medical services, cost of medical reports, cost of a medical device, cost of communications expenses required to process claims for these amounts—these amounts are reimbursable under art. 11.1(a) of Appendix D.

f. The Applicant's daughter faced significant educational, developmental and psycho-social disruption directly caused by the Applicant's life-threatening condition. Remedial expenses are reimbursable under art. 11.1(a) of Appendix D.

g. She was placed on sick leave with half-pay for the last nine months of her contract whereas she was entitled to full pay pursuant to art. 11.1(b) of Appendix D.

h. As a single mother, she took her minor daughter with her during her 2002 South Africa emergency medical evacuation. The Applicant submits that the Administration improperly fettered its discretion and acted unreasonably in denying the claim for her travel costs (airfare, half-DSA), which was presumptively compensable under the Staff Rules and relevant administrative issuances.

i. During a period of the medical evacuation, her daughter was enrolled in school in South Africa but fees in Tanzania were not refunded. The Applicant submits that the Administration improperly fettered its discretion and acted unreasonably in denying this education grant claim, which was presumptively compensable under the Staff Rules and relevant administrative issuances.

j. The Administration took 11 months from the advance packing of her personal effects and seven months from her request for shipment, to deliver her personal effects, requiring her to buy basic furniture necessities in replacement.

k. She has suffered a horrendous ordeal through the Administration's failure to protect her from environmental hazards (rickettsial infections) and inadequate medical treatment, the Administration's frustration and delay of medical evacuations and the Administration's litigation posturing that has sought to protract and deny her legitimate claims for more than a decade, all

of which have caused her long-term harm. The Applicant claims USD 50,000 in non-pecuniary damages.

l. The delay in prosecuting her cases before the JAB is explained by exceptional circumstances, including her physical and mental impairment. As the Administration did not exercise its discretion in waiving any applicable time limits, the Tribunal may do so and should declare all claims receivable.

27. For the reasons stated above, the Applicant requests:

a. A declaration that she is entitled to benefits under art. 11 of Appendix D and rescission of the decision to deny such benefits.

b. A declaration that she is entitled to benefits under art. 11.1 of Appendix D and rescission of the decision to deny such benefits.

c. A declaration that she is entitled to claim, under art. 11.1(a) of Appendix D for all reasonable medical, hospital and directly related costs, that her methodology described for computing such benefits is correct and rescission of the decision to deny such benefits.

d. A declaration that the Applicant is entitled to claim, under art. 11.1(b) of Appendix D, the salary provided therein, and rescission of the decision to deny such benefits.

e. A declaration that she is entitled to claim, under the Staff Rules and relevant administrative issuances, compensation for the Applicant's daughter's half-DSA and airfare and rescission of the decision to deny such benefits.

f. A declaration that she is entitled to claim, under the Staff Rules and relevant administrative issuances, compensation for her daughter's unpaid education at International School Moshi and rescission of the decision to deny such benefits.

g. A declaration that she is entitled to claim, under the Staff Rules and relevant administrative issuances, compensation for the Administration's delay in shipment of her personal effects, which compensation should be set at the reasonable replacement value incurred by the Applicant.

h. An order requiring the Administration to pay USD 50,000 in non-pecuniary damages.

i. An order requiring the Administration to pay pre-judgment interest on all of the foregoing claims, running from the date on which the harm was suffered until the date of judgment regarding liability (i.e. excluding any period required to resolve disputes concerning the quanta), at the US Prime Rate.

j. An order requiring the Administration to pay post-judgment interest on all of the foregoing claims, running from the date of judgment regarding liability for sixty days (regardless of any unsuccessful appeal on the particular claim), at the US Prime Rate.

k. An order requiring the Administration to pay post-judgment interest on all of the foregoing claims, running sixty days after the date of judgment regarding liability (regardless of any unsuccessful appeal on the particular claim), at the US Prime Rate plus 5%.

Respondent's Case

28. The Respondent's case is summarized below:

a. The Dispute Tribunal does not have jurisdiction or competence to hear and determine the Salary case under General Assembly Resolution 63/253. The Salary case was closed in 2006 and was improperly transferred by the Secretariat of the JAB to the New York Registry of the Dispute Tribunal after 1 July 2009.

b. The Salary case was not a pending case before the JAB when it was abolished as from 1 July 2009. The Secretariat of the JAB mistakenly included the Salary case among the pending cases transferred to the New York Registry of the Dispute Tribunal.

c. Many procedural steps have taken place in these proceedings, including a directions hearing in New York, the transfer of the Salary case to the Nairobi Registry and the filing by the Applicant of a motion to consolidate the Salary case with the Entitlements case. The Respondent submits that none of these steps serve to revive or reopen the Salary case.

d. In Order No. 041 (NBI/2011), the Dispute Tribunal found that the ABCC case was not receivable on the ground that it was time-barred under arts. 8(3) and (4) of the UNDT Statute. As a consequence of Order No. 041(NBI/2011), the ABCC Decision cannot be impugned in these proceedings and the Applicant's claim for compensation under Appendix D should not be considered by the Dispute Tribunal. Likewise, the breach of duty of care claim against the Respondent is not properly before the Dispute Tribunal.

e. The evidence of Drs. Saio, Lynen and Jadin is not relevant to the issues in these proceedings and is not admissible under arts. 18(1) and (5) of the Rules of Procedure of the Dispute Tribunal.

f. Part of the evidence given by the Applicant is inadmissible in these proceedings. The Applicant's evidence regarding her alleged misdiagnosis in December 1998 by the doctor appointed by the Organization and the allegations that the ICTR denied or delayed her medical evacuations from Arusha in December 1998 and April 2002, is also inadmissible. Such evidence would only be relevant to a claim against the Respondent for breach of duty of care. This claim is not properly before the Dispute Tribunal and the evidence relating to such a claim is inadmissible under art. 18(1) of the Tribunal's Rules of Procedure.

g. The Applicant's claim for DSA and air ticket for the Applicant's daughter's travel in 2002 and the claim for compensation arising from the alleged late shipment are time-barred in accordance with former staff rule 111.2(a).

h. The Applicant's claims for medical expenses, and mileage and DSA for travel to Nairobi for medical treatment, are not receivable as she failed to exhaust her internal administrative remedies before filing her appeal to the JAB. Article 11.1(a) of Appendix D states a staff member whose illness is service-incurred, and results in a permanent disability, is entitled to payment of "all reasonable medical, hospital and directly related costs". The ABCC decision rejected the Applicant's claim for compensation under Appendix D on the ground that her illness was not service-incurred.

i. Article 17 of Appendix D establishes a mandatory administrative remedy for contesting the ABCC decision, which is initiated by a request to the Secretary-General for reconsideration of the decision. The Applicant did not make such a request and instead filed an application with the former UN Administrative Tribunal which rejected the application on the ground that she had not followed the procedure set out in art. 17 of Appendix D.

29. On the basis of the foregoing, the Respondent requests the Dispute Tribunal to strike out the Salary case from the cause list. In respect of the Entitlements case, the Respondent requests that the Dispute Tribunal reject the application in its entirety.

Considerations

30. The legal issues arising for determination in this case are:

a. Whether the Tribunal has the jurisdiction or competence to hear and determine the Salary case.

- b. Whether the Applicant's claims in as far as they rely on art. 11 of Appendix D to the Staff Rules are receivable.
- c. Whether the Applicant is entitled to her claim for her daughter's half-DSA and airfare.
- d. Whether the Applicant is entitled to compensation for her daughter's unpaid education at International School Moshi.
- e. Whether the Applicant is entitled to compensation for the Administration's delay in shipment of her personal effects.
- f. Whether the Applicant is entitled to compensation for the delays by the Administration in processing her various claims.

31. The Respondent argues that the Tribunal does not have jurisdiction or competence to hear and determine the Salary case since the case was closed in 2006 and was improperly transferred by the Secretariat of the JAB to the New York Registry of the Tribunal after 1 July 2009. It is on the record in this case that on 28 November 2006, the Presiding Officer of the JAB informed the Applicant's counsel at the time that the appeal in the Salary case was not receivable as the JAB lacked jurisdiction to entertain it.

32. Articles 9 and 17 of Appendix D provide as follows:

Article 9. Reopening of cases

The Secretary-General, on his own initiative or upon the request of a person entitled to or claiming to be entitled to compensation under these rules, may reopen any case under these rules, and may, where the circumstances so warrant, amend in accordance with these rules any previous award with respect to future payments.

Article 17. Appeals in case of injury or illness

(a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty

days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date.

The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b)...

33. After the President of the New York JAB informed the Applicant's Counsel at the time that the Salary case was not receivable before the JAB, it was up to the Applicant to request the Secretary-General to exercise his discretion under arts. 9 and 17 of Appendix D to reopen the Salary case. The Tribunal finds that the Salary case was never properly before the Tribunal and is not receivable. It is within the discretionary authority of the Secretary-General to reconsider whether the existence of an injury is attributable to the performance of official duties. In this case, the Secretary-General has refused to exercise that discretion. The Applicant's claims in so far as they rely on art. 11 of Appendix D to the Staff Rules are therefore not receivable.

34. With respect to all of the Applicant's other claims including her claim for DSA and air ticket for her daughter's travel in 2002 and her claim for compensation arising from the late shipment of her property, the Tribunal agrees with the Respondent's submissions that these claims are not receivable as the Applicant should have requested Administrative review of the decisions denying her the payments in accordance with former staff rule 111.2(a). The Tribunal does not have the power to waive the time limits for requests for administrative review under the old internal justice system.

35. The Applicant went to great lengths to convince the Tribunal that her illness was service-incurred. The Tribunal does not dispute the evidence tendered by her witnesses who are medical experts. That having been said, however, this evidence is not relevant as it goes to issues which should have properly been put before the Secretary-General in accordance with art. 17 of Appendix D and within the appropriate time frame.

Judgment

36. The Application is dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 27th day of June 2012

Entered in the Register on this 27th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi