UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/026
Judgment No.: UNDT/2022/051
Date: 25 May 2022
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Michelsen, Officer-in-Charge

ARVIZU TREVINO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat
Clémentine Foizel, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Chief Executive Officer of the United Nations Joint Staff Pension Fund ("UNJSPF"), contests the Controller's decision of 30 December 2020 to deny him compensation under Appendix D of the Staff Regulations and Rules.

2. The Respondent submits that the application is not receivable and, in any event, without merit.

3. By Order No. 001 (NY/2022) dated 5 January 2022, the Tribunal held that the application is receivable. By Orders Nos. 020 and 042 (NY/2022) dated 10 February and 21 April 2022, the Respondent was ordered to file some additional information and documentation to clarify the merits of the case and the Applicant to comment thereupon.

4. For the reasons set out below, the Tribunal finds that the application is without merit, but awards the Applicant compensation for an unduly and inordinately protracted process when rendering the administrative decision.

Facts

5. In the application, the Applicant submits that "[d]uring 2015 and until his separation from service in 2019, [he] was continuously subjected in [United Nations] premises during the performance of his official duties to unwelcome and improper work incidents by [United Nations] staff members who utilized [United Nations] equipment and infrastructure for such actions". As a result, the Applicant "had to perform his official duties under extreme stress for years, enduring the harmful effects of working in a hostile, unsafe and unhealthy work environment without the protection from the [United Nations] Administration". This "damaged his health causing his

illness and led to total disability". Starting in August 2017, the Applicant therefore "had to take an extended medical leave", which was "duly certified" by the Medical Services Department, who "requested, received and reviewed all the periodic medical reports from Applicant's psychiatrist and approved all sick leave requests during a 17-month medical leave period".

6. On 29 June 2018, the Applicant filed a claim for "[n]euro-physical injury & invalidity [t]otal disability as per [art.] 3.2 of Appendix D as well as sick leave credit as per art. 3.9(b)ii".

7. After the Controller having twice remanded the Applicant's compensation claim back to the Advisory Board on Compensation Claims ("ABCC") for a renewed review, on 30 December 2020, the ABCC Secretary informed the Applicant that his "claim under Appendix D to the United Nations Staff Rules for illnesses (psychological) in connection with harassment and other incidents regarding [his] work starting in 2015 and diagnosed in 2017" had been denied. The ABCC had "concluded and determined" that the Applicant had "not met [his] burden of proof to show that [his] illness is attributable to the performance of duties, and recommended denial of the claim". This "recommendation to deny was subsequently endorsed by the Controller".

8. As background for the recommendation and decision to deny the Applicant's claim, the ABCC Secretary stated as follows:

> The board noted your association with Lovis, a company that provides solutions to enterprise problems and where you apparently served on its advisory board since separating from the Organization on a Pension Fund disability. The board reviewed the correspondence between the ABCC secretary and your counsel explaining this association.

> The board noted the reports of your psychiatrist, outlining years of alleged abuse and attribution of the cause of your illness, but also noted the opinion of Medical that there is uncertainty about the cause of your illness which could be due to matters outside the workplace and is most likely endogenous. This is supported by the nature of the illness, the nature and evolution of your symptoms, and by their failure to resolve once removed from the stressors of the workplace. Accordingly, although having considered the reports of your psychiatrist, Medical assessed that normal interactions and difficulties at work did not cause your illness, but heightened your awareness and emphasis of them, leading them to be emphasized at the exclusion of other factors.
>
> The board reviewed your psychiatrist's statements that your illness is caused by work, noting the statements were based on your descriptions, and that the psychiatrist does not have any knowledge of the workplace except as described by you. For such complex matters involving the evolution of psychiatric/psychological illness, Medical advised the board this would normally preclude any assessment of causation by a health professional.
>
> The board noted that, while there is no requirement to establish fault or negligence under Appendix D, there is a requirement to establish a link between the illness and the performance of duties. The board determined that you have not done so.

Consideration

The authority of the Controller to take the contested decision

9. It follows from the contested decision dated 30 December 2020 that this decision was taken by the Controller. In ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), which took effect on 1 January 2019, the delegation of authority to make decisions under staff regulation 6.2 and staff rules 6.4 and 6.5 regarding compensation for death, injury and illness under Appendix D to the Staff Regulations and Rules was, however, changed. Thereafter, the authority to do so was delegated to the Under-Secretary-General for the Department of Management Strategy, Policy and

Compliance ("the USG/DMSPC") instead of the previous delegation to either the Under-Secretary-General for the Department of Management for claims over USD25,000 or the Controller for *de minimis* claims.

10. The importance of proper authority is stressed by the Appeals Tribunal in *Appellant* 2021-UNAT-1157 in which it held that, "The requirement of authority is a fundamental precept of the principle of legality of the Administration. The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorized by law. It is central to the conception of the constitutional and administrative order that administrators in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law" (see para. 49). The Appeals Tribunal further held that "the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else".

11. Consequently, by Order No. 020 (NY/2022), the Tribunal instructed the Respondent to file his final written submissions on the competence of the Controller to take the contested decision and the consequence(s) thereof, after which the Applicant was allowed to provide his final comments on this issue.

12. The Respondent, in essence, submits that the Controller had the required authority to make contested decision, because the USG/DMSPC had sub-delegated the authority to decide on compensation claims under Appendix D, such as that of the Applicant, through the delegation of authority portal on 19 March 2019. As evidence, the Respondent appended as print-out from the relevant portal from which it follows that: (a) the USG/DMSPC made an entry regarding "Human Resources Sub-delegation" on 19 March 2019; (b) the Controller accepted it on 25 March 2019; and (c) the relevant sub-delegation of authority was valid until 20 March 2021. From an

annex signed by the USG/DMSPC on 22 November 2019, it then follows that the authority to make decisions on "Compensation for death, injury and illness (Appendix D)" was specifically subdelegated from the USG/DMSPC to the Controller.

13. The Applicant objects against this sub-delegation, arguing that it was not valid under sec. 2 of ST/SGB//2019/2 due to the difference in time between the entry into the portal (19 March 2019) and the signing of the document in which the delegation was specified (22 November 2019). Accordingly, the contested decision was unlawful as the delegated authority is required to be "clearly stated" and the Respondent has failed to provide "consistent, indisputable proof of delegated authority". Rather, the documents provided by Respondent "raise questions as to the absence of due diligence, lack of controls and lack due process in the [United Nation] Administration, and indicate as well a lack of adherence to ST/SGB/2019/2" and the Appeals Tribunal's findings in *Appellant* 2021-UNAT-1157 are not relevant.

14. In response, the Respondent submits that what had been submitted was "the table of sub-delegation in effect on the date of the contested decision", which "replaced the table of sub-delegation dated 15 March 2019 and originally attached to the delegation portal". The Respondent appended this additional document, which was signed by the USG/DMSPC on 15 March 2019.

15. Consequently, the Tribunal finds that the Respondent has adequately proved that at the time of the contested decision, the relevant sub-delegation of authority from the USG/DMSPC to the Controller had in fact been made and was also valid. There is therefore no issue in relation to *Appellant* 2021-UNAT-1157.

16. The Applicant further contends that the Respondent has failed to provide evidence of any consultation with the Under-Secretary-General for Operational

Support for the Controller's delegation of authority, as otherwise required under ST/SGB/2019/2.

17. The Tribunal notes that it explicitly follows from the printout from the delegation portal that the Controller accepted the sub-delegation on 25 March 2019. Accordingly, the Controller appropriately and undisputedly accepted to take on this responsibility. No issue therefore remains with regard to ST/SGB/2019/2.

18. In conclusion, the Tribunal finds that the Respondent has properly established that the Controller had the required authority to make the contested decision at the given time.

Was the contested decision lawful under Appendix D?

19. By Order No. 044 (NY/2022) dated 6 May 2022, the Tribunal allowed the Applicant to file his final observations, if any, summarizing his previously made submissions. The Applicant, however, did not do so, and in the following, the Tribunal has therefore summarized his submissions set out in the application:

> a. The Applicant filed "his claim form timely, together with the requested medical report from his psychiatrist including, as required, medical determination on the type of illness, treatment, causation, and prognosis". Thereby, the Applicant "provided evidence to demonstrate his eligibility for compensation, i.e. that illness he suffered was attributable to performance of official duties on behalf of the United Nations". It was "obviously illegal and contrary to the terms of Appendix D" that the Applicant was "obligated to prove he was actually harassed through a finding from [the Office of Internal Oversight Services] or other official body";

b. The "decision-making in this case was exercised in an arbitrary, irrational, capricious and illegal manner" and that "relevant matters have been ignored and irrelevant matters considered". The suggestion that the Applicant's case is "too complex" for any assessment of causation by a health professional is "not in accordance with the law and irrelevant". The Respondent "has not explained in what manner this case is complex and precludes assessment of causation";

c. The "request from the ABCC Secretary in August 2018 for a report from his psychiatrist that would address causation demonstrates that Respondent accepts that issue of causation requires expert medical determination". Unlike a case of physical injury, in cases of "psychological illness, expert medical determination is required from a qualified psychiatrist on the issue of causation". This is supported by "the terms of the Appendix D rules (amended) which were completely rewritten in 2017", and in summary, "causation of the underlying illness (and in this case, also the associated disability) is a medical determination as per the law";

d. The Respondent has recognized that "causation is medical determination, as it requires a medical report from the staff member's physician to address whether, and to what degree the illness is related to the staff member's work, and in cases of mental illness, Respondent specifically requires a report from a psychiatrist";

e. The conclusion that the "Applicant's psychiatrist's determination cannot be accepted since it is based [on the] Applicant's description of the workplace is unfounded". Psychiatrists "routinely diagnose illnesses based on the descriptions provided by their patients", as, for instance, war veterans;

f. The only medical expert determination on record in this case are the reports of Applicant's psychiatrist. The Respondent, however, is essentially requesting the Tribunal to ignore "the only medical evidence available by an accredited specialized medical professional (psychiatrist) supported by medical examinations and tests (including neurological evaluations and lab work), as well as years of treatment, and that directly addresses the causation of the illness and disability, linking the work incidents to the illness and disability suffered by the Applicant". Instead, DHMOSH's medical determination is neither based on a "medical examination of the Applicant nor on medical tests performed on the Applicant", or conducted by "an accredited psychiatrist".

g. With reference to *Peglan* 2016-UNDT-059 and in breach of a fundamental principle of administrative law, there is "no consistency in the [United Nations] Administration's reliance on the reports from the Applicant's psychiatrist". DHMOSH had "relied entirely on the reports of the Applicant's psychiatrist to certify all 17 months of medical leave requests, and to support its expert medical determination as Medical Consultant" to the United Nations Joint Staff Pension Fund, as well as in other instances. If DHMOSH had "any doubts on these medical reports why then it never requested that Applicant be examined by another psychiatrist obtained by the United Nations for a second opinion";

h. The medical report by the Applicant's psychiatrist provided to the ABCC on 31 July 2018 met all "requirements of Appendix D, as well as the instructions provided directly by [United Nations] Administration to the Applicant, and clearly determine[d] the link of the unwelcome and improper work incidents and the Applicant's illness and disability";

i. The Respondent stated in a "conclusory fashion that there was 'uncertainty' about the cause of the illness, citing in support of this proposition the nature of the illness, the nature and evolution of the symptoms, and the failure of the symptoms to resolve once Applicant left employment", but did not "explain how these cited factors resulted in `uncertainty'". The Applicant presented "credible evidence that he was subject to a campaign of defamation and harassment that cannot be deemed 'normal interactions and difficulties at work'";

j. In a "fair, rational, legal and unbiased process, [the] Respondent would conclude that the claim meets all the statutory criteria for a service-incurred illness: the incidents that caused the illness and disability occurred at work and because of work. while [the] Applicant was performing official duties in [United Nations] Premises. Further, "the report from his doctor, an accredited medical specialized professional, after conducting medical examinations, medical tests, conferring with other doctors and Applicant's therapist, reported that it was her professional determination that this is a service-incurred disability". The "work incidents (by staff members using [United Nations] infrastructure and systems) occurred during the Applicant's performance of official duties as [Chief Executive Officer] of the Fund in [United Nations] premises";

k. The Administration committed "serious procedural irregularities while reviewing, processing and deciding on the claim under Appendix D", including (i) "impermissibly requiring an 'official' finding of harassment as a condition for the claim to be considered"; (ii) "extraordinary delays", referring to *Dahan* 2018-UNAT-861; (iii) "avoidance of judicial review" by making appeals to the Tribunal moot; (iv) "denial of due process" by the ABCC Secretary failing to

> "comply with the adversarial principle and the principle of *audi alteram partem*"; (iv) the "procedural and legal irregularities by the [United Nations] Administration in the handling of Applicant's Appendix D claim are so numerous and so serious in nature that are tantamount to a denial of due process, denial to access to justice, and an outright illegal denial of Applicant's right to receive a benefit as provided by his contract and established under Article 3.2 of Appendix D of the Staff Regulations and Rules".

20. The Respondent submits that the contested decision was lawful. In the ABCC's recommendation, it "properly considered and weighed the Applicant's evidence". The ABCC "reasonably sought the technical advice" from DHMOSH, which "advised that from a technical perspective, the Applicant's medical evidence did not establish a direct causal link between the Applicant's service with the Organization and his illness". The ABCC concluded that the Applicant's evidence "did not fully support his claim that his illness is directly attributable to the performance of duties and made its recommendation accordingly", and the Controller "lawfully approved the recommendation".

21. Regarding the applicable Appendix D to the present case, the Tribunal notes that in the current Appendix D (ST/SGB/2018/1/Rev.1), it is stated that "[f]or claims filed for incidents that occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied" (see art. 6.1(b)). According to the Applicant's own factual submissions, whereas his compensation claim was submitted on 29 June 2018, it concerned incidents that occurred somewhere between 2015 and until his medical leave started in August 2017. The applicable Appendix D is therefore one appended to ST/SGB/2017/1, which was effective from 1 January 2017 and until 1 January 2018.

22. On its merits, the present case essentially turns around the question whether the illness or injury of the Applicant was "service-incurred" in accordance with Appendix D. As follows from art. 2.2 of Appendix D, in order to be "eligible to receive compensation", an injury or illness underlying a claim must be "service-incurred" as determined in accordance with art. 2.2(d) of Appendix D. This latter provision provides that an injury or illness is "service-incurred" if it is "directly attributable to the performance of official duties on behalf of the United Nations, in that it occurred while engaged in activities and at a place required for the performance of official duties".

23. Regarding the judicial review of a medical assessment provided by DHMOSH, the Appeals Tribunal held in *Applicant* 2021-UNAT-1133 that the Dispute Tribunal did not have the competence to decide that the "medical advice rendered by it to the ABCC was incorrect" and thereby question the sufficiency and relevance of a given medical assessment to a certain claim. In the dissenting opinion, an Appeals Tribunal Judge, however, specified that the Dispute Tribunal did not do so, but rather assessed whether the relevant medical opinion, based on its assessment and narrative content, was adequate and on point for the ABCC to make a recommendation on the pertinent question before it.

24. In the present case, in the Organization's medical opinion dated 6 November 2020, a Senior Medical Officer stated as follows (in response to Order No. 042 (NY/2022), the Respondent clarified that in the contested decision dated 30 December 2020, this was the document that was referred to as the "opinion of Medical" and that the term, "Medical" used therein, referred to DHMOSH):

> … I have reviewed the claim in detail, including recent medical reports and the statements provided by [the Applicant]. My determination is that his illness is not attributable the performance of official duties.

> … The claimant states his illness is secondary to regular workplace interactions, and acknowledges these interactions are not considered prohibited conduct.
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> … Whilst there is no requirement to establish fault or negligence under Appendix D, there is a requirement to establish a link between the illness and the performance of duties. The claimant has not done so, emphasizing only routine normal work and common workplace interactions, and there remains a significant amount of uncertainty as to the cause:
>
> > a. His illness could equally be due to factors at home or outside the workplace; or
> >
> > b. More likely however, his illness is endogenous, and unrelated to any specific cause at all. This is supported by the nature of the illness, the nature and evolution of his symptoms, and by their failure to resolve once he was removed from the stressors of the workplace.
>
> … I note and have considered in detail his psychiatrist's statements that his illness is caused by work. She has done so based on the claimant's descriptions, and does not have any knowledge of the workplace except as described by the claimant. For such complex matters involving the evolution of psychiatric/psychological illness, this would normally preclude any assessment of causation by a health professional. My assessment is that normal interactions and difficulties at work did not cause his illness, but heightened his awareness and emphasis of them, leading them to be emphasized at the exclusion of other factors.

25. The Senior Medical Officer's medical opinion therefore does not question whether the Applicant actually suffered from any illness as it acknowledges without doubt that the Applicant suffered from the illness as alleged. Rather, it concerns whether the Applicant's illness was attributable to the performance of official duties on behalf of the Organization. Whereas it can therefore be regarded as a finding on causation, the actual opinion of the Senior Medical Officer is based on a medical assessment of the Applicant's illness and its consequences for him.

26. While the assessment of whether an illness is service-incurred is a factual determination and often not of a medical nature, DHMOSH framed this assessment as a medical opinion in the present case by arguing that it is likely that the illness is endogenous, because of its medical aspects ("the nature of its illness, the nature and evolution of his symptoms, and by their failure to resolve once he was removed from the stressors of the workplace"), without assessing the work environment of the Applicant.

27. Regarding the role of DHMOSH, art. 1.7 of Appendix D explicitly sets out under the heading, "Role of the Medical Services Division", that in a given case, it "shall make a "medical determination" and that this "determination may include" a finding on the causality between an illness and an incident and/or the performance of work (see art. 1.7(a)(i) and (ii)). But it also specifies in art. 2.2, under the heading, "Eligibility for coverage" (emphasis added):

> (a) To be eligible to receive compensation under the present rules, the death, injury or illness underlying a claim must be service-incurred, as assessed in accordance with article 2.2 (d) below.
>
> (b) The Advisory Board on Compensation Claims will assess whether the death, injury or illness is service-incurred and provide its recommendation on a claim to the Secretary-General. …
>
> (c) Such an assessment will be based on the claimant's submissions, and, as appropriate, the *recommendations* of the Medical Services Division, technical advice from ex officio members of the Board and any other relevant documentary or other evidence.

28. Therefore, there is an ambiguity in the framework on whether the letter of the Senior Medical Officer of DHMOSH should be regarded as a "medical determination", with reference to art. 1.7 of Appendix D, which may include a finding on the causality between an illness and an incident and/or the performance of work, or a "recommendation" to the ABCC, as per in art. 2.2 of Appendix D.

29. In any event, under *Applicant* 2021-UNAT-1133, the Tribunal has no authority to review the medical opinion of DHMOSH or its relevancy related to the Applicant's claim before the ABCC. As the contested decision correctly reflected the conclusions of this opinion, the Tribunal concludes that the contested decision is lawful.

30. On the other hand, even if the Tribunal has the competency to review DHMOSH's finding on causality, at least to the limited extent stated in the dissenting opinion in *Applicant* and the Dispute Tribunal in *Applicant* UNDT/2020/116/Corr.1, the Tribunal finds that the ABCC and the Controller lawfully exercised its discretion when rejecting the Applicant's claim on the basis of DHMOSH's medical opinion. This finding is based on that in the contested decision, no "relevant matters" were ignored and/or no "irrelevant matters" considered, and on its own terms, it did not lead to an "absurd or perverse" decision. Rather, the Tribunal finds that the contested decision was "legal, rational, procedurally correct, and proportionate" (in line herewith, see *Sanwidi* 2010-UNAT-084, para. 40).

31. Accordingly, the Tribunal finds that the contested decision was lawful.

Was the ABCC process unduly and/or inordinately protracted?

32. In the application, the Applicant requests "moral damages" in "the highest end of the scale amounting to 2 years net base salary" for stress due to the "significant delays and the serious and numerous irregularities in the handling of the claim by the United Nations Administration". In support thereof, the Applicant files a medical report from his psychiatrist dated 6 October 2020.

33. In response, the Respondent solely contends that the "Applicant's claim of moral harm is not corroborated by reliable independent evidence".

34. The Tribunal notes that the Applicant filed his initial claim with the ABCC on 29 June 2018 and that the contested decision was dated 30 December 2020. This counts for approximately two-and-a-half years. It appears from the Applicant's account of the facts that the reason therefor was that the Controller twice remanded the claim back to the ABCC for renewed assessment, namely on 19 June 2019 and on 27 October 2020. Each time, the remand occurred after the Applicant had challenged the ABCC's finding that his compensation claim under Appendix D was not receivable before the Management Evaluation Unit and the Dispute Tribunal. The Respondent has not specifically denied these facts.

35. The Tribunal notes that the Appeals Tribunal has affirmed the principle that the Administration has a duty to respond in timely fashion to the requests of staff members. In *Dahan* 2018-UNAT-861, for instance, it held that the "appeal highlight[ed] the troubling issue of the Administration's delays in responding to staff and staff related issues" and emphasized that "[i]t is of paramount importance that the Administration addresses staff concerns with promptitude and adheres to the highest standards of care and due diligence" (para. 26). Under the jurisprudence of the Appeals Tribunal, harm to an applicant, such as stress, caused by a process that was unduly and/or inordinately protracted have also been compensated under art. 10.5(b) of the Dispute Tribunal's Statute (see, for instance, *Benfield-Laporte* 2015-UNAT-505, *Applicant* 2020-UNAT-1001 and *Appellant* 2021-UNAT-1137). When assessing whether an alleged injury is then compensable, the Appeals Tribunal generally requires an applicant to establish three elements, namely: "the harm itself, an illegality and a nexus between both" (see para. 20 of *Kebede* 2018-UNAT-874 as affirmed in, for instance, *Dieng* 2021-UNAT-1118 and *Laasri* 2021-UNAT-1122).

36. In the present case, the Applicant provides the 6 October 2020 medical report from his psychiatrist, which corroborates the Applicant's claim that the prolonged

process before the ABCC caused him stress. The Respondent has provided no evidence to refute this and solely contends that this report is not independent. Considering the credentials of the psychiatrist and that the Applicant has been her patient since December 2016, the Tribunal sees no reason to question her professional integrity and finds her report both reliable and convincing regarding this matter.

37. Next, the Tribunal finds that the process, which took approximately two-and-half years, was indeed unduly and inordinately protracted, in particular as this was the result of the Controller twice remanding the case back to the ABCC for a renewed review. Based on the case record, there is no basis for finding that these two remands were as such caused by the Applicant, at least the Respondent has not made any submissions to this end. Rather, it would appear that the Controller was unconvinced by the ABCC's recommendations in light of the Applicant's appeals to the Management Evaluation Unit and the Dispute Tribunal. The Tribunal therefore finds that the process unlawfully protracted as per *Dahan* and *Kebede*.

38. Finally, with reference to the 6 October 2020 medical report, the Tribunal finds that the Applicant has established the required nexus between his harm and the protracted process.

39. Regarding the compensation amount, the Tribunal finds that the present case falls within the lower end of compensable non-pecuniary harm for the specific type of harm and illegality. Accordingly, the Tribunal awards the Applicant USD2,500 in non-pecuniary damages under art. 10.5(b) of the Dispute Tribunal's Statute.

Conclusion

40. The application is rejected.

41. In compensation for the unduly and inordinately protracted process in rendering the contested decision, the Applicant is awarded USD2,500 in accordance with art. 10.5(b) of the Statute of the Dispute Tribunal

42. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional 5 percent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 25th day of May 2022

Entered in the Register on this 25th day of May 2022

(Signed)
Morten Michelsen, Officer-in-Charge, New York