



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GUSAROVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Alister Cumming, UNICEF
Chinonyelum Esther Uwazie, UNICEF

Introduction

1. The Applicant, a former Human Resources Manager with the United Nations Children’s Fund (“UNICEF”), who held a fixed term appointment at the P-4 level and was based in Nairobi, Kenya, is challenging the Administration’s decision to deny her claim for compensation for service-incurred illness.

Factual background

2. On 4 October 2015, the Applicant began her service with UNICEF. She held a fixed-term appointment as a Human Resources Manager at the P-4 level with the UNICEF Kenya Country Office (“KCO”) in Nairobi. She held this position until 28 February 2022, when she separated from service on the basis of a Mutually Agreed Termination.

3. The day after a meeting with her supervisor, on 4 February 2021, she had anxiety, panic attacks and high blood pressure and was placed on certified sick leave until 25 February 2021.

4. On 14 February 2021, her supervisor asked her to complete her 2020 performance evaluation report (“PER”) with a one-day deadline. In response, she informed her supervisor that she was unwell. However, she partially completed the PER.

5. On 18 February 2021, her supervisor asked her to complete her supervisee’s PER.

6. On 25 February 2021, she went back to work and had a meeting with her supervisors which caused her to have a nervous breakdown. Her doctor concluded that work-related stress exacerbated her symptoms.

7. On 4 May 2021, the Applicant submitted a claim to the Advisory Board on Compensation Claims (“ABCC”) for compensation for service incurred illness, which

she claimed occurred due to alleged incidents between her and her supervisors from 3 February 2021 until 29 March 2021.

8. In particular, she complained because her supervisor asked her to complete her PER during sick leave, while UNICEF stated that the requests were “in line with regular system generated notifications reflecting organizational deadlines”.

9. The said claim was rejected on 1 September 2021 by the ABCC, as not receivable.

10. The ABCC said:

We understand that your claim is based on alleged harassment/abuse of authority. However, as it is not within the purview of the ABCC to verify an allegation of harassment or abuse of authority and as the Organization has established legislation, procedures and recourse for such allegations, such claims are receivable by the ABCC only when the Organization has made a definitive finding of whether there has been harassment or an abuse of authority. This finding may be in the form of a conclusion in an OIOS or BOA report, an independent investigation report, a UNDT or UNAT opinion or UN Ethics Office report.

11. The Applicant wrote to the ABCC on 7 September 2021 seeking reconsideration of their decision. She cited *Wamalala* 2013-UNAT-300 in support of her request.

12. On 14 September 2021, the ABCC wrote to the Applicant:

From our diligent review of your claim, it is our understanding that you seek compensation because of alleged workplace harassment and/or excessive stress/burnout. Should you seek compensation for reasons other than those mentioned before, kindly let us know.

13. The Applicant responded saying that she “did not claim harassment, [she] just claimed that [her] illness was caused by the actions of UNICEF Management and thus was work-related.”

14. During the 521st meeting of the ABCC, held on 4 November 2021, the ABCC considered that the Applicant’s claim was not receivable. The ABCC reiterated what

its Secretariat previously communicated to the Applicant regarding the ABCC's procedural requirements for claims alleging harassment or abuse of authority, i.e., that such claims are receivable by the ABCC only when the relevant authority of the Organization or the United Nations Dispute or Appeals Tribunal has made a definitive finding that there has been harassment or abuse of authority.

15. On 9 December 2021, the Controller, United Nations Secretariat rejected the ABCC's recommendation to deny the Applicant's claim. The Controller did this on the ground that the members of the ABCC held different views about the procedural aspects of the Applicant's claim. The Controller then directed the ABCC to consider the Applicant's claim on its merits.

16. On 25 March 2022, the ABCC considered the merits of the Applicant's claim. The ABCC concluded that the Applicant did not meet her burden of proof to show that her illness was attributable to the performance of her official duties. The ABCC found that the subject of the Applicant's claim is considered normal employment activities and that UNICEF did not engage in any prohibited conduct towards the Applicant. The ABCC recommended that the Applicant's claim be denied. The Controller approved this recommendation on behalf of the Secretary-General.

17. The Applicant followed this up with the Board on 1 April and 4 April 2022.

18. On 4 May 2022, the Applicant was notified of the impugned decision. The letter from the ABCC stated:

The case was presented to the ABCC at its 521st meeting on 04 November 2021 at which the Board decided not to consider the claim as it was of the view that the procedural requirements for claims related to prohibited conduct (e.g., harassment, abuse of authority) as set out at the 461st meeting of the ABCC were not met. Upon request of the Controller, the ABCC reconsidered your claim on its merits at the 524th meeting, held on 25 March 2022. The ABCC's recommendation to deny your claim was subsequently endorsed by the Controller. The Board considered your email dated 19 September 2021 in which you stated that you are "not claiming for harassment" but your illness "was caused by the actions of UNICEF management." The Board also considered

UNICEF's statement that you have been identified as having performance issues that needed to be addressed by UNICEF management, consistent with applicable rules and regulations. In addition, the Board took note of your allegation that you were contacted during sick leave on work/performance issues. However, upon review of available information including UNICEF's comments thereon, the Board found that you consistently confirmed that you were well enough to participate in competitive interviews during your sick leave. After due consideration of the facts presented and available documentation, the Board found that the management actions that are subject of the claim are considered normal employment activities. The Board concluded and determined that you have not met your burden of proof to show that your illness is attributable to the performance of duties, and recommended denial of the claim.

19. The Applicant requested management evaluation of the ABCC decision on 28 May 2022.

20. The Applicant received a decision on her request for management evaluation dated 10 October 2022. The decision, *inter alia*, states:

Please be advised that I have decided to rescind the contested decision. In addition, I have remanded your claim back to the ABCC. I accept that, as the ABCC found, you were required under Article 1.8(a) of Appendix D to provide the evidence necessary to fully support your claim for compensation. However, I consider that the ABCC was obliged to consider whether your illness was directly causatively related to the events you alleged or the performance of official duties, and if so, whether you sustained any degree of permanent loss of function. I have therefore instructed that your claim be reviewed by the ABCC with a view to making a final recommendation.

I have not awarded you any monetary compensation. I do not consider that the ABCC unduly delayed in considering your claim. In addition, you did not produce any evidence of the harm you alleged. [...]

Given that the contested decision has been rescinded through the process of management evaluation, I would be grateful if you could advise whether you will withdraw your application.

21. On 10 October 2022, following the management evaluation process, the Respondent rescinded the contested decision and remanded the matter to the ABCC for fresh consideration.

22. The matter was then considered afresh by the ABCC.

23. On 8 March 2023, the Controller of the United Nations, on behalf of the Secretary-General, issued a new decision with respect to the Applicant's claim for compensation under Appendix D to the United Nations Staff Rules ("Appendix D").

24. On 10 March 2023, the Applicant was notified of this decision.

Procedural History

25. On 16 August 2022, the Applicant filed an application before the Dispute Tribunal sitting in Nairobi to challenge the decision mentioned in para. 18 above.

26. The Respondent filed his reply on 16 September 2022.

27. On 15 October 2022, the Applicant filed further submissions before the Tribunal in a document she called 'Comments to the Reply of the Respondent.'

28. The Applicant submitted that as a result of the management evaluation, she had "to withdraw the first part of [her] appeal related to the request to remand the case to the ABCC." She added:

However, UNICEF has not awarded me any monetary compensation, as they did not consider that the ABCC *unduly delayed* in considering my claim. In addition, UNICEF stated that I did not produce any evidence of the harm I alleged. I would therefore like to proceed further with this part of my appeal. [Emphasis added]

[...]

I do not agree with UNICEF that one year is a normal period for settling ABCC claim.

29. On 17 February 2023, the Tribunal issued Order No. 047 (NBI/2023) directing the parties to advise "whether there has been any progress in the review of the Applicant's claim by the ABCC and/or a subsequent decision by the Respondent."

30. On 27 February 2023, the Respondent wrote:

UNICEF remanded the decision to deny the Applicant's claim for compensation under Appendix D to the United Nations Staff Rules to the ABCC on 10 October 2022.

On 17 February 2023, the Secretariat of the ABCC informed UNICEF of the following progress in the review of the Applicant's claim:

- On 30 December 2022, the Board considered the Applicant's claim and made recommendations thereon to the UN Controller.
- The recommendations are pending consideration by the Controller.

The eventual decision by the Controller would constitute a separate administrative decision, distinct from the Applicant's claim in this case.

31. On 8 March 2023, the Controller of the United Nations, on behalf of the Secretary-General, issued a new decision with respect to the Applicant's claim for compensation under Appendix D.

32. The letter reads:

The Board considered all the information available on the case, including the management evaluation letter from UNICEF, and a note from the Division of Healthcare Management and Occupational Safety & Health (DHMOSH).

The Board noted that you were diagnosed with [omissis] as early as 2015 prior to the occurrence of the events that allegedly caused your illnesses and that there was no high-level incident that would allow a medical practitioner to make a primary diagnosis of PTSD or a related condition. The Board determined that the actions of UNICEF management were reasonable and conducted in a reasonable manner.

As a result, the Board concluded that the illness was not directly causatively related to the alleged events, given that you had depression as early as 2015 prior to the alleged events; the actions of the UNICEF Management were reasonable and conducted in a reasonable manner; and there was no high level incident that would allow a medical practitioner to make a primary diagnosis of PTSD or a related condition.

33. The parties' closing submissions were filed following this decision.

Submissions by the Parties

34. It is the Applicant's case that while hers was not a "completely new illness," it was a "severe aggravation" of a pre-existing condition.

35. The Applicant takes issue with the Board's method of establishing that there was no causal link between her illness and the work environment she served within. With regard to the high-level incidents referred to in the decision letter, the Applicant wonders how the Board did not notice a "series of serious nervous breakdowns which happened during an interaction with the management and were the result of such interactions. These events were well explained and "documented" she insists, in her submission to the ABCC. There were at least three such incidents between February and March 2021, and these were remarked upon by her doctor as symptoms of post-traumatic stress disorder ("PTSD").

36. The Applicant concludes as follows:

It is obvious that the Board is not able to consider my case objectively and procedurally correctly, as it is the fourth time they base their decision on irrelevant issues and disregard the relevant ones. Based on that I would like to increase my claim for moral damages, procedural delays and irregularities to two years salary at my grade and step at the time of the separation from UNICEF. As I have already mentioned in my initial submission to the UNDT, the delays and procedural mistakes of the ABCC caused me additional stress and anxiety, as I had to re-live the damaging events every time I thought about the submitted claim or followed up on the progress. While writing these final remarks, I again had flashbacks and panic attacks, I did not recover up to now and continue to take medications, have psychotherapist sessions and attend a psychiatrist.

37. The Respondent takes the position that the decision impugned in her application has been rescinded, and her claim before the ABCC was considered afresh. The Applicant's closing submissions, the Respondent argues, effectively seeks to challenge the decision of 10 March 2023. However, this decision constitutes a separate administrative decision which is not properly before the Tribunal.

38. The crux of his position is as follows:

[T]he Tribunal should dismiss the Application in its entirety. Following the rescission of the contested decision and the instruction to the Advisory Board on Compensation Claims ("ABCC"), the Applicant's request to withdraw her claim is uncontested. In addition, the Applicant

is not entitled to any of the damages sought. She has not adduced any evidence of harm as required by Article 10.5(b) of the Tribunal's Statute. Additionally, there is no evidence that the ABCC delayed in the consideration of her compensation claim under Appendix D.

Considerations

39. By her application, the Applicant claims that her illness was work-related and protected as such by Appendix D (which, she recalled, is a no fault insurance, that is a scheme where staff members need not prove negligence in order to be compensated by their employers (see *Wamalala* 2013-UNAT-300; *Edwards* UNDT/2011/022) and complains of the delay by the Administration to deal with her claim.

40. After the decision by the Executive Director who rescinded the challenged decision, and the request by the Applicant to rule on the damage for the harm suffered and the delay in taking the decision, the task for this Tribunal was narrowed.

41. In March 2023, the ABCC reviewed her claim afresh and the Controller made a new decision.

42. In her closing submissions, the Applicant effectively seeks to challenge the decision of 10 March 2023. However, this decision constitutes a separate administrative decision, the contested decision before the Dispute Tribunal having been rescinded. As a result, the Applicant's submissions relating to the merits of the 10 March 2023 decision are not properly before the Dispute Tribunal, who will not rule on them.

43. Therefore, the Tribunal will not consider the impact of the three high-level incidents that happened during February-March 2021 as recalled by the Applicant in aggravating her health conditions, nor will the Tribunal assess the lawfulness of the employer's behavior requiring or allowing a staff member on sick leave for psychological symptoms, allegedly related to work, to perform work-related tasks from home. The merits of the case were assessed by the ABCC in the new decision of March

2023, which is an autonomous decision, subject as such to be challenged in a different proceeding, if it will be the case.

44. The Tribunal will deal in this judgment only with the issue related to the delay of the Administration to intervene and to compensate the harm arising from this delay.

45. This Tribunal has already affirmed the duty of the employer to protect employees.

46. In *Cahn* UNDT/2022/008, this Tribunal observed that

53. [...] it is, in general, an employer's duty to protect the health, safety and welfare of its employees and other people who might be affected by its business. Employers must do whatever is reasonably practicable to achieve this. This means making sure that workers and others are protected from anything that may cause harm, effectively controlling any risks to injury or health that could arise in the workplace. ...

55. ... duty of care risks are constituted not only of occupational security risk (e.g., due to an armed conflict) or health risks (e.g., due to exposure to contagious diseases) or safety risks (e.g., work in substandard facilities), but also of risks arising from the prolonged exposure to high stress situations, instances of violence, harassment or discrimination, and any factor compromising health, security and wellbeing in the workplaces as well.

56. The standard of care is determined by requirements of reasonableness. It will vary depending on the circumstances of the case....

47. On appeal in the same case, the Appeals Tribunal in 2023-UNAT-1329 upheld (by majority) the first instance judgment. UNAT held:

61. The Appeals Tribunal is satisfied with the detailed analysis of the whole evidence as undertaken by the Dispute Tribunal and agrees with its well-reasoned conclusions about the Organization's failure to fulfill its duty of care towards Mr. Cahn, namely to promptly take protective action upon having been made aware of the disharmonious working environment.

...

64. Arguably, in the circumstances of the instant case, which depict a picture of anything but a harmonious working environment at ROE,

there existed a duty of care on the part of the Organization towards Mr. Cahn to timely implement preventive or interim measures and expeditiously undertake an investigation into his complaint and thus prevent any possible harm to his health, irrespective of whether the actions of his FRO rose, legally strictly speaking, to the level of prohibited conduct.

48. The dissenting opinion expressed in that judgment does not consider, instead, that duty of care is an obligation that requires intervention even *ex officio* by the employer, in order to prevent damage to the staff member, that this obligation exists regardless of a positive assessment of harassment, and that failure to take protective measures could be regarded as an implied administrative decision, even though no specific request for protective measure came from the staff member.

49. The components of the duty of care have been further delineated through the jurisprudence of several Administrative Tribunals (see, among others, UNAdT Judgments No. 872, *Hjelmqvist* (1998) and No. 1273, *Aidenbaum* (2006); Administrative Tribunal of the International Labour Organization (“ILOAT”) Judgment No. 402, *In re Grasshoff* (Nos. 1 and 2) (1980); Administrative Tribunal of the Asian Development Bank Decision No. 5, *Bares* (1995); see also *Cohen*, 2017-UNAT-716; *Applicant* UNDT/2021/043 (para. 177), *Kusuma* UNDT/2014/143, *McKay* UNDT/2012/018 (confirmed in *McKay* 2013-UNAT-287), *Edwards* UNDT/2011/022).

50. In its Judgments No. 1125, *Mwangi* (2003), and No. 1204, *Durand* (2005), the former UN Administrative Tribunal (“UNAdT”) took the view that staff regulation 1.2(c) codified a duty of protection having the value of a general principle of law. In *Mwangi*, the UNAdT stated that even where such obligations are not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including respect for their well-being.

51. This duty of protection applies not only to physical disease, but also to psychological disease, like in the case at stake.

52. This implies a duty to intervene promptly to protect the staff member, at risk for his/her health.

53. The Tribunal is of the view that duty of care requires the employer to intervene promptly also to assess if a claim maybe accepted or not within Appendix D, notably when this delay may impact on the health of the staff member, aggravating his/her psychological harm that could be relevant under Appendix D.

54. In other terms, prompt action by the Administration is not only a pillar of good administration, but it is also an expression of the duty of care by the Administration, whenever the delay of the Administration, in the circumstances of the case (in particular when psychological harm is claimed), is potentially aggravating the moral harm claimed by the staff member.

55. In the case at hand, it results from the file that the Applicant's medical reports stated that the Organization knew of the Applicant's illness.

56. Indeed, in February the Applicant was on sick leave after she had a break down in the office.

57. In responding to the email from her supervisor requiring, with regards to her PER, to "complete them as soon as you can latest cob (5 pm) tomorrow 15 February as I would like to have a performance discussion with you on Tuesday 16 February", she expressed her concern about her health to her supervisor in the email on 15 February 2021, where she clearly wrote that

I am not feeling better, not at all. I have high blood pressure and panic attacks, one happened after I saw your message yesterday. I am not sure whether you are aware, but I have long-standing [*omissis*], and recently my doctor doubled my medication because of the nervous breakdown. Nevertheless, even being on sick leave, I worked all the previous week, and today the whole working day [...].

58. The Applicant also produced to the Administration from the very beginning a medical certificate which stated that the Applicant's "symptoms worsened after returning to work after sick off period (8/2/2021 to 25/2/2021)" when "the supervisor recommended that her team needed to do more upon her resumption".

59. The Administration, therefore, knew the health conditions of the staff member and the harm suffered in relation to the work situation, but acted with delay in handling her claim.

60. The file shows that the Applicant submitted her claim on 4 May 2021 and received the decision on 5 May 2022, one year later. Given that the decision was negative (as the ABCC found that the Applicant did not satisfy her burden of proof to show that the management actions which formed the subject of the Applicant's claim exceeded the normal employment activities of the Organization), the Tribunal must consider also the time following the decision until the last decision on March 2023.

61. In sum, it took 22 months for the Administration to assess if the Applicant's pathology was related to the work environment and therefore the Tribunal is of the view that the ABCC unduly delayed the consideration of the Applicant's claim for compensation, notwithstanding that the delay could aggravate the moral harm suffered by the Applicant.

62. The Tribunal recalls that excessive delay in dealing with the administrative appeal of a staff member can be such as to violate his right of recourse (*Asaad* 2010-UNAT-021).

63. On compensation for moral damage, the former United Nations Administrative Tribunal consistently relied upon Judgment No. 353, *El-Bokany* (1985), which stated that an inordinate delay,

not only adversely affects the administration of justice, but on occasion can inflict unnecessary anxiety and suffering to an applicant", and "because of the dilatory and casual way in which [the Applicant's] case was dealt with, [she] is entitled to some compensation.

64. The Respondent recalls *McKay* UNDT/2012/018, where the Dispute Tribunal held that the 14 months it took for the ABCC to review a claim for compensation under Appendix D was not excessive, observing:

56. Even though the 14 months it took for the ABCC, after receipt of the Board of Inquiry Report, to review the claim may be seen as a non-negligible wait, this time span does not amount to an inordinate delay calling for compensation. It results from the case law that the Tribunal generally awards compensation for undue delay only when confronted with procedures having dragged on for several years (see, e.g., *Aly et al.* UNDT/2010/195; *Edwards* UNDT/2011/022; *Kamal* UNDT/2011/034; *Megherbi* UNDT/2011/161). Also, the Appeals Tribunal found no inordinate delay in *Ardisson* 2011-UNAT-136, where the Pension Board took slightly over a year to dispose of an appeal.

65. In the case at hand, however, the delay is much longer, and the final assessment of the case was given almost two years later after the Applicant's claim.

66. In *Cahn*, the UNDT found that the harm suffered by the Applicant could be compensated by an award of one month's net base salary for each month of infringement of the duty of care by the Office of the High Commissioner for Human Rights, that was seven months (and UNAT, in the appeal judgment, at para. 71, confirmed the assessment and gave "deference to the UNDT in the exercise of its discretion and (did not) ...lightly disturb the quantum of damages").

67. The Tribunal considers that in the case mentioned above, the application addressed directly the merits of the case, that was the delay in protecting the employee, while in the case at hand the dispute concerns the delay in handling the case with the simple aim to verify if there is a work-related issue or not (although this delay, in the circumstances of the case, was potentially aggravating the moral harm claimed by the staff member). The Tribunal further considers that one year after the claim the Applicant's work-relationship ended (for a reason not connected with the claim itself).

68. Therefore, the Tribunal is of the view that damages can be awarded in this case only in a smaller amount, calculated by a month of pay for each year of delay.

69. The Tribunal thus finds that the Applicant can award damages only in the amount of a two months' net base salary.

Conclusion

70. In light of the foregoing, the application succeeds.

71. The Respondent is to pay an amount equivalent to two months' net base salary at the P-4 level that the Applicant separated at.

72. The 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 five per cent shall be applied to the United States of America prime rate 60 days from the date the Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 7th day of June 2023

Entered in the Register on this 7th day of June 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi