



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Wanda L. Carter

LARRIERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Victoria Nakaddu Mujunga, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant filed an application contesting the decision of the Advisory Board on Compensation Claims (“ABCC”) which she describes as follows:

to deduct from the Applicant’s entitlement to compensation as a surviving spouse the amount of pension benefits being paid although she is not receiving any part of those benefits.

Historical and procedural background

2. On 19 August 2003, there was a terrorist bombing attack at the United Nations headquarters in Baghdad, Iraq. Mr. Sergio Vieira de Mello (a Brazilian national), the then United Nations High Commissioner for Human Rights and Special Representative of the Secretary-General in Iraq, was killed in the attack.

3. At the time of his death, Mr. Vieira de Mello was married to Mrs. Annie Vieira de Mello. The couple had married under the French law.

4. In January 2003, Mr. Vieira de Mello had initiated divorce proceedings against Ms. Annie Vieira de Mello in France. On 23 May 2003 a French court issued an order allowing the parties to live separately and authorized them to file an application for divorce. The court did not dissolve their marriage. Less than three months following the order, Mr. Vieira de Mello died, on 19 August 2003.

5. However, prior to the attack, the Applicant had also formed a family with Mr. Vieira de Mello and had accompanied him to Iraq. The Applicant was also at the scene of the bombing and she survived with injuries.

6. Effective 20 August 2003, the Organization began to pay Mrs. Vieira de Mello a widow’s compensation under Appendix D to the Staff Rules (“Appendix D”) and a surviving spouse’s benefit from the United Nations Joint Staff Pension Fund (“UNJSPF”).

7. On 17 May 2018, the Applicant requested a widow’s benefit from the UNJSPF as a surviving spouse of Mr. Vieira de Mello. The Applicant’s request was based on a judgment of the Ninth Family Court of the Capital District, Rio de

Janeiro, Brazil finding that at the time of Mr. Vieira de Mello's death, he and the Applicant were in a "stable union" under Brazilian law ("Brazil Judgment"). The Brazil Judgment found that the "stable union" had equal standing of a marriage under Brazilian law. The Brazilian judgment was issued in December 2016.

8. On 1 June 2018, the Applicant also filed an Appendix D claim for compensation as a widow arguing that she should receive half of the compensation awarded under Appendix D as one of two widows of Mr. Vieira de Mello. She relied on the same judgment issued by the Brazilian court.

9. On 3 December 2018, UNJSPF rejected the Applicant's request for a widow's benefit on the ground that she had not met the requirements of art. 34 of the Pension Fund's Regulations.

10. From October 2019, the Applicant embarked on the process of challenging the UNJSPF decision through the judicial review process.

11. On 12 November 2019, the ABCC also rejected the Applicant's request. Its decision was based on the choice of law analysis which determined that French law, rather than Brazilian law, was the law that should be applied to determine Mr. Vieira de Mello's marital status.

12. Upon receipt of the ABCC decision, the Applicant also started the process of challenging it in the Tribunal. On 2 April 2020, she filed an application before the United Nations Dispute Tribunal ("UNDT") challenging the ABCC's decision to reject her claim for compensation under Appendix D, as a surviving spouse of Mr. Vieira de Mello.

13. On 27 March 2020, UNAT, issued its judgment in relation to the UNJSPF decision. It held that UNJSPF had correctly decided that the Applicant was not entitled to a surviving spouse's benefit pursuant to art. 34 of the UNJSPF's Regulations. In its judgment, UNAT ruled that she could not be recognized as a surviving spouse, for the purpose of the UNJSPF's Regulations, because at the time of Mr. Vieira de Mello's death, Ms. Vieira de Mello was the only spouse reported by Mr. Vieira de Mello to the UNJSPF (*Larriera* 2020-UNAT-1004).

14. On 21 September 2021, the UNDT dismissed the Applicant's challenge against the ABCC's decision, finding it not receivable *ratione materiae*, (Judgment No. UNDT/2021/110).

15. The Applicant appealed against Judgment UNDT/2021/110.

16. On 28 October 2022, UNAT, reversed UNDT Judgment No. UNDT/2021/110 and held that the Applicant was entitled to a compensation under Appendix D. UNAT ruled that, unlike the judgment in 2020-UNAT-1004 related to the UNJSPF's Regulations, under the Staff Regulations and Rules, the law of Brazil, Mr. Vieira de Mello's national state, was to be the law determining his marital or domestic partnership status, as at the date of his death for Appendix D purposes (Judgment 2022-UNAT-1271).

17. Following the UNAT ruling, on 10 February 2023, the Applicant's Counsel wrote to the ABCC following-up on the request for compensation.

18. On 31 March 2023, the Applicant's Appendix D claim was presented to the ABCC at its 533rd meeting. On 10 May 2023, the ABCC Secretary informed the Applicant of the Controller's decision to award her compensation under Appendix D as a surviving spouse of Mr. Vieira de Mello.

19. On 8 December 2023, the Acting Secretary of the ABCC informed the Applicant that, in accordance with Article 10.2(b)(ii) of the former Appendix D, the annual compensation payable in connection with the death of Mr. Vieira de Mello would be divided equally between her and Ms. Vieira de Mello. The Acting Secretary of the ABCC further informed the Applicant that the decision would be implemented starting from 1 January 2024.

20. On 11 December 2023, the Applicant wrote to the Acting Secretary ABCC requesting an explanation of the calculations.

21. On 20 December 2023, the Acting Secretary of the ABCC explained that, after the deduction of pension benefits per art. 4.1 of Appendix D and application of cost-of-living adjustments, the monthly spousal benefit payable in connection

with the death of the late Mr. Vieira de Mello was USD 2,776.78, and the Applicant would be eligible for USD 1,388.39 ($2,776.78 \div 2$) as of January 2024.

22. On 19 January 2024, the Applicant requested management evaluation of the of ABCC's decision. She challenged the decision to reduce her entitlement for compensation under Appendix D, arguing that subtraction of the total UNJSPF benefit, to which she is not entitled, from the total Appendix D compensation is unfair and penalizes her.

23. On 23 February 2024, the Management Advice and Evaluation Section issued its decision and upheld the contested decision.

24. On 16 April 2024, the Applicant filed the application mentioned in para. 1 contesting the ABCC decision.

25. The Respondent filed his reply on 17 May 2024 and requests the Tribunal to reject the application. He contends that the contested decision is legal, rational and procedurally fair.

26. By Order 54 (NBI/2024), the Duty Judge invited the Applicant to file a rejoinder and invited the parties to explore resolving the dispute amicably.

27. On 7 June 2024 the Applicant filed a rejoinder as directed.

28. On 20 June 2024 the parties informed the Tribunal that they were unable to reach a settlement agreement.

29. On 5 August 2024 the case was assigned to undersigned Judge.

30. On 19 August 2024 by Order 108 (NBI/2024) the parties were invited to file their respective closing submission by 13 September 2024, which they did.

Submissions

Applicant's submissions

31. The Applicant acknowledges that the plain meaning of art. 4.1 of the Appendix D entails reduction of the ABCC benefit by any amount paid to any person entitled to a benefit under the rules of the Pension Fund. However, her contention is that based on logic and fundamental fairness, it is wrong to deduct theoretical amounts that are not being paid to the recipient.

32. The Applicant further seeks to rely on the words uttered by the Deputy Secretary-General in 2004 referring to the attack in Iraq, where he stated, among others, that:

It is important to recognize that a crisis is not business as usual...It also recognizes the importance of the need for flexible administration of rules while meeting minimum accountability requirements. This approach should come from the highest levels for it to infuse through the response.

33. The Applicant emphasizes and echoes the words of the Deputy Secretary-General and maintains that they should not be ignored. She requests that that her case be afforded the duty of care as contained in the statement of the Deputy Secretary-General.

34. As remedies, the Applicant requests:

- a. Rescission of the contested decision and recalculation of the benefit paid to her with no deduction for pension benefits paid to third parties;
- b. Correction of official records of service to reflect that the Applicant was the lawful spouse of Mr. Vieira de Mello; and
- c. Compensation for delays and moral damages.

The Respondent's submissions

35. The Respondent submits that the Organization lawfully deducted the pension benefit from the compensation payable under art. 10.2 of Appendix D and correctly

divided the net compensation between Mrs. Vieira de Mello and the Applicant. The Applicant has not cited any rule or regulation that entitles her to more. Deducting the pension benefit from Mrs. Vieira de Mello's portion only, would contravene the letter and legislative intent of the law.

36. The Respondent elaborates that the compensation payable under art.10.2(b) is the "annual compensation" payable to the widow(s). Applying the formula in art. 10.2(b), the annual compensation payable in the present case is USD89,926.40. The plain language of art. 4.1 requires a deduction of the pension benefit from "any compensation payable" under art. 10.2. The deduction is required whether there is one or more widows and whether one or all receive a pension benefit. Once the net annual compensation is determined after the deduction, art. 10.2(b)(ii) requires the Organization to divide that amount "equally among the widows". The Applicant has not identified any legal basis for her claim.

37. The Respondent maintains that if the ABCC pays the Applicant without deducting the pension benefit as required under art. 4.1, this would result in the total payment to the two widows being more than what would have been paid to one widow, which is contrary to the General Assembly's intent. It would also result in an unequal division of the annual Appendix D compensation contrary to the letter of art. 10.2(b)(ii) of Appendix D.

38. Regarding the Applicant's contention that she should be afforded the duty of care as a victim of terrorist attack, the Respondent avers that the Organization has fulfilled its commitments to victims of terrorist attacks and those who have otherwise died in service. The Staff Rules and Regulations apply equally to every staff member regardless of the circumstances of their death in service.

39. Accordingly, the Respondent requests the Tribunal to reject the application. Further, the Applicant is not entitled to any remedies sought. The Applicant has produced no evidence of harm caused by the contested decision nor provided any evidence of delay and of subsequent harm caused by the delay.

40. In relation to the Applicant's request for correction of official records of service to reflect her as the lawful spouse of Mr. Vieira de Mello; the Respondent

submits that the application does not contest any administrative decision not to change Mr. Vieira de Mello's official records. Nor was any such decision submitted for management evaluation, a jurisdictional prerequisite.

Consideration

Applicable law

41. Article 6.1 (b) of the current Appendix D provides that:

for claims filed for incidents that occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied...

42. As the death in service of Mr. Vieira de Mello occurred in 2003, before the entry into force of the current Appendix D in 2018, it is therefore the former version of Appendix D which applies to this case.

43. Article 4.1 (a) of the former Appendix D provided:

Subject to the provisions of paragraph (b) of this article, there shall be deducted from any compensation payable under articles 10.2, 11.1(c) and 11.2(d) of these rules the amount of all benefits paid to the staff member or to persons entitled through him under the Regulations of the Joint Staff Pension Fund, other than any part of such benefits deriving solely from voluntary contributions paid by the staff member himself under article XVIII of those regulations, provided that such benefits have become payable as a result of the same death, injury or illness which gave rise to the entitlement to compensation under these rules.

44. Article 10.2 (b) (ii) of former Appendix D stated:

If the deceased staff member leaves more than one widow, the annual compensation payable under this paragraph shall be divided equally among the widows. Upon the death or remarriage of one such widow, her share shall be divided among the remainder.

45. In view of the above legal provisions, it is clear that when there is more than one surviving spouse, both surviving spouses receive compensation under Appendix D and benefits from the UNJSPF.

46. In such a situation, the Administration have to subtract the UNJSPF benefit from the Appendix D compensation that each spouse is entitled to.

47. The issue before the Tribunal for determination is that in the present case, there is only one surviving spouse (Ms. Vieira de Mello) who is eligible for both the UNJSPF benefits and the Appendix D compensation. The Applicant is eligible for Appendix D compensation only.

48. In the present case, the Administration subtracted the total UNJSPF benefit from the total Appendix D compensation and then divided the remaining Appendix D compensation equally between the surviving spouses. Operating in such way, the Administration gave no relevance to the fact that only one of the surviving spouses was benefiting of the UNJSPF pension.

49. The Applicant, therefore, challenges the decision to reduce her Appendix D entitlement as a surviving spouse by the amount of the UNJSPF pension benefit paid only to another beneficiary (Mr. Viello's other surviving spouse), and to question why the Administration should deduct from her entitlement although she is not receiving any part of those UNJSPF benefits.

50. As a starting point it is worth stressing that pension and compensation are governed by different rules, respectively Pension Fund rules and United Nations Appendix D rules. For instance, the first provides for beneficiary of pension other than the staff member (e.g., spouse, dependent children and secondary beneficiary) pursuant to arts. 34, 36 and 37 of the UNJSPF's Regulations. However, as stated in 2020-UNAT-1004, para. 37, "the benefit is limited by the obligation on the part of an employing organization and a participant under Administrative Rules B.2 and B.3 to report his or her dependents". Administrative Rule B.3 goes on to state that there can be no change to the record after separation from service) differently from beneficiaries (staff member's spouse and dependent children and other secondary dependents, pursuant to art. 10.2 of the former Appendix D) indicated under the latter.

51. Having so said, the Tribunal finds the application well founded, based on a plain interpretation of the rules in the matter.

52. The first step of interpretation of any kind of rule consists of considering the literal terms. When the language used is plain, common and causes no

comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation (*Reilly* 2029-UNAT-975, para. 33).

53. The Appeals Tribunal outlined in *Reilly, ibidem*, the principles of statutory interpretation:

[T]he principle should be that the words of a legislative provision are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation, and the intention of the legislature. The General Assembly is the legislative branch of the United Nations, and its resolutions constitute legislation.

54. Having so said, art.4.1 (a) of the former Appendix D distinguishes clearly the position of the staff member and the one of other persons entitled to the said compensation: in case of the death of the staff member, like in the present case, the person entitled to compensation is directly the legitimate spouse; consequently, the position of the staff member became irrelevant in the calculation of the benefit, which, as said, belong directly to the spouse; in other terms, the administration cannot consider the *total* amount of pension and Appendix D benefit like if the staff member had asked for it, but have to consider the specific position of the spouses, considering the amounts they benefited.

55. In other terms, the compensation at stake is the object of a right the survivor –once the staff member dies- is directly entitled to, *jure proprio*, and not a benefit he/she inherited –*jure successionis*- from the staff member. This emerges clearly from the direct provision in art. 3.4 of Appendix D, which recognizes a right in favour of survivor dependents directly (“In the event of a service-incurred death of a staff member, the United Nations shall pay the compensation provided below to the staff member’s spouse or other eligible dependents(s)). On the autonomous position of the widow, it can be recalled also in *Larriera* 2022-UNAT-1271, par. 39, where UNAT –assessing the persons qualified to appeal before this Tribunal pursuant to its Statute- stressed that

the French language version of Article 3(1)(c) of the UNDT Statute informs the proper interpretation and application of the English language provision. Therefore, the apparently restricted phrase “in the name of” a staff member means, in effect, the dependent of a

staff member. In that sense, the phrase “in the name of” does not mean, literally, by use of the legal name of the deceased or incapacitated staff member, but means being a dependent of the named staff member.

56. In the calculation of the benefit for the survivor, therefore, the theoretical amount of the deceased staff member’s benefit is irrelevant.

57. Appendix D rules further provide that the amount of the total compensation under Appendix D shall be split between the multiple surviving spouses, so that in case of polygamy the amount of the compensation paid will be the same as if the staff member had one spouse only.

58. The rules also provide the principle of equality among spouses; if between two or among more spouses, all are entitled to the benefit under Appendix D, each spouse has an autonomous right to the compensation and they benefit of the same amount under Appendix D (prior to any personal deduction under art. 4.1(a) above mentioned).

59. Appendix D provides that the amount of all benefits paid to the staff member or to persons entitled under the regulations of the Joint Staff Pension Fund be deducted from any compensation payable under articles 10.2, 11.1(c) and 11.2(d) of these rules., the rule refers to what a beneficiary is entitled to receive under Appendix D and what the same person would receive under the pension scheme, and sets the deduction above mentioned.

60. The rule avoids that the same person can benefit of both entitlements (pension and compensation) by allowing compensation under Appendix D only for the amount exceeding the allowance paid under the pension plan.

61. When the beneficiary of both allowances is the staff member, the calculation is simple. When the beneficiary is not the staff member, who is deceased, only the legal position of the spouse comes into play, and the position of the deceased staff member remain irrelevant to the calculation of the benefit.

62. Therefore, when the beneficiary under Appendix D is the only spouse of the staff member, the deduction of the pension amount is applicable only if the spouse

(and no other beneficiary) benefits of pension as well (having been indicated by the deceased staff member in the plan documents as beneficiary of the pension). Otherwise, pension and compensation will be paid together in the full amount (of course, to the different persons entitled).

63. In other terms, the rule does not set a limitation of the total amount resulting from both entitlements in general terms (and with reference to the position of the staff member and the related costs for the Administration), but only a limitation of the total amount of what the same person, that is the same effective beneficiary, can receive simultaneously from the two sources. The rule sets (only) a prohibition of duplication of benefits for the same beneficiary.

64. Once recognized for the spouses the same right for the same amount under Appendix D, the Administration can, therefore, deduct the amount the person entitled to compensation received already as pension. But it is clear that what the deduction refers to is a personal entitlement and is applicable to the particular, individual claimant who receives the benefit.

65. The same principle applies when the beneficiaries of pension and compensation are more than one (which happens when the laws recognize polygamy or when, like in the present case, the plurality of spouses is the only effect of different national legal systems –French and Brazilian–, recognising only monogamist marriages but based on different criteria), because each is entitled to have the compensation minus the amount already benefited as pension, being instead irrelevant in the calculation of the pension other beneficiaries can have.

66. Notwithstanding the extraordinary relevance of the events that involved the Applicant, herself a victim of the terrorist attack and direct witness of the death of her beloved Sergio, the Administration surprisingly opts for an interpretation of the legal framework -cost-saving driven, but contrary to logic, common sense and law-, which led to an inequality of treatment (for a relevant amount, of almost eight thousand dollars per month, as detailed by the Applicant in her closing submissions, at para.9) received by the two survivors of Sergio De Mello, and that for all the reason above mentioned cannot be followed.

67. The acknowledgement of the Applicant's right to compensation under Appendix D in its full amount with no deductions from the early moment she was entitled to the benefit (pursuant to Judgment 2022-UNAT-1271, par. 29), plus interests for the delayed payment, can fully satisfy her position and does not leave any room for additional damages.

68. Finally, the Applicant's request, for correction of official records of service to reflect her as the lawful spouse of Mr. Vieira de Mello, is not receivable, because it does not contest any specific administrative decision (submitted for management evaluation).

Conclusion

69. In view of the foregoing, the Tribunal DECIDES:

- a. The application is granted;
- b. The contested decision is rescinded;
- c. The Respondent is to pay to the Applicant the compensation under Appendix D with no deduction for pension benefits paid to third parties; and
- d. The Respondent is to pay to the Applicant for the delayed payment of said compensation the interest at the US Prime Rate, from the moment the compensation was due to the payment date.

(Signed)

Judge Francesco Buffa

Dated this 30th day of September 2024

Entered in the Register on this 30th day of September 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi