



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

DIOUF NDIAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Shubha Suresh Naik, OSLA

Counsel for Respondent:

Bettina Gerber, UNOG

Introduction

1. The Applicant is the widow of a deceased staff member who served with the Office for the Coordination of Humanitarian Affairs (“OCHA”) in Bamako, Mali. By application filed on 8 March 2023, she contests the decision to deny her claim under Appendix D of the Staff Regulations and Rules of the United Nations (“Appendix D”) for compensation in respect of the death of her husband on 8 February 2017, which she claims was service incurred. The decision to deny the claim, dated 8 December 2022, was based on the recommendation of the Advisory Board on Compensation Claims (“ABCC”) which was endorsed by the United Nations Controller (“the Controller”) on behalf of the Secretary-General.

2. On 22 March 2023, the Respondent filed a motion requesting the Tribunal to determine the receivability of the application as a preliminary matter. The Respondent also requested the suspension of the deadline for filing his reply.

3. By email dated 28 March 2023, the Duty Judge suspended the deadline for the filing of the Respondent’s reply until the case was assigned to a Judge who would then consider the Respondent’s motion on receivability.

4. The case was assigned to the undersigned Judge on 31 August 2023.

5. On 13 October 2023, following the Tribunal’s Order No. 080 (NY/2023), the Applicant filed her response to the Respondent’s submissions on receivability.

Receivability

6. By Order No. 018 (NY/2024) dated 15 February 2024, the Tribunal decided that:

- a. The Applicant’s request to remand the case back to the ABCC to make a new determination on the eligibility for compensation under Appendix D for the alleged service-incurred death of her husband is dismissed as not receivable *ratione materiae*. That is because since the contested decision was based solely on a medical determination that was

made under art. 5.1 of Appendix D, the Tribunal does not have competence to review it. In any event, the Tribunal also found that the case has already been remanded back to the ABCC to make a new determination following a request for reconsideration submitted by the Applicant on 10 January 2023 under art. 5.1 of Appendix D. Therefore, the Tribunal found that this aspect of the application was moot.

b. The Applicant's request for the award of damages relating to the delay in reaching a decision by the ABCC is receivable;

c. The Applicant's request to refer the matter to the Secretary-General "for possible investigation and accountability" is receivable; and

d. The Respondent shall file his reply on the merits specifically regarding the Applicant's request for the award of damages.

7. On 15 March 2024, the Respondent filed his reply on the merits.

8. On 28 March 2024, the Applicant filed her rejoinder to the reply.

9. Having previously addressed the receivability of the application and having considered the parties' submissions on the remaining issues, the Tribunal will now proceed to examine the alleged undue delay in deciding the Applicant's claim and the request for referral to the Secretary-General.

Facts

10. As part of her claim before the ABCC, the Applicant submitted the following chronology of events in Bamako, Mali:

... On 26 January 2017 at around 21:45, [the Applicant's husband—"Mr. Ndiaye"] had severe symptoms of discomfort, including trouble breathing, and called his colleague ["MY" (name redacted for privacy reasons)], asking him for support. [MY] went to him, and they went out in [MY's] car to seek diagnosis and treatment.

... The [United Nations] Level 1 clinic was closed at the time. So they went to the [United Nations] Level 2 hospital, but were told that a referral from the Level 1 clinic was necessary. As it was not possible to obtain medical help from [United Nations] facilities at that time, they went to the private clinic [“Private Clinic No. 1” (name redacted)], arriving around 22:30. This clinic is one of the clinics formally recommended by the [United Nations].

... At [Private Clinic No. 1], [Mr. Ndiaye] was given a prescription for an x-ray to be done the next day, and was sent back home. [Mr. Ndiaye] had meanwhile made contact with the [United Nations Development Programme—“UNDP”] doctor to inform him of the situation, and the doctor told him to contact him the next day if the symptoms persisted.

... This means that the [Private Clinic No. 1], duly recommended by the [United Nations], failed to correctly diagnose [Mr. Ndiaye’s] problem or provide treatment. The UNDP doctor was informed but [Mr. Ndiaye] remained without a diagnosis or treatment.

... On 27 January 2017 around 09:00, [Mr. Ndiaye] went to the [“Private Clinic No. 2” (name redacted)] to take the prescribed x-ray and once more seek diagnosis and treatment. At this clinic, he received the correct diagnosis of stroke and some treatment. The UNDP doctor visited [Mr. Ndiaye], and OCHA was informed. Unfortunately, despite hospitalization and evacuation to Paris, [Mr. Ndiaye] died in Paris.

...

The ABCC process

11. The Respondent presented the following sequence of events in his reply on the merits dated 15 March 2024 (references and emphases omitted):

... Mr. Ndiaye passed away on 8 February 2017.

... On 2 February 2018, [“MG” (name redacted for privacy reasons)], who assisted the Applicant with the matter and was later designated as the Applicant’s Legal Representative for the case, submitted a claim under Appendix D of the Staff Regulations and Rules (Appendix D) to request compensation for the death of [the Applicant’s] spouse. [...]

... On 7 February 2018, the [Compensation Claims Unit—“CCU”] requested additional information from the Applicant including the death and marriage certificates. [...]

... On 5 April 2018, the CCU sent a reminder to the Applicant to submit the required documents to process the claim. [...]

... On 27 April 2018, [MG] submitted additional documents to the CCU. [...]

... On 4 May 2018, the CCU acknowledged receipt of all documents and advised the Legal Representative that the claim would be transferred to the ABCC Secretariat in New York for further review. [...]

... On 8 May 2018, the CCU transferred the case to the ABCC Secretariat. [...]

... On 21 May 2018, the ABCC Secretariat advised the CCU that the cause of death was cardiac arrest. The secretariat requested additional medical reports/necessary evidence to fully support that the death was attributable to the performance of duties on behalf of the Organization.

... On 31 May 2018, the CCU advised the Applicant/her Legal Representative to submit the required documents. [...]

... Following a reminder, on 5 October 2018, the Applicant provided medical reports from Mali and France. [...]

... On 11 October 2018, the Legal Representative advised CCU that one medical report was omitted from the latest submission and that it would be submitted, soon. [...]

... On 30 October 2018, the CCU sent a reminder to the Legal Representative to submit the missing medical report. [...]

... On 14 December 2018, the CCU advised the Applicant that her claim was pending receipt of additional information /clarification. [...]

... On 20 August 2019, the Legal Representative provided a statement from the Applicant in which she provided clarifications why she considered that the death of her husband was attributable to service. [...]

... On 23 August 2019, the Legal Representative provided the medical report which the CCU shared with the ABCC Secretariat on 28 August 2019. [...]

... By e-mail dated 17 June 2020, the Legal Representative followed up with the CCU concerning the case. One day later, the CCU informed him that they had not heard back from the [ABCC] but that they would follow-up with them. [...]

... Furthermore, following another communication by the Legal Representative, on 22 June 2020, the CCU, [United Nations Office in Geneva—“UNOG”] explained that the possible delay by ABCC could be because of the COVID pandemic, and that UNOG had transferred the documents to New York. [...]

... On 29 July 2021, the ABCC Secretariat sought [the Division of Healthcare Management and Occupational Safety and Health—“DHMOSH”] medical opinion on the case.

... On 12 July 2022, DHMOSH advised to consider the death not to be service incurred.

... The claim was presented to the Board at its 529th Meeting [on 4 November 2022] and its recommendation to deny the claim was approved by the Controller on 15 November 2022.

... By letter dated 8 December 2022, the CCU, UNOG, informed the Applicant that her case had been presented to the ABCC, which noted that, based on the medical determination made by the DHMOSH, it could not be established that Mr. Ndiaye's death was attributable to inadequate care that the Applicant alleged he received in Bamako. In particular, the letter informed the Applicant that, in its medical determination pertaining to this matter, DHMOSH established that there was no causal link between Mr. Ndiaye's death and the performance of his official duties or with the care that he received in Bamako. [...]

... On 10 January 2023, the Applicant's Legal Representative requested "reconsideration of the medical determination under Section 5.1 of Appendix D (ST/AI/2017/1), which was in force at the time of the death of the staff member". He further stated that "I would first request that before a Medical Board is convened, an important question on the argument of the claim be decided first by MSD/ABCC" taking issue that the [ABCC] had stated in its letter dated 8 December 2022 that it could not be established that the death was caused by inadequate care. [...]

... By memorandum dated 13 January 2023, the CCU informed the ABCC Secretariat that the Applicant "appealed" the decision on 10 January 2023 and submitted the Applicant's request for reconsideration of the case under Section 5.1 of the Appendix D. [...]

... On 30 January 2023, the [ABCC] Secretariat submitted the request to DHMOSH for further review.

... On 6 February 2023, the Applicant filed a management evaluation request indicating that the decision to be evaluated was the "decision by the ABCC, reached on non-medical grounds".

... On 9 February 2023, the Management Evaluation Unit rejected her request as non-receivable.

... On 24 February 2023, DHMOSH reiterated its initial determination that the death was not service incurred.

... On 8 March 2023, the Applicant filed an appeal against the decision of the ABCC to reject her claim under the Appendix D of the Staff Regulations and Rules. The Applicant is now represented by an [Office of Staff Legal Assistance—"OSLA"] lawyer.

...

The parties' submissions on the alleged delay by the ABCC

12. The Applicant's primary contentions may be summarized as follows:

a. The Tribunal would be justified in awarding compensation for "excessive and inordinate delay". The Administration has "a duty to respond in timely fashion to the requests of staff members". Staff members are entitled to compensation when they suffer harm as a result of an inordinately protracted process.

b. In the present case, the claim was filed on 2 February 2018, and it was initially rejected on 24 May 2018, when the ABCC Secretariat "refused to further process the claim unless additional documentation was presented to show that there was a causal link between the death of Mr. Ndiaye and his official duties with the United Nations". After several communications and following the submission of detailed documentation, the ABCC Secretariat in Geneva informed the Applicant in August 2019 that the case would be forwarded to the ABCC in New York. The Applicant continued to follow up regarding the status of the claim and on 22 June 2020, she was informed that "the delay was possibly due to [the] COVID-19 pandemic".

c. The decision on the claim finally came in December 2022, "close to 5 years from the initial submission and more than 3 years after it was re-submitted". During this time the Applicant "suffered from anxiety, financial problems, stress due to delay in finalizing the claim, and overall immense frustration over the lack of answers about her husband's death and whether she would be compensated". She attached a "Victim Impact Statement" to her application.

d. The Applicant states in her rejoinder that although there are no set timelines for the ABCC to decide a claim, this "cannot be used as a shield to protect the ABCC" where there is inordinate delay in taking a decision on the claim. She asserts that the relevant timeframe to be examined is not the period between Mr. Ndiaye's death and the filing of the claim, but "the excessive delay in reaching a final decision which was arrived at close to 5

years from the initial submission and more than 3 years after it was re-submitted”.

e. According to the Applicant, the Administration is responsible for the delay by requiring her to produce documents that were in its possession and not in hers. Moreover, even if the Applicant took 18 months to finally obtain all the required documents, it still took the ABCC another three years thereafter to make a final decision, as admitted by the Respondent. The COVID-19 pandemic only occurred in March 2020, which was at least seven months after the documents were submitted.

13. The Respondent’s main contentions may be summarized as follows:

a. To the extent that the Applicant is contesting an implied administrative decision arising from the alleged delay, this can only be reviewable if the Administration “altogether failed to respond” or to act. In the present case, however, the Administration “continuously provided information and advice when needed and processed the claim”. The Administration had to remind the Applicant and her Legal Representative “various times” to provide the missing information.

b. The applicable legal framework does not provide for any compensation award where no administrative decision exists and does not contemplate moral damages to third parties that do not have a contractual relationship with the Organization. Compensation can only be awarded where there is a direct causal link between an unlawful administrative decision and the harm suffered by a staff member as a result of that decision. The Applicant does not meet these criteria.

c. The Applicant does not have standing to request compensation for delay. Estates and beneficiaries have only “very narrow standing” to enforce the will of a deceased staff member in financial matters and cannot “step into the shoes of the staff member”. “Moral damages are *ad personam* and not transferable”. Awarding the compensation sought by the Applicant “would unlock a new compensation practice”, namely compensating third

parties for moral damages under Appendix D, which is beyond the Tribunal's authority.

d. Even if the Tribunal were to find that the Applicant has standing, she would still not be entitled to any compensation for the delay. That is because the applicable rules under Appendix D “do not contain any specific timelines within which the Administration has to consider a request for compensation”. Moreover, “the delays as portrayed by the Applicant as unreasonable were less significant” than they appear. Following the death of her husband in February 2017, “it took the Applicant one year to file her request under Appendix D”. It then took her another 18 months—that is, until August 2019—to submit all the requested documentation to support her claim as required under art. 1.8 of Appendix D. During this time the ABCC was unable to process the claim and make an informed recommendation to the Controller. However, the CCU “always acted promptly and had to remind the Applicant various times to provide the missing information/documentation”.

e. It is acknowledged that there was a delay of “almost three years” in processing the Applicant's claim. This occurred between August 2019 and July 2022 when the ABCC received DHMOSH's advice that Mr. Ndiaye's death was not considered to be service incurred. However, “the delay was not a result of negligence” in light of the onset of the COVID-19 pandemic in early 2020, which contributed to a backlog of cases for the ABCC to review. Considering the “complex procedural circumstances” involved, there is nothing to support a finding that the Administration acted “unfairly or in bad faith, without due diligence or negligently”.

f. Even if the Applicant could request compensation for the alleged delay in processing her claim, she would still need to provide “evidential support” for the damage she suffered and she “would need to establish a nexus between the alleged damage and the alleged breach”. The Victim Impact Statement provided by the Applicant is not sufficient. “Her claim of

moral harms is not corroborated by reliable independent evidence such as a medical assessment”.

g. Regarding the Applicant’s request to refer the matter to the Secretary-General for possible investigation and accountability, art. 10.8 of the Dispute Tribunal’s Statute “does not foresee a referral for investigation”. However, referral for accountability is at the Tribunal’s discretion.

Considerations

14. As stated above, the Tribunal has previously decided that the Applicant’s request to remand the case back to the ABCC to make a new determination on the eligibility for compensation under Appendix D for the alleged service-incurred death of her husband is not receivable since the contested decision was based on a medical determination. Therefore, the only issues remaining for the Tribunal’s consideration are the Applicant’s request for the award of damages relating to the alleged delay in reaching a decision by the ABCC; and her request to refer the matter to the Secretary-General for possible action to enforce accountability.

Whether the ABCC incurred undue delay in processing the Applicant’s claim

15. The Applicant submits that the Organization failed in its duty to respond in a prompt and timely fashion to her claim for compensation and that it failed to adhere to “the highest standards of care and due diligence”. She points out that her claim was first filed on 2 February 2018, and that despite “several communications and after the submission of detailed documentation” related to the case, the ABCC’s recommendation and the Controller’s decision “finally came in December 2022, close to 5 years from the initial submission”. She further submits that during this period, she suffered from anxiety, financial problems, stress “and overall immense frustration over the lack of answers” about the claim.

16. The Tribunal notes the Respondent’s argument that the Applicant does not have legal standing to request compensation for the delay because, according to

him, the Applicant is a third party who does not have a contractual relationship with the Organization.

17. In this regard, the Tribunal recalls that in its Order No. 018 (NY/2024), it determined that the present application is filed in accordance with art. 3.1(c) of the Statute of the Dispute Tribunal, which provides that an application under art. 2.1 of the Statute may be filed by “[a]ny person making claims in the name of an incapacitated or deceased staff member of the United Nations”. Accordingly, the Tribunal finds that the Applicant, as the widow of a deceased staff member, has legal standing to file the present application seeking compensation for the alleged undue delay in processing her claim related to the death of her husband.

18. Based on a review of the chronology of events provided by the Respondent and the supporting documents submitted by both parties, the Tribunal notes that Mr. Ndiaye passed away on 8 February 2017 and that the Applicant’s claim for compensation was first filed on 2 February 2018. This was then followed by numerous exchanges over a long period of time between the Applicant and her Legal Representative, on the one hand, and CCU/UNOG, on the other hand. The contested decision denying the Applicant’s claim for compensation was finally issued on 8 December 2022. This represented a period of almost five years between the initial filing of the claim and the issuance of the contested decision.

19. While each party is now claiming to have been the one that was reminding the other to take necessary action during this period, the Tribunal observes that the Administration was in a more advantageous position relative to the Applicant. This is because many of the medical records the Administration was asking the Applicant to provide regarding Mr. Ndiaye’s hospitalization and treatment were in fact in the Administration’s own possession or were more readily available to it. The Tribunal recalls that the Administration owes a duty of care to staff members or, in this case, their beneficiaries and recognized dependents, and is expected to take prompt action in response to their queries or concerns (see, for instance, the Appeals Tribunal in *AAM 2023-UNAT-1372*, para. 61, but also *Charles 2012-UNAT-242*, para. 29, and *AAG 2022-UNAT-1308*, paras. 69-70).

20. The principle that the Administration has a duty to respond in timely fashion to the requests of staff members is well established in the jurisprudence of the Appeals Tribunal. In *Dahan* 2018-UNAT-861, for example, the Appeals Tribunal pointed to “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). The Appeals Tribunal has also held that harm to an applicant, such as stress, caused by a process that was unduly or inordinately protracted may also be compensated under art. 10.5(b) of the Dispute Tribunal’s Statute (see, for instance, *Benfield-Laporte* 2015-UNAT-505, *Applicant* 2020-UNAT-1001/Corr.1, and *Appellant* 2021-UNAT-1137).

21. The Tribunal appreciates the Respondent’s admission that there was “indeed a delay of several months which is regretted”. The Tribunal also accepts the Respondent’s submission that the Administration did not process the Applicant’s claim “unfairly or in bad faith, without due diligence or negligently”. However, this is irrelevant to the issue at hand. It is clear from the Respondent’s own chronology of events that the Administration did not process the claim as promptly as it should have done. Even if, as argued by the Respondent, the clock only started running in August 2019 when “all the requested documentation was finally submitted”; and even after taking into consideration the uncertainty and disruption occasioned by the onset of the COVID-19 pandemic in 2020; it still took more than three years—that is, until 8 December 2022—for the contested decision to be issued. This delay was clearly excessive.

22. In light of the foregoing, the Tribunal finds that the ABCC took an inordinately long amount of time to process the Applicant’s claim for compensation following the death of her husband.

Whether the Applicant is entitled to compensation

23. The Appeals Tribunal has held that when assessing whether an alleged injury is compensable, an applicant is generally required 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).

24. In the present case, the Applicant filed a “Victim Impact Statement” in which she submits that the death of her husband, Mr. Ndiaye, “has left a huge void” in her life and the lives of their children and that not a day passes without them “suffering from his absence”. She also states that Mr. Ndiaye was a “most generous man” who supported not only his nuclear family but also his extended family and his in-laws. Thus, following his death, many people have lost income that used to “help them make ends meet”. She further asserts that “the delay by the United Nations in addressing [Mr. Ndiaye’s] case has been abysmal”. After his death, the support she received “in terms of his final entitlement and health insurance was provided *ad hoc* by his colleagues—not actually by the Organization”. It was also a former colleague of Mr. Ndiaye’s who helped the Applicant file her claim for compensation. Despite all of these efforts, and after all the correspondence over a period of almost six years, it was “even more heartbreaking and draining” for her to receive “a brief letter indicating that the claim was rejected”.

25. The Respondent submits that the “Victim Impact Statement” provided by the Applicant is “not corroborated by reliable independent evidence such as a medical assessment”. According to him, “Appendix D is neither life insurance nor a substitute for the [United Nations Joint Staff Pension Fund—“UNJSPF”] or estate planning. Unlike those mechanisms, it is not intended to provide a guaranteed and immediate cash infusion to the estate of a staff member like a life insurance policy for example”. The Respondent adds that Appendix D “cannot be reasonably relied upon by a staff member or an estate to provide for immediate living expenses upon the death of a staff member”.

26. The Tribunal considers the Respondent’s choice of words to be insensitive, uncalled for and misplaced. It also finds that the Applicant is justified in viewing this language as “frivolous and insulting”. The very purpose of compensating a staff member for harm suffered (or for compensating a beneficiary for the death of a loved one) is to alleviate their suffering and to place them in the situation where they would have been if the harm had not occurred. In that regard, the relevant

question is not whether the claim for compensation is granted or rejected, but whether a decision on the matter is made in a timely manner. In the absence of a timely decision on a claim for compensation, the agony of those affected is unduly prolonged. This represents a failure on the part of the Organization to perform the duty of care it owes to its staff members and their beneficiaries. “In light of the principle of efficiency of the Organization and the fact that improper delay would obviously cause a degree of anxiety and stress” to the Applicant, and the fact that she presented a “Victim Impact Statement” to support her account of moral damages, the Tribunal finds that the Applicant has established the required nexus between the harm she suffered and the protracted process (see *AAM 2023-UNAT-1372*, para. 61).

27. Regarding the quantum of compensation to be awarded, the Tribunal has taken into account the totality of the circumstances surrounding the filing of the claim and the issuance of the contested decision and considers that the undue delay of the process by the Administration was “a mere procedural flaw” (*AAM*, para. 62). The Applicant must also bear some of the responsibility for the delay resulting from her lateness in submitting some of the required documentation to support her claim. The Tribunal therefore finds that the harm suffered by the Applicant in the present case falls within the lower end of the spectrum of compensable non-pecuniary harm.

28. Accordingly, the Tribunal awards the Applicant the amount of USD3,000 in non-pecuniary damages under art. 10.5(b) of the Dispute Tribunal’s Statute.

The request to refer the matter for possible investigation and accountability

29. The Applicant submits that “while the ABCC is not primarily concerned with duty of care”, she nonetheless requests the Tribunal “to refer the issue to the Secretary-General for possible investigation and accountability”. In her rejoinder, the Applicant adds that she “seeks accountability for the delay in the whole process which seems to be systemic with ABCC”.

30. The Respondent argues that art. 10.8 of the Dispute Tribunal’s Statute “does not foresee a referral for investigation”; that the Applicant has not brought forward

any allegations of misconduct; and that if any potential misconduct involving a United Nations official has been observed, then the Applicant's Legal Representative, as a staff member, "would be under the obligation to report this to the Office of Internal Oversight Services". However, a referral for accountability is at the Tribunal's discretion.

31. Pursuant to art. 10.8 of its Statute, the Tribunal "may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability". The Tribunal stresses that this provision does not include the possibility of referring a matter for investigation.

32. In the present case, the Tribunal observes that the Applicant has not pointed to any specific instance of misconduct or to any individual staff member who may have engaged in a pattern of conduct that could be referred to the Secretary-General for accountability. Other than a general statement about delays being "systemic with ABCC", the Applicant has not identified any particular aspect warranting a referral to the Secretary-General.

33. While it is acknowledged that the processing of the Applicant's claim for compensation was inordinately protracted, there is no evidence that this was the result of any malicious act or gross negligence by any particular individual(s). In the absence of concrete details that could be brought to the attention of the Secretary-General "for possible action to enforce accountability", the Tribunal is not able to refer the present matter. Accordingly, this request is denied.

Conclusion

34. The application is granted in part.

35. In compensation for the undue and inordinately protracted delay in issuing the contested decision, the Applicant is awarded the sum of USD3,000 in accordance with art. 10.5(b) of the Statute of the Dispute Tribunal.

36. 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.

37. The application is rejected in all other respects.

(Signed)

Judge Joelle Adda

Dated this 22nd day of October 2024

Entered in the Register on this 22nd day of October 2024

(Signed)

Isaac Endeley, Registrar, New York