



Administrative Tribunal

Distr. Limited
6 February 2008

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1358

Case No. 1435

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Goh Joon Seng; Sir Bob Hepple;

Whereas at the request of a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal extended to 30 September 2005 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 September 2005, the Applicant filed an Application containing pleas which read as follows:

“Section II: **Pleas**

7. ... [T]he Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General that no further action be taken in the Applicant's claim for compensation;

(b) *to find and rule* that the Advisory Board on Compensation Claims [(ABCC)] erred as a matter of law and equity in failing to provide an appropriate and adequate remedy in light of the Respondent's continued refusal to provide information and documentation critical to the Board's deliberation of the case;

- (c) *to find and rule* that the absence of a reply by the Respondent ... should be interpreted as a failure by the Respondent to contest the claims submitted by the Applicant;
- (d) *to award* compensation equivalent to that provided under Appendix D as compensation for the service-incurred illness that led to her disability and for the resulting harm done to the Applicant;
- (e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the denial by the Respondent of the Applicant's right to due process of her claims;
- (f) *to fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case; [and,]
- (g) *to award* the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 28 February 2006 and once thereafter until 28 March;

Whereas the Respondent filed his Answer on 28 March 2006;

Whereas the Applicant filed Written Observations on 15 August 2006;

Whereas, on 26 October 2007, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts of the case are as follows:

The Applicant entered the service of UNDP on 1 May 1980 as a G-2 Administrative Clerk, Accounts Section, Department of Finance. Between 1984 and 1997, she received a number of promotions, reaching the G-6 level. The Applicant was placed on sick leave from April to October 1999 and, thereafter, on consecutive periods of special leave with full pay ("SLWFP") and annual leave until 6 December 2001, when she was awarded a disability pension and separated from the Organization.

Following a reorganization in 1993, the Applicant's post was cut and she remained in the Accounts Section without a formal posting.

On 26 June 1995, the Applicant was injured when she suffered a fall while at work. The ABCC recognized the injury as service-incurred and, on 3 June 1997, the Secretary of the ABCC advised the Applicant that "on the basis of a preliminary examination of [her] claim", reimbursement for medical bills had been authorized, as well as for transportation costs "on an exceptional basis", in the absence of receipts.

In 1999, the United Nations Medical Service was advised that the Applicant had been diagnosed with severe depression. The Applicant was placed on sick leave from April to October 1999, and upon her return to work, at the recommendation of her doctors and the Medical Service, she was relieved of any functions other than routine tasks. On 17 April 2000, the Deputy Medical Director advised UNDP that the Applicant should be immediately transferred from her present office, however, it appeared to be difficult to assign her different functions. On 21 July, the Director, Office of Human Resources (OHR), UNDP, advised the Applicant that she would be granted SLWFP for six months. In January 2001, her SLWFP expired and she was placed on annual leave until her

leave expired on 12 June. The Applicant continued in full-pay status from 13 June through 6 December when she was awarded a disability benefit.

On 5 April 2002, the Applicant submitted a claim for compensation to the ABCC under article 11 of Appendix D, claiming that her “current disability [arose] from a combination of physical and mental impairments, all of which should be recognized as service-incurred”. She submitted her claim under article 11 (c) as well as for loss of function under article 11.3 of Appendix D, stating that the reasons for her health problems arose from the “extreme and unwarranted mistreatment” she was afforded and the “constant harassment” to which she was subjected by her supervisors. On 4 May, the Applicant reiterated her claim.

On 24 June 2002, in connection with the Applicant’s claim that her illness was work-related, the Secretary, ABCC, requested UNDP to provide a detailed description of the Applicant’s work environment and her job functions since her association with UNDP. On 20 February 2003, in the absence of a reply, the Secretary, ABCC, again requested a reply from UNDP. On 12 March, UNDP forwarded the response of the Director of the Office of Finance and Administration, who indicated, inter alia, that although he felt that the “stress level in UNDP Accounts is very high” he did not think he was qualified to ascertain whether the stress level was “beyond the acceptable level”.

On 25 June 2003, the Secretary, ABCC, advised the Applicant, that the ABCC had decided, at its 413th meeting on 29 May, that injuries arising out of her 1995 accident were “attributable to the performance of official duties on behalf of the United Nations” but that, based upon the “medical documentation and the advice of the Medical Director, as the claimant’s injuries were of a temporary nature, there was no medical link between these injuries” and her depression. Thus, her claim for depression was “deferred, pending receipt of additional information which UNDP had been requested to provide”.

On 25 June 2003 and on 21 July 2004, the Secretary, ABCC, requested UNDP to provide more detailed information about the Applicant’s work environment since her association with UNDP, as well as an evaluative summary of the Applicant’s complete employment history. She indicated that the material submitted did not enable the ABCC to determine if there was a causal relationship between the Applicant’s illness and the performance of her official duties.

On 19 January 2005, counsel for the Applicant requested that, in the absence of additional material from UNDP, the ABCC consider the Applicant’s claim on the basis of the record before it.

On 11 May 2005, the Secretary of the ABCC advised the Applicant that her claim had been considered by the ABCC at its 422nd meeting held on 4 March and attached the decision of the Secretary-General dated 9 May which read as follows:

“Having considered all the available documentation on the case and as UNDP administration, despite repeated requests of the Board had failed to provide the information/documentation that was critical to the Board’s deliberation of the case, the Board was unable to make a recommendation to the Secretary-General as to whether or not the claimant’s illness (severe chronic depression) could be considered attributable to the performance of her official duties on behalf of the United Nations”.

On 23 September 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Organization has a duty to provide fora for the adjudication of claims of staff members alleging violation of their terms of appointment.
2. She was the unfortunate victim of a denial of due process occasioned by the continued refusal of UNDP to provide the requested information, unduly delaying the procedure and precluding the ABCC from reaching a decision.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred and is not properly presented before the Tribunal.
2. The Organization has provided appropriate fora to consider her complaints.
3. The absence of a strong defence by UNDP, and its failure to present material, additional to that which was already on record, did not deprive the Applicant of a forum in which to have her medical claims considered. The Applicant failed to provide sufficient evidence to permit the ABCC to find that her disease was work-related.

The Tribunal, having deliberated from 26 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant challenges the decision of the Secretary-General, following a report of the ABCC, not to take any action on her claim for compensation for injuries she alleges are attributable to the performance of her official duties. She requests the Tribunal, among other things, to rescind the Secretary-General's decision; to find that the failure of the Respondent to make a decision on her claim constitutes acquiescence to her claims by the Respondent; to award her compensation for the Respondent's alleged failure and for the resulting violation of her due process rights; and, to award her costs. The Tribunal will address each of these.

II. The Applicant entered the service of the Organization on 1 May 1980, as a local hire with UNDP. Between 1980 and 1997, the Applicant was promoted several times and by 1997, she was finally promoted to the G-6 level.

On 26 June 1995, the Applicant suffered an injury while at work. She alleges that the injury was service-incurred and that it left lasting physical impairment, including "neurological problems on the left side of her body with her neck and lower back, shoulder, knee and ankle". She further alleges that her physical symptoms worsened over time and were aggravated by the "extremely hostile working environment" to which she was subjected at UNDP. In 1999, she was diagnosed with severe depression, which she also attributes to the performance of her duties at UNDP, allegedly as a result of workplace harassment.

Following her diagnosis of depression in 1999, the Applicant was placed on extended sick leave, from April until October. Thereafter, upon her return to work, the Medical Service recommended that she be given light tasks. On 17 April 2000, the Deputy Medical Director recommended that the Applicant be "transferred from her

office immediately” and “until further notice” due to medical reasons. This recommendation appeared to be difficult to follow and she was not transferred. As of 21 July 2000, the Applicant was placed on SLWFP and on annual leave, until 26 December 2001, when the Pension Board Committee determined that she was incapacitated for further service and entitled to a disability benefit under the Regulations of the Fund. Her date of separation from service was retroactively effective as of 6 December.

III. On 5 April 2002, the Applicant sent a letter to the Secretary of the ABCC, requesting compensation under article 11.1 (c) of Appendix D, as well as making a claim for loss of function under article 11.3 of that Appendix, contending that both her 1995 injury and her 1999 diagnosis of depression were service-incurred. Subsequently, on 4 May, the Applicant filed a formal claim with the ABCC, again making her request that both her 1995 injury and her 1999 diagnosis be considered to be service-incurred and compensable under Appendix D.

IV. On 25 June 2003, approximately one year from the date she filed her claim with the ABCC, the ABCC determined that while the Applicant’s 1995 injury was indeed service-incurred, there was no evidence to link that injury with her 1999 diagnosis of depression. For that reason, the ABCC decided to treat separately the issue of whether the depression was service-incurred. In the same letter of 25 June, the Applicant was notified that the consideration of her depression would be deferred “pending receipt of additional information from UNDP”, which had been requested. The Applicant was further notified that “[i]mmediately upon receipt of the required information, it will be resubmitted to the Board for its consideration”.

V. While the ABCC had requested that UNDP address the specific allegations of workplace harassment made by the Applicant, UNDP did not provide a satisfactory response and, on 15 October 2004, after a 16 month delay, the Applicant’s counsel wrote to the Secretary of the ABCC and requested that a date be set for consideration by the ABCC of the Applicant’s claim, in light of UNDP’s failure to respond. On 2 December, counsel for the Applicant reiterated the request, inquiring what steps were being taken to finalize the Applicant’s claim. Thereafter, on 19 January 2005, the Applicant’s counsel again wrote to the ABCC, demanding that a deadline for UNDP’s response be set, and in the absence of any response, that a hearing be scheduled for the ABCC to decide the matter.

VI. Finally, on 4 March 2005, nearly three years after the Applicant first filed her claim with the ABCC, the ABCC issued its recommendation. Recalling that it had sent copies of the Applicant’s detailed “Explanatory Note” and “Summary of Facts” to UNDP and had asked that UNDP respond in detail to the allegations made by the claimant, the ABCC noted that, despite its repeated requests to UNDP, UNDP had failed to provide the information/documentation that was critical to the Board’s deliberation of the case. As a result, the ABCC determined that it was “unable to make a recommendation to the Secretary-General as to whether or not the [Applicant’s] illness (severe chronic depression) could be considered attributable to the performance of her official duties on behalf of the United Nations”. Thereafter, the Secretary-General sent a letter to the Applicant, in essence,

quoting the language of the ABCC and adopting it as his final decision. The Applicant then sought review by the Tribunal of the actions of the Board and the Secretary-General.

VII. The Respondent asserts several defences. First, the Respondent alleges that the matter is time-barred, as the Applicant failed to bring her claim to the ABCC within four months of the onset of her depression. Second, the Respondent alleges that the Applicant has had sufficient ability to have her claims adjudicated and that the failure of UNDP to provide sufficient evidence to the ABCC, such that the ABCC could make a finding favourable to the Applicant, is evidence that the Applicant's claims are unfounded.

VIII. The Tribunal first addresses the threshold issue raised by the Respondent - i.e., that the Applicant's claim to the ABCC is time-barred and therefore non-receivable. As the ABCC did not raise the time-bar issue, but instead considered the case on its merits, and as the Secretary-General accepted the ABCC's report, the Tribunal finds that the Applicant's claims are receivable. Therefore, the Tribunal turns to the merits of the claims.

IX. The Tribunal next addresses the issue of the failure of the ABCC to make a recommendation as to whether the Applicant's depression is service-incurred, such that she might be entitled to compensation under Appendix D. The Tribunal notes that the ABCC is the advisory board established for the purpose of reviewing claims made by staff members for compensation and disability for service-incurred injury and illness under Appendix D of the Staff Rules. As such, the ABCC is tasked with finding the facts in order to determine whether a claimed injury or illness is indeed service-incurred. In order to do that, the ABCC must obtain relevant information from various staff members, departments, agencies, funds or programmes of the Organization. Failing to obtain such information, the ABCC must then consider the evidence in the record and make a recommendation, based on whatever is before it. In the event, as in this case, that the only evidence in the record is that provided by the Applicant, where the Organization fails to provide any or sufficient evidence to rebut the allegations of the Applicant, in the opinion of the Tribunal, the ABCC must decide in the Applicant's favour. The ABCC cannot, as it did in the instant case, simply ignore its obligation to recommend and instead conclude that it has insufficient information to make a recommendation. To allow such a result would make a mockery of the procedural safeguards provided to staff members under the Staff Regulations and Rules, and in particular, under Appendix D. This is especially true in the case where the failure of procedure is at the hands of a quasi-judicial body, such as the ABCC. (See Judgement No. 1325 (2007).) The Tribunal has repeatedly "reiterate[d] the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization". (See Judgement No. 1106, *Iqbal* (2003).) This is also reflected in Judgement No. 1060, *Baddad* (2002), paragraph III, citing [International Labour Organization Administrative Tribunal] Judgement No. 495, *in re Olivares Silva* (1982):

"[The] first and greatest safeguard against the operation of prejudice lies in the procedural requirements which every set of staff regulations contains and whose main objective is to exclude improper influence from an administrative decision. ... [P]roof of prejudice is rendered unnecessary when procedural requirements have not been observed."

X. Moreover, the Respondent mischaracterizes the language of the ABCC report and wrongly concludes that, because the ABCC failed to find *in the Applicant's favour*, the Applicant's claim is, therefore, unfounded. The Tribunal cannot agree. The ABCC did not simply fail to find in the Applicant's favour; it failed to reach any decision, one way or the other, as the sole result of UNDP's failure to submit rebuttal evidence. Rather than making a recommendation based on the evidence in the record, as it should have, the ABCC simply refused to make any recommendation. This was compounded by the Secretary-General's subsequent acquiescence in this failure. The Secretary-General should have remanded the issue to the ABCC, demanding that a recommendation be made. Consequently, the Applicant was denied the right to have her medical issues adjudicated in accordance with the rules of procedure guaranteed to her. Such a denial violates her rights to due process, for which she is entitled to compensation.

XI. The Tribunal next turns to the corollary issue of UNDP's failure to address in an appropriate manner the request from the ABCC to provide specific information relating to the Applicant's claim. While the Applicant did provide very specific allegations about the nature of the alleged workplace harassment to which she claimed she was subjected, UNDP, in essence, failed to respond, despite the ABCC's repeated requests that UNDP respond "in detail" to the Applicant's allegations. There was, for example, no defence of the Applicant's specific claims that she was demeaned, shouted at, humiliated, embarrassed, etc. by her supervisors. In fact, UNDP's only response was that "there is good camaraderie between staff, and people work as a team to meet the deadlines". While the failure of UNDP to respond adequately to the ABCC's requests was not in itself a violation of the Applicant's rights, as the ABCC was free to - and, in fact had no choice but to - decide the matter with the evidence that was in the record, the Tribunal looks with disfavour upon UNDP's complete disregard for the authority of the ABCC. The Tribunal would hope that the senior management of UNDP review this matter and take whatever steps are needed to ensure appropriate compliance with the ABCC's requests in the future, in order to ensure that the ABCC can exercise its fact-finding and fully carry out its mandate.

XII. The Tribunal next turns to the issue of the three-year delay from the time the Applicant filed her claim with the ABCC and the time that the ABCC notified the Applicant of its failure to make any recommendation. The Tribunal notes that three years was an inordinate period of time to entertain the matter, especially given the fact that ultimately no recommendation was actually made and that the delay was entirely the fault of UNDP, for its failure to respond adequately to repeated requests by the ABCC, and this delay could easily have been avoided. The Tribunal further notes that the delay reasonably might have exacerbated the Applicant's depressed condition, worsening her illness, or at best, hindering her from making progress towards recovery, as she experienced additional stress and frustration from trying, without success, to compel the ABCC to act according to its mandate and decide her case. The Tribunal awards compensation to the Applicant for the violation of her rights in this regard.

XIII. Finally, the Tribunal turns to the Applicant's request for costs. While the Tribunal notes its general policy of not awarding costs, in view of the complexities of this case, taken together with the rather egregious failure of the ABCC to carry out its mandate and the failure of UNDP to respond to the ABCC, it seems appropriate to make an exception to the general rule. Therefore, the Tribunal awards costs to the Applicant.

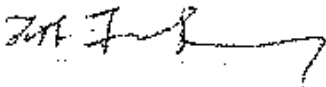
XIV. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant for violation of her due process rights, including for inordinate delay, the sum of US\$ 25,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;
2. Orders the Respondent to pay to the Applicant for costs the sum of US\$ 5,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
3. Rejects all other pleas.

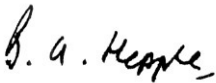
(Signatures)



Jacqueline R. **Scott**
Vice-President



Goh Joon Seng
Member



Bob Hepple
Member

New York, 21 November 2007



Maritza Struyvenberg
Executive Secretary