
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/070

Judgment No.: UNDT/2023/046

Date: 7 June 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GUSAROVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

S

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, filed a 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 expiration date of 31 January 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

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

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

10.

its Secretariat pre
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
claim. The

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 includ

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 (The 5 (di) 4 (sta) (si) -4 (on,)] TJET 0.00000912 0 612 792 re4(.2009

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 perform612 0o

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

23.

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

and made recommendations thereon to the UN Controller.

The eventual decision by the Controller would constitute a separate administrative decision, distinct from the Ap

is not entitled to any of the damages sought. She has not adduced any

Statute. Additionally, there is no evidence that the ABCC delayed in the consideration of her compensation claim under Appendix D.

Consideration

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.

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

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

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-reas

Case No.: UNDT/NBI/2022/070

Judgment No.: UNDT/2023/046

58. The Applicant also produced to the Administration from the very beginning a medical certificate which stated that the returning to work after sick off period (8/2/2021 to 25/2/2021) recommended that the Applicant should not return to work until further medical advice is received.

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 for 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 pathology was related to the work environment and therefore the Tribunal is of the 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 rights under article 109 of the Staff Regulations and Rules.

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

66. In *Cahn*, the UNDT found that the harm suffered by the Applicant could be compensated by an award of one month 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 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

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

Conclusion

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