

114th Session

Judgment No. 3173

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C.M. L. against the United Nations Industrial Development Organization (UNIDO) on 5 October 2010 and corrected on 12 January 2011, the Organization's reply of 3 May, the complainant's rejoinder of 1 August, and UNIDO's surrejoinder dated 4 November 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian national born in 1955, joined UNIDO in 1980. In 2003 she was appointed Senior Secretary to the Director of the Agro-Industries and Sectoral Support Branch in the Programme Development and Technical Cooperation Division (PTC/AGR) at grade G-6.

On 29 May 2008 the complainant was taken ill at work. She was placed on sick leave until 3 July. Shortly after she came back, she was

reassigned to another position within the same Division with effect from 4 August 2008.

On 15 September she wrote to the Secretary of the Advisory Board on Compensation Claims (ABCC) submitting a claim for compensation under Appendix D to the Staff Rules for an illness attributable to the performance of her official duties. The Secretary acknowledged receipt of the claim on 31 October and requested that the complainant submit additional information, including a detailed description of the circumstances that had caused her illness. She also advised her that the claim should be submitted through her supervisor. Under cover of a routing slip dated 24 November 2008 the complainant forwarded a memorandum of the same date to the Director of PTC/AGR for his “clearance”. This memorandum, which was addressed to the Secretary of ABCC, contained a detailed description of the circumstances leading to her illness. In particular, she explained that she had been placed on sick leave on 29 May as a result of an incident involving her then supervisor, the Director of PTC/AGR, whom she accused of having subjected her to “constant harassment and abuse”. The Director replied to the complainant on 16 December 2008 stating that he was not in a position to endorse what she had written but that he would ask the Director of the Human Resource Management Branch (PSM/HRM) to establish an independent panel to investigate her allegations. The complainant subsequently wrote twice to the Secretary of the ABCC enquiring as to whether she had received the Appendix D claim submitted through her supervisor. The Secretary informed her on 26 February 2009 that she had not received it, and on 3 March the complainant therefore sent her a copy of her claim.

By memorandum of 18 March 2009 the Director of PSM/HRM informed the complainant that an independent panel would be established to investigate her allegations of harassment. She asked her to provide submissions substantiating her allegations, adding that the review of these allegations was “without prejudice to [her] Appendix D claim”. She renewed her request on 7 May stating that the panel could not begin its work until the complainant’s submission

substantiating her claim and the reply of the Director of PTC/AGR had been received.

The ABCC met on 9 June and concluded that the complainant's illness was work-related. It therefore recommended inter alia that her illness be deemed attributable to service and that she receive compensation for past and future medical expenses provided that they are certified by the Medical Adviser as reasonable and related to that illness. At a second session on 16 June the representatives of the Director-General on the ABCC noted that the Board had reached its conclusion without assessing the views of the complainant and of her supervisor on the circumstances that led to her illness. In this connection, the other members of the ABCC commented that the fact that the illness was service-incurred was unrelated to the issue of harassment and that it was unnecessary to await the outcome of the independent panel's deliberations before issuing a recommendation on the claim.

On 8 September 2009 the Secretary of the ABCC forwarded the ABCC's recommendations to the Managing Director of the Programme Support and General Management Division (PSM) for decision. By a memorandum of 1 October the Secretary of the ABCC notified the complainant of the Managing Director's decision of 17 September not to endorse the recommendations because no causal link between the illness and the performance of her official duties had been established and because the ABCC had issued its recommendations before having received the findings of the independent panel.

On 27 October the complainant asked the Director-General to convene a medical board to review the Managing Director's decision in accordance with Article 17 of Appendix D, which provides that a claimant may ask the Director-General to reconsider the determination of the existence of an illness attributable to the performance of his or her duties within 30 days of notification of the contested decision and, in the event of such a request, a medical board shall be convened to consider the medical aspects of the appeal and report its conclusion to the ABCC. The Director of PSM/HRM informed the complainant on 10 December 2009 that the Medical Adviser of UNIDO – the Medical

Director of the Vienna International Centre (VIC) Medical Service – had been asked to convene a medical board.

The ABCC considered the complainant's appeal at its meeting on 27 April 2010. It recommended that a medical board should not be convened since the medical aspects of her claim were not in dispute and since she had not provided new evidence on administrative or legal aspects of her claim. The ABCC added that she might be able to file an appeal against the decision of the Managing Director with the Joint Appeals Board. By a memorandum of 10 June the Secretary of the ABCC informed the complainant of the Committee's position and of the Managing Director's decision to endorse its recommendations. The complainant requested that the Secretary send her a copy of the ABCC's report, which she did on 29 July. The Secretary also forwarded to the complainant, on 9 August, a copy of the Managing Director's decision of 1 June 2010 to endorse the ABCC's recommendations. The complainant retired on 10 August 2010.

The complainant wrote to the Secretary of the ABCC on 26 August asking when she would receive the "settlement of [her] claim". The Secretary replied that she was not sure that she understood this request. The complainant then explained that the ABCC, during its meeting on 27 April, had stated that it maintained its previous conclusion that her illness was attributable to service and that the Managing Director had endorsed that recommendation. On 22 September the complainant wrote to the Director-General asking him to confirm that the payments were being processed with respect to her compensation claim. PSM/HRM replied on 6 October 2010 that her request seemed to be based on an incorrect reading of the decision of 1 June, since the Managing Director had decided that her illness was not work-related. Therefore, there were no outstanding "payments" or other actions to be taken by the ABCC. The complainant impugns the decision taken by the Managing Director on 1 June 2010.

B. The complainant asserts that she did not receive the Managing Director's decision of 1 June 2010 concerning her Appendix D claim until 9 August 2010. Indeed, neither that decision nor the minutes

of the ABCC's meeting were attached to the memorandum of 10 June by which the Secretary of the ABCC informed her of the rejection of her compensation claim. In that memorandum, she argues, the Secretary stated that the ABCC would review her claim if she cooperated with PSM/HRM concerning her allegations of harassment and added that she might "have possible recourse with the Joint Appeals Board procedures governing internal appeals". The content of the memorandum was so ambiguous that, in her view, it cannot be deemed to constitute notice of a final decision on her compensation claim. It became clear to her that the Administration considered the decision of 1 June to be a rejection of her compensation claim only after she had made enquiries and received, on 29 July, a copy of the minutes of the ABCC's meeting and, on 9 August, a copy of the decision of 1 June. Therefore, the ninety-day period for filing a complaint with the Tribunal started on 9 August 2010. She adds that the Secretary of the ABCC gave her inaccurate information concerning her right of appeal given that, with respect to an Appendix D claim, the final determination lies with the ABCC and not with the Joint Appeals Board.

On the merits, the complainant contends that there is no evidence that the decision of 1 June was taken by the Managing Director with a delegation of authority from the Director-General. She considers that the ABCC made a fundamental procedural error in recommending not to establish a medical board, since Article 17(b) of Appendix D directs that a "medical board shall be convened" in the event of an appeal concerning a compensation claim for service-incurred illness. Consequently, the impugned decision is flawed insofar as the Managing Director endorsed the ABCC's recommendation on that issue.

The complainant contests the reasons given for rejecting her compensation claim, i.e. that she had not shown that her illness was service-incurred as she had not proved her allegations of harassment. She explains that she did not lodge a harassment complaint against her supervisor. It was he who requested an investigation when he became privy to the reasons for her illness. She emphasises that the ABCC

recommended not establishing a medical board because the medical aspects of the case were not in dispute. Therefore, the Administration showed bad faith in insisting that she prove her allegations of harassment in order to establish that her illness was service-incurred. In her view, she gave sufficient details in the memorandum of 24 November 2008 for the Administration to proceed with the investigation of her allegations of harassment.

The complainant alleges that her dignity was undermined insofar as she had to submit her compensation claim through her supervisor, who was in fact responsible for her illness. She considers that the Appendix D requirement to submit such a claim through a supervisor should be waived where the illness in question was caused by that person.

Lastly, she alleges breach of confidentiality with respect to her Appendix D claim, in particular because the Managing Director became aware of the allegations of harassment she made in her memorandum of 24 November 2008 and of the opening of an investigation by PSM/HRM.

The complainant asks the Tribunal to set aside the impugned decision, to find that she is entitled to compensation under Appendix D for a service-incurred illness and to order UNIDO to implement the recommendation of the ABCC to that end. She seeks moral and material damages together with compound interest at the rate of 8 per cent per annum on any material damages awarded to her. She also claims costs.

C. In its reply UNIDO submits that the complaint is time-barred and hence irreceivable. It argues that the date of notification of the impugned decision is 11 June 2010 and not 9 August because the Secretary of the ABCC notified the complainant of the Managing Director's decision of 1 June by a memorandum dated 10 June 2010, which was e-mailed to the complainant the following day. It points out that the ABCC recommended in April 2010 not to establish a medical board and that the Managing Director clearly accepted that recommendation. The Secretary of the ABCC in the memorandum of

10 June 2010 did not imply that the Board had maintained its initial recommendation of 2009 to consider that the complainant's illness was service-incurred. The Organization also submits that the complainant has failed to exhaust internal remedies, given that she did not file an appeal with the Joint Appeals Board challenging the decision of 1 June, despite having been advised to do so by the Secretary of the ABCC. It further objects to the receivability of the complainant's claims based on a breach of good faith and confidentiality as they were raised for the first time before the Tribunal.

The Organization asserts that the Managing Director acted with a delegation of authority from the Director-General and provides the minutes of an ABCC meeting held in 1986, according to which Appendix D claims involving compensation exceeding 2,500 United States dollars shall be approved by the Director of the Division of Administration (ADM), who was subsequently referred to as the Managing Director of ADM and, since 2006, as Managing Director of PSM. It also provides a copy of a memorandum dated 26 August 2002, by which the then Director-General informed the Chairman of the ABCC that the Managing Director of ADM would approve compensation claims on his behalf where they involve compensation in excess of 10,000 United States dollars.

UNIDO explains that the Managing Director, in her decision notified to the complainant on 1 October 2009, merely noted that the causal link between the complainant's illness and the performance of her duties had not been established, and that in her decision of 1 June 2010 she endorsed the ABCC's recommendation that it was not necessary to establish a medical board. Therefore, both decisions left open the possibility that the causal link between the illness and the duties might be established and compensation awarded if the complainant cooperated with the investigation of her allegations of harassment. The Managing Director was entitled to reject the ABCC's finding that the complainant's illness was service-incurred given that its initial recommendation was not based on a proper factual record regarding the cause of her illness. The Organization contends that the

complainant has failed to substantiate her allegations of harassment and to cooperate in that respect. It adds that, while the Acting Medical Director of VIC Medical Service concluded that she was suffering from work-related stress, she did not identify any specific cause for her stress. Moreover, the complainant did not produce medical evidence that she was harassed, even though she asserted that this was the sole cause of her illness. It was therefore necessary to conduct an investigation to determine the cause of her illness and her entitlements under Appendix D.

The Organization points out that the ABCC rightly recommended that no medical board should be established because, according to Article 17(b) of Appendix D, a medical board should be convened to consider and report on the medical aspects of the appeal. Given that the medical aspects of the claim were not in dispute, the medical board had no role.

Regarding the requirement that Appendix D claims be submitted through the supervisor, it explains that this is an important procedural safeguard to ensure that such claims are based on facts and are indeed related to the performance of the claimant's duties. It asserts that the complainant's dignity was not impaired by her supervisor's actions and that he did not act in bad faith in not forwarding her Appendix D claim to the Secretary of the ABCC, given that in the memorandum of 24 November 2008 the complainant asked him "to clear" her claim. On the contrary, it submits that the complainant failed to act in good faith, as she made serious accusations against her supervisor but refused to substantiate them when given the opportunity to do so, as a result of which the investigation panel was unable to meet.

The Organization denies any breach of confidentiality, explaining that both the ABCC and the Managing Director, in their respective capacities as advisory and decision-making authority, were entitled to receive information directly relevant to the complainant's claim for compensation.

D. In her rejoinder the complainant maintains that the decision communicated to her on 10 June 2010 was ambiguous and could not

in good faith be considered as having triggered the time limit for filing a complaint. In the event that the Tribunal considers there was no final determination of her compensation claim, she asks it to refer the claim back to the ABCC for a new recommendation without any reference to whether her allegations of harassment have been proven or not.

She contests the Organization's assertion that she did not cooperate with the Administration, explaining that her memorandum of 24 November 2008 was sufficiently detailed to allow the independent panel to investigate her allegations of harassment.

E. In its surrejoinder UNIDO maintains its objection to receivability. It asserts that all recommendations for compensation issued by the ABCC are based on findings of fact, as the Committee must establish whether an illness is service-incurred or not. In the Organization's view, the medical evidence showed that the complainant had experienced burn-out, probably caused by work-related stress, but given that such stress could obviously be triggered by factors other than harassment, it argues that the medical evidence alone was not sufficient to support her allegations of harassment. It was therefore reasonable, fair and lawful to seek the views of an independent panel.

Regarding the alleged breach of confidentiality, it states that the complainant could have voiced her concerns at the time and sought permission to submit her claim directly to the Secretary of the ABCC, but she did not do so.

CONSIDERATIONS

1. In May 2008 the complainant was employed as Senior Secretary to the Director of PTC/AGR. On the complainant's account of events, on 29 May 2008 she attended the office of PSM/HRM seeking help for stress and panic, at which point she collapsed. She was transferred to the VIC Medical Service for treatment. She then went on certified sick leave and returned to work on 4 July 2008. These essential facts are not disputed by UNIDO.

2. What the Organization does not accept is that the complainant (as she asserts) had, for some time before this incident, been the subject of harassment by her supervisor, the Director of PTC/AGR, and that such an incident occurred on 29 May 2008 in a context in which she was abused and harassed, precipitating the need for the medical treatment. At this point it is convenient to refer to a memorandum from the Acting Medical Director, VIC Medical Service, dated 26 March 2009, in which it was stated that:

“The symptoms [the complainant] presented on 29 May 200[8] are well known stress related symptoms in the literature.

All (para) medical experts involved conclude that she is suffering from work related stress, since there are no other factors known to be present and this did not happen before. Based on an occupational health questionnaire to identify work related stress, it could be concluded that her illness was mainly of work related origin.

Therefore the sick leave from 29 May 200[8] until 3 July 200[8] and the bills covering the [general practitioner] and psychologist consultations and [her] medications [...] are reasonable and justified as well as related to this sick leave.”

3. On 15 September 2008 the complainant submitted an Appendix D claim with the ABCC seeking payment of medical expenses “incurred due to work related illness”. On 31 October the Secretary of the ABCC acknowledged receipt of the claim, requested additional information, and advised the complainant that her claim had to be addressed through her supervisor. The complainant sought to comply with the Secretary’s last request by way of a memorandum dated 24 November 2008 which she sent to the Director of PTC/AGR. It outlined her account of abuse by the Director on 29 May 2008 and abuse by him more generally. Rather than forwarding this document to the ABCC, the Director wrote to the complainant on 16 December 2008 informing her he was “not in a position to endorse” what she had written and advising her that he had requested the Director of PSM/HRM to establish an independent panel “to carry out a detailed analysis of the accusations [she had] made”.

4. Ultimately, on 3 March 2009, the complainant forwarded a copy of her 24 November 2008 memorandum directly to the Secretary of the ABCC. By mid-March 2009 the Director of PSM/HRM informed the complainant that an independent panel would be established as requested by the Director of PTC/AGR. She asked the complainant to make a submission substantiating her claim of harassment. The Director noted that the review of her allegations by the panel was without prejudice to her compensation claim. At no point did the complainant make the submission as requested.

5. At meetings on 9 and 16 June 2009 the ABCC considered the complainant's claim. The ABCC had before it the memorandum of 26 March from the Acting Medical Director and was made aware of the fact that an independent panel was being set up. The minutes of the meetings indicate that some members of the Board felt that the outcome of the investigation by the panel should be awaited. However, the minutes also record that:

“After a long discussion and based on the Medical Adviser's opinion that the claimant's illness was mainly of work related origin, the ABCC deemed the claimant's illness attributable to service.”

6. The Board made four recommendations. The first, as stated above, was to “deem the illness attributable to service”. The others were consequential recommendations including one for the payment of the amounts claimed for medical expenses in the complainant's claim for compensation.

7. These recommendations were rejected by the Managing Director of PSM, acting with authority from the Director-General. In a note dated 17 September 2009 the Managing Director stated that:

“Under the provisions of Appendix D, for an illness to be recognized as service-incurred a causal link has to be established, on a basis of evidence, between the illness and the performance of official duties by a staff member. The ABCC passed a recommendation without awaiting the results of the review, by [an independent] panel, of the claimant's allegations. In addition, I note that a panel could not be set up in the absence of the staff

member's reply to the memorandum dated 7 May 2009 to the staff member. In the absence of the outcome of a panel review the basis for the claim cannot be established, thus the link between the illness and service with UNIDO can also not be drawn."

8. A copy of this note was sent to the complainant with a memorandum of 1 October 2009 from the Secretary of the ABCC, and on 27 October the complainant wrote to the Director-General requesting that a medical board be convened to review her claim pursuant to Article 17 of Appendix D. This was not done. The reasons are apparent from the minutes of a meeting of the ABCC held on 27 April 2010. The minutes recount a long discussion about the case setting out its history and then record the views of the Board as follows:

"The Members agreed that the medical aspects of the case were not in dispute and therefore it wasn't necessary to convene a medical board. A possible recourse available to the claimant may be to file an appeal against the Managing Director's decision on the ABCC's recommendation dated 16 June 2009 with the UNIDO Joint Appeals Board.

The Board concluded that the medical aspects of the case were not in dispute and the claimant had not provided any new evidence on administrative or legal aspects of her claim. Therefore, the ABCC recommended not to convene a medical board to deal with [the claimant's] appeal. The Secretary should inform the claimant accordingly."

9. The ABCC's recommendation not to convene a medical board was submitted to the Managing Director of PSM, who approved it on 1 June 2010. It is this decision that the complainant impugns before the Tribunal.

10. On 10 June 2010 the Secretary of the ABCC sent the complainant a memorandum. The subject matter was identified as the complainant's appeal against the decision not to approve her claim of September 2008. The Secretary noted and summarised the complainant's letter of 27 October 2009. She noted that the ABCC had considered her appeal on 27 April 2010. She further stated that:

"In accordance with Article 17 of Appendix D 'A medical board shall be convened to consider and to report to the Advisory Board on

Compensation Claims on the medical aspects of the appeal'. The ABCC concluded that the medical aspects with regard to your claim were not in dispute and that you had not provided any new evidence on administrative or legal aspects of your compensation claim. Therefore, the ABCC recommended not to convene a medical board. The Managing Director, PSM, has approved the recommendation.”

11. The Secretary then recalled the Managing Director’s original decision of 17 September 2009 and noted that the ABCC had expressed two opinions. The first was that if the complainant wanted the ABCC to proceed with a review of her claim, she would need to cooperate with the PSM/HRM in the creation and work of the panel. The second observation was that a possible recourse might be to file an appeal against the Managing Director’s decision with the UNIDO Joint Appeals Board.

12. On 6 August 2010 the complainant asked the Secretary of the ABCC for a copy of the Managing Director’s decision on her appeal. The actual text of the decision was sent by e-mail to the complainant on 9 August. The complainant filed her complaint with the Tribunal on 5 October 2010.

13. For reasons that will become apparent shortly, it is unnecessary to discuss the complainant’s contentions concerning the impugned decision. The Organization argues that the complaint is irreceivable on two main grounds. The first is that the complaint was filed out of time. That is, the complaint was not filed within ninety days of the complainant being notified of the decision, as mandated by Article VII, paragraph 2, of the Tribunal’s Statute. The second ground is that the impugned decision was not a final decision and the complainant failed to exhaust the internal means of redress.

14. However, before considering the question of receivability, one aspect of this case should not pass without comment. The approach of the Organization, which is a reflection of the position adopted by the Managing Director, involves an assumption which would not, in all cases, be correct. The assumption is that work-related

stress said by an employee to be the result of abuse and harassment, can only arise if, as an objective fact, there has been abuse and harassment. Such an approach takes no account of the possibility that stress can be the product of perceptions and not reality. Put slightly differently, an employee may be exposed to conduct which, viewed objectively, would not be characterised as abuse and harassment. But it does not follow that exposure to that conduct could not induce work-related stress in an employee who perceived that conduct as abusive and harassing. For this reason the answer to the question that was to be considered by the independent panel, i.e. whether the complainant had been subjected to “constant harassment and abuse” by her supervisor would not necessarily have answered the question raised by the complainant’s claim for compensation considered by the ABCC. Her claim raised the question of whether her supervisor’s conduct caused a stress-related illness not whether his conduct, viewed objectively, could be characterised as abuse and harassment. In this respect, the original conclusion reached by the ABCC following its meetings of 9 and 16 June 2009 did not depend on the independent panel reaching a conclusion that her supervisor had engaged in abuse and harassment.

15. UNIDO argues that the complainant was notified of the Managing Director’s decision on 11 June 2010 and it produces as an Annex to its reply the e-mail forwarding the decision. Accordingly, the ninety-day time limit expired before 5 October 2010. The complainant argues she was not notified of the decision until 9 August 2010 and that her complaint was filed within the prescribed time limit.

16. The memorandum of 10 June 2010 does, on its face, contain an accurate account of the decision of the Managing Director to accept the recommendation of the ABCC not to convene a medical board. However, the complainant resists this conclusion by contending that the decision was ambiguous as was the memorandum. The complainant also contends that the memorandum was misleading, in particular, by the suggestion that she could appeal to the Joint Appeals Board.

17. The Tribunal accepts that the effect of the decision of the Managing Director on the fate of the complainant's claim of 15 September 2008 and the review she sought on 27 October 2009 is far from clear. However, whatever may be the effect of the decision, what was decided by the Managing Director is not unclear. The decision of the Managing Director was to accept the recommendation of the ABCC not to convene a medical board. That is precisely what is said in the memorandum of 10 June 2010.

18. The complainant was notified of the decision on or about 11 June 2010. Her complaint was not filed within the ensuing ninety days. Accordingly, the complaint is irreceivable because it was filed outside the period specified by Article VII, paragraph 2, of the Statute of the Tribunal. Consequently, it is unnecessary to deal with the main additional argument advanced by the defendant about receivability, namely that the decision was not final.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Dolores M. Hansen
Michael F. Moore
Catherine Comtet