G. (No. 4)

v.

UNIDO

125th Session **Judgment No. 3949**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A. G. against the United Nations Industrial Development Organization (UNIDO) on 16 September 2014 and corrected on 6 November 2014, UNIDO's reply of 5 March 2015, the complainant's rejoinder of 22 June and UNIDO's surrejoinder of 28 September 2015;

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

Having examined the written submissions;

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

The complainant challenges the decision to dismiss as irreceivable his claims for compensation for injury or illness attributable to service.

Facts relevant to this case are to be found in Judgment 3669, delivered in public on 6 July 2016, and Judgments 3840 and 3841, delivered in public on 28 June 2017.

In November 2012 the complainant, who had been on sick leave since November 2011, was asked by the Administration to undergo an independent medical assessment pursuant to Staff Rule 108.03(viii), which provides, inter alia, that a "staff member who, in the opinion of the Medical Officer of the Organization, is unfit for duty may be required at any time to submit a medical certificate as to his or her

condition or to undergo examination by a medical practitioner named by the Director-General". An independent medical examination was carried out by Dr G. in January 2013.

On 20 March 2013 the complainant submitted a claim for compensation for service-incurred injury or illness, alleging that in his report Dr G. had "confirmed that the severe damages and injuries to [his] health [we]re work related". In subsequent communications the Secretary of the Advisory Board on Compensation Claims (ABCC) asked the complainant to provide details of when the alleged injury or illness had occurred, as such a claim must be submitted within four months of the injury or onset of the illness, as required by paragraph 3(b) of Administrative Circular AC.75 on the submission of claims for compensation in the event of death, injury or illness attributable to service (hereinafter "Circular AC.75"). Paragraph 3(b) also provides that: "While the Director-General may accept a claim later, in practice this procedure is limited to exceptional circumstances." The Secretary provided a copy of Circular AC.75, as well as a copy of Appendix D to the Staff Rules concerning "Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of UNIDO" and stressed that it was for the ABCC to assess the origin of his illness. The complainant replied that all the necessary information was contained in Dr G.'s report and did not specify the date of onset of his injury or illness.

In August 2013 the ABCC, which had sought the opinion of UNIDO's Medical Adviser, found that the onset of the complainant's illness was November 2011 and, in the absence of compelling reasons which could have prevented the complainant from submitting his claim on time, it recommended that his claim be dismissed as irreceivable. By a letter of 5 September 2013, the complainant was informed that the Director-General had decided to accept that recommendation on 4 September.

The complainant filed an appeal against that decision with the ABCC in October 2013, alleging that the true nature of his illness had been diagnosed only in February/March 2012 and that he had brought to the Organization's attention his claims for compensation in two

previous internal appeals filed in March and August 2012, which led to Judgments 3669 and 3841, respectively.

In November 2013 the complainant, who had returned to work in August 2013, went on sick leave until the expiry of his fixed-term contract on 31 December 2013. On 12 March 2014 he made an additional claim for compensation under Appendix D with respect to his sick leave as of November 2013.

The ABCC met in April 2014 to review his case and unanimously agreed to reconfirm its earlier recommendation to dismiss his claim with respect to his first period of sick leave as irreceivable, on the ground that the "additional information" brought forward by the complainant in October 2013 did not include any new evidence or facts. With respect to his illness during the second period of sick leave, the ABCC noted that the Medical Adviser had confirmed that he had not received any new medical information or diagnoses on the complainant. By a letter of 22 April 2014 the ABCC Secretary informed the complainant that the Director-General had decided to approve the recommendation of the ABCC on 16 April.

On 9 May 2014 the complainant asked the Director-General to review his decision to deem his compensation claims not receivable. By a letter of 19 June 2014 the complainant was informed that the decision of 22 April constituted the final decision, in accordance with Article 17 of Appendix D to the Staff Rules, and that the date of receipt of the letter was to be considered as the date of notification of the Director-General's final decision. That is the impugned decision.

The complainant asks the Tribunal to award him compensation pursuant to Appendix D, including reimbursement of lost salary, benefits and emoluments, and the restoration of sick leave. He claims actual and consequential damages for loss of career, reimbursement of all medical expenses incurred as a result of the Administration's failure to provide a safe work environment and the failure to prevent undue injury. He seeks moral damages in the amount of at least 100,000 Swiss francs, as well as costs, with interest on all amounts awarded.

UNIDO submits that some of the complainant's claims for relief are irreceivable for failure to exhaust internal remedies and that the complaint should be dismissed in its entirety.

CONSIDERATIONS

1. The complainant is a former staff member of UNIDO. On 20 March 2013 and later on 12 March 2014 he made claims for the payment of compensation under Appendix D of the Staff Rules. The ABCC concluded, in relation to the March 2013 claim, that it was irreceivable because it was out of time and recommended that it be dismissed. The Director-General accepted the recommendation and dismissed the claim on 4 September 2013. The ABCC concluded, in relation to the March 2014 claim, that it was irreceivable and recommended that it be dismissed. The Director-General accepted this recommendation and dismissed the claim on 16 April 2014. The primary and narrow issue raised in these proceedings is whether these decisions to dismiss the claims were correct.

2. Pursuant to Staff Rule 108.5, a staff member is entitled to compensation in the event of death, injury or illness attributable to the performance of official duties under Appendix D. Article 12 of Appendix D, entitled "Time limit for entering claims", provides that claims for compensation shall be submitted within four months of, relevantly, the onset of the illness, provided, however, that in exceptional circumstances the Director-General may accept for consideration a claim made at a later date. Circular AC.75 specifies the procedures for making a claim and adverts to the need for it to be made within four months of, amongst other things, the onset of an illness, though it also adverts to the discretionary power of the Director-General to exceptionally accept a claim submitted beyond that period.

3. The Tribunal has accepted that it is not always necessary for there to be strict compliance with the requirements of Circular AC.75 (see, for example, Judgments 3668, consideration 13, and 3004, consideration 5). This is appropriate having regard to the purpose and

object of Appendix D, namely to provide benefits to staff members whose work has negatively impacted on their health including, in the most extreme case, causing the death of the staff member. Nonetheless, those requirements, and in particular the time limit derived from Appendix D itself, exist for a purpose. They enable the Organization to be made aware, in a timely way and with some detail, that a claim is being made and therefore its liability, potentially, is being enlivened. The time limit serves several purposes. One is that it enables an investigation to be made about the cause of the death, injury or illness and to examine whether it is work-related at a point in time when the facts are not stale. Medical opinions can be obtained at a time proximate to the time of alleged causation and, if relevant, information can be obtained from those who may have observed an event or events said to have caused the death, injury or illness when memories are fresh. Another is that it enables an organization and, if relevant, its insurance broker to monitor over time potential financial and related liability arising from claims that might succeed.

4. It was not in issue that the complainant's alleged work-related illness first became apparent to him in February 2012 and that he was required to make his claim within four months. Any claim made beyond that time limit was prima facie time-barred. The complainant contends that he made the Organization aware of his illness on at least two occasions in 2012. However, the communications on which this contention is based cannot reasonably be viewed as a claim or claims for compensation under Appendix D. No reference is made in those documents to Appendix D, nor is anything said which might reasonably be taken to have been even an indirect reference to that Appendix and the benefits it confers.

5. An allied contention of the complainant is that UNIDO is barred from objecting to the receivability of the claims because, knowing of his alleged work-related illness, it failed to assist him in making the claims in the specified way. Thus, it is argued, UNIDO breached its duty of care towards him. There is a factual issue in these proceedings about when the complainant was informed of the

requirements of Circular AC.75 and provided with a copy of the document. However, it is tolerably clear that in the context of an internal appeal of the complainant, UNIDO referred to the need for claims to be made in accordance with Circular AC.75 in a submission dated 7 May 2012 and annexed to that submission a copy of the Circular. The complainant clearly received that submission and responded with a rejoinder dated 21 June 2012. A clear inference can be drawn that, at the latest, the complainant was aware, or at least should have then been aware, of the requirements of Circular AC.75. The complainant's plea that UNIDO breached its duty of care is unfounded.

6. The conclusion that the 20 March 2013 claim was irreceivable as being out of time was open to the ABCC and the circumstances do not suggest that the Director-General's acceptance of the ABCC's recommendation to dismiss the claim on that basis was, in the circumstances of the case, vitiated by failure to exercise the discretionary power to accept an out-of-time claim as provided in Article 12 of Appendix D and paragraph 3(b) of Circular AC.75. No error of law or other error attended the dismissal of the claim.

7. The claim made on 12 March 2014 does not, in terms, purport to relate to any illness or injury different from the illness which had been the subject of the rejected claim of 20 March 2013. The 12 March 2014 claim is couched in general and sweeping terms and the ABCC and the Director-General were entitled, as they did, to treat it as a repetition of the claim earlier rejected. The complainant relies on Article 17 of Appendix D that provides for the reconsideration of a determination by the Director-General of, in substance, the merits of a claim for compensation for injury or illness attributable to the performance of official duties. The complainant contends, it appears, that because this second claim was rejected, he was deprived of the opportunity conferred by Article 17. However, this plea is misconceived as Article 17 is not concerned with a claim rejected as being out of time. In the result, the challenge to the rejection of the 12 March 2014 claim is unfounded.

8. In his pleas, the complainant invites the Tribunal to adjudicate on his claim for benefits under Appendix D. There are a multitude of procedural and substantive reasons why that request cannot be entertained and should be dismissed. Suffice it to mention one. It is not the Tribunal's role, in a case such as the present, to adjudicate on the merits of a claim for compensation on medical grounds in the absence of a consideration of the question by a body that has been established for that purpose, if any, within an organisation (such as the ABCC) and in the absence of considered medical opinions addressing the question (see generally Judgment 3538, consideration 12).

9. The complainant sought an oral hearing. However, the Tribunal is satisfied the case can be adequately and fairly decided on the material in the brief, reply, rejoinder and surrejoinder.

10. In the result, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ