Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

BEZZICCHERI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
François Loriot

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

her condition was benign and would not require surgical intervention, she had demonstrated a slow healing process. The doctor therefore recommended at least four month of part-time rest. The doctor recommended that while at work on a part-time basis, she should avoid activities involving traction or the lifting of weight, as well as prolonged postures in a non-ergonomic environment.

8. According to the Applicant, in September 2008, while in Italy, she consulted a lawyer who instructed her to immediately submit a claim for disability benefits.

9. On 16 October 2008, upon approval by the UN Medical Service of the four-month part-time sick leave recommended by her doctor in Italy, the Applicant returned to work on a part-time basis until 15 January 2009.

10. On 26 December 2008, the Applicant emailed three staff members at UNODC. The subject line of the email read "DISABILITY BENEFIT ? / QUESTION" and the email stated:

> Dear Colleagues,
>
> I was told to refer to you with regard to question on above.
>
> I have been sick due to wrong office furniture / lack of ergonomic environment in work place. I was also forced to take prolonged sick leave to heal enough to work. In this regard and with reference to the UN Secretariat Administrative Instruction on Sick Leave – ST/AI/2005/3 – Section 3.2, I would like to ask what are the premises to obtain disability benefit, provided I may be entitled to it.

11. On 15 January 2009, the Applicant returned to work on a full-time basis. She submits that during the period of 15 January 2009 to 15 July 2009, she made "new efforts to localize […] UN office where she could address her claims".

12. On 7 September 2009, the Applicant sent an email which stated that she had already sent all her medical reports to both UN Medical Centre and the Van Breda [the Applicant's insurance company]". In addition, the Applicant attached "the most salient medical reports".

Headquarters, New York, is responsible to consider claims under Appendix D.

Please find attached below information on the procedures for submission of compensation claims and the claim form. You can submit the claim form and all supporting documentation including medical reports directly to the Advisory Board on Compensation Claims at the United Nations Headquarters at New York or, if you so wish, submit your claim and any documentation to the Social Security office at UNODC Headquarters Vienna, for onward transmission to the Claims Board.

Consideration of a claim under Appendix D by New York Headquarters may take some time, therefore, medical claims may be submitted to Vanbreda first. If compensation is granted under Appendix D, Vanbreda will be refunded for the reimbursements made relating to the claim and the claimant would be paid the remaining costs incurred.

(b) The rules and regulations of

17. On 9 November 2009, the Applicant submitted a one page form to the ABCC entitled "Claim for compensation under Appendix D". In her claim the Applicant stated that the nature of the injury/illness was spinal canal stenosis and the date of injury/illness was 1 January 2008. In the part concerning the nature of the claim, the Applicant checked the box "Reimbursement of medical expenses". She also filled in the line "Other (please explain):", stating the following:

> Compensation under article 11 of Appendix D to the Staff Rules related to permanent injury to the spine due to official duty at work station.

18. In the section "Additional comments and/or explanations", the Applicant included the following comment:

> The reason why I am only applying for compensation [illegible] is because we were so advised only on 2 October '09 (please see attached email).

19. The Applicant also included an attachment to her claim to "clarify the reasons for the delay of this submission as well as its necessity". The Applicant explained to the ABCC that

> inquiries regarding compensation claim/disability benefit began soon after hospitalisation in June 2008. However, despite repeated requests supported by my colleagues including the Representative and my immediate supervisor Regional HIV Adviser, specific advice in this regard was only received on 2 October 2009 … . On 4–23 October I left Thailand to attend a specialised treatment for canal stenosis. Hence this request was soon formulated and prepared on 9 November 2009, immediately after my return and as soon as work schedule permitted. …
> Kindly note that all medical certificates that cover the whole period since hospitalisation in Bangkok in June 2008, were duly sent to the Medical Service at the United Nations Office on Drugs and Crime Headquarters in Vienna, Austria as we were advised to do.

20. On 23 November 2009, the Appli

24. On 11 March 2011, the Applicant submitted a request for management evaluation with the Management Evaluation Unit ("MEU") of the ABCC's decision to find her 9 November 2009 claim for compensation time-barred.

25. On 13 April 2011, the MEU informed the Applicant that "[p]ursuant to Staff Rule 11.2(b), a staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies [such as the ABCC] is not required to request a management evaluation. In light of this, [the Applicant's] request is not receivable by the [MEU]".

26. On 9 June 2011, the Registry acknowledged receipt of the application contesting the ABCC's decision to reject her claim for compensation as time-barred and served it on the Respondent on 10 June 2011. On 7 July 2011, the Respondent filed his reply stating that the ABCC's finding that her claim was not receivable was reasonable. The Respondent also submitted that the application before the Tribunal was time-barred as it had not been submitted to the Dispute Tribunal within the applicable time limits.

27. On 5 September 2012, the Tribunal, by Order No. 180 (NY/2012), instructed the Applicant to file a submission, if any, relating to the Respondent's claim that her application was not receivable *ratione temporis*.

28. On 18 September 2012, the Applicant responded that her application had originally been submitted by email on 12 May 2011. The Applicant submitted that,

29. On 3 October 2012, the Respondent filed a response to the Applicant's submission regarding receivability, stating that her contentions had no merits and that she had not produced any credible evidence in support of her claim.

30. Upon having reviewed the parties' responses, the Tribunal determined, by Order No. 331 (NY/2012), dated 4 December 2012, that the Applicant had initially sent her application to the Tribunal on 12 May 2011 and that its delivery was not completed due to a technical issue. The Tribunal therefore decided that the Applicant's application was filed within the time limit and was receivable *ratione temporis*.

31. On 1 and 7 January 2014, the parties, upon direction by the Tribunal in Orders No. 347 (NY/2013) and No. 8 (NY/2014), filed their closing submissions.

Applicant's submissions

32. The Applicant states that the ABCC decision was erroneous because it did not take into account the exceptional circumstances, namely being hospitalized and suffering from a total disability, which made it impossible for her to submit a claim within four months from the date of injury or the onset of the illness. She stated that the disability appeared gradually, first as a muscle strain, only slightly symptomatic at the start, but progressively and slowly worsening. The date of the onset of the illness is unknown. The Applicant was put under intravenous morphine for three days during her hospitalization in Thailand, she continued to be hospitalized in Italy and she was not in a position to file any claim before going back to the office. The information related to the procedure was not provided to her until late 2009. The claim for compensation was submitted as soon as she could physically do so taking into consideration her exceptional circumstances. Upon her return to the workplace, the Applicant continued to seek advice from UNODC in Vienna to instruct her on the ABCC disability and claim process. However, her claim could only be submitted in November 2009, once she had received clear instructions;

33. In her closing submissions the Applicant underlined that

> 10. Though her post-hospitalization period after January 2009, when Applicant returned to work full-time, she made every effort to seek advice from HRMS and UNODC Regional Centre in Bangkok, amidst her daily exigencies of service and the numerous limitations and medical treatments required on a weekly basis. In the instant case, Respondent has never explained nor proven that it had responded timely to the Applicant's information requests. As established by the Applicant, prior to 2 October 2009, the Respondent's officials were often contacted and knew the Applicant's health conditions and efforts to file her claims, but delayed and neglected their final answer until 2 October 2009. The Respondent has never explained the reasons for its long delays to provide the Applicant with the necessary forms and information. The Applicant should not be held responsible for the Respondent's own negligence.

34. The Applicant requests the rescission of the Secretary-General's decision that her claim before the ABCC is time-barred. She also requests that the Tribunal remand the claim to the ABCC for adjudication on a full and fair basis and a three-month net salary compensation for the stress and delay. In the closing submissions filed on 20 January 2014, she amended her request for moral damage compensation to an amount of 12 months' salary.

Respondent's submissions

35. The Respondent's main submissions in his reply and closing submissions regarding the receivability of the Applicant's claim before the ABCC are that

> …the Applicant was diagnosed with carpal stenosis on 1 January 2008. She did not submit a claim for compensation to the ABCC until 9 November 2009…over one year and six months past the deadline.
>
> The ABCC concluded that the explanation provided by the Applicant for the delay in filing her claim did not constitute exceptional circumstances and was insufficient to waive time limits set out under article 12 of Appendix D. …
>
> …The Secretary-General's approval of the recommendation of the [ABCC] not to waive the time lim

> were exceptional circumstances that warranted the waiver of the time limit under Article 12 of Appendix D. The Applicant's medical condition did not justify her delay of one and a half years in submitting her claim for compensation. The Applicant cannot rely upon her own ignorance of the staff Rules and administrative procedures for the submission of a claim as an excuse for not meeting the time limit.
>
> …
>
> The Dispute Tribunal is to determine if the decision not to waive a time limit was legal, rational, and procedurally correct (*Sanwidi* [2010-UNAT-084]). The Dispute Tribunal does not substitute its own judgment for that of the decision-maker.

Consideration

Receivability

36. The Tribunal, by Order No. 331 (NY/2013), found that the application on the merits dated 12 May 2011 was filed within the time limit of 90 days from the day on which the Applicant received the decision

Rules governing compensation in th

condition worsened resulting in her hospitalization in early June 2008 in Bangkok. On 9 June 2008, the Applicant traveled at her own cost to Rome where she was again hospitalized. Following her hospitalization and medical examinations, the Applicant, in September 2008, consulted a lawyer in Italy who advised her to immediately submit a claim for compensation/disability benefit to the United Nations.

45. During this period, the Applicant was placed on sick leave on a full time basis from 15 June 2008 to 15 October 2008. The Applicant returned to work on a part-time basis on 16 October 2008 until 15 January 2009 at which point she returned to work on a full time basis.

46. The evidence produced by the Applicant indicates that on 26 December 2008, she emailed three colleagues for the purpose of obtaining clear information as to how and where to apply for a disability benefit. The record does not indicate whether anyone responded to this email or whether the Applicant followed-up to obtain a response thereto. The Applicant claims that despite her efforts nobody from her office was able to provide her with information relating to the relevant legal provisions and/or the competent body responsible for receiving such a claim until 2 October 2009.

47. On 2 October 2009, the Applicant made another query on the issue of disability benefits to HRMS who responded to her request that same day. In their response, HRMS provided her with clear information about disability benefits, medical expenses and the competent body responsible for addressing such claims.

48. The Tribunal considers that ignorance of the law is not an excuse and staff members are presumed to be aware of and know the regulations and rules applicable to them (*El-Khatib* 2010-UNAT-029; *Rahman* 2012-UNAT-260). The rules governing compensation in the event of illness attributable to the performance of official duties are contained in Appendix D to the Staff Rules. Consequently, all staff members, based on their obligation to know, be aware of, and respect all the staff

regulations and rules are presumed to be aware of the content Appendix D to the Staff Rules.

49. As evidenced by the Applicant's claim before the ABCC, she was aware that the deadline for her to submit a claim under Appendix D had expired resulting in her explaining that there were exceptional circumstances for the incurred filing delay which rendered her request receivable.

50. The Tribunal notes that iSeek (the United Nations internal web portal) was launched in Bangkok on May 2006 at which point all of the United Nations Staff Regulations and Rules, including Appendix D, became available to staff members within the UN Library section of iSeek. The Tribunal further notes that Appendix D is directly referenced in the index, and in the body, of the Staff Regulations and Rules.

51. Taking into consideration the Applicant's health condition and her difficult recovery during October 2008 and January 2009, the Tribunal considers that the latest date by which time can be considered to have started to run under Appendix D was four months from the date on which she returned to work on a full time basis – 15 January 2009. Consequently, the last date by which she could have filed any claim under Appendix D to the Staff Rules was 15 May 2009.

52. The Tribunal concludes that the ABCC correctly determined that the circumstances presented by the Applicant could not result in a waiver of the deadline for requesting the reimbursement of the costs for the June 2008 plane ticket and therefore correctly rejected this part of the Applicant's request. The cost of the ticket was known to the Applicant since June 2008 and there are no plausible explanations as to why she did not request its reimbursement together with her other medical costs from the same 2008 time period.

53. The second request submitted by the Applicant, as part of her 9 November 2009 claim for compensation, concerns the reimbursement of the costs of

57. Should a staff member not be able to file a claim for compensation within the imparted four months deadline, he or she may have the claim considered by the Secretary-General at a later date provided he or she can present exceptional circumstances, whether subjective and/or objective, to justify the delay.

58. The Tribunal considers that objective circumstances exist when, for example, the initial diagnosis or treatment of a progressive illness changes or is completed in accordance with the evolution of the illness or the recommended new treatment, neither of which can be foreseen by the treating physicians and, therefore, by the staff member, within four months from the onset of the illness. In such cases, the Tribunal is of the view that the interpretation of art. 12 of Appendix D must respect the principles of equity and non-discrimination in order to permit an equal consideration of the claims filed by staff members in relation to future medical, hospital or directly related costs which were not known to them within four months from the date of the onset of their illness.

59. Consequently, the established deadline should be calculated from the date of the new diagnosis or from the date on which the costs of the new treatment become effectively known by the staff member. Otherwise, a staff member's right to claim all the costs related to his or her illness will remain illusory and without substance. The Tribunal also considers that it would be absurd and unreasonable to expect a staff member to formulate a compensation claim within four months from the onset of the illness for possible future costs related to his or her illness which are unknown at the time. This conclusion is supported by the fact that the cost of the A2012 treatment was reimbursed to the Applicant.

60. In the present case, the Tribunal finds that the Applicant's illness resulted in the need for an ongoing evaluation as well as the exploration of new treatments. The Applicant was therefe

)8.4(e)8.6ntd and torsequostco

9 November 2009, therefore filed her compensation claim within a reasonable amount of time (as soon as possible).

61. The Tribunal considers that the ABCC erred in finding that the exceptional circumstances presented by the Applicant did not result in an objective justification for the delays incurred and finds that her request for the reimbursement of the October 2009 Ayurveda treatment was timely filed before the ABCC.

62. In view of the Tribunal's finding that the Applicant's claim presented exceptional circumstances justifying the delays incurred in the submission of her claim, the ABCC's 14 February 2011 decision shall be partially rescinded. The Applicant's request for compensation of the October 2009 Ayurveda treatment is to be remanded to the ABCC.

63. The Tribunal takes note that the Applicant: (i) between 2010 and 2012 underwent the same treatment (Ayurveda) on a yearly basis (18 to 30 October 2010, 10 to 29 October 2011 and 6 to 28 October 2012); (ii) filed timely requests for the reimbursement of these treatments; (iii) the only costs that were reimbursed were those of the 2012 treatment; and (iv) that in view of her medical condition, the United Nations Joint Staff Pension Fund is currently considering placing her on disability. These factors shall be fully and fairly considered by the ABCC in the light of art. 11.2 of Appendix D. The Tribunal considers that the present decision represents per se (itself) a sufficient remedy for the distress caused to the Applicant

employment, the right to just and favorable conditions and the right to protection against unemployment.

70. It results from the above that the right to just and favorable work conditions is a fundamental right and, in order to protect and promote it, the ILO adopted several conventions, as detailed below which establish mandatory legal provisions regarding safe and healthy working environment.

71. The ILO Convention on Occupational Safety and Health Convention (Convention No. 155) of 1981 states:

> Article 16
>
> 1. Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.
>
> …
>
> Article 19
>
> There shall be arrangements at the level of the undertaking under which—
>
> (a) workers, in the course of performing their work, co-operate in the fulfilment by their employer of the obligations placed upon him;
>
> (b) representatives of workers in the undertaking co-operate with the employer in the field of occupational safety and health;
>
> …
>
> Article 20
>
> Co-operation between management and workers and/or their representatives within the undertaking shall be an essential element of organisational and other measures taken in pursuance of Articles 16 to 19 of this Convention.
>
> Article 21
>
> Occupational safety and health measures shall not involve any expenditure for the workers.

72. The ILO Convention on Occupational Safety and Health Recommendation (Convention No. 164) of 1981, *Recommendation concerning Occupational Safety and Health and the Working Environment*.

> I. Scope and definitions
>
> 1
>
> (1) To the greatest extent possible, the provisions of the Occupational Safety and Health Convention, 1981, hereinafter referred to as the Convention, and of this Recommendation should be applied to all branches of economic activity and to all categories of workers.
>
> …
>
> II Technical Fields of Action
>
> …
>
> 4. With a view to giving effect to the policy referred to in Article 4 of the Convention, and taking account of the technical fields of action listed in Paragraph 3 of this Recommendation, the competent authority or authorities in each country should—
>
> (a) issue or approve regulations, codes of practice or other suitable provisions on occupational safety and health and the working environment, account being taken of the links existing between safety and health, on the one hand, and hours of work and rest breaks, on the other;
>
> (b) from time to time review legislative enactments concerning occupational safety and health and the working environment, and provisions issued or approved in pursuance of clause (a) of this Paragraph, in the light of experience and advances in science and technology;
>
> (c) undertake or promote studies and research to identify hazards and find means of overcoming them;
>
> …
>
> 8. There should be close co-operation between public authorities and representative employers' and workers' organisations, as well as other bodies concerned in measures for the formulation and application of the policy referred to in Article 4 of the Convention.
>
> IV. Action at the Level of the Undertaking
>
> …
>
> 14. Employers should, where the nature of the operations in their undertakings warrants it, be required to set out in writing their policy and arrangements in the field of occupational safety and health, and the various responsibilities exercised under these arrangements, and to

> bring this information to the notice of every worker, in a language or medium the worker readily understands.
> …
> 17. No measures prejudicial to a worker should be taken by reference to the fact that, in good faith, he complained of what he considered to be a breach of statutory requirements or a serious inadequacy in the measures taken by the employer in respect of occupational safety and health and the working environment

73. The ILO Convention on Promotional Framework for Occupational Safety and

the contract. An efficient policy is required to be established and equally implemented in all duty stations and the recommendations made by the specialists in their periodic reports must be followed.

76. The Tribunal notes that on 9 February 1999 the Secretary-General issued ST/IC/1999/14 –Guidelines for ergonomic work

a defined and important role, must be actively involved in assessing the occupational environment for staff members, including by making concrete proposals to management.

79. A positive example in this sense is ST/SGB/2003/19 (Basic security in the field: staff safety, health and welfare) which was adopted in late 2003. Section 3 of ST/SGB/2003/19 establishes clear obligations and deadlines, both for the staff members and the heads of departments, by stating that all the staff members must complete the mandatory e-learning programme as soon as possible and no later than 31 March 2004 and heads of departments and offices are responsible for ensuring completion of the learning programme by their staff and others for whom they are responsible, including by providing them with appropriate time and resources.

80. Therefore, it is advisable that such a model be followed when reviewing the current and future regulations and rules on occupational health and safety.

(*Signed*)

Judge Alessandra Greceanu

Dated this 10th day of April 2014

Entered in the Register on this 10th day of April 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York