



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DAHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Nicole Washienko, OSLA

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

INTRODUCTION

1. On 19 October 2016, the Applicant filed an application in which she contested the decision of the Advisory Board on Compensation Claims (ABCC) to deny her claim for compensation under Appendix D to the Staff Rules on the ground that it was not filed within the requisite time limit.

2. It is the Applicant's case that the ABCC was incorrect in finding that her claim was not filed in time. Further that in rejecting her request for a waiver of the time limit in light of the exceptional circumstances in her case, the ABCC did not properly and lawfully exercise its discretion.

3. By reply dated 21 November 2016, the Respondent submitted that the claim should be rejected on the grounds that it was filed almost 9 years after the expiration of the time limit and that the refusal by the ABCC to grant a waiver of the time limit was a lawful and proper exercise of the Secretary-General's discretion to reject the claim.

4. There do not appear to be any material disputes as to the relevant factual background and the Tribunal concluded that this claim may properly and justly be determined on the basis of the documents.

FINDINGS OF FACT

5. In October 2000, the Applicant commenced employment with the United Nations as a French Court Reporter for the International Criminal Tribunal for Rwanda (ICTR). When she separated from service she held a Field Service (FS) position at level 5 step 10.

6. There is no issue between the parties regarding the Applicant's satisfactory service and it is common ground that this case is concerned solely with her claim for compensation under Appendix D to the Staff Rules.

7. Since 2004, the Applicant had complained to her supervisors that she was suffering back pains, which she believed was caused by the type of chair that she was required to use while performing her duties for the Organization. In

particular, the following dates and events are relevant to a determination of the issues in the case:

- a. On 12 September 2008, the Applicant e-mailed her supervisor complaining of back pain and requesting the provision of an appropriate chair to perform her duties. This complaint was referred to the Court Management Section. In the absence of a positive response, the Applicant wrote again on 19 May 2010. She was advised that the matter had been referred to the ICTR Chief Medical Officer, Dr. MEH.
- b. As a result of several consultations, Dr. MEH concluded that the Applicant suffered injury to her back and on 7 October 2010, he wrote to Building Management Services requesting that the Applicant be provided with a suitable chair. It appears that there was further delay in implementing this request.
- c. On 27 October 2010, Dr. NMU, at the ICTR clinic, prescribed six sessions of physiotherapy which provided the Applicant with temporary relief.
- d. In December 2010, Dr. MEH arranged for the Applicant to travel to Nairobi for a scan. The necessary arrangements did not appear to have been made thereby necessitating an unusually long wait for a physician to become available. The Applicant found this experience very painful and states that she lost faith in the ICTR clinic and requested a referral to a specialist. On 18 December 2010, the Applicant saw Dr. M an orthopaedic surgeon at the Kilimanjaro Christian Medical Centre in Moshi. Dr. M concluded that the Applicant had a severe back injury and prescribed a high-backed chair to provide the necessary support to enable the Applicant to carry out her duties. Building Management Services, whose responsibility it was to provide a new chair, had not done so by April 2011. At this point the Applicant decided to take appropriate steps outside of the facilities provided by ICTR and travelled to her home country, France, seeking medical attention for her back condition.

e. A medical certificate prepared by Dr. S at the Paris Montmartre Clinic, dated 13 April 2011, indicated that:

For some years [the Applicant] has been presenting with postural static back pain without neurological signs, and paraesthesia in the ulnar region of the upper limbs. The neurological examination is normal. The MRI scan performed in Nairobi shows multilevel disc protrusions.

These are problems of a musculo-skeletal nature requiring functional treatment and, above all, an ergonomically sound workstation.

f. This was reported to the administration and finally, in December 2011, she was provided with a new chair to be used in her office. However, an appropriate chair was still not provided for her work in the courtroom. She continued to suffer back pain.

g. In or about September/October 2011 through to early 2012 the Applicant had treatment including surgery for cancer. The resultant chemotherapy spread over several months and during this period the applicant was diagnosed with depression which she considers was due to her continuing health problems, the lack of support by the ICTR Administration and her concerns about her future career prospects.

h. On 14 February 2013, the Applicant was examined again at the Kilimanjaro Christian Medical Centre and on 27 February 2013 she had a complete MRI scan at the Aga Khan University Hospital in Nairobi where Dr. KW confirmed the detailed diagnosis provided at the Kilimanjaro Christian Medical Centre. The Applicant considers that it was at this point that she had a definitive diagnosis which prompted and enabled her to make a claim for compensation under Appendix D to the Staff Rules.

THE ABCC CLAIM

8. On 27 March 2013, the Applicant filed her claim under Appendix D. She went into details regarding the various episodes relating to her back pain and stated that prior to 12 December 2012, she was not aware of the precise nature of the injury and had hoped that it would have been resolved by the provision of an

appropriate chair. She submits that in the circumstances and notwithstanding the fact that she was suffering back pain for several years prior to that her claim was nevertheless within time since it was made within the requisite time beginning with a definitive diagnosis. She also submitted that the fact that she was suffering from cancer and undergoing medical treatment over an extended period inhibited her from filing a claim at an earlier stage.

9. Having filed her claim on 27 March 2013, the Applicant's counsel made numerous follow up enquiries and was informed that the matter was under review. At no stage during this review, which the facts indicate took three years, was she asked for any explanation, clarification or further information.

10. In July 2016, the Applicant was again diagnosed with cancer for which she is receiving treatment.

11. It is the Applicant's contention that her claim was made within the period of four months of having received "confirmation of her medical condition" on 27 February 2013. Further, if her claim were to be deemed to be out of time she had provided a reasonable and compelling explanation for the grant of an extension of time for submitting her claim.

12. On 21 July 2016, more than three years after she filed her claim, the Applicant received an e-mail informing her that the claim was denied because she had filed it past the deadline.

13. The ABCC took the view that the Applicant should have been aware, by December 2010, that she had a back condition. If she believed that it was service incurred, she should have made the claim early in 2011. In addition, her request to waive the four-month deadline was denied because she provided insufficient information for the delay. Paragraph 19 below reproduces the full minutes recording the decision on the claim. The recommendation relating to the Secretary-General's discretion to accept for consideration a late claim is expressed as follows:

Recommends to the Secretary-General that due to the insufficient explanation for the delay in claim submission, the claimant's request to waive the provisions of Article 12 of Appendix D be denied, and the claim therefore be denied.

THE APPLICABLE LAW

14. Article 12 of ST/SGB/Staff Rules/Appendix D/Rev.1 ("Appendix D") states:

Claims for compensation under these rules shall be submitted within four months of the death of the staff member or the injury or onset of the illness; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a claim made at a later date.

THE ISSUES

15. The issues for determination are:

- a. When, if at all, did the Applicant become aware of the existence of a back injury which she could reasonably have considered as being attributable to performance of official duties on behalf of the United Nations?
- b. Did she file her claim to the ABCC within four months of the occurrence of the injury or the onset of the illness, if applicable?
- c. If she did not file the claim within the period of four months as required, did the ABCC apply the correct test in deciding whether there were exceptional circumstances to enable the Secretary-General to exercise his discretion to accept for consideration the claim.

CONSIDERATIONS

16. There can be no dispute about the fact that the Applicant had a back condition or injury which caused her significant pain and discomfort over a period of many years. Whether the condition was attributable to the performance of official duties is not a matter for the Tribunal but for the ABCC if, or when, they accept and examine a claim.

17. Claims must, in accordance with the provisions of article 12 of Appendix D, be filed within four months of the injury or onset of the illness, if applicable. However, the Secretary-General has discretion to accept for consideration a claim made at a later date if there are exceptional circumstances. This is a wide discretion which is not qualified in any way by the applicable regulatory framework. So long as this discretion is properly exercised it is immune from challenge.

18. By the Applicant's own admission, she was diagnosed with multiple disc dislocations in her back on 13 April 2011. Prior to this she was suffering with back pain, complained about it to her managers and sought medical treatment at the ICTR clinic. In particular, on 18 December 2010, Dr. M an orthopaedic surgeon expressed the opinion that the Applicant's back was severely affected and prescribed a special chair with a high back and armrest in order to alleviate the condition. Whilst the Applicant is critical of the various organisational failures to provide her with the appropriate adjustments to alleviate her condition there is no doubt that in her mind she had made the connection between her working conditions and back ailments. Accordingly, by a strict application of article 12 of Appendix D, the Applicant did not submit a claim for compensation within four months of knowledge of the injury or onset of an illness, if applicable. The claim that she filed on 27 March 2013 was accordingly out of time and subject to the Secretary-General's discretion exercisable "in exceptional circumstances".

19. Notwithstanding the fact that the claim was time barred on initial examination, the overall scheme of the rules governing compensation acknowledge that there may be exceptional circumstances which may cause the Secretary-General to accept for consideration a claim made at a later date. It is important to note that the exercise of discretion by the Secretary-General to accept a late claim for consideration has been entrusted to the ABCC and it is not for the Tribunal to exercise that discretion. The task before the Tribunal is to examine, if, in carrying out their delegated function under article 12, the ABCC applied the correct legal test, namely whether there were "exceptional circumstances" in this particular case so that the Secretary-General may accept the claim for

consideration on its merits. Before examining this question further, it will be helpful to produce the ABCC minutes recording the decision in its entirety.

The Advisory Board on Compensation Claims,

Having considered at its 493rd meeting on 14 June 2016, the claim submitted by the above-referenced claimant for compensation under Appendix D to the Staff Rules for injuries (neck and back pain) sustained in connection with her use of inadequate work chairs during her employment with the ICTR from 2000 to 2012 in Arusha, Tanzania,

Having also considered the statement from the claimant and her OSLA representative's brief regarding the significant delay in claim submission, the emails documenting the claimant's complaints of back pain and requests for appropriate chairs to perform her work from 2008 and the corresponding response from her supervisor and the UNICTR Chief Medical Officer; and the medical reports that indicate that the claimant was aware of and treated for her medical condition from December 2010 (specifically, in 2010, had received a prescription for an ergonomic chair at work, a prescription for an MRI for back pain and another for physical therapy for back pain; therefore, at the latest in 2010, she was aware of or should have been aware of an injury/illness and filed her claim within four months), but did not submit a claim for compensation under Appendix D to the Staff Rules until 28 March 2013;

Recommends to the Secretary-General that due to the insufficient explanation for the delay in claim submission, the claimant's request to waive the provisions of Article 12 of Appendix D be denied, and the claim therefore be denied.

20. A detailed examination of the minutes indicate that the ABCC focused exclusively on the history of the Applicant's back pain and found that it was filed outside the time limit. The Applicant provided information regarding her other medical problems concerning cancer and depression as part of her plea that there were exceptional circumstances in her case to recommend to the Secretary-General to consider her claim if it was deemed to have been made out of time. The Tribunal finds that there were at least two failures on the part of the ABCC in considering whether to exercise, on behalf of the Secretary-General, the power delegated to them to consider whether there were exceptional circumstances.

21. The ABCC minutes, read as a whole, recording the reason for not waiving the time limit does not indicate that any consideration, or weight, was given to the detailed account of the health problems experienced by the Applicant. It would appear that the ABCC disregarded evidence and information provided regarding the fact that the Applicant was undergoing treatment for cancer and depression which in her submission impeded her ability to direct her attention to the claim for service incurred injury. There is nothing to suggest that they considered this aspect at all. It is not a case of considering these reasons, apportioning appropriate weight to them and then either accepting or, as the case may be, rejecting them, as not satisfying the test of exceptional circumstances.

22. Further, in responding to the Applicant's enquiries about progress she was told by the ABCC that the matter was under consideration. There is no indication as to what, if anything, was the nature of such consideration which extended over three years. At no stage did the ABCC request further information.

23. Further, the ABCC refused to waive the time limit on the ground of insufficient explanation for the delay rather than the applicable norm of whether there were exceptional circumstances. The application of the test of "exceptional circumstances" under article 12 of Appendix D was narrowly circumscribed by the ABCC as applying solely to the reasons for delay. Whether there are exceptional circumstances includes, but is not restricted to, delay. It is a wide discretion exercisable by the SG in order to deal justly with a claim for compensation for service incurred injury.

24. The Tribunal finds that the ABCC was in error in failing to apply properly the discretion vested in them under Appendix D to the Staff Rules. Under the circumstances, the Tribunal considers that the best course of action is to remand this case to the ABCC in accordance with art. 10.4 of the UNDT Statute, which provides that:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case

for institution or correction of the required procedure, which, in any case, should not exceed three months. [...].

25. In compliance with the ruling in *Baracungana* 2017-UNAT-725, in which the United Nations Appeals Tribunal (“UNAT”) emphasized the need for this Tribunal to have the concurrence of the Secretary-General to remand a case to the ABCC, this case is so remanded.

JUDGMENT

26. The decision of the ABCC to deny the Applicant’s request for consideration of her claim for compensation under Appendix D to the Staff Rules is rescinded.

27. Subject to the concurrence of the Secretary-General, this claim is remanded to the ABCC for proper consideration in accordance with art. 10.4 of the UNDT Statute.

(Signed)

Judge Goolam Meeran

Dated this 11th day of January 2018

Entered in the Register on this 11th day of January 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi