Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. B. (No. 3)

v.

UNIDO

122nd Session **Judgment No. 3668**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. R. B. B. against the United Nations Industrial Development Organization (UNIDO) on 7 August 2013 and corrected on 13 November 2013, UNIDO's reply of 20 February 2014, the complainant's rejoinder of 6 June, UNIDO's surrejoinder of 15 September, the complainant's additional submissions of 17 October and UNIDO's final comments of 26 November 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decision not to award him the disability-related compensation foreseen by Appendix D to UNIDO Staff Rules.

Facts relevant to this case are to be found in Judgment 3160, delivered on 6 February 2013, concerning the complainant's first complaint and in Judgment 3222, delivered on 4 July 2013, concerning his second complaint. Suffice it to recall that he joined UNIDO in 1995 at the D-1 level. In December 2006 the Director-General informed him

that he had decided to reassign him to Algeria. However, this reassignment did not take place because the complainant was taken ill in March 2007 and never returned to work thereafter. His doctors considered that his illness was service-incurred.

On 2 July 2007 he submitted a claim for compensation to the Secretary of the Advisory Board on Compensation Claims (ABCC) in accordance with Appendix D to the Staff Rules, claiming reimbursement of his medical expenses. He separated from service on 19 September 2008 and was granted from that date a disability benefit by the United Nations Joint Staff Pension Fund (UNJSPF). Following many discussions, in October 2010 he was informed that the Director-General finally deemed his illness attributable to service and that his claims for medical expenses would be submitted to the ABCC. On 5 January 2011 he was informed that the ABCC's recommendation of partial reimbursement of his medical expenses had been approved by the Director-General.

In January and February 2011 the complainant asked the Secretary of the ABCC when he should expect the settlement of the other entitlements foreseen under Appendix D, i.e. "the compensation, the re[i]mbursement of annual leave and any other entitlement under the Appendix", which should be automatically granted once the illness is deemed attributable to service. The Secretary informed him on 21 July that the Director-General had approved the ABCC's recommendation that a full psychiatric assessment be done in order to determine to which extent his earning capacity had been affected from the time of separation to date, but he considered the claim concerning annual leave to be irreceivable. On 27 August the complainant asked the Director-General to review the decision not to pay him all the entitlements foreseen under Appendix D. On 16 September 2011 he was informed that no decision had yet been made as to the payment of his entitlements under Appendix D, and that the decision of 21 July concerned only the claim for reimbursement of annual leave, which was the only proper administrative decision appealable under Chapter XII of the Staff Rules. The complainant received a negative final decision with respect to his annual leave which is not contested before the Tribunal.

On 12 April 2012 the complainant wrote to the Director-General alleging that the decision of October 2010 by which he deemed his illness attributable to service had not yet been implemented. He undertook the medical assessment as requested but the Administration had refused to send him a copy of the medical reports which he had requested in November 2011, and no express decision had been made on his claim. He therefore requested the Director-General to settle his claim and to give instructions so that he be provided with the requested medical reports and a copy of the minutes of the ABCC's meeting. On 10 May 2012 the Secretary of the ABCC replied on behalf of the Director-General that his claim was still under consideration by the ABCC to which it had been referred for a recommendation.

By a letter of 15 May 2013 the Alternate Secretary of the ABCC informed him that on 8 May the Director-General had rejected his claim for payment under Article 11.1(c) of Appendix D, despite the ABCC's recommendation that such compensation payments be made. In the Director-General's view, the analysis of the ABCC was flawed; he stated in particular that payments under Appendix D should, as a general rule, be limited until the mandatory retirement age because he considered inter alia that the purpose of compensation under Appendix D was to compensate for the loss of earnings and that sufficient payments had been made to the complainant as he had been paid salary until his separation, had been reimbursed 5,965 euros under Appendix D and received 7,300 euros in connection with three related internal appeals, in addition to having been awarded a disability benefit from the UNJSPF immediately after separation from service. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and order the payment of compensation under Article 11.1(c) of Appendix D, i.e. "annual compensation payments equivalent to two thirds of his […] final pensionable remuneration" with retroactive effect to the date of his separation on 19 September 2008, together with compound interest from due dates. He also claims moral and exemplary damages, together with costs. In his rejoinder he asks the Tribunal to find the complaint receivable or to refer the matter back to UNIDO for

further proceedings in accordance with the appeal rules set out in Article 17 of the Appendix.

UNIDO asks the Tribunal to dismiss the complaint as irreceivable and devoid of merit.

CONSIDERATIONS

1. The complainant was employed by UNIDO but separated from the organisation on 19 September 2008. He filed a third complaint with the Tribunal on 7 August 2013. His first and second complaints have already been dealt with by the Tribunal in Judgments 3160 and 3222 respectively which set out some of the relevant background.

2. UNIDO argues that this third complaint is irreceivable because the complainant has not exhausted internal means of redress as required by Article VII of the Tribunal's Statute. It is convenient to address this issue at the outset and confine, at this point, the Tribunal's consideration of the facts to those relevant to this issue.

3. On 2 July 2007 the complainant sent to the Secretary of the Advisory Board on Compensation Claims (ABCC) a memorandum attaching copies "of receipts for medical expenses incurred as a result of [his] illness caused by work-related actions". He stated that "[m]ore bills w[ould] be submitted in due time and when received". The subject matter of the memorandum was identified as "Appendix D Claim". This was a reference to Appendix D to the Staff Rules which sets out rules governing compensation in the event of death, injury or illness attributable to the performance of official duties. Entitlements under these rules depend on the event being "attributable to the performance of official duties". If the injury or illness results in total disability then, amongst other things, UNIDO is obliged to pay "all reasonable medical, hospital and directly related costs" (Article 11.1(a) of Appendix D). Also in these circumstances, a staff member is entitled to payment of salary and allowances for a specified period (Article 11.1(b) of Appendix D) and, after that, annual compensation payments for the duration of the staff

member's total disability (Article 11.1(c) of Appendix D). Broadly similar provisions in Article 11.2 of Appendix D are applicable if the injury or illness has resulted in partial disability including an obligation to pay "all reasonable medical, hospital and directly related costs" (Article 11.2(a)). This summary is a gloss on some of the detail but is sufficient for present purposes.

4. The memorandum of 2 July 2007 might be understood as a claim seeking payment under either Article 11.1(a) or Article 11.2(a). However the critical issue is whether this claim raised for consideration only the question of whether the medical expenses were incurred in relation to an illness or injury arising from the performance of official duties for UNIDO. The Tribunal returns to this issue later. For a claim seeking payment of medical expenses to succeed it would be necessary for the complainant to have been suffering from an injury or illness that was attributable to the performance of his official duties and that the injury or illness had rendered him totally or partially disabled. Initially the claim in the memorandum of 2 July 2007 was rejected because the ABCC concluded the complainant's illness was not attributable to service. Its recommendation, based on this conclusion, was accepted by the Managing Director of the Programme Support and General Management Division, acting on behalf of the Director-General. In reaching this conclusion the ABCC proceeded on the basis that the claim was for medical expenses and this was communicated to the complainant in a memorandum of 5 December 2008.

5. On 14 January 2009 the complainant wrote to the Director-General appealing "this decision" which, in context, was the decision of the Managing Director based on the conclusion of the ABCC that the "[the complainant's] illness was not service incurred" which had founded the recommendation that the Director-General "dismiss [the complainant's] claim". This appeal was referred to a medical board in accordance with Article 17 of Appendix D which met on 2 December 2009. Its report was discussed by the ABCC at meetings in April 2010 and August 2010. The ABCC made a recommendation to the Director-General with the result that the Director-General decided on 19 October

2010 that the complainant's illness was attributable to his service with UNIDO. On 5 January 2011 the Secretary of the ABCC advised the complainant that the ABCC was recommending the payment of "compensation for medical expenses amounting to 24,539.22 Euros", which excluded reimbursement of the fees of one medical practitioner and some specific medication.

6. In an email dated 11 January 2011 the complainant wrote to the Secretary of the ABCC asking her "when [he] should expect the settlement of the other entitlements foreseen under the provisions of Appendix D". In a subsequent email dated 27 February 2011 the complainant reproduced the January email, said that he had not got an answer to the preceding question, and also said "[m]y understanding is that the settlement of these entitlements should be automatic once the sickness is deemed attributable to service which was decided over 4 months ago". Earlier in the February email he described these entitlements as "compensation, the re[i]mbursement of annual leave and any other entitlement[s] under the Appendix D".

7. The complainant was informed by letter dated 21 March 2011 from the Secretary of the ABCC that it would consider at its next meeting the matters raised by the complainant in his email of 27 February 2011. By email dated 19 April 2011 the complainant protested to the Director-General that the ABCC had no authority to review or revise his decision of 19 October 2010 and requested that the October decision be implemented. On 30 May 2011 the ABCC considered the issues raised by the complainant in his email of 27 February 2011. Its conclusions were communicated to the complainant by letter dated 21 July 2011. Firstly, the ABCC concluded that there should be a further psychiatric assessment of the complainant to determine the extent to which his earning capacity had been affected from the time of separation (19 September 2008) and secondly, it concluded that his claim for annual leave under Appendix D was irreceivable on the basis that the relevant provision applied only to staff members which he no longer was.

8. On 27 August 2011 the complainant wrote to the Director-General saying, relevantly, two things. Firstly, he requested that the Director-General give "instructions to settle [his] case as soon as possible and to pay all the entitlements foreseen under the Appendix D" and secondly, he asked that the letter be treated as a request "for [the Director-General] to review the decision not to pay all the entitlements foreseen under Appendix D following [his] successful appeal". In a letter dated 16 September 2011 from the Human Resource Management Branch, the complainant was informed, amongst other things, that no decision had been made on his request to pay him "all the entitlements foreseen under Appendix D". An internal appeal filed by the complainant concerning the decision about annual leave was unsuccessful.

9. In April 2012 the complainant wrote to the Director-General asserting, in effect, that there had been an implied administrative decision not to pay him entitlements under Appendix D and sought the review of that decision by the Director-General. This resulted in an email from the Secretary of the ABCC to the complainant asserting that his claim was still being considered by the ABCC and he could not take the next legal step of appealing until the Director-General made a final decision.

10. At a meeting of the ABCC on 17 January 2013, the ABCC resolved to recommend to the Director-General that, amongst other things, the complainant be paid compensation under Article 11.1(c) of Appendix D retroactively from the date the complainant's salary and allowances ceased to be payable and that compensation should continue to be paid for the duration of the complainant's disability subject to regular reviews. This recommendation was rejected by the Director-General and his decision (made on 8 May 2013) was communicated to the complainant in a letter dated 15 May 2013 in which the Director-General gave his reasons for rejecting the recommendations and concluding that the ABCC's analysis was flawed.

11. It should be noted immediately that the approach of the complainant, in asserting that the October 2010 decision of the Director-General had resolved, in principle, his entitlement to benefits under

Appendix D is not entirely misconceived as the correspondence from the Administration suggested. It is true that the specific decision made in October 2010 that the complainant's illness was attributable to service with UNIDO was made in the context of the complainant seeking the payment of medical expenses. However any entitlement to medical expenses under Appendix D (either under Article 11.1(a) or Article 11.2(a)) will arise because two preconditions are satisfied. The first is that the injury or illness was service-related and the second, which has two alternative elements, is that the injury or illness led to total disability or, alternatively, led to partial disability. Thus a decision effectively allowing for the payment of medical expenses involves an implied acceptance that both of these two preconditions have been met. Were it otherwise, a decision confined to the question of whether an injury or illness was service-related would not establish an entitlement to the payment of medical expenses under Appendix D.

12. UNIDO's argument on receivability contains several elements. The first is that the memorandum of 2 July 2007 was only a claim for medical expenses. The second is that the decision of the Director-General of 19 October 2010 concerned only the question of whether the claim for medical expenses should be met based on the answer to the subsidiary question of whether the complainant's illness was attributable to service with UNIDO. The third is that the emails of January and February 2011 involved separate, additional and different claims for benefits or entitlements under Appendix D that had not been made in the memorandum of 2 July 2007 and were not the subject of the decision of the Director-General of 19 October 2010. The fourth is that the decision of the Director-General of 15 May 2013 was an administrative decision refusing the separate additional and different claims made in January and February 2011. The final element is that the complainant has failed to appeal against the decision of 15 May 2013 as provided for in Article 17 of Appendix D. Thus, according to UNIDO, the complaint is irreceivable because the complainant has not exhausted internal means of redress.

13. The answer to this argument has two aspects. The first concerns procedure. How a claim for benefits under Appendix D is to be made is

addressed by an Administrative Circular promulgated by UNIDO in January 1991. It requires that a "claim under appendix D" must be submitted in writing and addressed through the staff member's supervisor to the Secretary of the ABCC. The Circular notes that medical expenses that are related to a claim should be paid by the claimant and then claimed according to the procedures described in the Circular. Those medical expenses might be reimbursed pending "the outcome of the claim under appendix D". The memorandum of the complainant of 2 July 2007 headed "Appendix D claim" could reasonably be viewed as a claim for all benefits to which the complainant might be entitled under Appendix D even though the specific matters addressed by the memorandum were medical expenses. It is true that the complainant did not, in his memorandum of 2 July 2007, detail matters the Circular required (personal data, reason for claim, attributability, medical information and the like); that fact does not, in the present case, justify the conclusion that the memorandum of 2 July 2007 was not a claim for all benefits available to the complainant under Appendix D.

14. The second aspect concerns the substance of the decision of 19 October 2010. As noted earlier this decision effectively allowing for the payment of medical expenses involves an implied acceptance that both of the two preconditions referred to earlier were met at the time the medical expenses were incurred. That is to say, it involved an acceptance that the complainant was totally or partially disabled at that time by an illness which was work-related. It may be accepted that no decision had been made in October 2010 whether the disability was partial, on the one hand or total, on the other. Accordingly whether the complainant had been and continued to be totally incapacitated or partially incapacitated remained for determination in order to establish the nature of the benefits the complainant was entitled to under Appendix D and the period for which there were payable.

15. The impugned decision communicated to the complainant on 15 May 2013 does not address that issue. Articles 11.1 and 11.2 of Appendix D speak of the determination by the Director-General of whether the disability was total, on the one hand, or partial, on the other.

Once that determination is made then the rights of a disabled staff member flow from the terms of Appendix D itself and not from some discretionary assessment by the Administration of the entitlements. The letter of 15 May 2013 (which set out the reasons for the decision made on 8 May 2013) purported to deal with a compensation claim of 27 February 2011 for entitlements under Appendix D and a claim for additional medical expenses. The reasoning of the Director-General set out in the letter addressed questions about whether the purpose of the compensation payments was for a loss of earnings or also for lost opportunities, inconsistencies of the practice among the organisations of the United Nations system on the duration of such payments, the relationship of the entitlements under Appendix D to the retirement age and whether sufficient payments had been made to the complainant (the Director-General actually said "I consider that sufficient payments have been made in connection with the case").

16. What the Director-General singularly failed to do was make the decision required by Appendix D, namely determine whether the complainant had been totally or partially disabled and whether he had remained so and for what period of time. The benefits to which the complainant would then be entitled would flow from the terms of Appendix D properly construed. If Appendix D does not expressly deal with all aspects of the entitlements (for example the duration of payment) then it would be necessary to interpret the Appendix to ascertain what, by implication, was intended to be the content and limits of those entitlements.

17. What the arguments of UNIDO have exposed is not that a final administrative decision was made in accordance with the provisions of Appendix D and that the complainant has failed to exhaust internal remedies in relation to that decision. Rather those arguments have revealed that, both in form and substance, no decision has yet been made by the Director-General on a critical issue that determines the nature and extent of the entitlements of the complainant under Appendix D.

18. The relief sought by the complainant included, as an alternative remedy, that the matter be remitted to UNIDO. The Tribunal concludes that this course is the appropriate one in the circumstances. The course the complainant's attempts to secure benefits under Appendix D has taken has been substantially influenced by the approach of the Administration and, in all the circumstances of the case, the complainant is entitled to costs.

DECISION

For the above reasons,

1. The matter is remitted to UNIDO in order for the Director-General to make the decision referred to in consideration 16, above.
2. UNIDO shall pay the complainant 4,000 euros costs.

In witness of this judgment, adopted on 6 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ