S.

v.

UNIDO

125th Session **Judgment No. 3951**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms H. S. against the United Nations Industrial Development Organization (UNIDO) on 11 December 2015 and corrected on 29 January 2016, UNIDO's reply of 11 May, the complainant's rejoinder of 11 August, UNIDO's surrejoinder of 23 November 2016, the complainant's additional submissions of 2 March 2017 and UNIDO's final comments of 13 June 2017;

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 challenges the decision to reject her claims for compensation for service-incurred injury or illness.

The complainant joined UNIDO in June 2008 as Managing Director of the Programme Support and General Management Division at the D-2 level. In December 2011 she was appointed as Principal Advisor to the Director General. Her initial two-year fixed-term contract was extended in 2010 for a period of three years. At the end of that period, she was offered an extension of only three months, because the Director General's term of office was due to end in June 2013 and

he felt that his successor should be free to appoint the staff of his office. The complainant objected to this short extension and challenged it through the internal appeal process. This culminated in a settlement agreement whereby, in return for her abandoning her claims against UNIDO in relation to the extension of her appointment, she was granted an extension of contract until the end of March 2015 – the month in which she would reach the mandatory retirement age – but in a different post (Special Advisor to the Director General) and at a lower grade (D-1).

On 27 January 2015 the complainant slipped on a patch of ice and injured her wrist. She underwent surgery a few days later, and further treatment was prescribed for the following months. She remained on sick leave until the end of her appointment. On 12 February 2015 she submitted a claim for compensation under Appendix D to the Staff Rules, seeking reimbursement of all medical expenses incurred in connection with her wrist injury. She contended that her injury was to be considered as service-incurred, because she had sustained it while she was making her way to work.

On 26 February 2015, while that claim was pending before the Advisory Board on Compensation Claims (ABCC), the complainant wrote to the new Director General, asking him to extend her contract on compassionate grounds for a period of one year, or at least until she had recovered from her injury. Failing that, she asked him to approve her Appendix D claim as a matter of urgency. She emphasised that her contract was due to end on 31 March and that, because she now wished to remain in Austria to pursue the treatment on her wrist instead of returning to her home country upon her retirement as initially planned, she would not have any health insurance cover during the first six months following her retirement.

At a meeting on 2 March 2015, the Director General told the complainant that he had decided not to extend her contract and that he would not interfere with the work of the ABCC in processing her claim. In an email of 6 March, referring to that meeting amongst other things, the complainant informed the Director General that she would appeal against what she considered to be his “abuse of authority since 2013”.

On 16 March 2015 the complainant sent a memorandum to the Director General, entitled "Request to review your administrative decisions", in which she asked him to reinstate her at the D-2 level with retroactive effect from September 2013 and to urgently approve her Appendix D claim. Following the rejection of this request, the complainant filed an appeal with the Joint Appeals Board (JAB) which was still pending at the time when she filed the present complaint.

On 27 March 2015 the complainant submitted a second Appendix D claim, seeking compensation for physical and moral injury resulting from the Director General's decision not to accede to her requests, and from an e-mail that she had received from the Officer in Charge of the Human Resources Management Branch which, according to her, constituted harassment. She supplemented this claim on 30 March, referring to various other actions on the part of the Administration which, in her view, had contributed to her physical and moral injuries. She separated from service on 31 March 2015.

The ABCC met three times to examine the complainant's claims. At its second meeting it decided that an ad hoc ABCC would have to be set up, because the complainant's identity had been revealed to the ABCC members – not only by the complainant herself, but also by the Secretary of the ABCC, who had inadvertently submitted a document to the ABCC in which her name appeared – whereas the ABCC's procedure required it to examine claims anonymously. The ad hoc ABCC met on 4 June and recommended that both of the complainant's claims be rejected on the grounds that she had not provided sufficient evidence of a causal link between her injuries or illness and the performance of official duties. By a decision of 17 June 2015 the Director General accepted that recommendation.

The complainant challenged the rejection of her claims by submitting a request for review to the Director General on 13 July 2015 and an appeal to the ABCC on 16 July 2015. Both submissions were considered by the ABCC at its meeting on 2 September 2015. The ABCC confirmed its recommendation, as it considered that the complainant had not put forward any new evidence or facts that would lead it to depart from its initial conclusions. By a letter of 15 September 2015 the

complainant was informed that the Director General had decided to approve the ABCC's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to determine that her wrist injury and the moral injury that she has suffered are attributable to service. She requests that UNIDO be ordered to pay all reasonable medical expenses related to these injuries incurred before and after her separation from service, including a specific payment of 620 euros and payment for physical, moral and material damages, as well as annual compensation payments under Article 11 of Appendix D to the Staff Rules until such time as she recovers from her injuries. She asks to be authorised to submit invoices directly to UNIDO for immediate payment, and to be provided with full documentation relating to the 83rd, 84th, 85th and 86th meetings of the ABCC. She also asks the Tribunal to determine that she has been subjected to "persistent institutional harassment" by UNIDO and to award her damages on that account in the amount of 100,000 euros. She claims 11,000 euros in costs for the internal appeal proceedings as well as the proceedings before the Tribunal. In her additional submissions, the complainant also asks the Tribunal to set aside the decision of 13 January 2017 by which the Director General dismissed her appeal to the JAB and to award her 500,000 euros in compensation under various heads.

UNIDO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal remedies, except as regards the specific issue of the rejection of her Appendix D claims, and as unfounded on the merits.

CONSIDERATIONS

1. The complainant was employed by UNIDO but separated from the Organization on 31 March 2015 on attaining the mandatory retirement age. On 11 December 2015 she filed a complaint with the Tribunal. The pleas in her brief and rejoinder as well as in additional submissions (dated 2 March 2017) she made following UNIDO's surrejoinder, traverse many issues and address a wide range of facts. It

is desirable, at the outset, to identify with some precision the decision she impugns and the legal and factual issues that may legitimately be raised in these proceedings before the Tribunal having regard to the subject matter of the impugned decision and the basis on which it was made.

2. In her complaint form, the complainant identifies the impugned decision as a decision made on 15 September 2015 and received by her the following day. This is a reference to a letter dated 15 September 2015 from the Secretary of the ABCC advising the complainant of essentially two things. The first was that the ABCC had, at its 86th meeting on 2 September 2015, "again considered [her] cases and unanimously agreed to confirm its earlier recommendations that the claims should be rejected, since [she] did not offer any new evidence or facts". The second was that the Director General had approved the recommendations of the ABCC on 14 September 2015. The reference to "[her] cases" in the above quotation from the letter of 15 September 2015 was to two claims identified earlier in the letter, namely two claims the complainant had made under Appendix D to the Staff Rules (case UNIDO/CC/2015/339 and case UNIDO/CC/2015/340). The letter of 15 September 2015 noted that the complainant had been informed by letters dated 17 June 2015 the claims were deemed to be not attributable to service.

3. Thus the impugned decision was a decision of the Director General accepting recommendations of the ABCC confirming recommendations which had earlier been made by the ABCC and accepted by the Director General that the two claims of the complainant (case UNIDO/CC/2015/339 and case UNIDO/CC/2015/340) under Appendix D should be rejected because the injuries on which the claims were based were not attributable to service. Accordingly the issues which may legitimately arise in a challenge to the impugned decision are whether legal flaws attended the rejection of the two claims, which might include an argument that the ABCC based its recommendations on facts which did not exist or that it failed to take into account evidence which would have justified the acceptance rather than the rejection of

the claims. Having regard to the reason expressly given for the rejection of the claims, a central factual issue was whether the injuries on which the two claims were based were attributable to the performance of official duties. That issue arises because Appendix D is, as Article 2 provides, centrally concerned with compensation for "death, injury or illness of a staff member which is attributable to the performance of official duties".

4. A very simple summary of the central facts is useful at this point. The complainant slipped on ice and broke her wrist. She claimed that this happened on her way to work and that accordingly she was entitled to compensation under Appendix D for this injury. Her first claim was for compensation for this injury. When the wrist injury happened, the complainant was nearing retirement age and she subsequently requested the Director General to extend her contract or approve her claim. The Director General agreed to neither and the complainant thereupon made a second claim under Appendix D for compensation for "depressive reaction to workplace related distress". The source of the distress was said to be the negative response of the Director General to her requests together with harassment by the Officer in Charge of the Human Resources Management Branch and related events.

5. Two matters should, at this point, be noted. The first is that in her additional submissions of 2 March 2017, the complainant seeks to impugn a decision of the Director General of 13 January 2017 following an internal appeal and the consideration of that appeal by the Joint Appeals Board. The subject matter of those proceedings was not the rejection of her claims under Appendix D discussed earlier. At the time the complainant filed the present complaint on 11 December 2015, any complaint about the subject matter of the 13 January 2017 decision would have been irreceivable at least for the reason that the complaint would have been premature. It is not open to the complainant to seek to impugn in these proceedings the decision she challenges in her pleas in the additional submissions of 2 March 2017. Thus it is unnecessary for the Tribunal to address the lawfulness of the decision of 13 January 2017.

6. The second matter concerns the use the complainant seeks to make in her pleas of submissions earlier made by her in the internal review and appeal process. Effectively, she seeks to incorporate, by reference, those submissions into her pleas in these proceedings before the Tribunal. The Tribunal has stated on a number of occasions and recently with increasing frequency that it is inappropriate to effectively incorporate by reference into the pleas in the Tribunal, arguments, contentions and pleas found in other documents, often a document created for the purposes of internal review and appeal (see, for example, Judgments 3692, consideration 4, and 3434, consideration 5). In this matter, the Tribunal will only have regard to pleas in the complainant's brief and rejoinder and will disregard any additional, supplementary or other pleas in documents annexed to the brief or rejoinder.

7. The ABCC's initial consideration of the complainant's claim for compensation for her wrist injury took place on 9 April 2015. The minutes record that the ABCC considered the material furnished by the complainant about the circumstances in which she had said the injury occurred. It is clear that the ABCC understood that compensation would be payable under Appendix D if a member of staff suffered an injury on the way to work. In this respect, it applied the appropriate legal principle. What the ABCC examined was whether, in fact, the complainant was on her way to work. In her initial account, she had left her home very early to undertake work described by her in fairly general terms. It is tolerably clear that at least some members of the ABCC were extremely sceptical about her account (and in particular that she had been travelling to work at such an early hour) and a request to the complainant for more details about what she would have been doing at work had not, as members of the ABCC perceived it, provided any firmer factual foundation for the complainant's contention she was on her way to work to perform official duties. There is nothing apparent about the ABCC's consideration of this claim both on 9 April 2015 and subsequently that suggests any error of law on the part of the ABCC either in applying appropriate legal principles or in evaluating the evidence. Related claims about procedure including delay are of no substance and, in any event, do not impact on the ABCC's ultimate

conclusion that the claim should be rejected. Accordingly, the Tribunal finds that the complainant's pleas are unfounded.

8. Similarly the ABCC rejected the complainant's second claim, concluding, after reviewing the evidence, that there were no actions on the part of UNIDO which could be categorised as harassment, illegal, inhuman, unfair or otherwise inappropriate, and that whatever symptoms she may have manifested, they were not attributable to her service with UNIDO. It was open to the ABCC to reach this conclusion about causation and its consideration of the claim does not, again, suggest any error of law either in applying appropriate legal principles or in evaluating the evidence. The Tribunal again finds that the complainant's pleas are unfounded.

9. The complainant's challenge to the consideration of her two claims for compensation under Appendix D initially by the ABCC and ultimately by the Director General is unfounded. Her complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ