

**114th Session**

**Judgment No. 3160**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A.R. B. B. against the United Nations Industrial Development Organization (UNIDO) on 27 September 2010 and corrected on 5 January 2011, UNIDO's reply of 20 April, the complainant's rejoinder of 19 July, and the Organization's surrejoinder dated 24 October 2011;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Tunisian national born in 1948, joined UNIDO in February 1995 as Head of the Agro-based Industries Branch at the D-1 level. On 8 December 2006 the Director-General notified him that, in order to strengthen the Organization's field presence, he would be reassigned, effective 31 January 2007, to Algeria as UNIDO Representative. By a memorandum of 15 January to the Director-General, the complainant expressed his reluctance to accept this new assignment, and he asked him to reconsider his decision. On 2 March the Director-General informed him that, after careful

consideration of his request, he had decided to maintain his reassignment. He added that a request for clearance had been submitted to the Algerian Government.

On 3 March the complainant fell ill and subsequently went on sick leave. On 15 March he was notified that UNIDO had received clearance from the Algerian Government and he was asked to contact the Administration upon resumption of his duties to discuss the effective date of his reassignment to Algeria. In the event, however, the complainant did not return to work and, since his doctors considered his illness to be service-incurred, on 2 July he wrote a memorandum to the Secretary of the Advisory Board on Compensation Claims (ABCC) – an independent body which makes recommendations to the Director-General concerning claims for compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of UNIDO – claiming compensation as foreseen in Appendix D to the Staff Rules. He attached copies of receipts for medical expenses, and he indicated that further bills would be submitted in due course. On 16 July the Secretary acknowledged receipt of his claim and asked him to provide her with the “documentation necessary to process [his] claim as stipulated in the Annex to the Administrative Circular UNIDO/DA/PS/AC.75” (hereinafter “the Circular”) concerning the submission of claims for compensation in the event of death, injury or illness attributable to service, as well as original medical bills or notifications of reimbursement from his health insurance provider. She added that his claim would be submitted for consideration by the ABCC upon receipt of the requested information.

On 4 September the complainant submitted further medical bills together with the notifications of reimbursement to the Secretary of the ABCC. In mid-September he was informed that UNIDO wished to obtain another assessment of his health by an independent doctor; consequently, he was examined by Dr G. on 13 October.

By a letter of 21 December 2007 the Director of the Human Resource Management Branch (PSM/HRM), referring to the letter of 16 July from the Secretary of the ABCC, reminded the complainant

that his Appendix D claim could not be presented to the Board unless it complied with the procedure set out in the Circular and its Annex, and in particular the following requirements: the claim should be submitted through his supervisor, he should state clearly the facts related to the circumstances of his illness and its relationship to the performance of official duties, and he should produce all pertinent documentary evidence of medical expenses. On 4 January 2008 the complainant replied to the Director, stating that her decision not to present his claim to the ABCC was unfounded given that he had already provided all documentation available to him and the Secretary of the ABCC had acknowledged receipt of his claim. On 16 January he sent the Secretary further evidence of his medical expenses. On 28 January the Director wrote again to the complainant, reiterating that he had to comply with the provisions of the above-mentioned Circular for his claim to be considered by the ABCC.

On 5 February the complainant asked the Secretary of the ABCC to indicate precisely what information was missing from his claim, as he had been informed by the Director of PSM/HRM that it was incomplete. That same day, the Secretary replied that his Appendix D claim was complete with respect to his medical expenses but that information was required as to the facts that had led to his illness and the relationship between those facts and the performance of his official duties.

By a letter of 6 February 2008 the Secretary of the UNIDO Staff Pension Committee (SPC) informed the complainant that Dr G. had concluded that he was not fit for work. Consequently, the PSM/HRM would present his case to the SPC for a recommendation on his eligibility for a disability benefit.

On 28 February 2008 the complainant wrote to the Director-General alleging a breach of confidentiality in the handling of his Appendix D claim, on the grounds that the Director of PSM/HRM had written to him on 21 December 2007 concerning his claim, despite the fact that she had no supervisory authority over the Secretary of the ABCC, who was appointed directly by the Director-General. He contended that the Secretary was not entitled to discuss his case with

anyone, except the Medical Service, and he therefore requested the Director-General to initiate a review of his allegations and to award him 50,000 euros in moral damages as well as 1,000 euros in costs. The Director-General replied on 21 April 2008 that he had found no breach of confidentiality, and that no medical details had been shared with the Director in question, who had merely reiterated the Secretary's request of 16 July 2007. He added that the Director had overall responsibility for the functions of PSM/HRM, and was therefore responsible for ensuring that staff members complied with administrative procedures.

On 18 June 2008 the complainant appealed against that decision with the Joint Appeals Board (JAB). He maintained that there had been a breach of confidentiality in the processing of his compensation claim, referring not only to the letter of 21 December 2007 from the Director of PSM/HRM, but also to the letter of 6 February 2008 which, according to him, showed that PSM/HRM had become privy to confidential medical information. He also accused the Secretary of the ABCC and the Administration of having intentionally delayed the review of his claim. He asked the JAB to recommend that the Joint Disciplinary Committee review his allegations of breach of confidentiality and that his Appendix D claim be examined without further delay. He also claimed moral damages and costs. In his further submissions to the JAB the complainant further asked the Board to recommend that the Secretary of the ABCC provide him with some documents concerning the status of his claim.

In its report of 11 June 2010 the JAB concluded that the Director of PSM/HRM should not have acted on behalf of the Secretary of the ABCC because, according to the ABCC's rules and procedures, its meetings should be confidential and conducted in private and all Appendix D claims should be considered by the ABCC anonymously. It therefore found that the letter of the Director of PSM/HRM of 21 December 2007 was evidence of a breach of confidentiality in the handling of the complainant's claim. However, it found no breach of confidentiality with respect to the letter of 6 February 2008 because, according to the applicable rules, UNIDO was responsible

for submitting the request to the SPC for a determination of eligibility for a disability benefit; consequently, it would necessarily be aware of the medical reasons justifying the request. The JAB recommended *inter alia* that the Secretary of the ABCC provide the complainant with the documents he had requested during the internal appeal and that the Director-General appoint an alternate to the Secretary, who was then absent, in order to process the complainant's Appendix D claim rapidly. It also recommended abolishing the requirement that Appendix D claims must be submitted to the ABCC through a staff member's supervisor, as this requirement could lead to conflict of interest.

By a memorandum of 2 July 2010 the Director-General advised the JAB of his decision to dismiss the appeal. In his view, the claims made with respect to the alleged breach of confidentiality were irreceivable as no administrative decision had been taken on that issue before 21 April 2008, and the appeal to the JAB was therefore premature. He also considered that the JAB had misunderstood the responsibilities of the Director of PSM/HRM and that it had failed to take into account the facts which led to the letter of 21 December 2007 from the Director, namely the complainant's failure to provide the Secretary of the ABCC with the documents required by the Circular and his refusal to discuss this issue with the administrative assistant of the Secretary during the latter's absence on sick leave. The Director-General added that the letter of 21 December 2007 had clearly been written in the complainant's interest and that without that reminder his Appendix D claim might have been void. The Director-General also considered that there was no evidence that substantive or medical details of the complainant's claim had been disclosed to the Director of PSM/HRM. However, he awarded the complainant 1,800 euros for the delay in dealing with his internal appeal and asked that he be informed accordingly. That is the decision the complainant impugns before the Tribunal.

B. The complainant submits that, in his statement of appeal to the JAB, he referred to both the letter of 21 December 2007 and the letter

of 6 February 2008 and, consequently, his claims concerning breach of confidentiality are receivable. He adds that UNIDO did not contest the receivability of his claim of breach of confidentiality related to the letter of 21 December 2007 before the JAB, which, in any event, found the appeal to be receivable in its entirety.

On the merits, he alleges breach of confidentiality insofar as the Director of PSM/HRM was made aware of his Appendix D claim and was made privy to confidential information, including medical information. He points out that, according to Appendix D to the Staff Rules, the ABCC makes recommendations to the Director-General concerning claims for compensation for work-related illness; the participation of the Director of PSM/HRM is not foreseen. The complainant stresses that even the ABCC does not know the name of the claimant and that, according to the Circular, the meetings of the ABCC must be confidential and conducted in private. Moreover, according to the Tribunal's case law, a staff member has a right to privacy in matters of his state of health and, in the complainant's view, this right applies even in the absence of specific statutory protection. He points out that he did not ask for the assistance of the Director of PSM/HRM and that, consequently, he cannot be deemed to have waived his right to confidentiality, as implied by the Director-General, who in the impugned decision indicated that the letter of the Director of PSM/HRM of 21 December 2007 was a "reminder" written in the complainant's own interest. The complainant also contends that the JAB erred in not recommending that he be awarded damages after having reached the conclusion that a breach of confidentiality had occurred with respect to his Appendix D claim.

Lastly, he submits that the award of 1,800 euros for undue delay is not an adequate remedy. He points out that in two previous cases against UNIDO the Tribunal awarded 5,000 euros in moral damages to a complainant whose internal appeal proceedings were unduly delayed for a similar length of time and the same amount to another complainant for undue delay and procedural irregularity. In that latter case, the Tribunal stated that international organisations must ensure

that internal appeals bodies are properly resourced. He therefore requests the Tribunal to make an additional award of 3,200 euros in moral damages in his case.

The complainant asks the Tribunal to set aside the impugned decision, and to award him material and moral damages together with costs. He also asks to be granted compound interest at the rate of 8 per cent per annum on any material damages awarded to him.

C. In its reply UNIDO asserts that the complainant's claims based on an alleged breach of confidentiality are irreceivable for failure to exhaust internal means of redress. The complainant raised these claims for the first time in his letter of 28 February 2008 to the Director-General, who replied on 21 April 2008; that is the administrative decision he should have challenged before filing his appeal with the JAB on 18 June 2008, and not the letter of 21 December 2007.

On the merits, the Organization rejects the allegation that the Director of PSM/HRM was made privy to confidential medical information, considering it speculative and groundless. It points out that, in the letter of 21 April 2008, the Director-General indicated that no medical details of the complainant's Appendix D claim had been shared with the Director of PSM/HRM, who was merely informed of what was missing in the file and not of what was already in the file.

UNIDO denies any breach of confidentiality, asserting that the Director of PSM/HRM was entitled to write to the complainant concerning his Appendix D claim given that the Secretary of the ABCC was absent on sick leave and that the complainant had refused to discuss the procedural aspects of his claim with the Secretary's administrative assistant. It argues that, since the Circular provides that an Appendix D claim must be submitted through the claimant's supervisor, it would make no sense to have a system whereby the identity of the claimant may be known by a colleague but not by the Director of PSM/HRM, which is the branch responsible for the administration of social security matters. UNIDO points out that the

complainant's claim was not yet before the ABCC when the Director of PSM/HRM wrote to him on 21 December 2007, as his submissions were incomplete. Moreover, the Director did not participate in the meetings of the ABCC when it finally reviewed the complainant's claim. It further submits that the Director of PSM/HRM acted in good faith in trying to address the complainant's failure to supply necessary documents for his own benefit.

With respect to alleged undue delay in the internal appeal proceedings, the Organization notes that in Judgment 2878 the Tribunal awarded a complainant 1,500 euros for a 21-month delay, which is in line with the Director-General's decision. It observes that the Tribunal awards greater moral damages when the delay is longer or if there is an additional procedural irregularity in the internal appeal proceedings; as this was not the case with respect to the complainant, the decision to pay him 1,800 euros was adequate.

D. In his rejoinder the complainant maintains that his complaint is receivable on the grounds that the letter of 21 December 2007 can be construed as an administrative decision. In any event, he argues that, according to the case law, an administration must not deprive a staff member of his or her right of appeal by being excessively formalistic. In his view, the Director-General showed bad faith in raising the issue of receivability for the first time in the impugned decision.

Regarding the merits of the case, he draws attention to Judgment 3004 also concerning UNIDO, in which the Tribunal ruled that there was no excuse for the Secretary of the ABCC to have provided confidential information to the Director of PSM/HRM regarding a staff member's claim for compensation, and that in doing so the staff member's right to anonymity had been breached. He therefore rejects the Organization's argument that the disclosure of confidential information to the supervisor justifies the involvement of and disclosure of confidential information to the Director of PSM/HRM. He also contends that the wording of paragraph 4 of the Circular supports the view that he was not required to state clearly, in



the written claim submitted through his supervisor, the reasons why he considered his illness attributable to service.

E. In its surrejoinder UNIDO maintains its objection to receivability. It recalls that, according to the case law, if an appeal was time-barred and the internal appeal body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on the basis of a recommendation of that body.

It argues that Judgment 3004 is not relevant to the case under review because the complainant did not provide all required documents until 21 February 2008, despite having been clearly instructed to do so several times, and because the Director of PSM/HRM, as already stated, did not participate in the ABCC's meetings. Thus, there was no breach of the rule of anonymity.

According to the Organization, the complainant can no longer object to the requirement that the detailed statement of claim be submitted through his supervisor since he eventually complied with that requirement. In any event, it denies that the Circular should be interpreted in "precatory" terms, as suggested by the complainant, and submits that he shows bad faith in alleging so. It explains that a claim for compensation for service-incurred illness has to be submitted through the supervisor because the latter ought to be informed if a subordinate's duties caused him or her injury.

## CONSIDERATIONS

1. The complainant impugns a decision of the Director-General dated 2 July 2010 whereby the Director-General concluded that his appeal of 18 June 2008 was not receivable. During the internal appeal proceedings the complainant alleged breaches of confidentiality with respect to two letters. The first letter, dated 21 December 2007, was from the Director of PSM/HRM. The second, dated 6 February 2008, was authored by the Secretary of the SPC. In his submissions to the Tribunal the complainant states that in the present proceedings he abandons his claims regarding that letter.

2. The complainant challenges the Director-General's rejection of the JAB's conclusion that there was a breach of confidentiality with respect to the letter of 21 December 2007. He further challenges the quantum of damages for delay awarded by the Director-General and argues that 1,800 euros was inadequate. He asserts that, consistent with the decision of this Tribunal in Judgments 2644 and 2662, the amount should be 5,000 euros instead.

3. In its reply UNIDO disputes the complainant's account of the facts. It argues that there was no administrative decision in the letter of 21 December 2007. Accordingly, there could have been no review of an administrative decision by the Director-General as prescribed by Staff Rule 112.02(a). The Organization accepts that the letter of 28 February 2008 that led to the Director-General's decision of 21 April 2008 did constitute a claim of breach of confidentiality and related claims for compensation for the alleged breach. However, it submits that the Director-General's letter of 21 April 2008 was an administrative decision and not an answer, which, under Staff Rule 112.02(b)(i), is the decision that must be appealed. Accordingly, internal means of redress have not been exhausted.

4. On the merits, UNIDO puts forward four pleas. The first is that it is speculative to claim that the Director of PSM/HRM was privy to confidential medical information. The second is that the Director was only aware that the Appendix D claim was incomplete. It cannot be concluded from this fact that the Director was privy to medical information. The third is that, in the circumstances, the action of the Director was appropriate. The Secretary of the ABCC was absent on sick leave and the complainant had refused to deal with the Secretary's administrative assistant; the complainant's claim being incomplete it was not before the ABCC. Furthermore, the relevant statutory provisions did not preclude the Director intervening as she did. The fourth plea is that the claim related to breach of privacy or confidentiality was without merit. No breach of confidentiality arose because of the disclosure of the mere fact that the complainant had made a claim.

5. As to the complainant's challenge to the amount awarded as moral damages for delay, UNIDO submits that the judgments cited by the complainant involved materially different circumstances. In its view, more apt is the decision in Judgment 2878, in which the Tribunal awarded damages of 1,500 euros for a 21-month delay. It concludes by saying that the complaint should be dismissed as irreceivable but, if not, should be dismissed on its merits.

6. In his rejoinder the complainant rejects UNIDO's contention that his complaint is irreceivable and he denies that he did not comply with the relevant statutory provisions regarding internal appeals. He argues that the letter of 21 December 2007 could be construed as an administrative decision involving a breach of his right to privacy and confidentiality. It was the violation of this right that he sought to have reviewed in his letter of 28 February 2008 to the Director-General.

7. The complainant submits that in any event the Director-General's letter of 21 April 2008 was an administrative decision and the general principles of good faith and his right not to be deprived of his right of appeal render his complaint receivable. He refers to Judgment 2965 concerning excessive formality. In addition, he reiterates that during the internal appeal proceedings UNIDO, in its statement on behalf of the Director-General, did not challenge the receivability of the allegation of breach of confidentiality with respect to the letter of 21 December 2007.

8. As to the merits, the complainant refers to Judgment 3004 and rejects UNIDO's argument that the obligation to submit an Appendix D claim through a supervisor militates against a breach of privacy and confidentiality arising if the Director of PSM/HRM comes to know of the claim. The complainant addresses, at length, this and related issues.

9. UNIDO maintains in its surrejoinder the challenge to the receivability of the internal appeal. Relying on the case law and in particular on Judgment 2966, it points out that if an appeal is

time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging a decision taken on a recommendation of that body. Likewise, it maintains its attack on the merits of the complainant's case, requesting that the complaint be dismissed in its entirety.

10. These pleas raise several issues. The first is whether the complaint is receivable having regard to Article VII of the Statute of the Tribunal. It is not receivable unless the decision of the Director-General of 2 July 2010 is a final decision and the complainant has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. The resolution of this issue raises, in turn, a subsidiary issue whether the letter of 21 December 2007 was, or evidenced, an administrative decision and whether the complainant's letter of 28 February 2008 to the Director-General should be viewed as a request to review that administrative decision. A related subsidiary issue is whether, even if there was no administrative decision or review of it, the failure of UNIDO to challenge the receivability of the complainant's appeal to the JAB on the basis that it was premature precludes the Organization from challenging it now as an element of its challenge to the receivability of the complaint to the Tribunal.

11. This Tribunal has recognised staff members' right to privacy. An example is found in Judgment 2271. In that case the existence of that right was the basis for impugning an administrative decision to refuse to withdraw three medical certificates from a file. The Tribunal set aside a decision confirming that refusal and acceded to the complainant's claim for token compensation (of one euro) for the moral injury he had suffered. However, in the present case, the complainant cannot point to any administrative decision, explicit or implicit, embodied in the letter of 21 December 2007. Nevertheless, the letter does establish that the Director of PSM/HRM was aware that the complainant had made an Appendix D claim and it can be inferred

that a decision had been taken earlier (and acted upon) by someone, almost certainly the Secretary of the ABCC, to communicate that information to the Director.

12. The complainant's letter of 28 February 2008 included the following statement: "The Secretary to the ABCC [...] had no cause or justification to inform or discuss with anyone else [...] my pending Appendix D Claim." It is relatively clear that the complainant was criticising, amongst other things, the conduct of the Secretary and her decision to communicate the existence of his claim allegedly in violation of his right to privacy. However, ultimately it is unnecessary to determine whether this can properly be characterised as an administrative decision having immediate legal consequences.

13. That is because during the internal appeal the Organization did not challenge the receivability of the complainant's appeal insofar as it concerned the letter of 21 December 2007. And it cannot be said this was inadvertent. The issue of receivability was addressed during the internal appeal. UNIDO noted that the alleged breach of confidentiality concerned two letters: the letter of 21 December 2007 and the letter of 6 February 2008. It was only in relation to the latter letter that a point was raised about the receivability of the complainant's claims. And the point was restricted to an argument that the allegation of breach of confidentiality arising from the letter of 6 February 2008 was being raised for the first time. In advancing the argument before the JAB UNIDO drew attention to Staff Rule 112.02(a) and set out its terms in a footnote to the statement which made reference to "[an] appeal [of] an administrative decision".

14. There are a number of decisions of this Tribunal in which an organisation has not been permitted to maintain an argument concerning the receivability of a complaint that was not raised in the internal appeal preceding the complaint to the Tribunal (see, for example, Judgment 2255, considerations 12 to 14). The principle that the failure to raise the issue of receivability in an internal appeal

precludes the argument being raised before the Tribunal exists to further the interests of justice. It should be applied in the present case. UNIDO's argument that the complaint as it concerns the letter of 21 December 2007 is irreceivable, should therefore be rejected.

15. Turning to the merits of the complaint, the issue is whether there was a breach of privacy or confidentiality as a result of the disclosure to the Director of PSM/HRM of the fact that the complainant had made an Appendix D claim. The answer is readily found in Judgment 3004 at consideration 6. In that judgment, the Tribunal addressed the question of whether there had been a breach of confidentiality arising from the Secretary of the ABCC providing confidential information to the Director of HRM. The Tribunal referred to the applicable rules of procedure which contemplate all communications would be through the Secretary. It said that the Director was "not justified in revealing to [the JAB] that the complainant had submitted a claim which was still pending before the ABCC". The disclosure of the mere fact that the claim had been made involved a breach of confidentiality. Being in a similar situation, the complainant should be awarded 4,000 euros as moral damages for breach of confidentiality.

16. As to the compensation for the delay, it is well established that internal appeals must be conducted with due diligence and with regard to the care owed by an international organisation to its staff (see, in particular, Judgment 2522). Furthermore, it has been said by the Tribunal in Judgment 2902 that "by any standards a delay of nearly 19 months to complete the internal appeal process is unreasonable". The time an appeal might reasonably take will usually depend on the particular circumstances. The Director-General recognised that the time taken in this case, a little over two years, was excessive and awarded moral damages. As noted earlier, both the complainant and UNIDO dispute the quantum of damages awarded by the Director-General for delay.

17. The amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. That latter consideration, the effect of the delay, will usually depend on, amongst other things, the subject matter of the appeal. Delay in an internal appeal concerning a matter of limited seriousness in its impact on the appellant would be likely to be less injurious to the appellant than delay in an appeal concerning an issue of fundamental importance and seriousness in its impact on the appellant. For example, an extensive delay in relation to an appeal concerning the dismissal of a staff member could have a profound impact on his or her circumstances. On the other hand, a delay of precisely the same period in relation to an appeal concerning a comparatively trifling issue may have limited or possibly even no impact on the circumstances of the staff member. In the present case, while not trivialising the complainant's claims, including the alleged breach of privacy, it is not apparent that the delay would be likely to have had a significant adverse impact on the complainant. It is not apparent that the assessment of 1,800 euros as damages in the present case was erroneous and this assessment will not be disturbed.

#### DECISION

For the above reasons,

1. The decision of 2 July 2010 is set aside to the extent that it did not find a breach of confidentiality arising from the content of the letter of 21 December 2007.
2. UNIDO shall pay the complainant 4,000 euros in moral damages for breach of confidentiality.
3. It shall also pay him 1,500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet