



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/026

Judgment No.: UNDT/2021/110

Date: 21 September 2021

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LARRIERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Background

1. On 2 April 2020, the Applicant filed an application challenging the Respondent's decision to reject her claim for compensation under Appendix D to the Staff Rules as a surviving spouse of a staff member killed in the course of official duties on 19 August 2003. The Respondent argued that the application is not receivable *ratione personae*. The Tribunal agrees and dismisses the application as not receivable.

Facts and Procedure

2. Through a motion dated 30 April 2020 and pursuant to art.19 of the Dispute Tribunal's Rules of Procedure, the Respondent filed a motion to suspend proceedings pending the United Nations Appeals Tribunal written Judgment dismissing the Applicant's appeal of the United Nations Joint Staff Pension Fund ("UNJSPF") Standing Committee's decision to uphold the denial of her claim for a widow's benefit. The Respondent argued that the substance of the claim in that appeal, that the Applicant was a surviving spouse of the decedent, was similar to the question for determination in the instant application. The Appeals Tribunal may have made factual and legal findings on this point which would guide this Tribunal under the principle of *stare decisis*.

3. On 13 May 2020, the Tribunal issued Order No. 091 (UNDT/2020) which suspended the proceedings pending the publication of the reasoned judgment by the United Nations Appeals Tribunal ("UNAT") in Case No. 2019-UNAT-1318 (*Larriera*).

4. UNAT published the reasoned Judgment in the said case on 19 June 2020.

5. The case was assigned to the current Judge on 26 August 2020 for consideration during the 1 January 2021 to October 2021 deployment (with a three month break in between).

6. By Order No. 031 (NBI/2021) of 5 February 2021, the Tribunal directed the parties to file submissions addressing the findings made in Judgment No. 2020-UNAT-1004 on the issue of whether the Applicant qualifies as a surviving spouse under the Staff Rules.

7. On 12 February 2021, the Applicant filed a motion to adduce additional evidence and informed the Tribunal that she would address the impact of Judgment No. 2020-UNAT-1004 in her further submissions. The Tribunal directed the Respondent to file a response to the motion which he did on 19 February 2021.

8. The Tribunal noted from the submissions that the UNAT decision dealt with legal provisions of UNJSPF and not Appendix D of the Staff Rules which forms the basis of the claim in this application.

9. Therefore, the Tribunal called for a case management discussion (“CMD”) on 19 August 2021.

10. At the CMD, the parties agreed that the applicable Appendix D is the one attached to the Applicant’s application as Annex 18 (ST/SGB/Staff Rules/Appendix D/Rev.1, of 1 January 1966, as amended by ST/SGB/Staff Rules Appendix D/Rev.1/Amend.1 of 8 January 1976, and by ST/SGB/Staff Rules/1/Rev.7/Amend.3 of 1 January 1993).

11. The Applicant clarified that her request to the Advisory Board on Compensation Claims (“ABCC”) was to re-open the Appendix D claim made in 2003 by the deceased estate of Mr. M. to compel the ABCC to pay her widow’s benefits in accordance with the Staff Rules.

12. The Respondent invited the Tribunal to find that the claim for compensation was not receivable *rationae temporis* as it was filed late.

13. The parties also agreed that the Tribunal should make a preliminary finding of whether the application is receivable *ratione personae*.

14. The parties further agreed that the Tribunal should decide on whether the impugned decision was made *ultra vires* by an unauthorized officer.

15. On the merits, the parties agreed that the decisive legal issue for determination is the interpretation of the term “surviving widow” under Appendix D and whether the Applicant qualifies as such.

16. The parties agreed that an oral hearing is not necessary and the case may be decided on the papers.

17. The parties filed closing submissions on 10 September 2021.

Parties’ submissions

Applicant’s submissions

18. The Applicant’s submissions are summarized below:

a. This application is receivable as it rests upon a final decision by the Secretary-General rejecting the requests of the Applicant and of the Permanent Mission of Brazil and of Argentina to recognize her status as a survivor of Mr. M as determined by the courts and Government of Brazil.

b. As a staff member at the time of the decedent’s death, she has standing to request the correct application of the Staff Regulations and Rules both as a staff member and as a claimant to challenge the refusal to have her proper legal status, confirmed as equivalent to marriage by the Government of Brazil, recognized by the Organization.

c. Following a comprehensive legal procedure in which Mr. M’s former spouse and his estate were represented, the courts and governmental authorities of Brazil confirmed the Applicant’s marital status in a stable union before and at the time of Mr. M’s death. Therefore, the Applicant retains all survivor’s rights in Brazil, where marriages and stable unions are recognized

as equivalent. Brazil was Mr. M's sole nationality. As he was solely a Brazilian national, and French law establishes that civil unions are subject to the law where they were recognized - in this case, Brazil, - and in the eyes of Brazil the existence of a stable union can be established when there is a separation, in France the stable union could be registered in the French Civil Registry.

d. The Applicant calls into question the application of the principle of delegation of authority to Appendix D claims with regard to the ABCC Secretary's ability to exclude claims absent a review by the ABCC. The recent delegation is limited and not intended to replace the right to a review by a joint staff/management body guaranteed under the Rules.

e. It has long been established that the practice of the Organization when determining the personal status of staff members for the purpose of entitlements under the Staff Regulations and Rules has been done and will continue to be done, by reference to the law of nationality of the staff member concerned. In the case of Mr. M that law is Brazil's. Furthermore, the Organization itself has long recognized the notion of various forms of civil union in accordance with national practice. Since 1988 the Brazilian Constitution equals stable unions to marriages. While the written communication of the policy in 2004 post-dated the stable union of the Applicant, the policy itself arose earlier, and reflects a longstanding practice. This established practice and its later formulation distinguishes it from the rules of the Pension Fund.

f. Mr. M was exclusively a Brazilian citizen; he never held French nationality. The Government of Brazil has recognized that the Applicant holds full legal rights as a surviving spouse of the deceased staff member. The Respondent sought and received twice from the Permanent Mission of Brazil the confirmation of the legally recognized union and the fact that it was equivalent for all legal purposes to a formal marriage. The Applicant is

therefore entitled to a residual benefit under Appendix D. The Applicant did not submit a new claim on behalf of the deceased staff member. Rather, under art. 9 of Appendix D, she brought a claim as a person entitled to reopen the case made for Mr. M in order to amend the previous award to his survivors.

g. The Applicant recalls the findings by the “Report For The Steering Group On Iraq - Lessons Learned Report and Implementation Plan - The United Nations Headquarters (“UNHQ”) Crisis Response to the 19 August 2003 Attack on the United Nations Office in Baghdad, where it is stated that

it quickly became evident that UNHQs did not hold sufficiently up to date, comprehensive information about personnel present in Iraq. Not only was there insufficient information on individual personnel files, there was no single source of basic data with accurate personnel numbers and names at UNHQs. The absence of this baseline data became a serious impediment to accounting for missing and injured personnel in the field and for responding to even simple enquiries (.); Personnel data was assembled at UNHQs from fragmented and out of date sources held at headquarters; staff members had not kept their personnel records up to date”, and recommends that “New minimum requirements for personnel data holdings should be developed at UNHQs and staff members and personnel officers should ensure information is up to date.. .to satisfy the needs of various departments who need different data for different reasons (administrative information, [...] etc).

h. Her right to due process was curtailed. While it was expected that she would have been assisted by management to process her claim, especially given that she was also a victim of the bombing, instead she was arbitrarily denied a hearing.

i. The Government of Brazil has confirmed that, under the laws of Brazil, the Applicant has status equal that of a surviving spouse and the Respondent is required to abide by that determination. As the equivalent of a

widow of a deceased staff member the Applicant is entitled to receive a share in the residual benefits as surviving spouse of Mr. M.

j. Appendix D was updated largely as a consequence of the 19 August 2003 terrorist bombing - as its provisions had not been updated since 1993 and it no longer met the needs of the Organization.

k. She lost not only her life partner but her chance for a family and a future together. Beyond the strict interpretation of rules, the Organization has a moral obligation to recognize this sacrifice. Instead, she was precluded from any recognition of her loss, deepening the accumulated trauma, and aggravating the lasting psychological damage - which has been well documented in this case.

l. The 19 August 2003 attack on the United Nations compound in Baghdad has been followed by terrorist attacks on United Nations compounds in Algeria and Somalia. The positive resolution of this case will hopefully bring equity and relief to United Nations staff in non-traditional unions, including the most vulnerable female staff, knowing they have the support of the Organization.

Respondent's submissions

19. The Respondent submits that the application is not receivable *ratione personae* under articles 2(1) and 3.1(b) of the UNDT Statute. The Applicant has produced no evidence that she represents the deceased staff member or that she appeals an administrative decision related to terms and conditions of her former appointment. The Applicant is not the staff member's wife. She also is not the representative of his estate. The fact that the Applicant alleges to be a third-party beneficiary of the deceased staff member's rights under Appendix D does not give her access to the internal justice system. Where the General Assembly wished to give such access to the system, it could have done so, as it did with respect to those alleging entitlement to benefits under the United Nations Pension Fund regulations.

There is no such language in the Dispute Tribunal Statute with respect to derivative rights under Appendix D and there is no basis for reading the Statute as granting such a right.

20. The Respondent argues that the Applicant's Appendix D claim is time-barred as it was filed 16 years late. According to the Respondent, art. 12 of Appendix D provides that claims for benefits as a surviving widow shall be submitted within four months of the death of the staff member. In exceptional circumstances, the Secretary-General may consider a late claim. The ABCC Secretary reasonably found that the Applicant's reason for the Applicant's late request, i.e., her own medical issues, did not qualify as exceptional circumstances for waiving the time limits.

21. This conclusion is supported by the fact that the Applicant did file a timely Appendix D claim under art. 11 for compensation for her own service-incurred injuries within the same four-month time limit. The Applicant was also able to file her case before the Brazilian Court in the intervening period in 2008. The ABCC Secretary also reasonably concluded that the protracted nature of the judicial process in Brazil was not an exceptional circumstance.

22. According to the Respondent, the Applicant claims that upon Mr. M's death, she was advised to obtain legal recognition of her relationship with him from the Government of Brazil. However, the Applicant waited five years to do so.

23. The Respondent argues that the Applicant has produced no evidence that the ABCC Secretary lacked the delegated authority to determine whether the Applicant's Appendix D claim was receivable. Unable to support her challenge to the ABCC Secretary authority to take the contested decision, the Applicant now attempts to relate her claim back to the time of the Applicant's death to determine that authority. However, this case does not challenge a decision made in 2003 and would be time-barred if it did. The only decision under review is the one of 12 November 2019.

24. The Respondent submits that by memorandum dated 22 May 2017, the Controller delegated to the ABCC Secretary the authority vested in him by section

5.2(a) of ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules) , and section 5(c) of ST/SGB/151 (Administration of the Staff Regulations and the Staff Rules), regarding, *inter alia*, the waiver or denial of request for waiver of the deadline for filing claims under the version of Appendix D that applies to this case as well as subsequent revised versions.

25. The Respondent argues that the Applicant is not the widow of the deceased staff member. On this argument, the Respondent makes the following submissions:

a. Article 10.2 of Appendix D grants compensation only to the widow of a staff member in the event of a staff member's death attributable to the performance of official duties on behalf of the United Nations. A "widow" is defined as surviving spouse consistent with the UNAT's interpretation.

b. The Appeals Tribunal has found that the Applicant is not the widow, i.e., the surviving spouse, of the deceased staff member notwithstanding the Brazilian Court's judgment. Accordingly, the Applicant is not entitled to a widow's benefit under Appendix D.

c. The law of the deceased staff member's nationality, i.e., the Brazilian law, does not determine whether the Applicant is the deceased staff member's surviving spouse, as she claims. This Tribunal has rejected the Applicant's reliance on the administrative issuance that was not in effect at time of the death of the staff member, the event that gives rise to a widow's benefit. In accordance with the *lex loci celebrationis*, the Appeals Tribunal found that the deceased staff member's stable union with the Applicant was not valid at the time of its celebration due to the existence of his valid marriage concluded under French law.

d. Mr. M never reported any marriage or other relationship with the Applicant to the Organization as required under staff rule 104.4(a) and (b), in effect during the relevant period. During his entire 33 years of employment

until his death, the deceased staff member reported one marriage only, the one to his wife in France.

Considerations

26. The Applicant challenges the Respondent's decision to reject her claim for compensation under Appendix D to the Staff Rules as a surviving spouse of a staff member killed in the course of official duties on 19 August 2003.

27. She alleges that she has standing to file this application because she was a "staff member at the time of the decedent's death" and "as a claimant to challenge the refusal to have her proper legal status, confirmed as equivalent to marriage by the Government of Brazil, recognized by the Organization".

28. The Applicant has argued that she is reopening the claim on the basis that she is also entitled to the benefits as a surviving spouse of the deceased staff member¹. However, UNAT found in *Larriera*² that the Applicant does not qualify as a surviving spouse or widow of the deceased staff member. This Tribunal adopts this finding as no new information has been adduced that would entitle the Applicant to a finding that she now qualifies as a surviving spouse of the deceased staff member for purposes of this application.

29. The Respondent has urged the Tribunal to find that the application is not receivable *ratione personae* citing arts. 2(1) and 3(1)(b) of the UNDT Statute which expressly spells out the type of individuals that may have access to the UNDT.

30. Article 2(1) of the UNDT Statute provides that the Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual to

¹ The beneficiaries of the deceased staff member already claimed and were paid the benefits. While the Applicant who was also a staff member at the time of the bombing in Baghdad also filed a claim and received her own benefits for her service-incurred injuries.

² 2020-UNAT-1004.

appeal an administrative decision that it alleged to be in non-compliance with the terms of appointment or the contract of employment.

31. The individual referred to above who is entitled to file an application in the UNDT is defined in art. 3(1) of the UNDT statute as:

- a. Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
- b. Any former staff member of the United Nations, including United Nations Secretariat or separately administered United Nations funds and programmes;
- c. Any person making claims in the name of an incapacitated or deceased staff member of the United Nations funds and programmes.

32. According to these statutory provisions and the jurisprudence, the UNDT's jurisdiction *ratione personae* is limited to these three categories of applicants. The General Assembly has in turn emphasized that the Tribunals shall not have powers beyond those statutorily conferred on them by their respective Statutes³.

33. As rightly argued by the Respondent, the Applicant has not established that she fits in any of the three categories enunciated in the Statute. She may not sue as a staff member because she is not, and she may not sue as a former staff member because the claim has no relation to her contractual status. It was held in *Shkurtaj* 2011-UNAT-148, that a former staff member has standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment. There must be a sufficient nexus between the former employment and the impugned action.⁴

34. The Tribunal having found that the Applicant is not the decedent's widow, she is not entitled to the benefits in any capacity. The Applicant has no standing *ratione personae*.

³ *Mindua* UNAT-2019- 921, paras. 17 and 27.

⁴ At para. 29.

35. It would be an error of law to proceed and address the rest of the issues that arose in this application after a finding that the Applicant has no standing *ratione personae* to bring a claim in this Tribunal⁵.

Judgment

36. The application is not receivable *ratione personae*. It is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 21st day of September 2021

Entered in the Register on this 21st day of September 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁵ *Khan* 2017-UNAT-727, para. 30.