



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-287/Corr.1

**McKay
(Appellant)**

v.

Secretary-General of the United Nations

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Delay in providing assistance was not the result of a single event but was a combination of the following: a) Mrs. McKay, who was the only person with the deceased, did not directly call the Lebanese Red Cross or Lebanese Police for reasons unknown to the Board, probably because she did not know their numbers, b) the Red Cross ambulance was not given sufficient information to identify the residence, c) radio coverage was not sufficient in the area.

14. The ABCC considered Mrs. McKay's claim on 21 August 2008 and issued a report on 19 September 2008, in which it noted that Mr. McKay had not received medical assistance on a timely basis due to lack of responsiveness on the part of UNIFIL Security, and recommended that his death "should be recognized as attributable to the performance of official duties on behalf of the United Nations", and that "compensation should be awarded to the dependent survivors under article 10.2 of Appendix D to the Staff Rules" and "directly related costs should be reimbursed, as per existing United Nations policy provisions". On 2 October 2008, the Controller approved the ABCC recommendations on behalf of the Secretary-General.

15. In September 2009, Mrs. McKay filed an application with the UNDT, seeking a copy of the BOI report, payment of certain expenses and compensation for failing to afford her deceased husband due protection while in service. By Order No. 43 (GVA/2010) dated 14 April 2010, the UNDT directed the Secretary-General to provide Mrs. McKay with a copy of the BOI report and to make a decision on the reimbursement of those expenses directly related to his death. The UNDT also directed Mrs. McKay to consider withdrawing her application "without prejudice".

16. Mrs. McKay subsequently filed a motion to withdraw her application from the UNDT.

18. In Judgment No. UNDT/2012/018, the UNDT rejected the Respondent's receivability challenge and ruled that Mrs. McKay's application was receivable as her claims concerned alleged non-compliance with Mr. McKay's terms of appointment, over and above the purview of Appendix D. However, the UNDT was not able to conclude that the alleged breach of the duty of care, contributing to Mr. McKay's death, had occurred in the present case or that the measures in place in response to health emergencies were insufficient. The absence of an autopsy report and the converging professional opinions of the attending doctor at Najem Hospital and the UNIFIL Chief Medical Officer as to when Mr. McKay passed away led the UNDT to conclude that "the manner and timing in which UNIFIL staff reacted to [Mrs. McKay's] calls for help at around 6 am could no longer have made any difference in the tragic outcome of the incident". The UNDT also concluded that no excessive delay could be identified in handling Mrs. McKay's claims to justify an award of compensation. Regarding the travel costs for family members to Lebanon and New York, the UNDT rejected Mrs. McKay's claims for reimbursement of airfares for her children as none of those expenses satisfied the Article 10.1, Appendix D, test of "reasonable and directly related" costs. In addition, the UNDT rejected Mrs. McKay's claim for costs against the Respondent for abuse of process.

Submissions

Mrs. McKay's Appeal

19. Mrs. McKay maintains that due to errors by the UNDT, she was denied a timely adjudication of her case. Although it is clear from the Staff Rules and precedents that appeals of decisions taken on the advice of the ABCC do not require management evaluation, the UNDT accepted the Respondent's argument that management evaluation was required in order to examine the central issue of duty of care. She then withdrew her September 2009 application and filed a request for management evaluation only to be informed that no management evaluation was required and she could make her application directly to the UNDT. Nearly a year later, on 13 September 2010, she filed a new but nearly identical application with the UNDT.

20. The UNDT erred in finding that Mr. McKay had passed away several hours prior to reaching the hospital, in view of the conflicting evidence in the BOI report and the statements by Mrs. McKay, the security focal point, the Lebanese Red Cross, and the security officers

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another UNIFIL staff member, whose account was, in turn, based on her conversation with a neighbour of Mr. McKay. No evidence shows that the neighbour had actually observed Mr. McKay at the time of the incident.

25. Contrary to Mrs. McKay's assertions, neither the BOI nor the ABCC found that any issues regarding the response of UNIFIL staff, including shortcomings in radio coverage, had contributed to Mr. McKay's death.

26. The Secretary-General submits that the UNDT considered Mrs. McKay's claims under a breach of contract framework, but did not find any breach. In this regard, the present case is distinguishable from those cases in which the former Administrative Tribunal found that the Organisation had breached its duty care and that those breaches could have prevented the staff members from suffering damages.

27. The Secretary-General rejects Mrs. McKay's claim that she was denied timely adjudication of her case. Mrs. McKay voluntarily withdrew her first UNDT application. It was correct for the UNDT to accept the Respondent's procedural objections regarding Mrs. McKay's first UNDT application, because it included not only claims in respect of the Appendix D compensation, but also claims for failing to afford certain conditions of service and claims for payment of certain expenses.

Considerations

28. Article 2(1) of the Statute of the Appeals Tribunal provides that this Tribunal:

shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

We find that the grounds for appeal are not substantiated in the present case. Hence, the impugned Judgment will be affirmed.

29. The alleged delay in the disposal of the case at the lower level did not have any impact on the outcome of the case and it was partially tolerated by the Appellant, who followed the UNDT's direction about the requirement of management evaluation and withdrew her initial submission. Furthermore, the dubiousness of the issue overrides all consideration of unbearable delay. Any annulment and remand, which was not even requested by the Appellant, would certainly have negative consequences on the time consumed in processing her claims.

30. With regard to the merits of the case, this Court upholds the UNDT's reasonable decision to accept the opinions of the attending doctor at Najem Hospital and the UNIFIL Chief Medical Officer concerning the approximate time of Mr. McKay's death.

31. That conclusion was correctly arrived at on the technical evidence: not only the UNIFIL Chief Medical Officer (significantly, a pathologist) but also the attending doctor at Najem Hospital, independently of each other, determined that the death had occurred some hours prior to Mr. McKay's arrival at the hospital.

32. That finding was not contradicted by the testimony of the individuals who had seen Mr. McKay unconscious. The versions of other persons who did not personally witness Mr. McKay cannot be considered.

33. It is perfectly correct to conclude, as the UNDT did, that, regardless of any deficiency in the Organization's duty of care towards its staff members, Mr. McKay had died before his wife called for help. As this conclusion is not manifestly unreasonable, the appeal cannot be allowed.

34. This Tribunal is of the view that no entitlements or compensation are due to Mrs. McKay or Mr. McKay's estate, other than the ones already granted.

35. Insofar as Mrs. McKay challenges the quantum of compensation and alleges undue delay in the handling of her claims, we do not find any merit in her appeal and affirm the UNDT Judgment in respect of these claims.

Judgment

36. The appeal is dismissed and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar