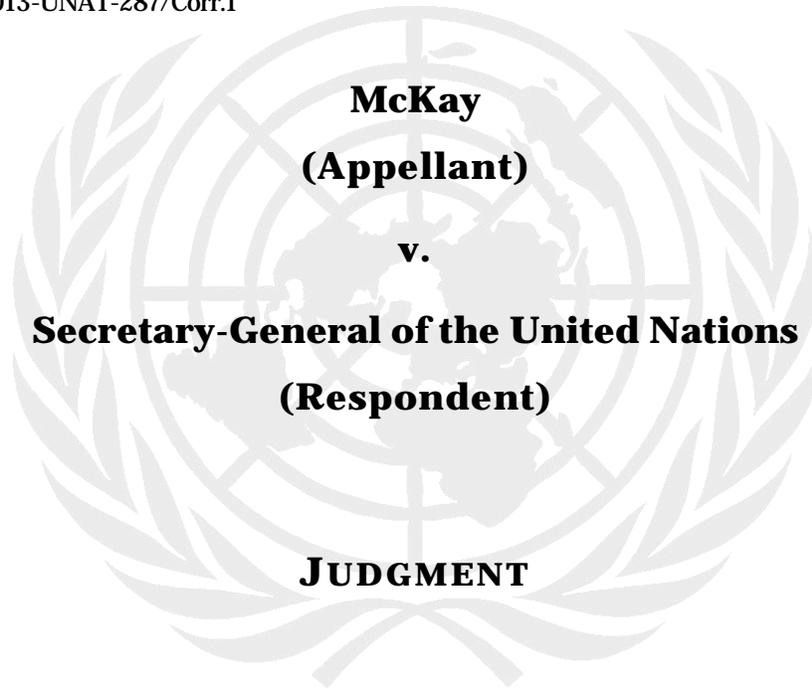




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

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



**McKay
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Mary Faherty
Judge Rosalyn Chapman

Case No.: 2012-314

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Appellant: George Irving

Counsel for Respondent: John Stompor

Reissued for technical reasons on 07 June 2013

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mrs. Nayyar McKay against Judgment No. UNDT/2012/018, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 9 February 2012 in the case of *McKay v. Secretary-General of the United Nations*. Mrs. McKay appealed on 9 April 2012, and the Secretary-General answered on 8 June 2012.

Facts and Procedure

2. Mrs. McKay's husband, Mr. Peter McKay, passed away on Sunday, 28 January 2007, at his residence in Tyr, Lebanon. At the time of his death, Mr. McKay was a Senior Telecommunications Engineer at the FS-6 level serving with the United Nations Interim Force in Lebanon (UNIFIL).

3. According to Mrs. McKay, in the early morning of 28 January 2007, she noticed her husband experiencing severe chest pain. She tried to secure help through her husband's radio, personal mobile phone and neighbours.

4. Her calls either failed to go through or were not responded to. However, a neighbour, who was the security focal point for the area, was woken up by Mrs. McKay's phone call sometime after 6 am. He immediately dressed and left for Mr. McKay's residence. It appears that at approximately 6.20 am, he made a call to the Lebanese Red Cross for an ambulance. When he arrived at Mr. McKay's residence at approximately 6.30 am, he saw a Red Cross ambulance and medics carrying Mr. McKay on a stretcher. The Red Cross medics had found Mr. McKay "unconscious" and performed cardio pulmonary resuscitation (CPR) on him before they transported him from his residence to the ambulance. The security focal point observed that "[Mr. McKay] looked pale and unconscious". The ambulance took Mr. and Mrs. McKay to Najem Hospital, which is located approximately 100 meters away from Mr. McKay's residence.

5. The ambulance arrived at Najem Hospital at around 6.40 am. The security focal point followed the ambulance to Najem Hospital and called the UNIFIL Chief Medical Officer to inform her of the situation.

6. The attending doctor at Najem Hospital examined Mr. McKay upon arrival. In a medical report dated 28 January 2007, the attending doctor stated that Mr. McKay was dead upon arrival at the hospital, as there were no vital signs and his body was "cold", and "the color of the body

[was] blue to dark”. In the opinion of the attending doctor, the cause of death was “probably cardia [sic] attack” that had happened “more than five hours” before.

7. The UNIFIL Chief Medical Officer arrived at Najem Hospital at approximately 7.10 am. She examined Mr. McKay’s body and confirmed his death. In her subsequent interview with the Board of Inquiry (BOI), the Chief Medical Officer recalled:

I examined Peter and he was really dead. I don't think he died an hour ago. I am a Pathologist. He was already dead. Rigor mortis had already started and he was completely cold ... His condition when I saw him even just before touching the body, it was like somebody who could have died maybe 2-3 hours ago because he was already ashen, he was already grey and cold. And a human being, one hour after death does not become cold.

8. The Chief Medical Officer directed that Mr. McKay’s remains be transported to another hospital. She then asked Mrs. McKay whether she could request an autopsy examination, but Mrs. McKay refused. No autopsy was performed and Mr. McKay's remains were embalmed for transportation to the United Kingdom, his home country.

9. UNIFIL personnel managed the travel arrangements for Mr. McKay’s remains and for Mrs. McKay and their three children, who had travelled to Lebanon after learning of their father's death, to return to the United Kingdom. The UNIFIL Administration advised the deceased's family that the cost of the tickets for three of them would be recovered and deducted that amount from Mr. McKay’s last salary.

10. In March 2007, Mrs. McKay and a daughter returned to Lebanon to attend to pending paperwork with the UNIFIL Administration. In May 2007, Mr. McKay’s final emoluments of USD 106,167.2 including death benefits were paid to his heirs.

11. On 10 May 2007, following the submission of a 3 May 2007 investigation report on the death of Mr. McKay, the UNIFIL Commander convened a BOI to investigate and report on the circumstances of his death.

12. On 27 May 2007, Mrs. McKay made a request for compensation to the Advisory Board on Compensation Claims (ABCC).

13. In a report dated 6 June 2007, the BOI found that Mr. McKay had died of natural causes, although the exact cause or time of the death could not be determined. It also found:

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. On 23 April 2010, the Administration provided a copy of the BOI report to Mrs. McKay on a confidential basis and, on 4 May 2010, the Administration provided an update on the status of the payment of expenses directly related to Mr. McKay's death and informed Mrs. McKay that no further action would be taken on her claims.

17. In June 2010, Mrs. McKay submitted a request for management evaluation. On 30 July 2010, she was advised that her claims for certain outstanding costs incurred following her husband's death would be re-examined. She was also advised that she could file an application directly with the Dispute Tribunal as the Controller's decision on behalf of the Secretary-General was based on the advice of the ABCC, a technical body within the meaning of Staff Rule 11.2.

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

on duty. Where evidence is contradictory, it is reasonable to assume that had the emergency procedures operated as they should have, it may have made a difference. Mrs. McKay asserts that both the BOI report and the Controller's decision on the basis of the ABCC advice recognized the possibility that insufficient radio coverage in the area may have contributed to the delay in providing assistance to her late husband. The UNDT adopted the Chief Medical Officer's theory without further evidence or testimony.

21. The present case involves a similar set of circumstances to those in *Durand*¹ before the former Administrative Tribunal where issues included the extent of the Organisation's liability for breach of its duty of care towards a staff member serving on mission assignment, the delays in processing the estate's entitlements as well as the refusal to disclose a BOI report. It should be noted that in *Durand*, the former Administrative Tribunal awarded compensation not only for the breach of duty of care but also for the excessive delays in handling the case, as well as the withholding of the BOI report.

22. Mrs. McKay requests that the Appeals Tribunal vacate the UNDT Judgment, direct a judgment in her favour and award her compensation of three years' net base salary in view of the exceptional circumstances of the case.

Secretary-General's Answer

23. The Secretary-General maintains that the Appellant has failed to establish any error in the UNDT's finding that Mr. McKay had already died by the time she called for help at approximately 6 am, on 28 January 2007. The UNDT based its finding on the medical evidence in the form of a medical report by the attending doctor at Najem Hospital and the statement of the UNIFIL Chief Medical Officer, who is a pathology specialist.

24. Contrary to Mrs. McKay's assertions, the security focal point observed that Mr. McKay looked pale and unconscious when he was brought to the ambulance; he did not state that Mr. McKay was alive. The President of the Lebanese Red Cross stated that the ambulance team found Mr. McKay unconscious; he did not state that Mr. McKay was alive when the ambulance team found him. The statements by the security officer on duty and another UNIFIL staff member were not based on their first-hand observations, but on the verbal information from

¹ Former Administrative Tribunal Judgment No. 1204, *Durand* (2004).

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