



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

Judgment No. 2015-UNAT-601

**Karseboom
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sophia Adinyira Judge Inés Weinberg de Roca
Case No.:	2015-688
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Mr. Karseboom: Robbie Leighton/OSLA
Counsel for Secretary-General: Zarqaa Chohan

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/130, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 30 October 2014 in the case of *Karseboom v. Secretary-General of the United Nations*. The Secretary-General filed an appeal on 24 December 2014 during the winter recess of the Appeals Tribunal, which was registered as timely on 5 January 2015. On 6 March 2015, Mr. Alfred Karseboom filed his answer.

Facts and Procedure

2. The following facts were agreed upon by the parties:¹

... In November 2005 the Applicant was appointed as a Regional Security Officer (RSO) in the province of Kananga, in the Democratic Republic of Congo [(DRC)] in [the United Nations Organization Mission in the DRC [(MONUC)].

... On 14 April 2006, whilst on leave in Spain, the Applicant had a bicycle accident in which he sustained a back injury. He sought treatment in Spain during April 2006 from Dr. Perez Francisco at the Complejo Hospitalario Nuestra Senora De Candelaria.

... The Applicant spent approximately three months recovering from this injury and on 23 August 2006 he was medically cleared to return to duty by Dr. Perez Francisco.

... The Applicant returned to duty in MONUC on 11 September 2006.

... On 1 October 2006 the Applicant's appointment was extended until 30 September 2007.

... During the period from 11 October 2006 to 13 October 2006, as part of his official duties, the Applicant was sent on an obligatory MP5 shooting and yearly pistol requalification course in Kinshasa.

... An incident occurred on 12 October 2006 as the Applicant was being dropped off after the course which resulted in the Applicant falling through a grille covering a gutter. The fall sustained on 12 October 2006 resulted in injuries.

... Initially, the local UN medical services in Kinshasa treated the Applicant for the injuries to his left leg and left knee. No complaint was made of any injury or pain to his back. After a few weeks, they determined that his condition required more extensive treatment than could be provided by the UN there. On 1 November 2006, a sonography revealed a massive hematoma with a rupture of the lateral internal ligament in the Applicant's left knee. Consequently, on 3 November 2006, Dr. Tesfaye Teklu, Chief of

¹ Annex 1 to Answer: Joint Submission on Agreed Facts Pursuant to Order No. 96 (GVA/2014), paras. 1-32.

Peacekeeping Section, [Medical Services Division (MSD)], instructed that the Applicant be medically evacuated for treatment in Spain. On 9 November 2006 the Applicant was medically evacuated.

... In March 2007, the Applicant was informed by his traumatologist that his vertebrae required surgical repair and he was placed on a waiting list for surgery.

... On 3 April 2007 the Applicant was notified by Human Resources [HR] at MONUC that his balance of sick leave was now exhausted, and that his salary would be withheld until medical documentation was provided to MONUC and MSD concerning the status of his medical treatment and condition.

... On 16 April 2007, HR MONUC notified the Applicant that a number of medical documents had been received and forwarded to [the MSD] in New York for review and certification. The Applicant was further informed that his salary would continue to be withheld pending the receipt of a decision from MSD.

... On 15 September 2007 the Applicant submitted a claim for compensation under Appendix D to the Staff Rules.

... On 30 September 2007 the Applicant's appointment was permitted to expire.

... On 11 September 2008 the Applicant was informed by Van Breda International, his healthcare insurance provider, that the United Nations had cancelled his coverage.

... On the same day, 11 September 2008, the Applicant was informed by Ms. Lalita Kakrecha, MONUC that he had been separated from his post.

... On 19 September 2008, the Applicant contacted Ms. Lalita Kakrecha, MONUC, to request information on how to receive his separation entitlements.

... On 6 October 2008 Ms[.] Susan Asomaning, [Officer-in-Charge (OIC)] Personnel Section, MONUC, sent the Applicant the forms to finalize his separation from MONUC.

... On 28 October 2008, the Applicant submitted the separation forms to Human Resources Section, MONUC Kinshasa DRC by mail.

... On 12 January 2009 Ms[.] Susan Asomaning emailed the Applicant and informed him as follows:

(a) that he had been separated from the Organization for 'Abandonment of Post' on 30 September 2007; and

(b) that his last working day was marked as 11 October 2006.

... On 4 February 2009 the Applicant was informed by Field Personnel Operations Service, [Field Personnel Division (FPD)/Department of Field Support (DFS)] that he would be contacted once payroll had completed his case.

... On 15 December 2009, the Controller, on behalf of the Secretary-General, approved the [Advisory Board on Compensation Claims (ABCC)]'s recommendation regarding the Applicant's claim following its meeting on 12 October 2009. The ABCC recommended, *inter alia*, the following:

- (a) that only the Applicant's injuries to his left leg and left knee were attributable to the performance of official duties on behalf of the United Nations and that all reasonable medical expenses certified by the Medical Director as directly related to those injuries alone could be reimbursed under Appendix D to the Staff Rules;
- (b) that the Applicant should be granted special sick leave credit for the period from 12 October 2006 to 30 September 2007 (when he was separated from service), as being directly related to the service-incurred injuries, under the provisions of article 18(a) of Appendix D; and that he should be credited for any days of annual leave that he was erroneously charged during that period in order to remain on full pay status; and
- (c) that the Applicant should receive compensation under article 11.2(d) of Appendix D for the loss of earning capacity for the period from 1 October 2007 to 4 August 2008, the compensation to be based on the salary that he was receiving when he separated from service on 30 September 2007...

... On 18 January 2010, the Office of Staff Legal Assistance (OSLA), on behalf of the Applicant, wrote to DFS, ABCC, the United Nations Joint Staff Pension Fund ([UNJSPF or] Pension Fund), and MONUC advising that he wished to "pursue and/or update all claims which are available to him". This included a request for a disability benefit under Article 33 of the Pension Fund's Regulations.

... On 10 February 2010, pursuant to the ABCC decision of 12 October 2009, the Applicant was awarded 43,064.13 USD as compensation for loss of earning and 865.67 USD for reimbursement of medical expenses.

... On 14 April 2010 Dr. Serguei Oleinikov, Deputy Director at the Medical Services Division, recommended that the Applicant receive disability benefits.

... On 22 September 2010 the Applicant submitted an Addendum to his request of 18 January 2010 requesting that the injuries sustained to his back as a result of the events of 12 October 2006 be recognized as service incurred and consequently compensated.

... Around this time Management decided that, in light of Appendix D, the Applicant should not have been separated on 30 September 2007 instead he should have been granted Special Sick Leave credits, first on full pay and then on half pay, pending a final decision by the ABCC regarding his disability. Consequently, Management began to implement the Applicant's retroactive reinstatement for the period 1 October 2007–20 April 2011. To this end, on 19 January 2011, FPD/DFS

wrote to the Secretary of the ABCC requesting a recommendation from the ABCC that the Applicant be awarded half pay for the period from 1 October 2007 to 4 August 2008 to supplement his sick leave with half pay over this period ... In early March 2011, the MSD asked Dr. Roberto Perez Pestana, an occupational medicine and work incapacity specialist in Spain, to conduct an independent evaluation of Mr. Karseboom in connection with his request for a disability benefit. Dr. Pestana was also asked to carry out a functional evaluation of the Applicant's left knee in connection with his claim for permanent loss of function under Appendix D...

... On 21 April 2011 Ms. Dulcie Mapondera, Senior Legal Officer at UNJSPF, reverted to the Applicant to notify him that, after consideration of the new medical evidence submitted and pursuant to Article 33(a) of the Fund's Regulations, he was to be awarded a disability benefit.

... On 28 April 2011 the Applicant was informed by FPD/DFS that his reinstatement would be implemented over the next few days.

... On 17 May 2011 Mr. Demetri Gounaris, Secretary of ABCC, advised the Applicant that on 4 March 2011 the ABCC had recommended:

(a) That, pursuant to Article 18(a) of Appendix D, the Applicant be granted special sick leave credit for half days within the period from 1 October 2007 to 4 August 2008;

(b) That sums awarded under article 11.2(d) for the same period be recovered from the Applicant.

... On 29 July 2011, per the Secretary[-]General's decision of 6 May 2011, the Organization recovered 43,929.80 USD from the monies owing to the Applicant, to reflect an adjustment of the sick leave credit at half pay from 1 October 2007 to 4 August 2008 combined with the Applicant's sick leave entitlements at half pay.

... On 13 December 2011 Ms. Maria Clarissa Lijauco-O'Donnell, Chief of Pension Entitlements and Client Service for [the ...] Pension Fund, informed the Applicant that his estimated pension entitlements for incapacity were:

(a) (as per Article 33) a disability payment of \$35,558.00 per year, which would remain in effect for as long as he remained physically incapacitated;

(b) (as per Article 34 and 35) the Applicant's wife would receive a benefit payment of \$17,779.00 per year in the event of the Applicant's death;

(c) (as per Article 36) any of the Applicant's children who were under the age of 21, would, in the event of the Applicant's death receive \$3,186.00 per year.

... On 8 February 2012 Ms. Silvina Colicchia, Administrative Assistant of ABCC, advised the Applicant that following its 458th meeting on 14 October 2011, the ABCC had recommended that:

- (a) based on the current medical information, as the claimant has not sustained any degree of permanent loss of function due to his leg and knee injuries in accordance with the 6th Edition of the [American Medical Association (AMA)] guides to permanent impairment, the claimant's request for compensation under Article 11.3(c) of Appendix D be denied; and
- (b) the claimant's request that his spinal injury be recognized as service-incurred be denied.

3. On 2 February 2012, the Controller, on behalf of the Secretary-General, approved the recommendation.

4. On 27 April 2012, Mr. Karseboom filed an application before the UNDT contesting the decision to deny his request for compensation on the grounds that he had not sustained any degree of permanent loss of function due to his leg and knee injuries, and that his spinal injury would not be recognized as service-incurred. On 30 July 2012, he submitted an addendum to his application.

5. On 30 October 2014, the UNDT issued its Judgment. The UNDT held that the procedures for reconsideration provided for in Article 17 of Appendix D were not followed by the ABCC. Having received the requests for reconsideration, the Administration did not convene a medical board; instead, it conducted a review of the original determination that the spinal injuries were not service-incurred. In conducting this review, the ABCC relied upon the so-called independent medical evaluation provided by Dr. Pestana. The UNDT concluded that the decision by the Secretary-General on the request for reconsideration was made on the basis of an invalid process in violation of Article 17 of Appendix D and was therefore unlawful and void.

6. In addition, Mr. Pestana's terms of reference did not require him to investigate or give his opinion on the cause of Mr. Karseboom's back injuries, the very issue under consideration by the ABCC. His report could therefore not provide any direct evidence or conclusions upon which the ABCC could properly reach a conclusion and make a recommendation about the causation of Mr. Karseboom's back pain. The ABCC therefore made its recommendation based on uncertain facts and inferences which were derived, improperly, from the absence of evidence. Moreover, there were significant delays in processing Mr. Karseboom's claim for compensation for his back injury.

7. The UNDT further found that the ABCC's failure to convene a medical board which undermined the lawfulness of the Secretary-General's decision on the cause of Mr. Karseboom's spinal injuries, also impugned the decision about the loss of function related to Mr. Karseboom's leg and knee injuries.

8. Turning to the issue of material damages, the UNDT held that had the ABCC found that Mr. Karseboom's spinal injury was service-incurred, he would have been entitled to the maximum amount under Article 11(3) of Appendix D, which is twice the annual amount of the pensionable remuneration at grade P-4, step V. The UNDT estimated the probability that Mr. Karseboom would have succeeded in his claim for compensation at "a conservative 50%". Considering that the maximum amount Mr. Karseboom could have obtained under Article 11(3) of Appendix D would have been USD 300,208, the UNDT found that the potential loss to Mr. Karseboom was half of this maximum, i.e. USD 150,104, corresponding to two years and eight months' net base salary at the FS-4, step 10 level at the time of his separation on 20 April 2011.

9. Having considered several factors, such as the serious and fundamental violation of the Staff Rules causing Mr. Karseboom to lose at least a 50 per cent chance to receive full compensation under Appendix D, the Administration's negligent approach to his case, as well as the delays in processing his claims, the UNDT concluded that this was an exceptional case under Article 10(5)(b) of the UNDT Statute justifying an award greater than two years' net base salary. The UNDT emphasized that the compensation it was awarding was not an award under Appendix D, but a measure of the opportunity that was lost by Mr. Karseboom to receive such compensation by reason of the procedural violations in his case.

10. The UNDT also awarded moral damages in the amount of three months' net base salary as at 20 April 2011 for the "deep and legitimate sense of injustice" Mr. Karseboom felt given the Administration's failure to process his claims in a "correct and timely manner", as well as a number of incorrect decisions by the Administration.

Submissions

The Secretary-General's Appeal

11. The UNDT erred in making assumptions that had the ABCC followed the correct procedures, it might have decided that the spinal injury was service-incurred. In making these assumptions, the UNDT essentially made medical findings and placed itself in the position of

the MSD, the ABCC, the Controller and, ultimately, the Secretary-General. The UNDT was not, however, competent to determine that an injury was service-related, and it was not appropriate for the UNDT to assume that the injury was service-related. Rather, the determination as to whether the injury is service-incurred under Appendix D rests with the ABCC and the Secretary-General. If the UNDT determined upon its review that the proper procedures had not been followed, it should have remanded the case back to the ABCC to convene a medical board to reconsider the original determination.

12. The UNDT further erred in finding that Mr. Karseboom suffered 100 per cent permanent loss of function caused by his spinal injuries and awarding compensation on that basis. While the UNDT acknowledged that it could neither make an award under Appendix D nor substitute its own views for those of the medical service, it essentially did so. It calculated the amount of material damages to be awarded to Mr. Karseboom on the basis of medical findings and by incorrectly applying the schedule relating to permanent loss of function under Article 11(3) of Appendix D to Mr. Karseboom's case.

13. Moreover, the UNDT erred in awarding compensation for loss of opportunity. Contrary to the UNDT's finding that Mr. Karseboom had lost an opportunity to obtain compensation under Appendix D, his claim for compensation for his alleged service-incurred injury had been considered on two occasions by the ABCC and he had also received a disability pension from the UNJSPF. According to the Appeals Tribunal's jurisprudence, loss of opportunity usually applies to cases of selection or promotion and not to the loss of opportunity to obtain compensation under Appendix D.

14. The UNDT erred in awarding moral damages. Contrary to the UNDT's conclusion, there was no procedural violation warranting such compensation. In making its finding, the UNDT relied upon the *Meron* case² to justify an award of compensation for "excessive and inordinate delays, including delay in convening a medical board". The UNDT failed to take into consideration that Mr. Karseboom contributed to at least two years of the delay in processing his claim before the ABCC, by failing to file in a timely manner the relevant documents in support of his claims. The UNDT also failed to take into account the different processes that had to be undertaken in order to deal with Mr. Karseboom's requests, namely two claims before the ABCC and one claim for disability before the UNJSPF.

² *Meron v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/004, affirmed by the Appeals Tribunal in Judgment No. 2012-UNAT-198.

15. Moreover, there was no delay in convening a medical board or in implementing the Administration's decisions. The record reflects that on 10 February 2010, Mr. Karseboom received reimbursement of special leave, medical expenses and loss of earnings following the Controller's decision of 15 December 2009. Finally, contrary to Mr. Karseboom's contention, there was no mistake that led to his reinstatement; rather, his appointment of limited duration expired on 30 September 2007 and he was reinstated in order to enable the UNJSPF to consider his disability claim and to receive loss of earnings and special leave with pay under Appendix D. The facts of this case are therefore distinguishable from those of the *Merón* case.

16. As to the other allegedly incorrect decisions by the Administration warranting compensation, the Secretary-General contends that these were not subject to management evaluation within the relevant time limits and the UNDT exceeded its jurisdiction in considering these matters.

17. Mr. Karseboom further failed to produce evidence of moral damages resulting directly from a breach of his rights. In making its assessment, the UNDT appears to have relied solely upon his statements when he appeared before the UNDT.

18. For the foregoing reasons, Mr. Karseboom failed to meet the test of an award for moral harm set out in *Asariotis*³ and as such, the UNDT erred in awarding moral damages.

19. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

Mr. Karseboom's Answer

20. Contrary to the Secretary-General's contention, the UNDT made no medical finding regarding the causation of Mr. Karseboom's spinal injuries. It did not find that the spinal injury was service-incurred. The Secretary-General conflated the basis used in the impugned Judgment for calculating loss of opportunity damages with the substantive finding regarding the legality of the decision challenged. In so doing, the Secretary-General purports to challenge the substantive finding of the Dispute Tribunal while advancing arguments relevant only to the remedies.

21. In finding that the ABCC had not followed a procedure prescribed under the rules when reviewing its own decision, the UNDT did not need to go behind any opinion expressed by a medical expert. This is also not appealed. Similarly, in finding that reliance on the absence of

³ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

evidence in support of Mr. Karseboom's explanation of causation from Dr. Pestana's report was unreasonable, the UNDT did not need to rely on any opinion expressed by a medical expert. It is also not appealed. If an expert is not asked to address a question in a report, no substantive conclusions can be drawn from his failure to answer it. Drawing the conclusion that this medical opinion was not properly supported was well within the UNDT's jurisdiction.

22. The *Frechon* case is precedent for the type of review the UNDT conducted.⁴ In that case, it was held that the UNDT could legitimately review the opinion provided by the Director of MSD. The circumstances allowing them to do so included the fact that the basis for the Director of MSD's decision did not support her conclusion. By the same token, the UNDT reviewed the express basis for the MSD's decision and found that it did not support the MSD's conclusion.

23. Turning to the Secretary-General's contention that the UNDT erred in awarding compensation for loss of opportunity, Mr. Karseboom maintains that the nature of his injuries was not at issue before the UNDT. Rather, the issue was whether the review as to whether these injuries were service-incurred had been done in a lawful fashion. On 14 July 2014, in response to Order No. 96 (GVA/2014), which requested further particulars on the remedy sought, Mr. Karseboom submitted that the basis for compensation should be his permanent loss of function of the whole person. Under Appendix D, compensation for such a loss of function is twice the annual pensionable remuneration at grade P-4, step V. The Secretary-General did not object to this submission or attempt to adduce evidence to counter the above assertion. He is therefore precluded from raising this argument on appeal.

24. In the alternative, Mr. Karseboom requests that the matter be remanded to the UNDT for a hearing of expert evidence. The fact that the Secretary-General failed to take issue with the above submission during the UNDT proceedings means that Mr. Karseboom was not afforded the opportunity to adduce evidence in this regard. He was therefore deprived of a fair hearing.

25. As to the Secretary-General's argument that the UNDT should have remanded the case to the ABCC, Mr. Karseboom contends that had the UNDT ordered such remand, precedent shows that it "would [...] have been subject to appeal by the Secretary-General using a diametrically opposite pleading". The Secretary-General had previously argued in another case that such an order was outside the UNDT's jurisdiction and, as such, the argument is "opportunistic and ill-conceived".

⁴ *Frechon v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-132.

26. Contrary to the Secretary-General's assertion, loss of opportunity damages are not reserved to selection or promotion cases. Loss of opportunity damages apply to where there is a "loss of opportunity" such as the loss incurred by Mr. Karseboom. The failure to lawfully process Mr. Karseboom's request for reconsideration as to whether his spinal injuries were service-incurred resulted in a loss of opportunity to receive appropriate compensation for those injuries. The very fact that the UNDT was not competent to make medical findings of fact led to damages being calculated in terms of loss of opportunity. Thus, the situation is analogous to that of a recruitment exercise where the actions of the Administration mean the issue was not properly reviewed. In such cases, the UNDT cannot substitute its opinion for that of a selection panel but it can calculate loss of opportunity damages where a staff member has been denied reasonable consideration to which he was entitled as a result of an unlawful decision.

27. Turning to the award of moral damages, Mr. Karseboom contends that the two limbs set out in *Asariotis* are plainly present. The UNDT correctly found procedural and substantive errors in the taking of the contested decision, which breached Mr. Karseboom's right to reasonable consideration of his claim for compensation for a service-incurred injury. The UNDT also heard evidence from Mr. Karseboom on the pain and suffering caused by these errors and excessive and inordinate delays in processing his requests for compensation under Appendix D, and nothing precluded the UNDT from basing its award of moral damages on oral testimony uncontested by the Secretary-General.

28. Moreover, the agreed-upon facts were relevant when considering the impact that the contested decision had on Mr. Karseboom. The nature of the breach of his contractual rights was severe and the delay had serious financial consequences for him. The circumstances of the breach of Mr. Karseboom's rights and the delay in processing his requests make this one of the most egregious cases and the compensation awarded by the UNDT is commensurate to the harm incurred.

29. Mr. Karseboom requests that the Appeals Tribunal dismiss the appeal and uphold the UNDT Judgment in its entirety. Should the appeal succeed, Mr. Karseboom asks that the Appeals Tribunal order compensation sufficient to remedy the clear harm caused by the unlawful review as to whether Mr. Karseboom's spinal injuries were service-incurred.

Considerations

30. The UNDT found that the contested administrative decision to deny Mr. Karseboom compensation under Appendix D “on the grounds that his spinal injury was not service-incurred and that he had not sustained any degree of permanent loss of function” was unlawful and void.

31. The UNDT consequently awarded him USD 150,104 in material damages and three months’ net base salary as at 20 April 2011 for moral damages.

32. Mr. Karseboom had requested DFS, the ABCC, the Pension Fund and MONUC to reconsider the ABCC’s recommendation of 12 October 2009 in order that the injuries to his back could be recognised as service-related and compensation awarded. In response, the ABCC adopted a long-standing practice of requesting an independent medical evaluation at the cost of the Organization. This practice advantages claimants in that, if a medical board is convened and if it upholds the Secretary-General’s decision, the claimant would be obliged to pay certain medical fees and expenses, which could be considerable.⁵

33. The UNDT held that this procedure was “in breach of the fundamental rule of administrative law that the parties are bound by the rules of the Organization”.⁶

34. The UNDT elaborated on this finding in paragraphs 80 and 81 of its Judgment as follows:

... The practice adopted by the ABCC is in clear contravention of art. 17. The Secretary-General is required by art. 17(c) to make a decision on the request for reconsideration on the basis of the ABCC recommendations together with the report of a medical board. In this case, a medical board was not convened and the decision was made without such a report.

... The Applicant has demonstrated that the correct procedures required by art. 17 were not followed by the ABCC. Instead, the ABCC relied on a process that is not mandated by any regulation or rule of the Organization. As the decision of the Secretary-General on the request for reconsideration was made on the basis of an invalid process it is unlawful and therefore void.

⁵ See impugned Judgment, paras. 53-54.

⁶ *Ibid.*, para. 79.

35. Article 17 of Appendix D to the Staff Rules entitled “Appeals in case of injury or illness” states:

(a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date. The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b);

(b) A medical board shall be convened to consider and to report to the Advisory Board on Compensation Claims on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations;

(c) The Advisory Board on Compensation Claims shall transmit its recommendations together with the report of the medical board to the Secretary-General who shall make the final determination;

(d) If after reviewing the report of the medical board and the recommendations of the Advisory Board on Compensation Claims, the Secretary-General alters his original decision in favour of the claimant, the United Nations will bear the medical fees and the incidental expenses; if the original decision is sustained, the claimant shall bear the medical fees and the incidental expenses of the medical practitioner whom he selected and half of the medical fees and expenses of the third medical practitioner on the medical board. The balance of the fees and expenses shall be borne by the United Nations;

(e) Whenever an appeal under this article involves also an appeal against a decision of the Joint Staff Pension Board, the medical board established under the Regulations and Rules of the Joint Staff Pension Board and such medical board's report shall be utilized to the extent possible for the purposes of this article.

36. The Secretary-General does not contest the UNDT's finding that the provisions of Article 17 relating to a medical board were not followed. However, he argues that the UNDT erred in law by making medical findings which it was not competent to do, such as: “From

the date of the October 2006 accident until now, the Applicant has been seriously disabled with a 100% permanent loss of function caused principally by his spinal injuries.”

37. The Secretary-General submits that the UNDT was not competent to determine that the injury was service-related, and it was not appropriate for the UNDT to assume that the injury was service-related.

38. The Appeals Tribunal finds merit in this submission. The following quotes are other findings which are beyond the UNDT’s competence:

- a) [T]here is a strong probability that the ABCC would have reached a different conclusion on the causation of the Applicant’s permanent spinal injuries had it followed the correct procedures in assessing his claim.⁷
- b) [T]he ABCC made its recommendations based on uncertain facts and inference which were derived, improbably, from the absence of evidence. The ABCC recommendations and the consequent decision of the Secretary-General were not well founded.⁸
- c) After the second accident, [Mr. Karseboom] was permanently disabled and unable to work again.⁹
- d) As the medical evidence about causation is in dispute, the probability that [Mr. Karseboom] would have succeeded in his claim for compensation is estimated at a conservative 50%.¹⁰
- e) The violations of the Staff Rules were serious and fundamental and caused [Mr. Karseboom] to lose what is, at least, a 50% chance to receive full compensation under Appendix D.¹¹

39. The UNDT explained that:¹²

there are no alternative means of assessing damages and it is necessary to consider the likelihood that, but for the procedural errors, the ABCC would have reached a different conclusion about the cause of the permanent injuries to [Mr. Karseboom]’s spine. This is not a medical assessment but an evaluation of [his] loss of opportunity[...]

⁷ *Ibid.*, para. 112.

⁸ *Ibid.*, para. 95.

⁹ *Ibid.*, para. 108.

¹⁰ *Ibid.*, para. 113.

¹¹ *Ibid.*, para. 116.a.

¹² *Ibid.*, para. 107.

40. The UNDT was not competent to assume that there was a likelihood of the ABCC reaching a different conclusion. Moreover, although the UNDT considered that it was not making a medical assessment, its conclusions for its award of damages were in reality based on its own unqualified diagnoses and prognoses.

41. The Secretary-General submits that the UNDT, upon determining that the proper procedure had not been followed, should have remanded the case back to the ABCC to convene a medical board to re-examine Mr. Karseboom's case. Instead, the UNDT erred in effectively placing itself in the place of the medical expert and the decision-maker.

42. The Appeals Tribunal agrees with this submission.

43. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:¹³

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

¹³ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

44. The UNDT was faced with a case in which there was conflicting medical evidence. Moreover, the UNDT's own observations on the shortcomings of the medical evidence indicated a need for a medical board.

45. In this regard, the UNDT found that the ABCC could not lawfully rely on Dr. Pestana's report as it had not been prepared for the purposes of a medical board. It also considered that the references in Dr. Sosa's report to a fractured vertebra warranted further investigation by the ABCC. The UNDT further determined that Dr. Sosa's opinion about Mr. Karseboom's back injury could have influenced the outcome of the latter's request for reconsideration had it been properly considered and that a medical board could have evaluated his opinion alongside any conflicting medical opinions. The UNDT found that the failure of the ABCC to convene a medical board deprived Mr. Karseboom of the full medical evaluation to which he was entitled under article 17 of Appendix D.¹⁴ In addition, Mr. Karseboom had submitted to the UNDT that the ABCC should have convened a medical board.

46. Clearly then, once the UNDT had decided that the procedure for presenting a medical opinion to the Secretary-General was flawed, the only proper course for it to take, since the issue was a medical one, was to remand the case to the ABCC to convene a medical board so that the Secretary-General could be properly advised on Mr. Karseboom's request for reconsideration.

47. The Appeals Tribunal finds that the UNDT, by making medical findings which it was not competent to make and thereby awarding Mr. Karseboom material and moral damages, exceeded its competence and committed errors of law and procedure.

48. Lastly, we turn to Mr. Karseboom's argument that, in view of Article 10(4) of its Statute, the UNDT did not have the power to remand the case to the ABCC to convene a medical board, since an order under that provision requires the concurrence of the Secretary-General.

49. The relevant part of Article 10(4) of the UNDT Statute provides:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the

¹⁴ Impugned Judgment, para. 98.

concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months.

50. Mr. Karseboom's argument has no merit. Firstly, Article 10(4) has no application to the present case. An order under Article 10(4) can only be made prior to the determination of the merits of a case. In the present case, the UNDT had already determined on the merits that the Secretary-General's decision was unlawful and void. There was thus nothing to prevent it from ordering a remand. Secondly, under Article 9(1) of its Statute, the UNDT "may order production of documents or such other evidence as it deems necessary".

51. For the foregoing reasons, the appeal succeeds.

Judgment

52. The appeal is allowed. The Judgment of the UNDT is set aside and the case is remanded to the ABCC to convene a medical board.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 30th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar