



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

Judgment No. 2017-UNAT-725

**Baracungana
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Deborah Thomas-Felix Judge John Murphy
Case No.:	2016-963
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Baracungana: Nicole Washienko, OSLA

Counsel for Secretary-General: Zarqaa Chohan

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Liability and Relief No. UNDT/2016/092, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 27 June 2016, in the case of *Baracungana v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 26 August 2016, and Mr. Séverin Baracungana filed his answer on 28 October 2016.

Facts and Procedure

2. Mr. Baracungana is a former staff member of the United Nations High Commissioner for Refugees (UNHCR). He joined UNHCR in May 2005 as a Senior Programme Clerk at the GL-5 level. On 1 January 2010, he was separated from service.

3. A few days after his separation from service, Mr. Baracungana began suffering from an illness that paralyzed his limbs and left him entirely unable to move without the aid of others. He was subsequently diagnosed with polyradioculopathy/polyneuritis, a disorder of the peripheral nervous system.

4. On 9 June 2011, Mr. Baracungana filed a claim for compensation under Appendix D to Staff Rules in relation to his diagnosis of polyradioculopathy/polyneuritis.

5. On 27 June 2011, Mr. Baracungana's claim was forwarded by the Senior Human Resources Associate, UNHCR, to the Officer Responsible for Compensation Claims, Compensation Claims Service (ORCC/CCS), United Nations Office at Geneva.

6. On 26 July 2011, the ORCC/CCS recommended to UNHCR that Mr. Baracungana's Appendix D claim be rejected on the basis that his illness was not deemed to be attributable to the performance of his official duties on behalf of UNHCR.

7. By e-mail dated 10 August 2011, the Senior Human Resources Associate, UNHCR, forwarded the ORCC/CCS's memorandum of 26 July 2011 to Mr. Baracungana. He also informed Mr. Baracungana that, in accordance with Article 17 of Appendix D, Mr. Baracungana had 30 days to appeal the denial of his claim.

8. On 7 September 2011, Mr. Baracungana appealed the rejection of his Appendix D claim to the Senior Human Resources Associate, UNHCR, who, in turn, asked Mr. Baracungana on 29 September 2011 to furnish detailed reasons as to why his ailment was service related.

9. In a letter dated 15 October 2011, Mr. Baracungana provided the reasons as to why his diagnosis of polyradioculopathy/polyneuritis was attributable to the performance of his duties for UNHCR.

10. Under cover of a memorandum dated 2 November 2011, the ORCC/CCS forwarded Mr. Baracungana's Appendix D claim to the Advisory Board on Compensation Claims (ABCC), with the following statement:

I take this opportunity to briefly explain this claim. The claimant states that he fell ill on 7 January 2010, a few days after his separation, due to "polyradi[o]culoneuropathy". [sic] The claimant also states, inter[alia], that he did not undergo an exit medical examination. The UNHCR Medical Service informed [the ORCC/CCS' office] that the claimant's illness is linked to hepatitis B/polyneuritis and that based on a recent medical report from the claimant's treating physician, the illness is not linked to the claimant's official duties. As such, this claim was rejected locally. Please note that due to the indication that his claim did not fall under Appendix D, my office did not raise the issue of the 4-month deadline for submitting a claim. The claimant did, however, provide justification for the late submission of his claim.

11. The ABCC examined Mr. Baracungana's claim on 11 June 2013. The operative part of the ABCC's recommendations to the Secretary-General dated 20 June 2013 reads,¹

Having considered ... the claim submitted by [Mr. Baracungana] for compensation under Appendix D to the Staff Rules for illness (polyradioculopathy/polyneuritis) which began on 07 January 2010, a few days after his separation, in connection with his work for UNHCR;

Having also considered the claimant's statement, medical reports, and the advice of the Medical Director, in particular that, there is no indication that the claimant's illness is directly related to his service, including the non-performance of an exit medical examination;

Recommends to the Secretary General that

- (i) the explanation provided regarding the delay in the submission of the claim be considered sufficient to waive the provisions of Article 12 of Appendix D; and

¹ Underlines in original.

- (ii) claimant's claim for compensation under Appendix D to the Staff Rules for illness in connection with his work be denied.

12. The ABCC's recommendation was approved on behalf of the Secretary-General on 16 July 2013. The decision was, however, not communicated to Mr. Baracungana until June 2014.

13. On 22 September 2014, Mr. Baracungana filed an application before the Dispute Tribunal challenging the decision made on behalf of the Secretary-General with regard to his Appendix D claim.

14. In Judgment No. UNDT/2016/092 now under appeal, the UNDT noted that both the ORCC/CCS and the ABCC had failed to provide Mr. Baracungana with the reasons for denying his claim for compensation, and that the ABCC had also failed to provide Mr. Baracungana with the details of its composition. The Dispute Tribunal found that "[i]n the absence of reasons it becomes difficult if not problematic for that individual to exercise his/her right of access to justice".² The Dispute Tribunal also found that "the lack of clarity on the composition of the ABCC [] amounted to a denial of due process in the determination of [Mr. Baracungana's] claim".³ The Dispute Tribunal consequently ordered a remand of the matter to the ABCC so that the procedural errors could be corrected and Mr. Baracungana's Appendix D claim could be reconsidered. As to whether the remand on its own volition without the concurrence of the Secretary-General accorded with Article 10(4) of the UNDT Statute, the UNDT considered that it was "not prepared to allow its power of judicial review to be circumscribed by art. 10.4. It is not deemed that the concurrence of the Secretary-General is necessary to take the appropriate remedial measure if this is found to be necessary."⁴ The UNDT furthermore awarded Mr. Baracungana one month's net base salary under Article 10(4) of the UNDT Statute as compensation for procedural delay occasioned by such reconsideration.

² Impugned Judgment, para. 76.

³ *Ibid.*, para. 81.

⁴ *Ibid.*, para. 90.

Submissions

The Secretary-General's Appeal

15. The UNDT erred in finding that the present case was receivable, as Mr. Baracungana had failed to appeal the decision to reject his Appendix D claim as prescribed in Article 17 of Appendix D. Mr. Baracungana had failed to exhaust the required administrative remedies available under Appendix D before he appealed to the Dispute Tribunal. The Dispute Tribunal should not have received Mr. Baracungana's application unless and until the Appendix D remedies had been exhausted.

16. The UNDT neither sought nor obtained the concurrence of the Secretary-General, as required by Article 10(4) of its Statute, before deciding to remand Mr. Baracungana's Appendix D claim to the ABCC for reconsideration.

17. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment in its entirety. He also states:

In order to facilitate resolution of the present case, [the Secretary-General] will receive a request from [Mr. Baracungana] in accordance with Article 17 of Appendix D for reconsideration of the determination by the Secretary-General [of 16 July 2013] of [Mr. Baracungana's] Appendix D claim, notwithstanding the thirty-day deadline set forth in Article 17 of Appendix D, provided that, in accordance with Article 17 (a) of Appendix D, [Mr. Baracungana] accompanies such request for reconsideration with the name of his medical practitioner for the medical board to be convened in this matter.

Mr. Baracungana's Answer

18. The Dispute Tribunal properly exercised its jurisdiction and acted within its competence by remanding Mr. Baracungana's claim to the ABCC. Its decision is supported by a case decided by the former Administrative Tribunal in Judgment No. 1426 (2009). The UNDT's power of judicial review and the need to take the appropriate remedial measure cannot be circumscribed by Article 10(4) of the UNDT Statute.

19. In the event that the Appeals Tribunal finds that the Dispute Tribunal exceeded its competence, Mr. Baracungana submits, alternatively, that the doctrine of estoppel precludes the Administration from arguing that the failure to convene a medical board renders the case non-receivable. Mr. Baracungana contested the decision by ORCC/CCS within the 30-day

time limit, though he did not provide the name of a medical practitioner of his choosing. The ABCC decided not to convene a medical board. Instead, it took upon itself to reconsider whether Mr. Baracungana's claims were due to his service with UNHCR. The Secretary-General cannot now be heard to complain that no medical board was convened.

20. The appeal should be dismissed in its entirety. As the Secretary-General did not appeal the UNDT's award of one month's net base salary to Mr. Baracungana, that award should not be overturned.

Considerations

21. The UNDT found that the contested administrative decision to deny Mr. Baracungana compensation under Appendix D to Staff Rules on the grounds that his medical condition was not service-related was unlawful as it breached Mr. Baracungana's due process rights. Specifically, the UNDT held that: a) the Administration (the ABCC and the ORCC/CCS) failed to provide reasons to Mr. Baracungana for the rejection of his Appendix D claim, and b) the ABCC failed to follow its own rules regarding its composition.

22. The UNDT consequently remanded the case to the Administration for correction of procedure, and awarded Mr. Baracungana one month's net base salary for procedural delay, pursuant to Article 10(4) of its Statute.

23. Appendix D to Staff Rules applicable at the time governed the payment of compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.⁵ Article 17 of Appendix D 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);

⁵ ST/SGB/Staff Rules/Appendix D/Rev.1, 1993.

(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.

24. The Secretary-General does not contest the UNDT's findings concerning the above-mentioned procedural irregularities or its award of compensation for them. However, he argues that the UNDT erred in law by finding that the case at hand was receivable, as Mr. Baracungana had failed to request reconsideration of the Secretary-General's determination on his claim, as required by Article 17 of Appendix D, and by remanding the case to the ABCC without the concurrence of the Secretary-General.

25. First, the Secretary-General submits that the UNDT was not competent to receive the application filed by Mr. Baracungana, since the latter had failed to exhaust the required administrative remedies, i.e., request for reconsideration of the determination by the Secretary-General of his Appendix D claim.

26. The Appeals Tribunal does not find merit in this submission. We note that the former Administrative Tribunal in Judgment No. 1427 held that:⁶

V. Instead of requesting that a medical board be convened to review the Secretary-General's determination, however, in accordance with article 17, the Applicant sought administrative review of the Secretary-General's decision by letter dated 10 October 2005. Having received no answer, she submitted a Statement of Appeal, dated 16 January 2006, to the [Joint Appeals Board (JAB)]. The JAB, however, on 28 November 2006 properly rejected the Applicant's appeal, noting that "the appeal is not receivable by the JAB for lack of competence in the matter", as the contested decision "[fell] under Appendix D, rather than Chapter XI of the Staff Rules". The JAB informed the Applicant that in the event she chose to pursue her claim, she would be well advised to "focus future action within the framework of Appendix D of the Staff Rules and the Statute of [the] Tribunal". The Applicant now comes before the Tribunal asking the Tribunal to set aside the decision of the ABCC that her tick typhus was not service-incurred.

VI. At the outset, the Tribunal must first consider whether the Applicant's claim regarding the ABCC is receivable, *ratione materiae*. Unfortunately for the Applicant, the Tribunal finds that it is not. Article 17 of Appendix D sets forth with considerable specificity the procedure to be followed by a staff member seeking to obtain a review of the Secretary-General's determination that his or her illness or injury is attributable to the performance of services on behalf of the Organization, such that the staff member would be entitled to compensation under Appendix D. That process requires that the Applicant request that a medical board be convened to review the decision of the Secretary-General within thirty days of notice of the Secretary-General's decision. In exceptional circumstances, the Secretary-General "may accept for consideration a claim made at a later date".

VII. In the instant case, the Applicant has failed to request reconsideration of the Secretary-General's decision in accordance with article 17, even though she was directed by the JAB to pursuing her claims under Appendix D. As the matter was never properly before the JAB and as the Applicant has never sought the appropriate review of the matter, the claim is not properly before the Tribunal.

27. However, the jurisprudence of the former Administrative Tribunal, though of persuasive value, cannot be binding precedent for the new Tribunals to follow.⁷ In our view, Article 17 of Appendix D does not make it obligatory for the staff-member to request that a medical board be convened to review the Secretary-General's determination, nor does it

⁶ Former Administrative Tribunal Judgment No. 1427 (2008), V – VII.

⁷ *Leal v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-337, para. 18, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

institute such a request as a condition of receivability of the application for judicial review of the relevant (negative) administrative decision taken on behalf of the Secretary-General. This is just an option afforded to the staff member, if the latter wishes to bring his/her case before a medical board. In other words, the law does not specifically condition the right of the staff member to file an application for judicial review on his/her having prior sought reconsideration of the relevant determination by the Secretary-General. Consequently, as for all conditions of receivability of an application for judicial review, these provisions of Article 17 of Appendix D may not be interpreted so broadly as to hamper a staff member's access to justice, absent clear language to that effect.

28. Further, the present case is distinguishable from *Christensen*,⁸ where this Tribunal, though seized of the claim by Ms. Christensen against the ABCC decision, following the Former Administrative Tribunal's Judgment No. 1427, dealt with the issue of the existence of exceptional circumstances that would have warranted the waiving of the applicable time limits for the Secretary-General to reopen Ms. Christensen's case or to reconsider his determination, under Article 9 or Article 17 of Appendix D.

29. We turn now to the Secretary-General's argument that, in view of Article 10(4) of its Statute, the UNDT did not have power to remand the case to the ABCC, since an order under that provision requires the concurrence of the Secretary-General to that effect. We find merit in this submission for the reasons set out below.

30. 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 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.

31. The plain language of Article 10(4) of the UNDT Statute makes it clear that an order, under it, for the remand of a case to the Administration for institution or correction of the required procedure, not observed at all or found flawed by the UNDT, can be made only with the concurrence of the Secretary-General of the United Nations. This is the existing law,

⁸ *Christensen v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-218.

no matter how surprising and regrettable it is for the United Nations internal justice system to allow for the Judge's power of judicial review to be so circumscribed.

32. The UNDT was faced with a case in which the contested administrative decision to deny Mr. Baracungana compensation under Appendix D was undisputedly procedurally unlawful due to the failure of the ABCC and the ORCC/CCS to provide reasons to him for the rejection of his claim, and the violation by the ABCC of its own rules regarding its composition. These failures hampered Mr. Baracungana's efforts in his filing for reconsideration of his claim as well as in exercising his right of access to justice.⁹

33. Under Article 10 of its Statute, the only proper course for the UNDT to take was either to remand the case, provided that the Secretary-General concurred thereupon, to the ABCC to follow the prescribed procedure, or to consider whether the procedural flaws warranted the rescission of the impugned administrative decision. Therefore, the Appeals Tribunal holds that the UNDT, by making an order to remand the case to the Administration without the concurrence of the Secretary-General, which it was not competent to do, exceeded its competence and committed errors of law and procedure.

Judgment

34. For the foregoing reasons, the appeal is allowed in part. Judgment No. UNDT/2016/092 is set aside, except for its finding on the receivability of the application, and the case is remanded for a hearing *de novo* before a different UNDT Judge.

⁹ Impugned Judgment, paras. 75 and 76.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar