



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

Judgment No. 2021-UNAT-1138

**McGregory John Kollie
(Appellant/Respondent)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case Nos.:	2020-1454 & 2020-1456
Date:	25 June 2021
Registrar:	Weicheng Lin

Counsel for Mr. Kollie:	Self-represented
Counsel for Secretary-General:	André Luiz Perreira de Oliveira

JUDGE SABINE KNIERIM, PRESIDING.

1. Mr. Kollie submitted a claim with the Advisory Board on Compensation Claims (ABCC) seeking compensation for his service-incurred injury that he had sustained from a vehicle accident. The ABCC recommended, and the Secretary-General decided, to award him USD 30,412.29 for a 28 per cent permanent loss of the function of the whole person (PLF). Mr. Kollie wrote to the ABCC expressing his concerns and requesting review of its recommendation. After the ABCC's response, Mr. Kollie pursued the case to the United Nations Dispute Tribunal (Dispute Tribunal or UNDT). The Dispute Tribunal partially granted his application. It found that Mr. Kollie's application was timeously filed, because it had been filed within 90 days of the receipt of the ABCC's response, which the Dispute Tribunal treated as a new decision. The Dispute Tribunal ordered the Secretary-General to pay more compensation and the ABCC to provide a reasoned and itemized decision on Mr. Kollie's request for reimbursement of out-of-pocket expenses. Both Mr. Kollie and the Secretary-General appealed that Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). For reasons set out below, we grant the Secretary-General's appeal and dismiss Mr. Kollie's appeal.

Facts and Procedure

2. Mr. Kollie was a staff member with the United Nations Mission in Liberia (UNMIL) from 15 November 2005 through 30 November 2018. This case arose from his injury from a car accident while he was returning from official travel on 9 May 2007. He was admitted to a military hospital and diagnosed with cervical spine injury with radiculopathy.

3. On 8 July 2007, Mr. Kollie submitted a claim for compensation under Appendix D to the Staff Rules (Appendix D). He was seeking "[r]eimbursement of medical expenses" and "[c]laim for injury [as he was] [o]n duty when the accident occurred".

4. At its 461st meeting on 18 December 2012, the ABCC considered Mr. Kollie's claim and recommended that his injuries (cervical spine fracture C1 posterior ring and C5/6 subluxation) be recognized as service-related, meaning that all his certified and reasonable medical expenses could be reimbursed. But the ABCC also recommended that Mr. Kollie's claim for compensation be denied, as he had not sustained any degree of PLF.

On 19 February 2013, the Controller approved the ABCC's recommendation on behalf of the Secretary-General.

5. In October 2016, Mr. Kollie underwent a permanent medical impairment evaluation. The evaluation report dated 25 October 2016 stated that Mr. Kollie suffered a 23 per cent PLF. Mr. Kollie submitted that evaluation report to the ABCC, which in turn forwarded it to the Medical Service Division (MSD) for advice as to whether Mr. Kollie sustained any degree of PLF, and whether such PLF constituted partial or total disability. On 18 January 2017, the MSD advised the ABCC that Mr. Kollie suffered a 28 per cent PLF, but that he did not fall under the disability provisions of Appendix D.

6. On 11 April 2017, at its 500th meeting, the ABCC considered Mr. Kollie's Appendix D claim in light of the MSD's advice and recommended that he be awarded USD 30,412.29 for a 28 per cent PLF under Article 11.3(c) of Appendix D. The Controller approved the ABCC recommendation on behalf of the Secretary-General on 16 May 2017.

7. In a memorandum dated 19 May 2017, the ABCC advised the Department of Field Support (DFS) of the decision to award Mr. Kollie compensation under Appendix D and requested that the DFS advise Mr. Kollie accordingly. The DFS in turn asked the UNMIL to inform Mr. Kollie of the Controller's 16 May 2017 decision.

8. On 23 May 2017, Mr. Kollie received notification of the Controller's decision to award him USD 30,412.29 in satisfaction of his Appendix D claim.

9. On 7 June 2017, Mr. Kollie wrote to the ABCC regarding the latter's "Recommendation Made During the 500th Meeting on April 11, 2017". He expressed a number of concerns about the ABCC's failure to address some "seminal issues" identified in the 25 October 2016 evaluation report, and asked the ABCC to "review" its 11 April 2017 recommendation so as to "fully address[]" issues such as substantial upward review of the compensation, cost for future medical treatment, cost for recruiting assistance for personal and home care activities now and in the future (at least USD 2,500 per month), loss of future earning (at least USD 3,000 per month), compensation for pain and anguish, retroactive payment of all out-of-pocket expenses (past expenses approved by the MSD and recently incurred expenses), compensation for institutional liability for negligence of UNMIL to provide him with prompt qualified surgical intervention. He also requested that the ABCC

recommend that he be stationed in a United Nations mission or agency in a country with the appropriate facilities and expertise to attend spinal injuries.

10. In a memorandum dated 25 July 2017, the DFS advised the UNMIL that the ABCC had reviewed Mr. Kollie's memo of 7 June 2017.

11. In a follow-up e-mail dated 27 July 2017, the DFS sent the UNMIL, for onward forwarding to Mr. Kollie, a copy of the MSD's PLF assessment for Mr. Kollie with a note that the United Nations had awarded Mr. Kollie more PLF than the independent doctor had assessed. On 27 July 2017, the UNMIL forwarded the DFS' e-mail to Mr. Kollie.

12. On 22 August 2017, Mr. Kollie sent a "Petition for Reconsideration" of ABCC's 25 July 2017 assessment and DFS' 27 July 2017 e-mail. Mr. Kollie provided a summary of some judgments rendered by the former Administrative Tribunal of the United Nations to rebut the ABCC's position that the award for damages and future foreseeable medical expenses were unavailing under Appendix D. He requested that "the Board reconsiders the special circumstances and gravity of my injuries, my age and the diminished quality of life that confronts me, and accordingly reconsider all the cogent issues specifically traversed in my memo to the Board of June 07, 2017".

13. On 24 August 2017, the DFS responded to Mr. Kollie's "Petition for Reconsideration": "There is nothing more ABCC can do or reply to Mr. Kollie. He may wish to appeal to the [Management Evaluation Unit] MEU or UNDT if he wishes any further review. The ABCC has awarded him all compensation he is currently eligible for and will continue to accept and review future claims (e.g. medical expenses and, if his condition worsens, Permanent Loss of Function)." Mr. Kollie received this DFS response on 25 August 2017.

14. On 2 October 2017, Mr. Kollie filed an application with the Dispute Tribunal to contest the decision to award him USD 30,412.29 for a 28 per cent PLF under Article 11.3(c) of Appendix D, seeking an adjusted award for a 28 per cent PLF, at least USD 2,500 per month for recruiting assistance for personal and home-care activities, at least USD 100,000 for the continuing pain and anguish, the retroactive payment of all out-of-pocket expenses, placement in a United Nations mission or agency in a country with the appropriate facility and expertise to attend spinal injuries, or alternatively at least USD 25,000 a year to cover the cost of follow-up treatment in South Africa, and a special

disability pension of at least USD 3,000 a month for loss of future earnings in the event of his separation from the United Nations.

15. In Judgment No. UNDT/2020/119 dated 15 July 2020, the Dispute Tribunal partially granted Mr. Kollie's application. The UNDT determined that his UNDT application of 2 October 2017 was timeously filed, because it was filed within 90 calendar days of the notification of a contested decision. The UNDT found that after Mr. Kollie had addressed a letter seeking additional reliefs to the ABCC on 7 June 2017, the ABCC took a decision on 25 July 2017, in which it reviewed Mr. Kollie's additional requests and rejected some of them. Consequently, the UNDT considered that Mr. Kollie was notified of the new decision by the ABCC on 27 July 2017, and since the 90-day deadline fell on 25 October 2017, and Mr. Kollie filed his UNDT application on 2 October 2017, it was timely and receivable.

16. The UNDT declared Mr. Kollie's claim of negligence irreceivable on the *res judicata* basis¹ and upheld the ABCC's determination of the degree of Mr. Kollie's PLF (28 per cent). However, it found the calculation of compensation based on the pensionable remuneration scale at the date of injury to be "absurd and unreasonable"² and ordered the pensionable remuneration scale at the date of the Controller's decision, 16 May 2017, be used to calculate the compensatory award to Mr. Kollie. It also ordered the ABCC to "provide a reasoned and itemized decision on [Mr. Kollie's] request for reimbursement of out-of-pocket expenses as set forth in [his] Annexes A20 and A21".³

17. Both parties appealed the UNDT Judgment. Mr. Kollie filed an appeal on 11 September 2020, and the Secretary-General filed an answer on 27 November 2020. The case was registered as 2020-1454. On 14 September 2020, the Secretary-General appealed, and on 9 November 2020, Mr. Kollie answered. The case was registered as 2020-1456.

¹ On 22 October 2017, Mr. Kollie requested a management evaluation of "the August 24, 2017, final decision of the Advisory Board on Compensation Claims (ABCC) with regards to my claims of damages against the Mission for gross negligence in the way and manner the Mission negligently delayed decision for several years for expert treatment of my work-related spinal cord injuries". The MEU determined that his request was time barred, because he had been notified of the decision to award him USD 30,412.29 in May 2017 but did not request management evaluation until 22 October 2017. Mr. Kollie subsequently filed an application with the UNDT to contest the "ABCC decision" not to award compensation for his claims of negligence. In Judgment No. UNDT/2019/156 dated 30 October 2019, UNDT dismissed Mr. Kollie's application as irreceivable *ratione materiae*. No party appealed that Judgment.

² Impugned Judgment, para. 65.

³ *Ibid.*, para. 90(b).

Case No. 2020-1454

Mr. Kollie's Appeal

18. Mr. Kollie requests that the Appeals Tribunal vacate the UNDT Judgment and grant him “just, fair and equitable” reliefs.

19. Mr. Kollie submits that the UNDT erred in finding that the Respondent had been transparent in respect of the calculation formula and the percentage of PLF and in concluding that the ABCC had included the calculation formula in its recommendation.

20. The UNDT erred in not finding that it was a violation of Article 17 of Appendix D for the ABCC not to convene a medical board to review his request for reconsideration of its own recommendation of 11 April 2017 to award him USD 30,412.29.

21. The UNDT erred in procedure by remanding his claim for reimbursement of out-of-pocket expenses to the ABCC, though he had already provided proof to the Dispute Tribunal.

22. The UNDT erred in law in finding that the Secretary-General had correctly decided to deny his disability claim.

The Secretary-General's Answer

23. Without prejudice to the appeal that he has filed against the same UNDT Judgment, the Secretary-General requests that the Appeals Tribunal dismiss Mr. Kollie's appeal in its entirety. Alternatively, he requests that the Appeals Tribunal determine that the pensionable remuneration scale at the day of injury be used.

24. The UNDT was correct in holding that the calculation formula was transparently included in the ABCC's recommendation of 11 April 2017.

25. Mr. Kollie has failed to demonstrate that the UNDT erred in failing to convene a medical board to review the claims set forth in his 7 June 2017 letter. In that letter, Mr. Kollie did not request that the ABCC convene a medical board, or provide the name of a medical practitioner, or accuse the ABCC of failure to comply with the provisions of Article 17.

His reliance on the UNAT Judgments in *Meron*,⁴ *Baron*⁵ and *Ansa-Emmim*⁶ is misplaced, as those cases did not involve the use of Article 17.

26. Mr. Kollie's challenge of the UNDT's remanding of the issue of out-of-pocket expenses to the ABCC is not receivable, since the UNDT ruled in his favor.

27. The UNDT correctly concluded that the disability provisions of Appendix D (11.1 & 11.2) were not applicable to his case as he had not suffered any loss of earnings.

28. Mr. Kollie has failed to demonstrate that the UNDT erred when it affirmed the lawfulness of the ABCC's consideration of his expenses. He has failed to address any claim of additional expenses to the ABCC.

Case No. 2020-1456

The Secretary-General's Appeal

29. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety. Alternatively, he requests that the Appeals Tribunal determine that the pensionable remuneration scale at the date of injury be used.

30. The Secretary-General submits that the UNDT erred in fact and law and exceeded its jurisdiction in finding Mr. Kollie's application to be receivable. The Dispute Tribunal mixed the two decisions taken by different decision-makers (the Controller and the DFS) into one decision. Only the Controller's decision on PLF was taken following the ABCC's 11 April 2017 recommendation, which was communicated to Mr. Kollie on 23 May 2017. Consequently, his 2 October 2017 UNDT application was out of time and not receivable *ratione temporis*. The UNDT also erred in finding the application against the DFS' decision of 27 July 2017 to be receivable *ratione materiae*, in the absence of any request for management evaluation. The DFS decision was not issued following the advice of a technical body, the ABCC. Mr. Kollie had to request management evaluation of the DFS decision, but he did not.

⁴ *Meron v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-198.

⁵ *Baron v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-257.

⁶ *Ansa-Emmim v. United Nations Joint Staff Pension Board*, Judgment No. 2011-UNAT-155.

31. The UNDT erred in law by finding that Mr. Kollie should be awarded compensation based on the pensionable remuneration scale at the date of the Controller's decision, i.e., 16 May 2017, contrary to the express provisions in Appendix D (11.3(a) and 11.3(c); at the time of death, injury or illness). The same rationale was maintained in the 2017 revised Appendix D (1.3(k)). The UNDT has created requirements not foreseen in the applicable legal framework. There is no discretion for the Secretary-General in his application of Appendix D since it is explicit in this regard. The fact that the Secretary-General did not appeal *Laca Diaz*⁷ does not mean that the UNDT may be allowed to conclude against what was clearly established by the applicable legal framework.

Mr. Kollie's Answer

32. Mr. Kollie requests that the Appeals Tribunal dismiss the Secretary-General's appeal and affirm the UNDT Judgment in respect of the receivability of his case and the award of compensation based on the pensionable remuneration scale of 2017. Mr. Kollie also requests that the Appeals Tribunal grant him any other "just and fair" reliefs.

33. Mr. Kollie submits that the Secretary-General's challenge of the UNDT's determination on the receivability of his case should be stricken out as frivolous claims, as he did not raise those grounds at the first instance.

34. Alternatively, Mr. Kollie submits that the arguments in the appeal have no legal basis.

35. The Dispute Tribunal correctly concluded that the clock started to run on 27 July 2017, when the ABCC rejected his Article 17 request for reconsideration, and that his application was timeously filed, without the need to file a management evaluation request.

36. The UNDT did not mix two decisions. It correctly determined that the ABCC tasked the DFS to communicate its recommendation to Mr. Kollie. To argue that the advice obtained from the ABCC in the e-mail of 25 July 2017 was a decision taken by the DFS and not the ABCC is to suggest that even the ABCC's recommendation of 11 April 2017 was a decision taken by the DFS and the UNMIL.

⁷ *Laca Diaz v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/066.

37. The UNDT correctly determined that the award of compensation should be based on the pensionable remuneration scale in effect at the time of assessment, i.e., 16 May 2017, consistent with the well-founded Judgments *Laca Diaz* and *Wamala*.⁸ It would be unfair for him to sustain the injury in 2007 and not to be compensated until 2017, but on a scale ten years out of date. There is no explicit guidance in Appendix D indicating the relevant and operative date for assessing the pensionable remuneration in any given case.

Considerations

Did the UNDT err in not finding that it was a violation of Article 17 of Appendix D for the ABCC not to convene a medical board to review Mr. Kollie's request for reconsideration of its recommendation of 11 April 2017 to award him USD 30,412.29?

38. Mr. Kollie is of the view that his 7 June 2017 letter to the ABCC constitutes a request for decision review under Article 17 of Appendix D to the Staff Rules which reads, in relevant parts:

(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).

39. We do not agree. On 16 May 2017, the Controller, on behalf of the Secretary-General, decided to approve and follow the 11 April 2017 recommendation of the ABCC that Mr. Kollie be awarded USD 30,412.29 for a 28 percent PLF under Article 11.3(c) of Appendix D. It is undisputed on appeal that Mr. Kollie was notified of this decision on 23 May 2017.

40. Mr. Kollie's letter of 7 June 2017 cannot be regarded as a request under Article 17 of Appendix D to convene a medical board and reconsider the Secretary-General's decision. In the letter, Mr. Kollie did not refer to Article 17 of Appendix D, and he did not request to convene a medical board. Further, he did not challenge and request review of the 16 May 2017

⁸ *Wamalala v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/133.

decision but only of the recommendation of the ABCC. His letter was addressed to the ABCC, and he expressly asked the ABCC for a review of its 11 April 2017 recommendation. The Secretary-General's 16 May 2017 decision was not mentioned at all in Mr. Kollie's letter. Also, in his 7 June 2017 letter, Mr. Kollie accepted the determination of a 28 percent PLF, but submitted that "the same will, most likely, degenerate to [a] greater impairment in the future". Further, in his 2 October 2017 application to the UNDT, Mr. Kollie did not refer to Article 17 of Appendix D nor did he claim that his 7 June 2017 letter was meant as a request for decision review under this provision, or that a medical board should be convened to examine his claims. Finally, contrary to Article 17(a) of Appendix D, Mr. Kollie's 7 June 2017 letter was not accompanied by the name of the medical practitioner to represent him on the medical board provided for under paragraph (b).

41. As Mr. Kollie, in his 7 June 2017 letter, referred to possible future impairments, we point him to Article 9 of Appendix D on the reopening of cases, which provides:

The Secretary-General, on his own initiative or upon the request of a person entitled to or claiming to be entitled to compensation under these rules, may reopen any case under these rules, and may, where the circumstances so warrant, amend in accordance with these rules any previous award with respect to future payments.

42. Should Mr. Kollie's state of health deteriorate, he has the possibility to request the reopening of his case under this provision.

Mr. Kollie's claims for compensation under Article 11.1, 11.2 and 11.4, and for a higher compensation under Article 11.3 of Appendix D

43. In his application to the UNDT and in his appeal, Mr. Kollie submits that he is entitled to receive compensation under Article 11.1, 11.2 and 11.4 of Appendix D. He is also of the view that the compensation awarded under Article 11.3 of Appendix D should be higher.

44. The UNDT found that the application was receivable and took a decision on the merits. It rejected Mr. Kollie's claims regarding Article 11.1, 11.2 and 11.4 of Appendix D. With regard to Article 11.3 of Appendix D, the UNDT rejected Mr. Kollie's argument that the degree of PLF should be higher than 28 percent but found that the compensation had not been calculated correctly, and that Mr. Kollie was entitled to receive a higher amount of compensation.

45. The Secretary-General is not estopped from claiming on appeal that Mr. Kollie's application is not receivable. Contrary to Mr. Kollie's contentions, the Secretary-General does not raise this issue for the first time before the Appeals Tribunal; he already raised it before the UNDT, e.g., during the oral hearing and in his 26 June 2020 closing statement. Further, both the UNDT and the Appeals Tribunal have authority to raise and decide on questions of receivability *sua sponte*.⁹

46. The issue on appeal is whether the UNDT was correct in saying that the application was receivable. We find the UNDT erred, and the application was not receivable.

47. At the outset, we note that some confusion in this case is caused by the uncertainty about what is the "administrative decision" challenged by Mr. Kollie. In his 7 June 2017 letter, he addressed the ABCC requesting, *inter alia*, review of its 11 April 2017 recommendation, and in his 2 October 2017 UNDT application, he challenged the "ABCC's 24 August 2017 decision" in respect of his claims under Appendix D. However, on appeal to the Appeals Tribunal, Mr. Kollie submits that he wants to contest the Secretary-General's (16 May 2017) decision to follow the ABCC's (11 April 2017) recommendation. As explained in more detail further below, only the 16 May 2017 decision of the Secretary-General is an appealable administrative decision under Article 2(1)(a) of the UNDT Statute. Insofar as Mr. Kollie's application challenged the 11 April 2017 recommendation or the 25/27 July 2017 and 24 August 2017 communication of the ABCC, there was no administrative decision, and the application was not receivable *ratione materiae*.

48. Assuming (contrary to the wording of Mr. Kollie's 2 October 2017 application) that this application was meant from the beginning to be directed against the 16 May 2017 decision of the Secretary-General, it was not receivable *ratione temporis* as it was filed outside the time limits under Article 8(1)(d)(ii) of the UNDT Statute and Staff Rules 11.2 and 11.4.

49. Article 8(1)(d)(ii) of the UNDT Statute provides:

An application shall be receivable if ... [t]he application is filed within the following deadlines:

⁹ *Ali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-773, para. 17; *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, paras. 20-21.

... In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision[.]

50. And Staff Rules 11.2 and 11.4 read, in relevant parts:

Staff Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

Staff Rule 11.4

United Nations Dispute Tribunal

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

(b) Where a staff member is not required to request a management evaluation, pursuant to staff rule 11.2 (b), he or she may file an application directly with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received notification of the contested administrative decision.

51. In the present case, the Secretary-General took his decision on 16 May 2017 on the recommendation of the ABCC, which is a technical body pursuant to Staff Rule 11.2(b). Consequently, no request for management evaluation was necessary, but Mr. Kollie had to file his application within 90 calendar days from the date on which he received notification of this decision.

52. The UNDT noted that the Controller's approval of the ABCC recommendation on 16 May 2017 only considered the award of PLF. In the letter of 7 June 2017, Mr. Kollie requested other reliefs that the ABCC had not considered in its recommendation of 11 April 2017. According to the ABCC's response to Mr. Kollie's 7 June 2017 letter, it was stated that the ABCC "has reviewed Mr. Kollie's memo of 7 June 2017 and noted as follows" and specifically rejected some of the reliefs requested by Mr. Kollie. Therefore, the UNDT concluded that this additional response from the ABCC communicated to Mr. Kollie on 27 July 2017 was not simply a correspondence between the Secretary of the ABCC and Mr. Kollie. The e-mail, according to the UNDT, clearly indicated that the ABCC had reviewed Mr. Kollie's additional requests and rejected them. Therefore, the UNDT found that this communication constituted the notification of the decision on Mr. Kollie's claim under Appendix D.

53. We do not agree. The UNDT's finding is erroneous for two different reasons.

54. Firstly, the UNDT misinterpreted the content and scope of the administrative decision taken by the Secretary-General on 16 May 2017. By awarding compensation of USD 30,412.29 for a 28 percent PLF under Article 11.3 of Appendix D, the Secretary-General, at the same time (implicitly), rejected all other claims under Articles 11.1, 11.2, 11.3 and 11.4. It is self-evident that, in determining the lump sum at USD 30,412.29 for a 28 percent PLF under Article 11.3, the Secretary-General also determined that the lump sum was not higher than USD 30,412.29, and the degree of PLF was not higher than 28 percent. Further, the Secretary-General's 16 May 2017 decision was clearly meant to deal with Mr. Kollie's claims under Appendix D in total. By awarding (only) compensation under Article 11.3 for PLF, the Secretary-General, at the same time, decided that the conditions for claims under Articles 11.1, 11.2 or 11.4 were not met, and that Mr. Kollie would not receive any payments under these provisions. This finding is supported by the testimony of Dr. M. R. of the MSD during the 9 June 2020 oral hearing, where he confirmed his earlier recommendation as follows:

Q In paragraph 3, you say: "The claimant has returned to work and appears to have suffered no loss of [...] potential injury. And – He does not therefore fall under the disability provisions of [...] Articles 11.1" and "11.2 of Appendix D [...]" Can you briefly explain your conclusion and how you arrived at those conclusions?

A [...] Yes, okay, well, I mean, essentially disability is a legal term. It's not a medical term. We refer to it generally as being some sort of physical or mental impairment that substantially affects somebody's major life functions. And in the context of

Appendix D -- this is, 1966 Appendix D -- it focuses on work and on earnings and earnings' potential.

So where somebody is at work and receiving their normal pay, in essence, they're not considered to have either partial or total disability. All of the provisions of Article 11.1, which is on total disability or 11.2, which is on partial disability, revolve around a loss of income, loss of salary, loss of entitlements due to their service-incurred injury. And they trigger additional payments based under the disability provisions of Appendix D.

So when a claimant does not lose any salary or entitlements, either in full or in part, they're not entitled to that disability provisions. And as from my understanding, the claimant had returned to work, did not suffer a downgrade in any of their pay or entitlements, they were not considered disabled at that stage under Appendix D.

55. And the Secretary of the ABCC stated:

Q. Okay. So did the ABCC also consider whether the claimant was disabled partially or totally?

A. Yes, it did. Because the question was put to the medical services and medical services replied stating that -- based on the facts, that the claimant was working full time, suffered no loss of income, and pursuant to the standard in Appendix D -- I'm paraphrasing now -- but was working in accordance with his capacity. There was no need to consider -- to make a formal decision on disability, but disability was considered both by medical and by the ABCC.

56. Both statements show that (possible) claims under Articles 11.1, 11.2 and 11.4 (which also requires total or partial disability) of Appendix D were considered during the administrative proceedings, and the Secretary-General's 16 May 2017 decision therefore covered Mr. Kollie's alleged claims under Appendix D in full. It follows that Mr. Kollie, if he was not happy with this decision but wanted a higher compensation under Article 11.3 as well as compensation under Articles 11.1, 11.2 and 11.4 of Appendix D, had to contest the 16 May 2017 decision and either request reconsideration under Article 17 of Appendix D or file an application with the Dispute Tribunal within 90 calendar days from 23 May 2017, the date on which he received notification of the decision.¹⁰ However, as stated above, Mr. Kollie did not request reconsideration under Article 17, and he filed his UNDT application only on 2 October 2017, when the 90-day time limit had already elapsed.

¹⁰ *Baracungana v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-725, paras. 24-28.

57. Secondly, the UNDT had a wrong understanding of the ABCC's response to Mr. Kollie's 7 June 2017 letter. Contrary to the UNDT's findings, with regard to Mr. Kollie's claims under Articles 11.1, 11.2, 11.3 and 11.4 of Appendix D, this response did not constitute an administrative decision under Article 2(1)(a) of the UNDT Statute which could be challenged by the staff member.

58. With respect to claims under Articles 11.1, 11.2, 11.3 and 11.4 of Appendix D, the ABCC has no competence to issue administrative decisions, but its power is limited to give recommendations to the Secretary-General. This follows from Article 16(a) of Appendix D, which reads:

(a) An Advisory Board on Compensation Claims shall be established to make recommendations to the Secretary-General concerning claims for compensation under these rules.

59. Articles 11.1, 11.2, 11.3(a) and 11.4 clearly and expressly provide that determinations under these rules can only be made by the Secretary-General:

Article 11.1

In the case of injury or illness resulting in disability which is determined by the Secretary-General to be total, and whether or not the staff member is continued in the employment of the Organization or is separated[.]

Article 11.2

In the case of injury or illness resulting in disability which is determined by the Secretary-General to be partial[.]

Article 11.3

(a) In the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General on the basis of the schedule set out in paragraph (c) below, and in accordance with the principles of assessment set out in paragraph (d) below, and applying, where necessary, proportionate and corresponding amounts in those cases of permanent disfigurement or loss of member or function not specifically referred to in the schedule[.]

Article 11.4

Notwithstanding any other provisions of article 11, the Secretary-General may award additional compensation as follows.

60. During the oral hearing, the Secretary of the ABCC confirmed this understanding of Appendix D when he stated:

Q. Now, I need to also get a little clarification here. You started your testimony by saying that you run the secretariat, you adjudicate those matters that are within your authority. I'd like to know which matters are within your authority and which are not?

A. [...] At the time of – of [sic] the relevant time of this claim and everything that was processed, I had a delegation of authority up to \$10,000 to pay medical expenses, but that was it. I did not have authority to deny claims, to decide on permanent loss of function, to decide on disability. All I could do is decide upon the advice of UN medical services whether to pay medical expenses up to \$10,000 a year. It was a very limited delegation of authority.

61. Therefore, with respect to claims under Articles 11.1, 11.2, 11.3 and 11.4 of Appendix D, the ABCC only has authority to give a recommendation but not to issue an administrative decision. It is the Secretary-General (the Controller) who takes a decision on claims based on these provisions of Appendix D. Such a decision, as laid out above, was taken on 16 May 2017 and communicated to Mr. Kollie on 23 May 2017.

62. Under the Appeals Tribunal's consistent jurisprudence, new time limits will only start to run when the Administration reconsiders a decision at a later stage and issues a fresh administrative decision.¹¹ In the present case, no new and fresh administrative decision was issued. It is undisputed that the Secretary-General (or the Controller on his behalf) did not review and reconsider the matter. The ABCC is not competent to review the Secretary-General's earlier decision of 16 May 2017 and issue a fresh administrative decision with respect to claims under Articles 11.1, 11.2, 11.3 and 11.4 of Appendix D. For this reason alone, its 25/27 July 2017 response to Mr. Kollie's 7 June 2017 letter cannot be regarded as a review of the Secretary-General's 16 May 2017 decision. Also, examining the content of the ABCC's response, we do not find that it can be regarded as a review of any decision taken with respect of Mr. Kollie's claims under Articles 11.1, 11.2, 11.3 and 11.4 of Appendix D. The 25/27 July 2017 e-mail which was forwarded to Mr. Kollie reads as follows:¹²

¹¹ *Elmi v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-704, paras. 23-24. See also *Afeworki v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-794, paras. 27-31.

¹² Bold in original.

Please be informed that the Advisory Board on Compensation Claims (ABCC) has reviewed Mr. Kollie's memo of 7 June 2017 and noted as follows. Please advise Mr. Kollie accordingly.

Permanent Loss of Function (PLF) is assessed by Medical Service Division (MSD) based on medical reports submitted by the claimant and pursuant to the standards established in the [American Medical Association (AMA)] Guides to Permanent Impairment, sixth edition. Mr. Kollie appears to be asking about future PLF awards: if at any time, his condition has worsened, he may submit a medical report documenting such worsening. The report will be submitted to MSD for consideration of whether further PLF has occurred pursuant to the AMA Guides to Permanent Impairment.

Mr. Kollie raises the issue of gross negligence, pain and suffering, and other compensation. Liability for gross negligence and other compensation is not provided for under Appendix D to the Staff Rules (or generally by workers' compensation schemes). Appendix D provides for medical expenses and PLF compensation.

63. Nowhere in the e-mail can we find any notion that the issue of compensation under Articles 11.1, 11.2, 11.3 and 11.4 had been reopened and that the 16 May 2017 decision to (only) award compensation for a 28 percent PLF under Article 11.3 had been reconsidered. The ABCC's response to Mr. Kollie's 7 June 2017 letter was of an explanatory and informational nature. In its message, the ABCC advised Mr. Kollie how to proceed should his health condition deteriorate. The e-mail merely informed Mr. Kollie how PLF had been assessed and how he should proceed in case his condition should worsen in the future.

64. The final 24 August 2017 communication from the ABCC, for the same reasons as above, cannot be regarded as a review of the 16 May 2017 decision of the Secretary-General or an administrative decision under Article 2(1)(a) of the UNDT Statute.

65. It follows that an application against these communications of the ABCC was not receivable *ratione materiae*, as there was no administrative decision which could be challenged under Article 2(1)(a) of the UNDT Statute.

Mr. Kollie's claim for gross negligence

66. We agree with the UNDT that Mr. Kollie's claim for gross negligence is *res judicata*, as it has already been dealt with in Judgment No. UNDT/2019/156 issued on 30 October 2019. Mr. Kollie has not demonstrated on appeal, and we cannot find, that his present claim differs from the one decided in that Judgment.

Mr. Kollie's claim for out-of-pocket expenses

67. The UNDT ordered the ABCC to provide a reasoned and itemized decision on Mr. Kollie's request for reimbursement of out-of-pocket expenses. The UNDT explained that Mr. Kollie had set forth the expenses for which he had sought reimbursement in an e-mail dated 1 October 2015 (Annex A20 to his UNDT application) together with invoices and supporting documents (Annex A21 to his UNDT application). While the Secretary of the ABCC testified that all eligible medical expenses had been reimbursed, there was no record of the ABCC's decisions on these specific expenses claimed by Mr. Kollie.

68. We find that the UNDT should have dismissed the application as not receivable *ratione materiae* because Mr. Kollie's request for the reimbursement of out-of-pocket expenses had been implicitly rejected by the ABCC, and Mr. Kollie did not file a request for management evaluation within 60 calendar days. Under Article 16(c) of Appendix D, "[t]he Advisory Board may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under the provisions of this article".

69. The Secretary of the ABCC has confirmed during the oral hearing before the UNDT that the ABCC has a delegation of authority to pay medical expenses. Mr. Kollie had already requested the payment for his expenses in an e-mail of 1 October 2015. However, according to him, the ABCC neither approved his claim nor reimbursed his claim. Mr. Kollie reiterated his request in his 7 June 2017 letter to the ABCC. In the 25/27 July 2017 response, the ABCC stated that Appendix D provided for medical expenses but it did not approve Mr. Kollie's request for reimbursement or express an intention to reimburse his out-of-pocket expenses.

70. We find that the 25/27 July 2017 communication (at the latest) constitutes an implied administrative decision to reject Mr. Kollie's claim for reimbursement of his out-of-pocket expenses. Under the consistent jurisprudence of the UNAT, even the absence of any response on the part of the Administration to a staff member's request can constitute an (implied)

appealable administrative decision subject to judicial review under Article 2(1) of the Statute of the Appeals Tribunal. We have held that not taking a decision is also a decision.¹³ The date of an implied administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine.¹⁴

71. Having received the 25/27 July 2017 response from the ABCC, Mr. Kollie must know that the ABCC would not reimburse his out-of-pocket expenses as set forth in Annex A20 of his application to the UNDT. Although he had expressly requested to be reimbursed in his 7 June 2017 letter, the ABCC merely responded that Appendix D provided for medical expenses, but it did not approve his out-of-pocket claims.

72. The 24/25 August 2017 response to Mr. Kollie's 22 August 2017 "Petition for Reconsideration" cannot be regarded as a fresh administrative decision on this issue. While Mr. Kollie, in his petition, had explicitly mentioned his claim for past and present medical expenses, there was nothing in the 24 August 2017 e-mail which could be regarded as a reconsideration or review of this matter. The e-mail briefly stated that "there is nothing more the ABCC can provide or reply to Mr. Kollie. He may wish to appeal to the MEU or UNDT if he wishes any further review." Thus, the 24/25 August 2017 e-mail merely reiterated the (implied) 25/27 July 2017 decision to reject Mr. Kollie's claim for reimbursement of out-of-pocket expenses.

73. Consequently, according to Staff Rule 11.2(a) to (c), Mr. Kollie had to file a request for management evaluation within 60 calendar days from 27 July 2017:

Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

¹³ *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177, paras. 19 & 21.

¹⁴ *Adnan-Tolon v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-970, para. 29, citing *Rabee v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-296, para. 19, in turn citing *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273, para. 24

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. ...

74. It follows that Mr. Kollie had the onus of filing a request for management evaluation within 60 calendar days from 27 July 2017. However, Mr. Kollie did not file a request for management evaluation within the prescribed time limit but, on 2 October 2017, he went directly to the Dispute Tribunal.

75. We note, finally, that when Mr. Kollie actually did file a request for management evaluation on 22 October 2017, he only addressed the issue of gross negligence but not the issue of out-of-pocket expenses.

Judgment

76. Mr. Kollie's appeal is dismissed, and the Secretary-General's appeal is granted. Judgment No. UNDT/2020/119 is modified and Mr. Kollie's UNDT application is dismissed in its entirety.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 11th day of August 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar