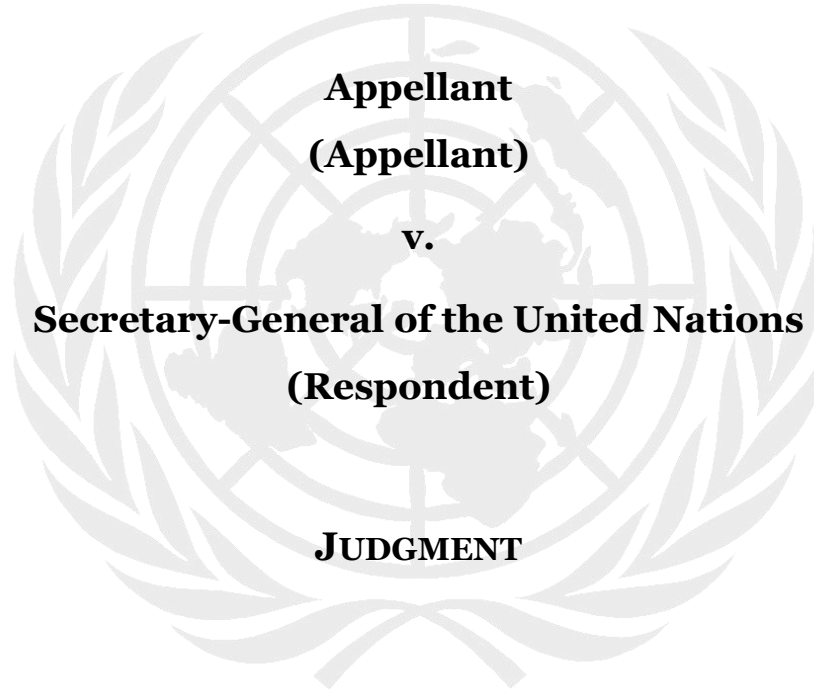




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1157



**Appellant
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge Sabine Knierim
Case No.:	2020-1487
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Jay Pozenel

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Appellant has appealed against Judgment No. UNDT/2020/167 by which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York rejected his application against the Administration’s decision, dated 11 January 2019, to deny his claim for compensation under Appendix D to the Staff Rules (“Appendix D”) on the basis that it was time-barred and that there were no exceptional circumstances to warrant the acceptance of the late claim. For reasons set out below, we allow the appeal in part, and remand the case to the UNDT.

Facts and Procedure

2. The Appellant joined the Organization in October 2001 with the Department of Peace-keeping Operations (DPKO) on a temporary appointment, and he was granted a fixed-term appointment in April 2002. He was sent on detail assignment to the United Nations Operation in Burundi (ONUB) initially for one year from 29 August 2004 to 28 August 2005.

3. While serving at the ONUB in Bujumbura, Burundi, the Appellant contracted malaria. He was medically evacuated to the Nairobi Hospital in Kenya and was hospitalized there for a month from 4 March 2005 to 3 April 2005.

4. According to the discharge summary dated 30 March 2005 and an addendum dated 31 March 2005, the Appellant suffered from falciparum malaria which was complicated by acute renal failure and anemia. The discharge summary noted: “The patient had been in Bujumbura for six months and was not on any malaria prophylaxis”, and after intensive care and treatment for nearly a month at the Nairobi Hospital, “[the Appellant] is making [a] good recovery but will require a long convalescent period”.¹ While at the Nairobi Hospital, the doctors performed two 2-D echocardiogram tests on the Appellant: the first one was done when he developed pulmonary congestion and it showed that he had global hypokinesia and a mild pleural effusion, and the second one was done on 31 March 2015 and it showed that “[t]he effusion has cleared but still has global hypokinesia with an ejection fraction estimated

¹ More than 13 years later, on 25 April 2018, the Appellant’s treating physician issued an addendum to his discharge summary of 30 March 2005 to “correct the wrong entry that [the Appellant] was not taking malaria prophylaxis. [The Appellant] had been on daily Doxycycline for malaria prophylaxis. Despite this he came down with malaria.”

at 41%”.² According to the addendum of 31 March 2005, a cardiologist had seen the Appellant and had commenced him on medications.

5. In a letter dated 24 November 2005 “to whom it may concern”, the Appellant’s treating physician stated that the malaria that the Appellant had contracted in March that year had “affected his [k]idneys, lungs and blood pressure”, but “[h]e has made a complete recovery. His blood pressure is normal, kidney function has completely recovered and he is in good condition to continue his work.” According to the Appellant, after he had recovered from malaria, he was medically cleared as fit for duty in 2005 for his service in Burundi and again medically cleared in 2006 for his service with the United Nations Stabilization Mission in Haiti.

6. In 2011, the Appellant had recurrent congestive heart failure requiring hospitalization. Since 2011, he has received extensive medical therapy relating to his congestive heart failure. In 2015, the Appellant had a defibrillator/pacemaker implanted.

7. On 14 September 2017, the Appellant’s cardiologist provided a letter on his medical condition. The doctor wrote that “[the Appellant] was hospitalized for malaria at Nairobi Hospital in 2005. His clinical hospital course was complicated by shock and [disseminated intravascular coagulation (DIC)] and renal failure requiring short term dialysis and heart failure with pulmonary edema. Diagnostic studies included an echocardiogram that revealed global hypokinesia. A follow up echocardiogram one month after presentation confirmed sustained [left ventricular (LV)] systolic dysfunction.” An addendum to the letter listed six echocardiogram tests done to measure the Appellant’s left ventricular ejection fraction (LVEF) between 2001 and 2016, with the LVEF measurement at 30-35 per cent on 19 December 2016.

8. On 25 September 2017, the Appellant filed a claim for compensation under Appendix D (Appendix D claim). On the Appendix D claim form, the Appellant described the nature of his injury/illness as “heart failure” that occurred on 4 March 2005 when he contracted cerebral malaria. He stated that: “I had end-organ damage to my heart secondary to cerebral malaria, and my heart failure condition will require lifelong care”. In a memorandum of the

² Ejection fraction (EF) is a measurement of how much blood the left ventricle pumps out with each contraction. It is expressed as a percentage. A normal heart’s EF may be between 50 and 70 per cent. An EF from 41 to 49 per cent may be considered “borderline”. It does not always indicate that a person is developing heart failure. Instead, it may indicate damage, perhaps from a previous heart attack. (Quoted from <http://www.heart.org/en/health-topics/heart-failure/diagnosing-heart-failure/ejection-fraction-heart-failure-measurement>)

same date addressed to the Secretary of the Advisory Board on Compensation Claims (ABCC), the Appellant wrote, “Recently and for the first time since [he] joined this Organization [he] became aware of the existence of Appendix D”, though he had “read the Staff Rules of the Organization”. He alleged that no one at either the ONUB or the DPKO had advised him of the availability of compensation under Appendix D for his health, physical and psychological trauma in 2005. He also alleged that the Burundi office had failed to inform the Headquarters of his illness, which then could have been forwarded to the ABCC for review.³

9. On 26 October 2017, the Appellant was notified that the Secretary of the ABCC had denied his Appendix D claim on the basis that his claim was time-barred, because his illness (heart failure) had manifested itself in March 2005 and he was treated for that illness at the time and consequently his Appendix D claim was filed over 11 years past the deadline as stipulated in Article 2.1 of Appendix D, and the information that he had submitted did not indicate any medical incapacity during the pertinent time period to warrant a waiver of the deadline for filing the Appendix D claim.⁴

10. As he indicated that he would seek medical input, on 16 November 2018, the Secretary of the ABCC requested medical advice from the Director, Medical Services Division (MSD), as to the date of the onset of the Appellant’s malaria and of his heart condition. He also sought advice on what would be the deadline of his claim and whether exceptional circumstances existed in this case.

11. In a response memorandum dated 6 December 2018, Dr. M. R., a Senior Medical Officer of MSD, stated that the Appellant’s cardiac symptoms were diagnosed on 8 March 2005 and had likely developed in 24-48 hours prior to the diagnosis. Dr. M. R. noted that since the Appellant continued to have ongoing regular reviews with cardiologists, who ordered cardiac testing and prescribed cardiac medication, “[i]t would be unlikely for such treatment

³ On 14 March 2018, the Appellant sent the Secretary of the ABCC an addendum to his letter of 25 September 2017, clarifying that he had become aware of his malaria being the cause of his heart failure only in 2017 after his cardiologist had reviewed the 30 March 2005 discharge summary and informed him of the connection between malaria and his heart problem.

⁴ Following management evaluation, on 25 September 2018, the Appellant filed an application with the Dispute Tribunal (Case No. UNDT/NY/2018/040) to contest the decision to deny his Appendix D claim on the ground of time bar. After the Secretary of the ABCC informed the Appellant, on 25 October 2018, that he had decided to rescind the decision, and he would reconsider the Appellant’s claim under Appendix D in effect on the day of incident (2005) and seek some medical input on the case, the Appellant withdrew his UNDT application, and that case was closed on 29 November 2018 by the Dispute Tribunal (see Judgment No. UNDT/2018/119).

to have continued for over 10 years from March 2005 without a medical practitioner enquiring about, commenting on or explaining the reason for ongoing cardiac investigations and the use of heart failure medication in a relatively young man who would not normally be taking such medication”. Dr. M. R. also stated that there was no medical support provided for exceptional circumstances.

12. On 11 January 2019, the Secretary of the ABCC advised the Appellant that there were no exceptional circumstances that warranted the acceptance of the late claim (the contested decision). The Secretary of the ABCC informed the Appellant that his office had consulted the MSD and both his office and the MSD had reviewed all the materials, medical reports, e-mails and the letters the Appellant had submitted since 2017. The Secretary of the ABCC noted that the Appellant’s cardiologist did not connect his heart condition to malaria in her letter of 14 September 2017, contrary to the Appellant’s assertion, and that the Appellant had received further treatment for his heart condition in 2011 and 2015. The Secretary of the ABCC concluded that the onset of the illness was March 2005 and the Appellant’s claim was over 11 years past the deadline (i.e., four months from the onset of illness) and was thus time-barred.

13. The Appellant appealed by again requesting management evaluation on 6 February 2019 and applying to the UNDT on 10 April 2019.

14. In Judgment No. UNDT/2020/167 dated 14 September 2020, the Dispute Tribunal rejected the Appellant’s application. The Dispute Tribunal first dismissed his claim of breach of care as not receivable, as he had failed to request the Secretary-General’s consideration of, and decision on, that claim, before he had filed a request for management evaluation. The UNDT found that the Secretary of the ABCC had a valid delegated authority to decide to deny the Appellant’s Appendix D claim on the ground of time bar. The Dispute Tribunal also found that the Secretary of the ABCC had reached a reasonable conclusion that the date of the onset of illness was March 2005 after he had reviewed all the materials, medical reports, e-mails, the letter from the Appellant’s cardiologist as well as the MSD’s opinion. The UNDT did not find any issue, procedural or substantive, with the conclusion that the Secretary of the ABCC had reached that there had been no exceptional circumstances to allow the acceptance of the Appellant’s late Appendix D claim.

15. The Appellant appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) on 9 November 2020, and the Secretary-General filed an answer to the appeal on 11 January 2021.

Submissions

The Appellant's Appeal

16. The Appellant requests that the Appeals Tribunal reverse the UNDT Judgment, rescind the contested decision and remand his case to the full ABCC, and award him one year's net base salary for delay and breach of duty of care. He also requests that the Appeals Tribunal grant his request to adduce evidence that he has attached to his appeal as Annexes 24, 25 and 26.⁵

17. The Appellant requests that the Appeals Tribunal admit Annexes 24 to 26, because they were obtained after he had filed his UNDT application, and no additional evidence was permitted during the course of the UNDT proceedings. He submits that the evidence would be "materially relevant" to the consideration of his case by the ABCC or a medical board.

18. The Appellant maintains that the UNDT erred in determining the non-receivability of his claim of breach of duty of care. He had specifically included that claim in his original Appendix D claim. There is no official procedure or instruction on how to submit such a service-related claim. After he received a negative response from the ABCC, he proceeded to file a request for management evaluation of his claims including the breach of duty of care.

19. The Appellant submits that the UNDT erred in determining that the Secretary of the ABCC had the delegated authority to deny his Appendix D claim, as it is not clear on what basis the Dispute Tribunal based its opinion that his claim was below USD 25,000.⁶

⁵ Annex 24 is a medical report dated 17 May 2019 prepared by the same doctor at the Nairobi Hospital, who had issued the discharge summary of 30 March 2005. Annex 25 includes a periodic medical examination form dated 28 April 2005 showing the results of the tests on the Appellant and the conclusion of an internal doctor. It also includes a record of the Appellant's visits to the MSD in New York in 2005 and his visit to the Nairobi Hospital on 24 November 2005. Annex 26 is an e-mail dated 3 May 2018 from Dr. M. R of the MSD to the Appellant.

⁶ In a memorandum dated 22 May 2017, the Controller delegated the authority to the Secretary of the ABCC so that the latter could, *inter alia*, "approve and pay, or deny, claims for compensation under Appendix D involving payment of medical expenses not in excess of USD 25,000 per annum per injury or illness" and "waive, or deny, requests for waiver of the deadline for filing claims under Appendix D".

20. The Appellant also submits that the UNDT made several mistakes of fact that led to an improper conclusion. It is not true that the Secretary of the ABCC reviewed all the relevant materials and relied on the advice of the MSD. Neither the MSD nor the Secretary of the ABCC had reviewed his full medical record, since the medical reports that he submitted to the ABCC were more recent and did not reflect his full medical record.

21. The Appellant is of the view that the UNDT failed to appreciate that issues relating to the filing deadlines for Appendix D claims necessarily entail more than just a staff member's diligence. They often entail understanding of medical issues and reliance on the advice of medical professionals. It was a mistake to apply the pre-2017 version of Appendix D to his case, because his Appendix D claim was not for the malaria that he contracted in 2005, but for the congestive heart failure that he came to know in 2017. The central issue in this case was when he became, or ought to have become, aware of the causal nexus between malaria and the onset of his heart condition. In the present case, he did not become aware of the connection between malaria and his heart problem until 2017 after his cardiologist had reviewed his full medical record. This factual issue and the issue of exceptional circumstances ought to have been reviewed by the ABCC.

22. Time limits are not designed to preclude staff members who suffer work-related effects on their health from benefiting from the social security that they were promised upon entering the service. The Appellant notes in this regard that Mr. M. R. of the MSD was initially supportive and helped him draft his request to the ABCC.

The Secretary-General's Answer

23. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment. Alternatively, he requests that the Appeals Tribunal remand the matter to either the Dispute Tribunal for additional findings or the ABCC for further findings and determination, if the UNAT finds that the UNDT erred in determining that the Secretary of the ABCC had a valid delegated authority to deny the Appellant's Appendix D claim on the ground of time bar, and if the UNAT also finds that there was an insufficient basis for a determination that the Appellant's Appendix D claim was less than USD 25,000.

24. Regarding the Appellant's request to adduce the documents in Annexes 24 to 26 in support of his argument that the Secretary of the ABCC did not address all available information, the Secretary-General refers only to Annex 24. He requests that the Appeals Tribunal rejects the request to add Annex 24 as additional evidence, because this one-page summary medical history report dated 17 May 2019 was not available on 11 January 2019, when the Secretary of the ABCC took the contested decision. Annex 24 is thus not relevant to the present case.

25. The Secretary-General submits that the UNDT correctly held that the Appellant's claim of negligence was not receivable because he had not separately submitted his claim of negligence to the Secretary-General for consideration and decision, in accordance with *Wamalala*.⁷

26. The Secretary-General also submits that the UNDT correctly applied the pre-2017 version of Appendix D to the Appellant's case, because the chain that connects his heart condition in 2017 to the performance of his official duties, as he describes it, starts with malaria he contracted in 2005 while on duty with the ONUB.

27. The Secretary-General maintains that the Appellant has failed to demonstrate that it was an error for the UNDT to find that the Secretary of the ABCC had the delegated authority to deny his request for waiver of the deadline for submitting his Appendix D claim. The Appellant conflates the authority of the Secretary of the ABCC regarding decisions on claims under USD 25,000 with his authority on deciding on time limit waivers. His submission of Appendix D claim 11 years after the incident was *ipso facto* also a request for waiver of the time limits. The decision by the Secretary of the ABCC to deny such a request is a procedural matter and is not subject to monetary limitation.

28. The Secretary-General contends that the UNDT did not err in finding that the Secretary of the ABCC had appropriately exercised his discretion in deciding that the lack of knowledge of Appendix D could not serve as a justification for submission of a claim past the deadline. As he has admitted that he was unaware of Appendix D before September 2017, the lateness of the Appellant's filing of his claim had nothing to do with the complexities of his medical case.

⁷ *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300.

Considerations

29. The Appellant appeals the UNDT Judgment on the following principal grounds: (i) the UNDT erred in determining the non-receivability of his claim of negligence or breach of duty of care; (ii) the UNDT erred by applying the previous version of Appendix D to his claim, instead of the current version of Appendix D (ST/SGB/2018/1); and (iii) the UNDT erred in finding that the Secretary of the ABCC had the delegated authority to make the contested decision.

30. The Tribunal will address these issues in turn.

Whether the claim of negligence or breach of duty of care was receivable

31. With respect to the Appellant's first ground of appeal, we find no error in the UNDT Judgment. The Appeals Tribunal has previously established that a claim of gross negligence or breach of duty of care against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.⁸

32. The Appellant was therefore required to submit his claim of gross negligence or breach of duty of care to the Secretary-General for consideration and subsequently for management evaluation pursuant to Staff Rule 11.2(a) before proceeding with his application to the UNDT. In the present case, the Appellant failed to submit such a separate claim, which he raised, instead, in his claim under Appendix D, and, accordingly, his claim of gross negligence or breach of duty of care by the Administration was not receivable *ratione materiae* by the UNDT.

33. Similarly, the ABCC Secretary's response that the Appellant viewed as negative decision on his claim of gross negligence or breach of duty of care against the Administration was not a decision stemming from an appropriate authority to decide upon such a request, which was the Secretary-General. Consequently, while it is true that the Appellant requested the review of the breach of duty of care claim in his request for management evaluation, this did not assist him, as this could not substitute his obligation to make the original claim of gross negligence separately to the Secretary-General for his consideration and decision, as

⁸ *Dahan v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-861, para.22; *James v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-600, para. 25, citing *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 27.

correctly found the UNDT. Hence, his contentions that there was no other official procedure or instruction directing how such a service-related claim should be submitted and that he fulfilled the requirements of the law when he proceeded to request management evaluation of that particular aspect of his claim are without merit.

Whether the UNDT erred about the applicable version of Appendix D

34. Turning to the Appellant's second ground of appeal, we find it also without merit.

35. Appendix D governs compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. Appendix D has been revised by ST/SGB/2018/1 effective from 1 January 2018, of which Article 6.1(b) (Transitional measures) provides that "[f]or claims filed for incidents that occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied".

36. The Appellant asserts that he is claiming compensation for the congestive heart failure he suffered in 2017, and not for the malaria he contracted in 2005 and that, therefore, the version of Appendix D that was in force in 2017 should apply to his case, instead of the previous version of it, as erroneously found by the UNDT.

37. In response, the Secretary-General argues that, under Article 2(a) of Appendix D, a claim for compensation under Appendix D can be made if the damage for which compensation is sought is attributed to the performance of a staff member's official duties; in the instant case, the chain that connects the Appellant's heart condition in 2017 to the execution of his official duties, as he describes it, starts with the illness he contracted in 2005 while on duty in Burundi, which affected the condition of his heart, and then allegedly led to congestive heart failure in 2017; in other words, the attribution to the Appellant's duties is the illness he contracted while working in Burundi in 2005; since the Appellant does not show any other attribution of his 2017 congestive heart failure to the execution of his duties, if the Appellant's 2017 heart condition is not attributed to the illness in 2005 while he was on mission, then the injury is not attributed to the execution of his duties and cannot serve as the basis of a claim at all.

38. We agree with the Secretary-General. In the case at hand, as the UNDT correctly held, the relevant provisions of the previous Appendix D, as it stood prior to the entry into force of Appendix D by ST/SGB/2018/1, were applicable because the starting point of the line of causal effects which allegedly led to the Appellant's congestive heart failure is connected to incidents that transpired in 2005, when he contracted malaria while on duty in Burundi.

Whether the Secretary of the ABCC had the proper authority to take the challenged decision

39. The Appellant contends that the UNDT erred in finding that the Secretary of the ABCC had the delegated authority to make the contested decision and making such a finding on the basis of a memorandum of 22 May 2017 from the Controller to the Secretary of the ABCC. He argues that this finding confuses the authority to approve recommendations of the ABCC with the authority to make unilateral decisions without consulting the ABCC. The process for considering a claim by the ABCC resulting in a recommendation goes to the Controller of the United Nations for a decision. That decision-making authority has been delegated in some instances to the Secretary of the ABCC. Even so, the delegated authority to the ABCC Secretary is strictly limited. Finally, the Appellant asserts that this was not, and it was never claimed to be, a *de minimis* claim. It is not clear if, or on what basis, the Dispute Tribunal opined that the claim was below the threshold of USD 25,000.

40. The Secretary-General in his answer addressed these contentions in relevant part as follows:⁹

... The Appellant fails to demonstrate that the UNDT erred in finding that the Secretary of the ABCC had the authority to deny the Appellant's request for waiver of the submission deadline.

... The UNDT held that the Secretary of the ABCC had the authority, under the delegation of authority granted to the Secretary of the ABCC by the Controller, to deny the Appellant's request for waiver of deadline to submit his Claim.

... The Appellant claims that the Secretary of the ABCC's authority to deny claims without bringing them before the ABCC is limited to claims under USD 25,000. The Appellant, however, conflates the Secretary of the ABCC's authority regarding decisions on claims under USD 25,000 and his authority on deciding on requests for waivers.

⁹ The Respondent's answer, subtitle C, and paras. 26-31, underline and italics in original, internal citations omitted.

... The UNDT found that pursuant to the provisions of the Administrative Instruction on “Administration of the Staff Regulations and Staff Rules” (“ST/AI/234/Rev.1”) the Secretary-General delegated to the Controller the authority to make certain determinations on claims brought before the ABCC. The UNDT further found that this delegation remained in force pursuant to section 4.2 of the Secretary-General’s Bulletin on “Delegation of authority in the administration of the Staff Regulations and Staff Rules” (“ST/SGB/2015/1”) and pursuant to the transitional measures related to the Secretary-General’s bulletin on “Delegation of Authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules” (“ST/SGB/2019/2”). In addition, the UNDT found that on 22 May 2017, the Controller further delegated, in a memorandum, of his authority to make determinations regarding certain claims to the Secretary of the ABCC.

... Specifically, the Controller delegated his authority to the Secretary of the ABCC, *inter alia*,

- i. “to approve and pay, or deny, claims for compensation under Appendix D involving payment of medical expenses not in excess of USD 25,000 per annum per injury or illness, and
- ii. “to waive, or deny, requests for waiver of the deadline for filing claims under Appendix D”.

... In the instant case, on 14 March 2018, the Appellant requested that his Claim be considered by the ABCC notwithstanding its late filing, on the ground of exceptional circumstances. Thus, the Appellant’s submission of his Claim 11 years after the incident is *ipso facto* also a request for a waiver of the time limitations. Because the delegation of the authority to deny requests for waivers of the deadline for filing claims is a procedural matter and is not subject to monetary limitations the Secretary of the ABCC had the delegated authority, pursuant to the Controller’s memorandum quoted above, to deny the Appellant’s request for consideration of his claim after the deadline for filing such claim based on alleged exceptional circumstances.

... In any case, should the UNAT consider that the Controller and, thus, the Secretary of the ABCC, did not have authority to deny the Appellant’s request for consideration of his claim after the deadline for filing it, the UNDT nevertheless correctly found that the Controller and, by further delegation, the Secretary of the ABCC had the authority to deny claims that total less than USD 25,000. It is not clear, however, from the record the basis [sic] on which the UNDT found that the Appellant’s Claim totalled less than USD 25,000. Accordingly, in such case, the UNAT could remand the matter for clarification by the UNDT or by the ABCC as to whether the Appellant’s claim was within such monetary limitation.

41. The Appellant's submission that the Secretary of the ABCC did not have the authority to determine his case and deny his claim for compensation under Appendix D on the basis that it was time-barred, and that there were no exceptional circumstances to warrant the acceptance of the late claim, rests on two factual premises (questions of mixed fact and law). The first is that, when the Secretary of the ABCC made the contested decision on 11 January 2019, he lacked the statutory power to do so. The second is that the decision of the Secretary of the ABCC was defective because he had reached the contested decision unilaterally without any prior consultation with the ABCC.

42. The applicable law on these matters is as follows:

43. Appendix D to the Staff Rules (ST/SGB/Staff Rules/Appendix D/Rev. 1), as it was in force before it was revised in 2017, provides the principles of award and general provisions in section II, and particularly Article 2(a)-(b) reads:

(a) Compensation shall be awarded in the event of death, injury or illness of a staff member which is attributable to the performance of official duties on behalf of the United Nations, except that no compensation shall be awarded when such death, injury or illness has been occasioned by:

(i) The willful misconduct of any such staff member; or

(ii) Any such staff member's willful intent to bring about the death, injury or illness of himself or another;

(b) Without restricting the generality of paragraph (a), death, injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any willful misconduct or willful intent when:

(i) The death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations; or

(ii) The death, injury or illness was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards to the staff member's health or security, and occurred as the result of such hazards; or

(iii) The death, injury or illness occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connexion with the performance of official duties; provided that the provisions of this sub-paragraph shall not extend to private motor

vehicle transportation sanctioned or authorized by the United Nations solely on the request and for the convenience of the staff member[.]

44. Articles 12 to 16 of Section IV titled “Administration and procedures” of Appendix D read:

Article 12. Time limit for entering claims

Claims for compensation under these rules shall be submitted within four months of the death of the staff member or the injury or onset of the illness; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a claim made at a later date.

Article 13. Type and degree of disability

The determination of the injury or illness and of the type and degree of disability shall be made on the basis of reports obtained from a qualified medical practitioner or practitioners.

Article 14. Medical examination

The Secretary-General may require the medical examination of any person claiming or in receipt of a compensation for injury or illness under these rules. In case of refusal or failure of a claimant or beneficiary to undergo such examination at such time or times as, in the opinion of the Secretary-General, may be reasonably necessary, the Secretary-General may bar the claimant or beneficiary from receiving compensation in full or in part.

Article 15. Documentary evidence

Every person claiming under these rules or in receipt of a compensation under these rules shall furnish such documentary evidence as may be required by the Secretary-General for the purpose of determination of entitlements under these rules.

Article 16. Advisory Board on Compensation Claims

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

(b) The Advisory Board may be consulted by the Secretary-General on any matter connected with the implementation and administration of these rules;

(c) The 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;

- (d) The Board shall consist of:
- (i) Three representatives of the Administration appointed by the Secretary-General;
 - (ii) Three representatives of the staff appointed by the Secretary-General on the recommendation of the Staff Committee;

who should have the necessary expertise in administrative and personnel matters.

(e) A Secretary shall be designated by the Secretary-General. He may not, at the same time, be a member of the Advisory Board on Compensation Claims.

45. Under the applicable legislative framework, the Secretary-General is bestowed with the authority to determine claims for compensation under Appendix D when these are submitted within four months of the death of the staff member or the injury or onset of the illness, as well as with the discretionary authority to determine whether to grant a waiver to the four-month deadline to file a compensation claim to the ABCC on the basis of exceptional circumstances.

46. Pursuant to ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), Annex III under the title “MATTERS WITHIN THE AUTHORITY OF THE CONTROLLER”, the authority concerning “[g]rant of compensation for death, injury or illness up to \$25,000 (on recommendation of Advisory Board on Compensation Claims)” was delegated to the Controller.

47. This delegation remained in force when the contested decision was made on 11 January 2019, as the UNDT correctly found,¹⁰ pursuant to section 4.2 of the Secretary-General’s Bulletin on “Delegation of authority in the administration of the Staff Regulations and Staff Rules” (ST/SGB/2015/1), which provided that “the delegations of authority which currently exist through administrative issuances, memorandums or other written communications shall continue to be applicable” unless stated otherwise. In section 2.3, ST/SGB/2015/1 provided that “[d]elegated authority may be further delegated, unless such further delegation has been excluded in writing”, in conjunction with a transitional measure that the Secretary-General put in place on 30 December 2018 on the eve of the coming into effect of the Secretary-General’s Bulletin on “Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules” (ST/SGB/2019/2), which prescribed that “the United Nations officials in the entity performing functions under a

¹⁰ Impugned Judgment, paras. 37 & 40-43.

delegation of authority which was in effect as at 31 December 2018 are hereby sub-delegated, under this delegation, the authority to perform the same functions through 31 March 2019, unless and until this sub-delegation is expressly changed by the head of entity”.

48. Further, in the memorandum dated 22 May 2017, the Controller delegated authority to the Secretary of ABCC to “waive, or deny, requests for waiver of the deadline for filing claims under Appendix D”. This memorandum reads as follows:

1. This delegation of authority is a further delegation of authority vested in the Controller in exercising authority under the Staff Regulations and Rules for the granting of compensation for service-incurred death, injury or illness in accordance with paragraph 5 (c) of the ST/SGB/151.

2. I hereby delegate authority to you:

i. to approve and pay, or deny, claims for compensation under Appendix D for funeral expenses, sick leave credit, and permanent loss of function in their entirety,

ii. to approve and pay, or deny, claims for compensation under Appendix D involving payment of medical expenses not in excess of USD 25,000 per annum per injury or illness, and

iii. to waive, or deny, requests for waiver of the deadline for filing claims under Appendix D.

3. This delegation of authority supersedes any previous delegation of authority from the Controller to the Secretary of the ABCC.

49. The requirement of authority is a fundamental precept of the principle of legality of the Administration. The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorized by law. It is central to the conception of the constitutional and administrative order that administrators in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.¹¹ Whether the Secretary of the ABCC is vested with the power to determine claims for compensation under Appendix D when these are submitted within four months of the death of the staff member or the injury or onset of the illness, as well as with the discretionary authority to determine whether to grant a waiver to the four-month

¹¹ *Comp. Margaret Mary Fogarty v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1117, para. 30.

deadline to file a compensation claim to the ABCC on the basis of exceptional circumstances is a mixed question of law and fact. The authority of the Controller, and consequently the Secretary of the ABCC, is fact dependent on the amount of the claim. The source, nature, conditions precedent and extent of that power (if it in fact exists) will be questions of law.

50. Further, it is trite law that an element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else.¹² Delegation or sub-delegation of authority should be authorized by the statute, either expressly or impliedly, and the relevant statutory powers of delegation may not be construed widely. The delegatee must also keep within the bounds of the power actually delegated or sub-delegated, which may be narrower than that possessed by the delegating authority, but never wider than that possessed by the latter as per maxim *nemo plus iuris ad alium transferre potest, quam ipse habet* (No one can transfer more rights to another than he himself has), which reflects a corollary of the principle of the legality of the Administration. Failing that, any action will be *ultra vires*.

51. In the present case, per the applicable law provisions, the sub-delegation of authority to the Secretary of the ABCC from the Controller was still valid when the contested decision was made on 11 January 2019. However, the delegating provisions of ST/AI/234/Rev.1, which constituted the legal basis upon which that delegated power of the Controller rested, clearly suggest that what was delegated to the Controller was the power to determine the “[g]rant of compensation for death, injury or illness up to USD 25,000”. Nevertheless, in the memorandum dated 22 May 2017, the Controller sub-delegated that authority to the Secretary of the ABCC not only to approve and pay, or deny, claims for compensation under Appendix D involving payment of medical expenses not in excess of USD 25,000 per annum per injury or illness, but also to waive, or deny, requests for waiver of the deadline for filing claims under Appendix D.

52. This sub-delegation, however, has to be interpreted and confined within the context of the delegating provisions of ST/AI/234/Rev.1, which expressly confer upon the Controller the power to determine only claims for compensation for death, injury or illness up to USD 25,000. Thus, even accepting that the Controller was impliedly delegated the discretionary power to determine the related issue whether to grant a waiver to the

¹² H.W.R. Wade/C. F. Forsyth, *Administrative Law*, Eighth Edition, 2000, p.315; René Chapus, *Droit administratif général*, Tome 1, 15^e édition, 2001, p. 1024 *ff*.

four-month deadline to file a compensation claim to the ABCC on the basis of exceptional circumstances, his/her authority to make such decisions was subject to the above-mentioned monetary constraints concerning claims up to USD 25,000.

53. In the instant case, the UNDT found that on the date of the contested decision denying the Appellant's claim for compensation made on 14 March 2018, the Secretary of the ABCC had the valid delegated authority to take decisions with respect to the approval, payment and denial of the Appendix D claims, as had previously been delegated to him by the Controller on 22 May 2017.¹³ However, it is not clear on what basis the UNDT found that the Appellant's claim totaled less than USD 25,000, in order for it to conclude that the Secretary of the ABCC was properly kept within the bounds of the sub-delegated authority he had received from the Controller to make the decision at issue.

54. The Secretary-General's contention that, because the delegation of the authority to deny requests for waivers of the deadline for filing claims is a procedural matter and is not subject to monetary limitations for which the Secretary of the ABCC had the delegated authority, pursuant to the Controller's memorandum quoted above, to deny the Appellant's request for consideration of his claim after the deadline for filing such a claim based on alleged exceptional circumstances, is not tenable. First, because at the core of the present litigation primarily stands the Appellant's claim for compensation for the chronic progressive disease he suffered allegedly while on duty in Burundi, and secondly, because the authority to deny requests for waivers of the deadline for filing claims is not just a procedural matter; it is also a substantive one strictly interconnected with the substance of his claimed right for compensation.

55. The evidence and submissions on record are insufficient to determine the material issue as to whether the Appellant's claim for compensation totaled less than, or in excess of, USD 25,000, in order to determine the authority of the Secretary of the ABCC to take the contested administrative decision. As already noted, this is a factual determination which, without the relevant evidence, cannot be made. The UNDT failed to inquire by eliciting evidence on this specific issue. This information is important to the determination of the case and it was the duty of the UNDT to require that parties provide this very pertinent information, among others, to assist in the determination of the case. In this regard, in

¹³ Impugned Judgment, para. 43.

passing, we take note that, when a complainant calls for proof that power has in fact been delegated to a specific person, it is a matter for the Organization to produce such proof.¹⁴

56. It is therefore the ruling of the Appeals Tribunal that the UNDT erred on a question of law and fact which has resulted in a manifestly unreasonable decision. In the circumstances, the appeal is upheld and the Judgment of the UNDT is vacated. The case is remanded to the UNDT for additional findings of fact. The question for determination by the UNDT is whether the Secretary of the ABCC had, in view of the Appellant's claim for compensation, the valid power to take the contested decision.

57. Because of the way in which this appeal is dealt with by us, we do not need to consider the Appellant's request to adduce the documents in Annexes 24 to 26 in support of his argument that the Secretary of the ABCC did not address all available information.

Whether the Secretary of the ABCC lawfully made the challenged decision without consulting the ABCC

58. Next, we entertain the Appellant's ground of appeal that the UNDT erred in finding that the Secretary of the ABCC had delegated authority to make the contested decision inasmuch as the ABCC had not been consulted before the contested decision had been taken. Though the case at hand has already been decided on the merits, this ground of appeal cannot be left without being analyzed since it concerns an important aspect of the Appellant's due process right.

59. On this issue, the UNDT opined:¹⁵

The Applicant further argues that such delegation is not lawful on the ground that Appendix D requires the Secretary-General to obtain an advisory opinion of ABCC. However, art. 16 of the applicable Appendix D only states that the ABCC "may be consulted by the Secretary-General on any matter connected with the implementation and administration of these rules". Therefore, contrary to the Applicant's argument, the Controller is not required to obtain an advisory opinion of ABCC in all circumstances.

¹⁴ *Comp. ILOAT Judgment No. 2028 in re Stenberg*, 8(3).

¹⁵ *Impugned Judgment*, para. 39.

60. This is not a correct conclusion in terms of the Controller's or the Secretary of the ABCC's exercise of the relevant delegated or sub-delegated authority, respectively.

61. Indeed, as opposed to the Secretary-General's authority to make such decisions *per* Article 16 of the applicable Appendix D, the wording of ST/AI/234/Rev.1, Annex III, is plain: the decision to grant compensation for death, injury or illness up to USD 25,000 is taken by the Controller, and consequently the Secretary of the ABCC, only on recommendation of the ABCC.

62. Therefore, ST/AI/234/Rev.1 requires consultation of the ABCC, and the ABCC has several members who are supposed to function as a single body. However, there is no dispute that the ABCC's recommendation was never sought and obtained in this case by the Secretary of the ABCC. So, there was a wrongful failure to consult the ABCC; the Secretary of the ABCC was wrong to decide on the case before he had consulted it; and, in line with *tu patere legem quam ipse fecisti* (Obey the law that you yourself have forged), the impugned decision he took in breach of his duty to consult the ABCC was *ultra vires*.

The Appellant's request for anonymity

63. In a motion dated 15 October 2021, the Appellant requests that the Appeals Tribunal anonymize his name in any interim or final orders on the grounds that a publicly available order referring to his medical condition would unnecessarily negatively affect his personal and professional situation.

64. Article 10(9) of our Statute does make some provision for confidentiality when it states that the judgments of the Appeals Tribunal shall be published "while protecting personal data". Given that the case concerns a claim for compensation under Appendix D and relies on sensitive medical evidence to support it, we find that it is reasonable to redact the Appellant's name from this Judgment and any public pronouncement of the Judgment.

Judgment

65. The appeal is allowed in part. Judgment No. UNDT/2020/167 is set aside, except for its findings on the receivability of the Appellant's claim of gross negligence or breach of duty of care and the applicable version of Appendix D. The case is remanded for a hearing *de novo* before a different UNDT Judge.

66. We order that the Appellant's name be redacted from this Judgment and any public pronouncement of this decision.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 14th day of December 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar