



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

WAMALALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a current staff member with the United Nations Organization Mission in the Democratic Republic of the Congo (“MONUSCO”), filed an Application with the United Nations Dispute Tribunal (UNDT) appealing the decision by the Advisory Board on Compensation Claims (ABCC) to award him \$49,114.03 for permanent loss of function of his right leg as a result of injuries sustained in a road accident. The Applicant further asserted a claim for gross negligence against the Secretary-General for failing to adequately ensure his safety and security in connection with the accident.

2. Following the Parties’ response to Case Management Order No. 003 (NBI/2012), the Registry informed the Parties it was considering holding a hearing for this case in Kinshasa and would set down a hearing date.

3. On 23 February 2012, the Respondent filed a “Motion for Leave to Have Receivability Considered as a Preliminary Issue”. The Tribunal reviewed the Motion and allowed the Applicant to file a response if he so wished. The Applicant filed his Response to the Motion on 2 March 2012.

Facts

4. The Applicant was travelling in a UN military vehicle on 13 February 2009 when he was involved in a road traffic accident. The Applicant was taken to a Level 3 hospital in the Democratic Republic of Congo (DRC) but was later evacuated to a Level 4 hospital in South Africa. The Applicant underwent emergency surgery which included amputation of his right leg.

5. The Applicant thereafter filed a claim for compensation with the ABCC on 1 July 2009. On 25 June 2010, the ABCC recommended, *inter alia*, that “the claimant’s injuries . . . should be recognized as attributable to the performance of official duties on behalf of the United Nations . . . and based on the current

medical information, the claimant should be awarded a compensation in the amount of USD49,114.03 . . .”¹

The Respondent’s submissions

6. The Respondent contends that the Applicant’s negligence claim is not receivable under Articles 2.1(a) and 8.1 of the Tribunal’s Statute.

7. The Respondent further contends that the “conduct” of the Administration is not an administrative decision subject to appeal, and a management evaluation is a necessary step in the appeal process.

8. Further, it is Respondent’s contention that the Tribunal is not vested with general jurisdiction to review prejudicial or injurious conduct but instead has the jurisdiction to review administrative decisions.

9. Lastly, the Respondent asks the Tribunal to determine the receivability of the Applicant’s negligence claim as a preliminary matter as there is a possibility that the hearing of the negligence claim alone would involve three hearing days, requiring significant judicial resources for its determination.

The Applicant’s submissions

10. In regards to the issue of judicial economy, the Applicant states that although judicial economy is better served by considering receivability issues first, there is no error in considering the merits of the case at the same time as receivability.

11. The Applicant contends that the “conduct” of the Administration can be challenged and cites several cases to support this proposition.

12. Because the challenged decision in this case is inaction by the Administration, it is difficult to pinpoint precisely when it occurred and the Administration’s decisions or failures to take appropriate prompt action is subject to challenge.

¹ Respondent’s Reply, para 14.

13. That the Tribunal must reject the Respondent's second argument that the Applicant must have submitted the negligence claim for consideration and determination by the Administration and only a denial by the Secretary-General of a claim for compensation can be challenged before the Dispute Tribunal.

Consideration

Whether the conduct of the Administration is or is not an administrative decision subject to an appeal

14. What is an administrative decision? In *Andronov*,² the former UNAT held that an administrative decision is one which is unilaterally taken by the administration in a precise individual case, with direct legal consequences for a staff member. *Andronov* has been endorsed in several other cases for this proposition³. The issue then becomes whether the conduct of the Administration in this case constitutes an administrative decision.

15. In this case, the conduct of the Administration is the alleged negligence in not promptly providing the Applicant with the proper medical care, aggravating his medical injuries. The Respondent contends that the "conduct" of the Administration is not an administrative decision subject to an appeal. The Respondent cites *Bajnoci*, UNDT/2012/028 as guiding authority for this proposition.

16. Further, the Respondent states that the Applicant has not submitted the negligence claim for consideration and determination by the Administration and therefore is not contesting an administrative decision. The Respondent goes on to state that in the absence of an administrative decision, there has been no internal review of the claim by the Administration through the mandatory management evaluation process

17. With all due respect, the Respondent's interpretation of "conduct of the Administration" in *Bajnoci*, as applicable in this case, is misplaced. In *Bajnoci*,

² UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

³ See *Tabari*, 2010-UNAT-030; *Schook*, 2010-UNAT-013; *Planas*, UNDT/2009/086; *Larkin* UNDT/2010/108; *Elasoud*, UNDT/2010/111; *Buscaglia*, UNDT/2010/112.

the Tribunal found that the “conduct” of the Chief of Section and Head of the Organ of the International Criminal Tribunal for the Former Yugoslavia (ICTY) during the review process of Bajnoci’s eligibility and suitability for conversion to a permanent appointment was not an administrative decision subject to an appeal pursuant to Articles 8.1 and 2.1 of the Tribunal’s Statute.⁴

18. The reasoning in *Bajnoci* was that the conduct of Bajnoci’s supervisors was based on abuse of authority by another staff member, and a staff member must follow prescribed procedure in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) in getting redress. Therefore, *Bajnoci* had a clear path in which to address her grievance. The Applicant in this case however does not have an avenue for addressing his grievances, other than bringing the Application to the Tribunal.

19. The Tribunal does not intend to discuss the *Bajnoci* case further on the issue of administrative decision but it is clear that the *Bajnoci* case is inapposite to the present case. The conduct of the Administration in this case, i.e. negligence in not providing proper medical care promptly cannot now be challenged in any other avenue other than being examined at a full hearing and on the merits before this Tribunal.

20. The Tribunal further takes note of the Respondent’s argument that “[o]nly a denial by the Secretary-General of a claim for compensation for negligence can be challenged before the Dispute Tribunal, after being submitted for management evaluation”.⁵

21. The Tribunal does not consider that there are two separate claims, one relating to negligence and one relating to the amount of compensation awarded to the Applicant. The averment of negligence is related to the serious injuries that the Applicant sustained. What he is in fact saying is that given the state of his injuries, had more care been shown, he would not have found himself in the physical state in which he is today. The claim of negligence should be determined together with the compensation issue.

⁴ *Bajnoci* UNDT/2012/028 at 21.

⁵ Respondent’s Motion for Leave to Have Receivability Considered a Preliminary Issue, para. 8.

Whether the Tribunal has jurisdiction to review the compensation amount awarded by the ABCC

22. On the compensation issue, the Respondent submits that there has been no management evaluation requested by the Applicant and therefore the matter is not receivable.

23. Staff Rule 11.2(b) provides: “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 taken pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation”.

24. It is clear staff rule 11.2(b) exempts the necessity of a management evaluation in two sets of cases, namely, in cases regarding advice obtained by the Administration from technical bodies and a decision taken after a disciplinary measure. It is further to be noted that in the *Guide to Resolving Disputes*, “[a] management evaluation is not required if the contested decision was taken by the administration based on the advice of an expert or advisory board, such as the Advisory Board on Compensation Claims or a medical board”.⁶

25. What the Applicant is challenging here is the administrative decision made by the ABCC, an advisory board, and there was no requirement for him to go through the management evaluation procedure.

26. Any person who is aggrieved by any act of the administration should be able to vindicate his/her rights before a judicial body. In matters of employment, Article 6.1 of the International Covenant on Economic, Social and Cultural Rights provides: “The State Parties to the present Covenant recognize the right to work . . . and will take appropriate steps to safeguard this right”.⁷ It is in very exceptional cases that access to a judicial body can be denied and even then there must be

⁶ Administration of Justice in the United Nations, *A Guide to Resolving Disputes* (New York, June 2009), p. 4.

⁷ International Covenant on Economic, Social and Cultural Rights, (New York, 16 December 1966), Art.6.1.

valid reasons for such a non-access. What the Applicant is therefore attempting to do is vindicate his rights that he avers were denied to him and that denial has an impact on his right to work. He cannot therefore be denied access to the Tribunal in the absence of a clear and express provision to that effect.

27. It is interesting to note here that Article 7(g) of the Code of Conduct for Judges adopted by the General Assembly (A/Res/66/106) dated 13 January 2012 provides that “[j]udges must take reasonable steps to maintain the necessary level of professional competence and to keep themselves informed about relevant development in international administrative and employment law as well as international human rights norms”. Maintaining the necessary level of professional competence in these areas surely would also mean applying them in judicial decisions whenever applicable.

28. In the case of *Tadonki* UNDT/2009/016, this Tribunal stated in paragraphs 8.2.7 and 8.2.8 “that the rules and regulations of the United Nations relating to employment should be interpreted and applied in a manner that takes into account the international human rights standards” and that “[t]he way in which the employment is terminated should therefore be considered in the context of the rights of the employee to due process and the compliance of the decision maker to international law and principles of the rule of law”.

29. It therefore follows that in applying the above stated legal principles, the Code of Conduct for Judges and the UNDT Statute dealing with cases that do not require management evaluation, the Applicant should have his case heard by the Tribunal.

Conclusion

30. The Application is receivable. In the circumstances, the Tribunal has jurisdiction to entertain it.

Case Management Directions

31. The case will be heard on the merits. Required notices and orders will be issued by the Tribunal in due course.

(Signed)

Judge Vinod Boolell

Dated this 17th day of April 2012

Entered in the Register on this 17th day of April 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi