Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. This is a judgment on a preliminary issue regarding the receivability of the Applicant's claim that she was unlawfully denied compensation for injuries sustained as a result of a vehicular accident while on official duty. The administrative decision, which is being contested, was made on the recommendation of the Advisory Board on Compensation Claims ("ABCC") on 25 August 2010 and was notified to the Applicant on 27 August 2010.

2. It is the Applicant's case that the accident, whilst driving her private vehicle, was incurred in the course of service with the United Nations as she was commuting from the United Nations Headquarters to her home in the borough of the Bronx, New York, USA. The Respondent resists the claim on the basis that there were no errors of law or fact committed by the ABCC when rejecting the Applicant's claim for compensation since the ABCC found that the Applicant did not travel by the most direct route possible between her office at the United Nations and her residence when the accident occurred.

3. Furthermore, the Respondent contends that the application is not receivable because the Applicant did not exhaust the administrative process of seeking reconsideration of her claim pursuant to art. 17 of Appendix D to the Staff Rules. The Applicant contends that there is no such requirement and that her application is receivable.

4. By Order No. 158 (NY/2012) dated 2 of August 2012, Her Honour Judge Greceanu, gave the parties leave to make submissions on the preliminary issue of receivability and ordered that this preliminary issue is to be decided on the papers before the Tribunal. She further indicated that the issue of receiveability is to be

determined in accordance with the proper interpretation of the meaning of art. 17 of Appendix D to the Staff Rules.

5. This case was assigned to the undersigned Judge on 25 October 2012.

Consideration

Appendix D to the Staff Rules (ST/SGB/Staff Rules/appendix D/Rev.1)—Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations

6. Article 17 sets out the procedure for such appeals and provides as follows (emphasis added):

> (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);
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> (b) A medical board shall be convened to consider and to report to [the ABCC] on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations;
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> (c) [The ABCC] shall transmit its recommendation together with the report of the medical board to the Secretary-General who shall make the final determination;
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> (d) If after reviewing the report of the medical board and the recommendations of [the ABCC], the Secretary-General alters his original decision in favour of the claimant, the United Nations will bear the medical fees and incidental expenses; if the original decision is sustained, the claimant shall bear the medical fees and the incidental

> expenses of the medical practitioner whom he selected and half of the medical fees and expenses of the third medical practitioner on the medical board. The balance of the fees and expenses shall be borne by the United Nations;
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> (e) Whenever an appeal under this article involves also an appeal against a decision of the Joint Staff Pension Board, the medical board established under the Regulations and Rules of the Joint Staff Pension Board and such medical board's shall be utilized to the extent possible for the purposes of this article.

The preliminary question of receivability

7. In accordance with Order No. 158 (NY/2012) the sole issue for determination in this judgment is the receivability of the claim having regard to art. 17 of Appendix D to the Staff Rules.

8. It has not been contended that the Applicant was first required to file a request for management evaluation in accordance with art. 8.1 of the Statute of the Dispute Tribunal, nor has it been contended that the contested decision was not an administrative decision under art. 2.1(a) of the Statute.

9. For the avoidance of doubt, pursuant to staff rule 11.2(b), the Tribunal holds that the Applicant was not required to file a request for management evaluation given that the recommendation made and the decision taken by the Administration was based on advice obtained from a technical body, namely the ABCC. Furthermore, it is unarguable that the decision itself is an administrative decision which has direct impact on the Applicant and affects a contractual entitlement (see the United Nations Appeals Tribunal's judgments in *Andati-Amwayi* 2010-UNAT-058 and *Pellet* 2010-UNAT-073).

10. The Respondent's contention that the application is not receivable is based on the fundamental premise that the Applicant was obliged to exhaust the administrative

process by seeking reconsideration of the claim and he relies on art. 17 of Appendix D to the Staff Rules in support of this contention.

11. In the reply submitted on 14 October 2010, the Respondent argues that a staff member must first seek a review of the decision by the Secretary-General within 30 days of notice of the decision in question. The Applicant takes issue with the use of the imperative "must" submitting that the wording of art. 17 of Appendix D is not an obligatory first step because of the use of the word "may" thereby indicating that this was a discretionary requirement. The Applicant's further submission is that, in her case, the discretionary provisions of art. 17 applies to circumstances where the Secretary-General may have denied a claim on medical grounds, namely on the basis of the type or extent of the injuries, illness or disability resulting from an accident occurred during performance of official duties.

12. The Applicant's interpretation is supported by a reading of the whole of art. 17 of Appendix D which clearly indicates that it relates to the denial of entitlement on medical grounds as the following provisions indicate:

a. Article 17(a): The second sentence stipulates that a request for reconsideration shall be accompanied by the name of the medical practioner chosen;

b. Article 17(b): Provides that a medical board shall be convened;

c. Article 17(c): Provides that the ABCC shall transmit its recommendation to the Secretary-General with the report of the medical board;

d. Article 17(d): Provides for a review, by the Secretary-General, of the report of the medical board.

13. The Tribunal observes that the grounds upon which the Applicant's benefit has been refused are not medical in nature. Therefore the procedure outlined in art. 17 of Appendix D is not applicable to this case.

14. The Respondent's contention that the Applicant has failed to exhaust all remedies under the procedure is not supported by a proper interpretation of art. 17. If it was the intention to require a staff member, who is dissatisfied with the decision of the Secretary-General, to seek a review as an obligatory first step before filing a claim with the Tribunal, it would have said so in clear terms (see also *Scott* 2012-UNAT-225). For example, the requirement that, where required, a staff member must first seek management evaluation before filing a claim to the Tribunal is stated in clear terms under art. 8.1 of the Statute of the Dispute Tribunal.

15. The Tribunal does not consider that there is any ambiguity in the wording of art. 17 of Appendix D. However, it would appear from the different interpretation given by the Respondent that it may well be of assistance to the parties for the Tribunal to deal with this submission. The Tribunal would rule in favour of adopting the interpretation that gives rise to least injustice by applying the internationally recognized principle of interpretation that an ambiguous term of a contract is to be construed against the interests of the party which proposed or drafted the contract or clause, particularly when dealing with a provision such as art. 17 that has been unilaterally imposed by the Respondent. This principle, also known as *contra proferentem*, was affirmed by the Dispute Tribunal in *Tolstopiatov* UNDT/2010/147, para. 66.

16. The Tribunal also takes into account that at all material times the Applicant was pursuing her claim diligently and it is inconceivable that she would not have resorted to seeking a review of the impugned decision as a necessary first step if it was clear that that is what she was required to do. The list of staff rules and procedures is intended to assist both staff members and the decision-makers in

the system to have certainty and clarity not only about their rights but also their responsibilities. It is no part of the purpose of these rules to frustrate a staff member from pursuing legitimate grievances by placing hidden hurdles in the way. If the intention of the rule is as advocated by the Respondent then the way to deal with it is not to use the Respondent's questionable interpretation to prevent staff members from exercising their rights but to amend the rule to remove any lack of clarity or ambiguity. That said, it is the Tribunal's interpretation that art. 17 of Appendix D is clear and its intention is unambiguously directed at providing the staff member with an opportunity to challenge the medical basis of a decision by seeking a review. Whilst it may be preferable to do so, it is a step too far to conclude, or even to infer, that art. 17 requires the staff member to first seek reconsideration of all decisions made on the recommendation of the ABCC before recourse to a judicial challenge before the Tribunal.

Conclusion

17. The Tribunal finds that the application is receivable. Given that Order No. 158 (NY/2012) was confined to receivability and not the substantive merits of the application, the parties will be given an opportunity to present any final submissions for the determination of the merits of the claim.

Orders

18. In light of its findings above, the Tribunal orders that, by **5:00 p.m., Friday, November 9 2012**:

a. The parties are to file and serve any further concise submissions not exceeding three pages or, alternatively, to state that they rely on submissions made already and that they have nothing further to add;

b. The parties are to confirm that they are agreeable to the determination of the substantive merits of the claim on the documents;

c. The Applicant is to file and serve:

i. The police report of the accident;

ii. The statement that the Applicant gave to United Nations Safety and Security Service; and

19. Any written statement, which she submitted to the ABCC.

(*Signed*)

Judge Goolam Meeran

Dated this 6th day of November 2012

Entered in the Register on this 6th day of November 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York