



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 13 September 2010, the Applicant filed a claim challenging the decision not to award her compensation for injuries sustained from a vehicular accident. She contends that when the accident occurred she was commuting from work and therefore on official duty. The administrative decision that is being challenged was made on the recommendation of the Advisory Board on Compensation Claims (“ABCC”).

Scope of the case

2. The Tribunal has identified the following two issues:
- a. Were the ABCC justified in insisting that the Applicant produce further details, including documentary evidence, to prove that she had a legitimate reason for travelling in the direction opposite to her home?
 - b. Was it a proper and lawful exercise of the discretion of the ABCC not to recommend that the Applicant’s claim be accepted because she refused to answer certain questions and to provide information that would enable them to apply properly the test to determine whether she was on official duty?

Procedural history

3. The Respondent’s contention that the application was not receivable because the Applicant did not exhaust the administrative process of seeking reconsideration of a claim pursuant to art. 17 of Appendix D to the Staff Rules was the subject of a Judgment on receivability issued on 6 November 2012 (Judgment No. UNDT/2012/167). The Tribunal found that the application was receivable. The parties were ordered to file and serve any further concise submissions not

exceeding three pages, or, alternatively, to state that they rely on the submissions made already and had nothing further to add. They were also asked if they agreed to a determination of the substantive merits of the claim on the basis of the documents. Finally, the Applicant was ordered to file and serve a copy of the police report of the accident, the statement that she gave to the United Nations Safety and Security Service and any written statements which she had submitted to the ABCC.

4. The Applicant confirmed that she relied on the submissions made already and wished to have a determination of the substantive merits of the claim on the documents. The Respondent was not prepared for the case to be determined on the documents before the Tribunal, because the Respondent considered that the evidentiary record was incomplete. The Respondent reserved his position in relation to whether there should be a determination without a hearing pending their perusal of the documents which the Tribunal had ordered the Applicant to produce.

5. By a joint submission, dated 20 November 2013, the parties informed the Tribunal that they did not wish to have this matter referred to the Mediation Division of the Ombudsman, nor did they wish to participate in any other form of alternative dispute resolution.

6. By Order No. 240 (NY/2012) dated 27 November 2012, the Applicant was ordered to identify the authorities that she was seeking to rely upon, and the Respondent was ordered to file and serve a submission stating the basis for requesting a hearing, identifying the areas of dispute that may best be resolved by evidence and witnesses. Furthermore, the Respondent, who had previously argued that the application was not receivable, because the Applicant had not exhausted the opportunity of review by the ABCC, was reminded that, since the Applicant had provided additional information, the Respondent was required to explain why the review which they had earlier indicated ought to have taken place should not now take place. The Tribunal had in mind not only the particular role of the ABCC in

determining applications for compensation, but also the principal reason advanced by the Respondent justifying the refusal of the claim as being the Applicant's unwillingness to provide further particulars explaining the reason why she did not adopt a direct route on her way home from the office. The Respondent decided not to refer the matter for a review by the ABCC on the ground that the Applicant had not yet provided relevant particulars regarding the route that she had taken which was not the most direct from the UN to her home.

7. The Applicant produced a detailed reply to Order No. 240 (NY/2012) and the Respondent provided an explanation as to why the case could not be referred to the ABCC for review. The Respondent stated that the Applicant's submission dated 19 November 2012 did not provide the information requested by the ABCC. The Respondent contended that the Applicant's evasive submissions to the ABCC and to the Tribunal are insufficient to establish any facts, adding that if the Tribunal considered it necessary to determine why the Applicant was travelling in the opposite direction to her home then a hearing was necessary. In the event that a hearing was convened, the Respondent wished to call the Applicant and her passenger mentioned in the police report in order to verify the facts regarding the question whether the Applicant had a legitimate reason for travelling in the opposite direction to her home.

8. In Order No. 11 (NY/2013) dated 17 January 2013, the Tribunal considered the available evidence on file, noted the Applicant's preference for a determination on the documents and took into account the Respondent's cautionary note regarding the requirement for the Tribunal to establish as a fact the question whether or not the Applicant was on duty on behalf of the United Nations at the time of the accident. The Tribunal decided, in the circumstances, to accede to the Applicant's request that there be a judicial determination on the documents.

9. In the Tribunal's view, the Respondent's concern that the Tribunal might be minded to substitute its decision for that of the ABCC was misplaced. The task of the Tribunal is to find whether the insistence on the part of the ABCC that the Applicant explains and provides documentary evidence that her presence in traffic moving in the direction opposite to her home was reasonable, legitimate and lawful.

Facts

10. The Applicant lives in the Bronx, New York, which is located north of the United Nations Headquarters in Manhattan, New York. On 29 July 2009 (the day of the accident), her office was located on 46th Street and 1st Avenue, approximately 10 miles from her home.

11. The Applicant states that she left work at approximately 4:30 p.m. and that the accident occurred within 10–12 minutes thereafter. The accident occurred on 15th Street and 2nd Avenue, approximately 1.7 miles south of the United Nations Headquarters. It was the adoption of this route which, in the opinion of the ABCC, was opposite to that of direct travel to her home, that is a central issue in this case.

12. On 13 October 2009, the Applicant met the Secretary of the ABCC to discuss filing an Appendix D claim with respect to the accident. On 20 October 2009, the Applicant submitted a statement to the ABCC.

13. On 1 December 2009, the Applicant was informed that her claim would be presented to the ABCC at its next meeting, to be held on 10 December 2009. In addition, the Applicant was requested to confirm her prior conversation with the Secretary of the ABCC on 13 October 2009, in which the Applicant stated that the accident had occurred on 15th Street and 2nd Avenue, and that she had been in the vicinity to pick up her son from camp on 14th Street, before going home.

14. On 2 December 2009, the Applicant informed the Secretary of the ABCC that her written statement, the police report, and the statement she gave to the United Nations Safety and Security Service was adequate information for the ABCC's consideration of her claim. It is a matter of surprise that she did not answer the specific question put to her.

15. On the same day, the Secretary of the ABCC again requested that the Applicant confirm their prior conversation that the Applicant was in the vicinity of 14th Street to pick up her son when the accident occurred. The Applicant responded that she had nothing further to add and reiterated that she was on her way home from work when the accident occurred. The Tribunal observes that yet again the Applicant did not provide the information requested by the ABCC.

16. On 10 December 2010, the Applicant's claim was presented to the ABCC at its 448th meeting. On 23 March 2010, the Controller's approval of the ABCC's recommendation was transmitted via email to the Applicant. The ABCC noted that the Applicant lived in the borough of the Bronx, New York, and requested that the Applicant submit additional information explaining why she was at 15th Street and 2nd Avenue when the accident occurred.

17. On 30 March 2010, the Applicant submitted a statement to the ABCC. The Applicant acknowledged that, on 13 December 2009, she informed the Secretary of the ABCC that after leaving work on the day of the accident "[she] was going directly home but [that she] had to pick up [her] six year old son". However, the Applicant did not provide the requested information to the ABCC.

18. On 23 April 2010, the Applicant's claim was presented again to the ABCC at its 450th meeting. On 26 May 2010, the ABCC's recommendation was transmitted to the Applicant. The Applicant was informed that, prior to the ABCC making a recommendation on her claim, it requested that she submit documentary evidence

from her son's school or day camp confirming that he had been enrolled there and was in attendance on the date of the accident.

19. On 7 June 2010, the Applicant forwarded additional comments to the ABCC. She stated that she never informed the ABCC that her son was enrolled at a school or day camp on the day of the accident and that she was not in any position to provide the requested information to the ABCC. The Applicant further stated that on the day of the accident, her son was in the vicinity of her work place and that she had to pick him up before driving home.

20. On 25 June 2010, the claim was presented again to the ABCC at its 451st meeting.

21. On 17 August 2010, the Secretary-General approved the ABCC's recommendation to deny the Applicant's claim for compensation under Appendix D of the Staff Rules. The decision was based on the following factors:

a. The accident had not occurred on a direct route from the office to the Applicant's residence. Instead the Applicant had been travelling in the opposite direction;

b. Commuting accidents are considered to be attributable to the performance of official duties on behalf of the Organization if the claimant is travelling between the office and her/his residence via the most direct route possible;

c. Since the Applicant had not been travelling via the most direct route possible between the office and her place of residence on the date of the accident, the accident of 29 July 2009 cannot be recognized as attributable to the performance of official duties on behalf of the Organization.

22. The Applicant received notice of the contested decision on 27 August 2010.

Parties' submissions

23. It is the Applicant's case that the accident, which occurred while she was driving her private vehicle, was in the course of service with the United Nations as she was commuting from the United Nations Headquarters in New York to her home in the borough of the Bronx, New York, USA.

24. The Respondent resists the claim on the ground that there were no errors of law or fact committed by the ABCC when they rejected the Applicant's claim for compensation since the ABCC found that, when the accident occurred, the Applicant was not travelling by the most direct route possible between her office at the United Nations and her residence.

Applicable law

25. The relevant provisions regarding a staff member's entitlement to compensation for injuries incurred while on official duties are promulgated in Appendix D to the Staff Rules. The general principles governing the payment of compensation for service incurred injury are to be found in 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), which in art. 2(a) and (b) states that:

The following principles and definitions shall govern the operation of these rules:

(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 wilful misconduct of any such staff member; or
- (ii) Any such staff member's wilful 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 wilful misconduct or wilful 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.

26. It follows from Appendix D that it makes no specific provision to the effect that the Applicant should be entitled to compensation for her injuries incurred while commuting to and from work in a private car. Rather, the reference in art. 2(b)(iii) excluding compensation for injuries occurred while travelling by means of "private motor vehicle transportation sanctioned or authorized by the United Nations solely on the request and for the convenience of the staff member" would appear to suggest the opposite.

27. However, in the Respondent's submission dated 5 February 2013, in response to Order No. 35 (NY/2013), it is admitted that "the ABCC has allowed compensation claims for injuries sustained during travel to and from work by the most direct route". The practice of the ABCC in being prepared to consider awarding compensation in such circumstances is not to be discouraged. However, it created a legitimate

expectancy on the part of the Applicant that she was entitled to such compensation (see *Sina* UNDT/2010/060, as affirmed by the Appeals Tribunal in *Sina* 2010-UNAT-094 on liability). Such expectancy is subject to the requirement of proof that the injury in question was sustained in connection with the performance of official duties. There would therefore be an obligation on a claimant to respond to reasonable requests for information to enable the ABCC to make a determination as to eligibility to claim compensation.

Consideration

28. Appendix D does not specifically provide for compensation in a situation such as that of the Applicant. However, under the practice of the ABCC, staff members are entitled to compensation when commuting via the most direct route to and from work.

29. In the present case, the accident clearly did not occur on the most direct route of the Applicant from her office to her home as the accident occurred 1.7 miles south of her office whereas her home was located 10 miles to the north of her office. The Applicant submits that the reason for her detour was that she had to pick up her son.

30. It is implicit from the manner in which the ABCC dealt with the Applicant's claim that the fact that she was not on the most direct route home from work did not in itself disentitle her to compensation. However, the ABCC expected the Applicant to provide the information requested so that they could have made an informed decision as to her eligibility. An examination of the exchange of correspondence between the Applicant and the ABCC indicates that the Applicant was less than cooperative in the manner in which she responded to the ABCC. The Tribunal is not satisfied that the information requested was unreasonable or otherwise unjustified.

31. In all the circumstances, it was reasonable for the ABCC to require from the Applicant an explanation supported by appropriate documentation, if available,

about her trip from work to home since she was not travelling via the most direct route. The ABCC made the request several times. The Applicant consistently refused to provide all the information requested. Eventually, the ABCC concluded that the intransigent attitude of the Applicant in refusing reasonable requests for information left it with no alternative, but to draw the inference that the Applicant was not on a direct route home from her office and recommend that she should not be compensated for her injuries.

32. The Tribunal finds that the ABCC was correct in rejecting the Applicant's claim for compensation for injuries suffered from the car accident.

Conclusion

33. The application is dismissed in its entirety.

(Signed)

Judge Goolam Meeran

Dated this 26th day of March 2013

Entered in the Register on this 26th day of March 2013

(Signed)

Hafida Lahiouel, Registrar, New York