



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/044
Judgment No.: UNDT/2014/135
Date: 19 November 2014
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

JAMES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is a staff member of the United Nations Mission in Liberia (UNMIL). He initially filed an incomplete Application on 10 August 2013 and a complete Application on 25 September 2013 challenging the “rejection of [his] claim for compensation for loss of one eye” by the Advisory Board on Compensation Claims (ABCC). He is also contesting UNMIL’s alleged negligence in referring him to a sub-standard medical facility for cataract surgery.

2. The Applicant is seeking the following remedies:

a) An “unequivocal declaration” that UNMIL is fully responsible for the failed cataract surgery, “which resulted in the loss of [his] right eye”;

b) An “unequivocal declaration” that he is fully entitled to benefits under Appendix D of the United Nations Staff Rules (Appendix D) for the loss of his right eye, and rescission of the decision by “the UN authorities” to deny him such benefits;

c) A declaration that pursuant to Appendix D, he is also entitled to compensation for the physical and emotional suffering imposed by this injury, compensation for loss of career, and full reimbursement of all medical and other directly related expenses he has incurred as a result of his injury;

d) Monetary compensation in the amount of USD 2.25 million as full compensation for: the injury to his right eye, reimbursement of medical and other expenses incurred in the process of managing the injury, compensation for the disfigurement to his face, loss of career and for the physical and emotional injuries he has suffered as a result of his injury and the refusal by UNMIL Administration to accept responsibility for his condition.

Procedural history

3. The Respondent submitted a Reply on 25 October 2013 in which he asserted that the claims raised in the Application are not receivable.

4. On 13 November 2013, the Applicant filed a Motion for leave to file a response to the Respondent's Reply. By Order No. 006 (NBI/2014) dated 16 January 2014, the Applicant was granted permission to submit comments solely on the issue of receivability that had been raised in the Respondent's Reply. He filed his response on 17 January 2014.

5. By Order No. 248, the Tribunal instructed: (a) the Applicant to submit copies of emails dated 6 and 7 May 2013 that he sent to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM); and (b) the Respondent to submit his comments and any relevant documentation on paragraphs five and six of the Applicant's response dated 17 January 2014.

6. The Parties' filed their submissions on 12 November 2014 but since the Applicant failed to comply with the directives in Order No. 248, the Tribunal struck out his submissions by way of Order No. 251 (NBI/2014) and gave him an opportunity to comply by 13 November 2014.

7. On 13 November 2014, the Applicant filed a submission that did not fully comply with Order No. 251 (NBI/2014). The Tribunal, by its Order No. 254 (NBI/2014), struck out four paragraphs of this submission because they were not in compliance with Order No. 251.

Facts

8. The Applicant is employed by UNMIL on a fixed-term appointment (FTA) as a Civil Affairs Officer at the NO-B level.

9. On 25 January 2008, the Ophthalmologist at the Level III Hospital, which was run by the Jordanian Military contingent (JORMED III) of UNMIL, diagnosed the Applicant as having a mature cataract in his right eye. The Ophthalmologist discussed the prognosis and complications of surgery with the Applicant and then recommended that the Applicant be transferred to a Level IV hospital for cataract surgery.

10. The Applicant was admitted to the Korle-Bu Teaching Hospital (Korle-Bu) in Accra, Ghana, on 20 February 2008 for cataract surgery and discharged on 26 February 2008. On 11 March 2008, the UNMIL Medical Services Section referred the Applicant to JORMED III for “complication after cataract surgery”. According to the Applicant, as a result of the complications, he returned to Korle-Bu where a second surgical procedure was performed on him.

11. The Applicant was treated at the 37 Military Hospital in Accra on 15 June 2012 based on a referral from JORMED III.

12. On 9 July 2012, the Applicant informed the UNMIL Chief Medical Officer (CMO) that he was convinced his eye condition would be further aggravated by continued use of computers as required by his job with UNMIL and as a result, he had decided to seek early retirement as of 31 December 2012. He then requested compensation for the loss of his eye.

13. On 23 July 2012, the Applicant filed a claim for compensation under Appendix D with the ABCC for the loss of one eye and diminishing vision in the other eye. He indicated in the claim form that the cataract in his right eye was exacerbated by his intensive use of computers for work purposes and that his injury was caused by “professional error” on the part of the eye doctor during the cataract surgery.

14. On 9 August 2012, the ABCC forwarded the Applicant’s claim to the Director of the Medical Services Division (MSD) of OHRM for review and advice.

15. By an email dated 14 November 2012, the UNMIL CMO requested that the Applicant make himself available for a final medical evaluation by a senior ophthalmologist in Accra.

16. On 27 November 2012, the Commander of the 37 Military Hospital convened a medical board (37 Military Hospital Medical Board) in Ghana to examine and report on the condition of the Applicant. The report of the 37 Military Hospital Medical Board, which was finalized on 13 December 2012, indicated that the Applicant had “pseudophakic bullous keratopathy” in his right eye, an immature cataract in the left eye, glaucoma and “refractive error”. The 37 Military Hospital Medical Board concluded that it could not make a determination as to compensation because there was no evidence that the Applicant’s cataract was caused by his work with computers. The findings of the 37 Military Hospital Medical Board were shared with the Applicant on 18 December 2012.

17. On 2 January 2013, the Applicant wrote to the ASG/OHRM seeking special consideration for compensation for the loss of his eye and immediate separation from UNMIL on grounds of health disability.

18. By a memorandum dated 9 January 2013¹, MSD informed ABCC that there was no evidence that the Applicant’s cataracts were caused by prolonged use of computers and that his condition was most likely due to age as he was 54 at the time of the onset. MSD concluded that since the condition was not service-incurred, there was no need to address questions relating to disability and permanent loss of function.

19. On 25 January 2013, the ASG/OHRM responded to the Applicant’s letter of 2 January. She advised him that:

- a) MSD had sent a medical opinion to the ABCC for consideration;
- b) The medical board convened by the 37 Military Hospital was the hospital’s internal procedure to be able to provide a medical report regarding

¹ This memorandum was received by ABCC on 14 January 2013.

the status of his eye. This medical board was not convened at the request of the United Nations and did not comprise of doctors selected by UNMIL;

c) She did not have the capacity to seek special consideration for him in matters pertaining to the administration of the disability provisions of the Pension Fund.

20. On 27 January 2013, the Special Entitlements Unit of the Department of Field Support (DFS) informed the Human Resources Office of UNMIL (UNMIL HRO) of MSD's findings and conclusion that the Applicant's illness was not found to be directly related to the performance of his official duties. This was communicated to the Applicant on 28 January 2013.

21. The Applicant wrote to the ASG/OHRM again on 6 and 7 May 2013². On 23 May 2013, the Director of MSD responded to the Applicant on behalf of the ASG/OHRM. She reiterated that the 37 Military Hospital Medical Board was part of the hospital's internal procedures and had not been convened under the authority of the United Nations. She assured him that the Report of the 37 Military Hospital Medical Board had not been submitted to the ABCC and had not been considered by it during its deliberations. She then advised him that if his medical condition prevented him from performing his duties, MSD could recommend his case to the Pension Fund for consideration.

22. The Applicant responded to the Director of MSD on 27 May, disagreeing with her response of 23 May and reiterating his request for compensation and separation.

23. At its 463rd meeting on 11 June 2013, the ABCC considered the Applicant's claim for compensation under Appendix D and concluded that his injury was not service-incurred.

² These emails were referred to in the response from the Director of MSD dated 23 May 2013. The Applicant was unable to provide the Tribunal with copies "due to technical problems with his computer".

24. On 16 July 2013, the Controller, on behalf of the Secretary-General, approved the ABCC recommendation of 11 June 2013 to deny the Applicant's request that his illness (bilateral cataracts and loss of vision in the right eye due to corneal damage) be recognized as service-incurred.

Preliminary matters

25. As indicated earlier, the Applicant filed a Motion for leave to file a response to the Respondent's Reply (Motion) on 13 November 2013 but since the Respondent had raised the issue of receivability, the Tribunal provided him with an opportunity to provide comments solely on this issue.

26. The Rules of Procedure of the Tribunal do not specifically provide for any other filings apart from an application and a reply. However, pursuant to article 19 and 36.1 of the UNDT Rules of Procedure, the Tribunal may exercise its discretion and allow a response to a Reply based on an application of a party or on its own initiative. Thus, providing a response to a Reply is not a right or an entitlement. In granting such a request, the Tribunal weighs factors such as: (i) whether the Respondent raised issues or facts that were not addressed in the Applicant's pleadings; (ii) whether the Applicant failed to adequately canvass all the issues raised in his/her pleadings; or (iii) whether allowing such a response will assist the Tribunal to fairly and expeditiously dispose of the matter and do justice to the parties.

27. The Tribunal has reviewed the record and is satisfied that the Applicant has already been given an opportunity to provide comments on the issue of receivability that was raised by the Respondent in his Reply. Additionally, the Applicant provided extensive documentation and submissions on the substantive aspect of his case in his pleadings. In light of the foregoing, the Tribunal finds that there would be no value added in the Applicant submitting comments on the Respondent's Reply.

28. Consequently, the Tribunal **rejects** the Applicant's Motion in so far as it purports to respond to the substantive parts of the Respondent's Reply.

Issues

29. The following are the issues for determination by the Tribunal:
- a) Is the Applicant's negligence claim receivable?
 - b) Is the Applicant's claim for separation on health grounds receivable?
 - c) Is the Applicant's claim that the Secretary-General erred in rejecting his claim for compensation under Appendix D receivable?

Considerations

Is the Applicant's negligence claim receivable?

Submissions

30. It is the Respondent's case that the Applicant failed to request management evaluation of this claim. Consequently, it is not receivable.

31. The Respondent avers that a cause of action premised on negligence is receivable only if an applicant has previously submitted the contested decision for management evaluation³. Under staff rule 11.2(a), the Applicant was required to submit a request for management evaluation in order to contest an administrative decision denying his negligence claim. The Applicant did not submit the denial of any such claim for management evaluation, as required.

32. The Applicant submits that his negligence claim is receivable.

Considerations

33. Pursuant to art. 8.1(c) of the Statute of the Dispute Tribunal, the jurisdiction of the Dispute Tribunal can only be invoked in certain cases if a contested administrative decision has been previously submitted for management evaluation.

³ See *Wamalala* 2013-UNAT-300 at para. 30.

Thus, a mandatory first step for an applicant, prior to the submission of an application to the Dispute Tribunal, is to request management evaluation of the contested administrative decision.

34. Staff rule 11.2(b) clearly sets out the circumstances under which a staff member need not request management evaluation of a decision before resorting to the Tribunal. This includes cases regarding administrative decisions taken pursuant to advice obtained from technical bodies and administrative decisions taken upon the completion of a disciplinary process. Negligence claims clearly do not fall under the purview of staff rule 11.2(b) and must therefore be previously submitted for management evaluation before there can be recourse to the Tribunal.

35. Additionally, in *Wamalala* UNDT/2012/052, this Tribunal deemed the applicant's claim for negligence and his claim against the compensation awarded him under Appendix D to be one claim. Consequently, the Tribunal determined that both claims were receivable because there was no requirement for the applicant to request management evaluation of the compensation claim. In *Wamalala* 2013-UNAT-300, the United Nations Appeals Tribunal (UNAT) set aside the Dispute Tribunal's finding that the claim of gross negligence was receivable. UNAT held that:

Under the UNDT Statute, the Dispute Tribunal is not competent to hear and pass judgment on a claim for gross negligence against the Secretary-General that has not been the subject of an administrative decision and thereafter, management evaluation. Under Article 8(1)(c) of the UNDT Statute, an application shall be receivable if “[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required”.

.....

It is settled case law of the Appeals Tribunal that a request for management evaluation is a mandatory first step in the appeal process. Accordingly, since Mr. Wamalala failed to request management evaluation, his claim is not receivable *ratione materiae*, and the claim of gross negligence by the Administration is not receivable by the UNDT.

36. Based on the existing jurisprudence, this Tribunal cannot consider the Applicant's claims for negligence and compensation under Appendix D as one single claim. They must stand as separate claims. Thus, the question now is whether the Applicant submitted his negligence claim for management evaluation.

37. Apart from a general rejection of the Respondent's contention that this claim is not receivable, the Applicant did not make any submissions on the issue of receivability in his 17 January 2014 response. The record, however, shows the following communication from the Applicant:

- a) A letter dated 2 January 2013 addressed to the ASG/OHRM setting out his medical condition and requesting the ASG's urgent authorization for his separation from service on health grounds and compensation for the damage to his eye;
- b) Emails dated 6 and 7 May 2013 addressed to the ASG/OHRM rejecting the findings of the 37 Military Hospital Medical Board and of the ABCC and requesting special consideration for separation on health grounds and a recommendation to the Pension Fund for disability payments; and
- c) A letter dated 27 May 2013 addressed to the Director of MSD rejecting her response of 23 May and reiterating his request for compensation and separation.

38. While these communications were addressed to officials within Administration, they did not comply with staff rule 11.2(a) that clearly directs staff, as a first step, to submit a request for management evaluation to the Secretary-General. Pursuant to ST/SGB/2010/9 (Organization of the Department of Management) the Management Evaluation Unit (MEU) is the office mandated to receive management evaluation requests from an aggrieved staff member on behalf of the Secretary-General. Staff rule 11.2(a) does not provide staff members with the

option of writing to the ASG/OHRM or other officials within the Administration to request management evaluation.

39. UNAT held in *Servas* 2013-UNAT-349 that:

A staff member must be familiar with the Staff Rules and understand her obligation to act in conformance with those rules. This means that a request for management evaluation must be submitted *prior to* bringing an application before the Dispute Tribunal.

40. The Tribunal concludes that the Applicant's negligence claim is not receivable because he was required to request management evaluation of this claim under art. 8.1(c) of the Statute of the Dispute Tribunal but he failed to do so.

Is the Applicant's claim for separation on health grounds receivable?

41. The Respondent submits that the Applicant does not challenge any administrative decision related to this request. Similarly, the Applicant did not request management evaluation of any administrative decision related to this request.

42. The Tribunal reiterates its observations at paragraphs 37 and 38 above. While the Applicant engaged the ASG/OHRM and the Director of MSD on his request for separation on health grounds, he did not go the additional mile of requesting management evaluation of what he viewed as their negative responses.

43. The Tribunal concludes therefore that the Applicant's claim for separation from service on health grounds is not receivable because he failed to request management evaluation of this claim in accordance with the Staff Rules and the UNDT Statute.

Is the Applicant's claim that the Secretary-General erred in rejecting his claim for compensation under Appendix D receivable?

Submissions

44. The Respondent asserted in his Reply that: (a) the Applicant was in fact challenging the decision of the Secretary-General, dated 16 July 2013, to approve the recommendation of ABCC that his claim for compensation under Appendix D of the Staff Rules be rejected; and (b) this claim is not receivable for the following reasons:

a) The Applicant's claim for compensation was denied on the basis of MSD's medical opinion that the Applicant's cataract was not due to prolonged use of visual display units. MSD concluded that the Applicant's condition was most likely age related and not service-incurred. Given that the ABCC recommendation and the Secretary-General's decision are based on medical grounds, the appeal procedure set out in article 17 of Appendix D applies⁴.

b) The Applicant failed to exhaust the internal administrative process by requesting reconsideration of the Secretary-General's decision pursuant to article 17 of Appendix D to the Staff Rules.

c) The obligation to exhaust internal administrative remedies before resorting to judicial review is a principle largely recognized in administrative law. The principle places an obligation on an aggrieved party, who desires judicial review of an administrative decision, to exhaust any internal remedies at his or her disposal before approaching a court or tribunal.

d) The General Assembly noted the importance of exhausting internal administrative remedies in resolution 62/228 (Administration of justice at the United Nations).

⁴ See *Simmons* UNDT/2012/167.

e) Under staff rule 11.2(b), a decision based on advice from a technical body such as the ABCC is not subject to management evaluation. Instead, the appeal procedures set out in article 17 of Appendix D provides the Secretary-General with an opportunity to reconsider his decision, taken on the basis of an ABCC recommendation, before a staff member may seek judicial recourse before the Dispute Tribunal.

45. The Applicant avers that he is not contesting the Secretary-General's decision of 16 July 2013 because this decision was never delivered to him. He is in fact contesting the ABCC decision that was conveyed to him on 28 January 2013.

46. The Applicant further contends that he sought management evaluation of the decision conveyed to him on 28 January 2013 in that he wrote to the ASG/OHRM on two separate occasions seeking review of his case based on the evidence he submitted. He also submits that in addition to the communication between him and the Office of the ASG/OHRM, a Medical Board was set up at the 37 Military Hospital in Accra to review his case. This Medical Board concluded that he was not entitled to any compensation, thereby rendering his case closed as far as the Organization was concerned. Since his case was now considered closed by the Organization, it could not be the subject of any further management review and as such, it would have been futile for him to seek any further management evaluation of his case. Consequently, the only option left was for him to file an application with the Tribunal.

Considerations

47. Appeals against the decision of the Secretary-General in cases of injury or illness are made by a request for reconsideration under article 17 of Appendix D to the Staff Rules. Article 17(a) provides as follows:

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 consideration 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);

48. The Applicant clarified in his submission of 17 January 2014 that he is not contesting the ABCC decision of 16 July 2013 because he was unaware of this decision until the Respondent filed it as an annex to his Reply. He further clarified that the decision he is contesting is the one dated 27 January 2013 from the Special Entitlements Unit of DFS that was forwarded to him on 28 January 2013 by UNMIL personnel.

49. The 27 January 2013 email from DFS stated the following:

Dear A.,

Reference is made to the subject claim;

1) We have been informed by the Advisory Board on Compensation Claim[s] (ABCC) that Mr. Mike James' claim was reviewed by the Medical Service Division and the claimant's illness (bilateral cataracts and loss of vision in right eye due to corneal damage) was found not to be directly related to the performance of his duties on behalf of the Organization.

2) The Medical Services Division stated that there is no evidence available on the claimant's level of use of visual display units nor in the claimant's medical reports nor in the medical literature to support his claim. 'It is most likely he has age related cataract development, as he was age 54 at the time of the onset. The delayed presentation meant he had complicated cataract pre-operatively and this has had the greatest bearing on his subsequent poor outcome'.

3) Kindly advise the claimant accordingly.

50. After a careful reading of this email, the Tribunal can only conclude that the Applicant erroneously construed this notification to be the decision of the ABCC. The language clearly indicates that the ABCC was merely informing DFS and the

claimant (here the Applicant) of MSD's review of his condition and MSD's conclusion on his claim. Nowhere within this email does it state that the ABCC had made a decision on his claim. The record shows that the ABCC did not, in fact, consider the Applicant's claim until its 463rd meeting on 11 June 2013 and that it was not until 19 July 2013 that the ABCC informed DFS of the Secretary-General's decision⁵ of 16 July 2013 to deny the Applicant's claim.

51. The Tribunal concludes therefore that the administrative decision at issue is actually that of 16 July 2013 and that while the email of 27 January 2013 was an illuminating communication on MSD's findings, it cannot be considered as the decision of the ABCC or of the Secretary-General.

52. The Tribunal also concludes that since the basis upon which the ABCC rejected the Applicant's claim for compensation was medical in nature, the procedure set out in article 17 of Appendix D is applicable.

53. The Tribunal, by Order No. 248, directed the Respondent to provide his comments and any relevant documentation on the Applicant's assertion that he had not received the decision of 16 July 2013. On 12 November 2014, the Respondent informed the Tribunal that he "is not in a position to dispute the Applicant's assertion that he was not notified of the Controller's 16 July 2013 decision". The Respondent maintained, however, that the Application is not receivable.

54. The Tribunal has no reason to doubt the Applicant's assertion that he did not receive the Secretary-General's decision of 16 July 2013, especially in light of the Respondent's inability to provide the Tribunal with documentation to show that the decision was in fact communicated to the Applicant.

⁵ The 11 June 2013 recommendation of the ABCC to deny the Applicant's claim was approved on behalf of the Secretary-General by the Controller.

55. In *Schook* 2010-UNAT-013, UNAT remanded the case back to the Dispute Tribunal because no written administrative decision had been communicated to Mr. Schook. UNAT held that:

Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider.

56. Similarly, in *Manco* 2013-UNAT-342, UNAT held that “[w]here the Administration chooses not to provide a written decision, it cannot lightly argue recevability, *ratione temporis*”.

57. While *Schook* and *Manco* related to time limits for requesting administrative review and management evaluation, respectively, they are relevant to the case at hand because the Respondent is arguing that the claim is not receivable because the Applicant failed to request reconsideration of the Secretary-General’s decision within the delay stipulated in article 17 of Appendix D. Thus, fundamentally all three cases relate to the time frame within which a staff member must seek a review of an administrative decision.

58. It is unjust for the Respondent to tell the Tribunal that he cannot dispute the Applicant’s non-receipt of the decision and then in the same breath move for the dismissal of the Application on the basis of irreceivability because the Applicant failed to exhaust the procedure set out in article 17(a) prior to resorting to formal litigation. The question here is how could the Applicant have requested reconsideration of a decision that he was unaware of?

59. Although the Tribunal commiserates with the Applicant for the uncertain position he has now been placed in, the fact remains that the Appendix D procedure has not as yet been exhausted. The Applicant has not sought reconsideration of his claim and even though he is convinced that a United Nations-established medical board has already reviewed his case, the Tribunal finds that this is not the case. The

terms of reference for the 37 Military Hospital Medical Board clearly state that this medical board was convened “by the authority of the Commander of the 37 Military Hospital”. Further, the Applicant has not placed any evidence before the Tribunal to show that UNMIL or the United Nations played any role in the constitution of this medical board.

60. In *Amany* UNDT/2014/018, this Tribunal emphasized that:

[...] the purpose of the request for management evaluation is to give the Administration an opportunity to set right what would appear to be a wrong decision and to provide an acceptable solution where necessary. This procedure is conducive to good administration and prevents the Tribunal from being clogged with cases unnecessarily.

61. The same is true of the reconsideration process under article 17(a). Since the Applicant’s claim has not been subjected to reconsideration by the ABCC, the Tribunal is not competent to entertain his Application. However, due to the exceptional circumstances of this case, the Tribunal finds that the Respondent should be given an opportunity to correct the omission of not providing the Applicant with a copy of the 16 July 2013, which would have enabled the Applicant to seek reconsideration using the proper channel.

Decision

62. Pursuant to article 19 of the UNDT Rules of Procedure, which allows the Tribunal to issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties, and the exceptional circumstances of this matter, the Tribunal orders the following:

- a) The Respondent is to formally notify the Applicant of the Secretary-General’s decision of 16 July 2013 **no later than 28 November 2014**.
- b) Once the Applicant receives the Secretary-General’s decision, it will be up to him to decide whether or not to seek reconsideration of his claim in

accordance with article 17(a) of Appendix D, which reads in relevant part as follows “[r]econsideration 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.**

63. In light of the Tribunal’s findings that the claims presented by the Applicant are not receivable, the current Application is dismissed in its entirety.

(Signed)

Judge Vinod Boolell
Dated this 19th day of November 2014

Entered in the Register on this 19th day of November 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi