UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/046
Judgment No.: UNDT/2016/023
Date: 16 March 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Antonio Gonzalez

Counsel for Respondent:
Alan Gutman, ALS/OHRM
Elizabeth Gall, ALS/OHRM

Introduction

1. In his application, the Applicant, a former Security Officer with the Security and Safety Services in the Department of Safety and Security, contests:

> … the correctness, reasonableness, lawfulness and fairness of: (i) Administrative decision of May 6th, 2015, taken pursuant to recommendation of [the United Nations Advisory Board on Compensation Claims, ("ABCC")] which was communicated to Applicant by way of email from … [the] Secretary ABCC on May 8th 2015, (ii) the correctness and fairness of ABCC's recommendations to the Administration, (iii) the correctness and reasonableness of [the United Nations Medical Services Division ("MSD")] Director's advisory opinion to ABCC[,] (iv) the correctness, lawfulness, fairness and reasonableness of Investigation, of conduct of the investigation and of conduct of Chief of Security and safety service on the investigation and recommendations to ABCC, and (v) Correctness, lawfulness, reasonableness and fairness of the actions of the Administration, or lack thereof, directly, or sequentially leading to the decision, regarding injuries suffered when Applicant private vehicle crashed against stinger barrier (MP5000), at UN entrance post 103 south, within the United Nations Headquarters District, on July 27, 2015, as Applicant entered the complex into work.

2. In his reply, the Respondent submits that, because the Applicant has failed to request the ABCC to reconsider his claims for personal injury under art. 17 of Appendix D to the Staff Rules (Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on Behalf of the United Nations), the application is not receivable *ratione materiae*.

Facts

3. On 27 July 2013, the Applicant was involved in an accident at the main entrance by security post no. 103 at the United Nations Headquarters in New York where his car collided with a so-called "stinger" security arm barrier.

4. On 25 November 2013, the Applicant submitted a claim for compensation under Appendix D to the Staff Rules to the ABCC, appending a "Personal Injury

claim", for the alleged personal injuries which he claims to have suffered in connection with his car accident on 27 July 2013.

5. By letter dated 8 May 2015, the ABCC Secretary informed the Applicant that his claim for compensation under Appendix D to the Staff Rules was considered by the ABCC at its 482nd meeting held on 14 April 2015. To this letter was appended the ABCC's recommendation by which it was recommended to deny the Applicant's compensation claim. On 6 May 2015, on behalf of the Secretary-General, the Controller countersigned the ABCC's recommendation.

6. On 29 May 2015, Counsel for the Applicant emailed the Management Evaluation Unit ("MEU"), copying the ABCC, a letter by which he requested the Secretary-General to reconsider the Applicant's case pursuant to art. 17 of Appendix D to the Staff Rules.

7. By email of 3 June 2015, the ABCC Secretary responded to Counsel for the Applicant's 29 May 2015 email, stating *inter alia* that:

> Please be advised if a medical board is sought under Article 17 of Appendix D to the Staff Rules, [the Applicant] is required to (i) identify one medical practitioner to participate in the board (I note your letter appoints one, and an alternate), (ii) articulate the specific medical issue(s) he wishes the board to review and (iii) sign and deliver an undertaking accepting liability for half the expenses of the medical board if he does not prevail. In addition, the medical practitioner identified by [the Applicant] must also sign and deliver an undertaking accepting that the claimant, and not the Organization, will pay their fees and expenses in the event the claimant does not prevail. A form of such undertaking is attached below.
>
> I note that the medical issue which may be addressed by a medical board is whether the injuries claimed are consistent with the incident with his vehicle at the security barrier.
>
> [The Applicant] may wish to consider, however, that even if he prevails on the medical aspect of his claim, the Secretary-General decision on his case found that there was "no credibility whatsoever to the incident as related by the claimant." […].
>
> Alternatively, if your client wishes to pursue further recourse, he may also wish to consider a review by the MEU pursuant to Staff Rule 11.2

> or he may wish to submit further relevant medical information to the ABCC for reconsideration.
>
> With respect to the latter, what is required is new medical reports establishing his medical conditions claimed *(inter alia*, back and neck pain, lateral hearing loss, lateral tinnitus, carpal tunnel right wrist, branchial neuritis, reduced speech discrimination, vestibular deficit, vision abnormality, and PTSD) are a direct result of the incident which has been accepted as service-incurred pursuant to the Secretary-General's decision."

8. By a letter dated 19 June 2015 addressed to the ABCC Secretary, Counsel for the Applicant responded to the Secretary-General, stating, *inter alia*, that:

> Having reviewed a letter from [the ABCC Secretary] and analyzed the board's recommendations to the Administration, we believe that it may have been an oversight of the board, or MSD Director regarding due diligence of what was already before both the board and MSD Director.
>
> It is also our concern that certain facts, relevant for fair and independent determination of [the Applicant's] injury claims, may not have been made available to the board, or were over-looked by the board in arriving at its recommendations. While there may have been an oversight, it cannot be ruled out that there could have been intentional human errors and omissions.
>
> As you may already know experts rely on degrees of probability as to causation. In medical terms experts talk of probability within a reasonable degree of medical certainty in their opinions which is scientifically and legally acceptable way of drawing expert conclusions.
>
> [The Applicant's] injuries and illnesses were documented in his treating medical expert reports and have already been duly submitted to you through the DSS Executive Office. The same reports were also submitted to the MSD Director and have guided the MSD Director's other advisory opinions and decisions. We have however done our due diligence and highlight and spell out to you what must have been over-looked during the boards review:
>
> 1. In two separate expert reports dated September 23, 2013 and January 28, 2014, both [Dr. A], MD., board certified ophthalmic surgeon, and [Dr. B], MD., board certified Ophthalmic specialist, and experts in diseases and surgery of the Retina, Macula and Vitreous, while evaluating [the Applicant] for vision abnormalities associated with the incident of July 27, 2013, conducted three separate ocular field tests. [Dr. A's] sound and reasonable expert

opinion noted that [the Applicant's] vision abnormalities which showed improvement with time but were the result of the concussion effect of the incident of July 27, 2013. [Dr. A] concluded that [the Applicant], must have suffered a concussion typical of sudden acceleration deceleration accidents [footnote omitted].

2. To validate his expert opinion [Dr. A] referred [the Applicant] for a Glaucoma test which was conducted by [Dr. C], a Glaucoma specialist on March 7, 2014, which revealed that [the Applicant] did not have any glaucoma [footnote omitted].

3. [Dr. D], an expert in interventional pain management has extensively treated [the Applicant] for his injuries and illnesses regarding the incident of July 27, 2013. In [Dr. D's] expert narrative report dated August 14, 2014, [Dr. D], MD., whose report is medically detailed and sound, opined, within a reasonable degree of medical certainty, "the bilateral carpal tunnel syndrome exacerbation could be as a result of the exacerbation through the motor vehicle accident"[footnote omitted] referring to the accident of July 27, 2013. It should be borne in mind that, as a pain management expert, [Dr. D], MD., confirms that pain development is a process, and not an instantaneous occurrence.

4. [Dr. E], MD., (Psychiatrist) and specialist in neuro-psychiatry, has extensively treated [the Applicant] regarding his injuries associated with the incident of July 27, 2013. In his expert narrative report dated 30th September 2014 [Dr. E] opined as follows "it is my professional opinion, within a reasonable degree of medical certainty, that [the Applicant's] post-traumatic stress symptoms and secondary Major Depression, are the direct result of the work accident of July 27, 2013" …

5. [Dr. F], MD. FAAOS, an Orthopedist and spine Surgeon specialist, at both Hackensack University Medical Center and Hoboken University Medical Center has led the treatments of [the Applicant] regarding his injuries which occurred as a result of the incident of July 27, 2013. In his expert narrative report dated August 25, 2014 [Dr. F] reasonably outlined [the Applicant's] injuries and illnesses through sound and reasonable medical diagnoses confirming the extent and seriousness of [the Applicant's] injuries and illnesses.

6. As an orthopedic expert with over 28 years of spine surgery, [Dr. F] opined within a reasonable degree of medical certainty that "considering the patient's symptomatology, results of comparative tests, examinations, scientific studies, and past experiences with similar cases, it is likely that cervical and lumbar areas will be permanently painful to some degree and predisposed to further

> injury from aggravation or trauma, none of which were a problem before the above mentioned accident" … referring to Accident of July 27, 2013.
>
> 7. [Dr. F] further reasonably opined in the same expert narrative that "the findings of [Dr. A], [Dr. G], [Dr. H] and Vestibular test results cannot rule out MTBI (Mild traumatic Brain Injury) …
>
> 8. See also the findings of [Dr. G], Board Certified Neurologist and neurophysiologist that the result of vestibular test confirming nervous system involvement in [the Applicant's] injuries.

9. On 19 June 2015, by request for management evaluation addressed to the MEU, the Applicant challenged "[t]he decision of the Secretary-General, based on the recommendation of [ABCC], and the correctness of ABCC recommendations, denying compensation under Appendix D for [the Applicant's] injuries and illnesses".

10. On 23 June 2015, the Officer-in-Charge of MEU acknowledged receipt of the 19 June 2015 request for management evaluation.

11. On 15 July 2015, in response to the Applicant's request for management evaluation, the Officer-in-Charge of MEU notified the Applicant that his request was considered not receivable, stating, amongst other reasons, that (emphasis in original):

> The MEU considered that article 17 of Appendix D prescribes a specific procedure in the event that a staff member wished to seek reconsideration of a determination of the existence of a service-related injury or illness or of the type and degree of disability. The MEU noted that, in *James*, UNDT/2014/135 (under appeal), the [Dispute Tribunal] held that a staff member was required to exhaust the reconsideration procedure in article 17 of Appendix D before appealing to the [Dispute Tribunal]. *But see Baron*, UNDT/2011/174 (finding receivable an appeal of a decision based on the recommendation of the ABCC, when submitted to the [Dispute Tribunal] without first requesting reconsideration under article 17 of Appendix D, but then ordering a medical evaluation to be performed by a medical board).
>
> The MEU noted that your counsel's correspondence dated 29 May 2015 specifically requested reconsideration under article 17 with respect to the existence of your injuries and/or illnesses and the type and degree of disability. Your counsel's further correspondence dated

> 19 June 2015 concerned matters related to your alleged illnesses, injuries and disability and the review of your case by MSD. While your counsel stated that certain elements of the board's recommendations raised matters of law, the MEU noted that your counsel did not raise any matters other than those related to the determination of the existence and extent of an alleged service-related injury or illness and the type of disability.
>
> The MEU considered that the proper recourse in your case would be to proceed with an appeal under article 17 of Appendix D. The MEU noted, however, that the ABCC Secretary had also offered to present new medical reports to the ABCC for reconsideration. In any event, the MEU considered that your request was not receivable with the MEU.

Procedural background

12. On 22 July 2015, the Applicant filed the application. As instructed by the Registry, the Applicant refiled the application in the required format on 3 August 2015.

13. On 11 August 2015, the application was transmitted to the Respondent, who duly filed his reply on 11 September 2015.

14. The case was assigned to the undersigned Judge on 16 September 2015.

15. By Order No. 289 (NY/2015) dated 12 November 2015, the Tribunal ordered (a) the Applicant to file a response to the receivability issues raised by the Respondent in his reply by 1 December 2015; and (b) the parties to attend a Case Management Discussion ("CMD") on 7 December 2015 which, at the subsequent request of the Applicant, was rescheduled to 8 December 2015.

16. On 1 December 2015, the Applicant filed a motion dated 25 November 2015 to strike out the documents annexed as "R/1" (pages 1–10 and 71), "R/2" (page 1) and "R/3" (in its entirety) appended to the reply.

17. At the 8 December 2015 CMD, the parties confirmed that the request for reconsideration filed by the Applicant pursuant to art. 17 of Appendix D to the Staff

Rules was still pending before the ABCC and no decision had been taken. The parties agreed that, taking into account the contentions made at the CMD regarding the pending procedure before the ABCC, no further submissions were needed on the question of prematurity of the application invoked *ex officio* by the Tribunal, which was therefore ready to be determined.

18. By Order No. 303 (NY/2015) dated 9 December 2015, the Tribunal ordered that it would proceed to determine the question of prematurity of the application on the record before it, including the parties' oral submissions made at the CMD on 8 December 2015.

19. By motion dated 10 December 2015, Counsel for the Applicant filed a motion in which he stated, *inter alia*, that:

> … the Respondent, through his counsel, confirmed at the CMD upon inquiry of the Tribunal that the reconsideration earlier made by the Applicant is pending before the ABCC and in light of the Applicant's new medical reports of 12 August 2015, which the Applicant had not presented to the ABCC, the Applicant, through his counsel, raised no objection to the concerns observed by the Tribunal or the ex officio invocation of art. 17(a) and (b) of appendix D to the staff Rules.

20. Counsel for the Applicant then requested to:

> … withdraw the present Application, without prejudice of his right to initiate a new proceedings concerning the same substantive questions at stake, in the present case and hereby through his counsel, respectfully advices the Tribunal accordingly, and requests that the Tribunal allow his wish to withdraw the present case, and in order that he may properly avail himself to reconsideration under art. 17(a) and (b), as invoked ex officio by the Tribunal, and in order to properly allow him to submit the similar documents to those relied upon before the Tribunal to the ABCC for reconsideration and submission to the Medical Board.

21. On 18 December 2015, Counsel for the Respondent filed a response to the Applicant's 10 December 2015 motion in which it was requested that "the motion be rejected, and that the Dispute Tribunal dismiss the Application as not receivable", explaining that (footnote omitted):

> … First, the Dispute Tribunal does not recognize the right to withdraw an application without prejudice or with conditions (Order No. 115 (NY/2013) and *Sheykhiyani*, UNDT/2009/023). A withdrawal must be full and final, including on the merits (*Giles*, UNDT/2012/194).
>
> … Second, the Applicant's observations are misguided. Contrary to the Applicant's claim, the reconsideration of the Applicant's claim is not "pending". The Applicant's attachments of Annex A and Annex B are insufficient to convene a medical board. In order for the medical board process to proceed, the Applicant must as a first step, not only identify his choice of physician, but also complete and return the forms that were provided to his counsel by the Secretary of the ABCC in June 2015. These forms require the Applicant and his designated physician to acknowledge and agree to the provisions of Article 17(d) of Appendix D (Attachment No. 1). Lastly, any report or document that the Applicant wishes to bring to the attention of a medical board must be submitted to the Secretary of the ABCC, and not as attachments to a motion or as correspondence with the office of the Secretary-General.

22. On 19 December 2015, Counsel for the Applicant commented on the Respondent's 18 December 2015 response and retracted his 10 December 2015 request to withdraw his application.

Respondent's submissions on receivability

23. The contentions of the Respondent on receivability may be summarized as follows:

a. The application is not receivable *ratione materiae* as the Applicant has failed to pursue his internal remedy of reconsideration of the contested decision under art. 17 of Appendix D;

b. The requirement to exhaust internal administrative remedies before seeking judicial preview is an established principle of international administrative law and is one that is recognized by the General Assembly in the context of the internal justice system, referring to General Assembly resolution 62/228, para. 51. The Appeals Tribunal has also recognized the principle that a litigant must first exhaust any available internal remedies

before seeking recourse to judicial review. This principle underlies the well-established jurisprudence that an application is not receivable if the applicant has not complied with the mandatory requirement to seek management evaluation of administrative decisions under staff rule 11.2 and art. 8.1 of the Statute of the Dispute Tribunal;

c. The requirement to exhaust internal remedies has been applied by the Dispute Tribunal in cases where applicants have not followed the internal procedures to challenge performance evaluation ratings and decisions not to certify sick leave. The principle is also consistent with the Appeals Tribunal's jurisprudence affirming that the Tribunals do not have competence to conduct *de novo* investigations of complaints of prohibited conduct: an applicant must exhaust his or her entitlement to request that his or her complaint be addressed under the procedures established by ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority), referring to *Luvai* 2014-UNAT-417, paras. 62-65);

d. The Dispute Tribunal has recognized that an applicant who wishes to challenge a decision on a claim under Appendix D on medical grounds must seek reconsideration of the decision under art. 17 of Appendix D, before he or she may have recourse to the Tribunal. The procedures set out in art. 17 include the following requirements: (i) the staff member's request for reconsideration is to be accompanied by the name of the medical practitioner chosen to participate in the medical board; (ii) a requirement to convene a medical board; (iii) the ABCC is required to transmit its recommendation to the Secretary-General with the medical board's report; and (iv) a review by the Secretary-General of the medical board's report. Reconsideration under art. 17 gives the Organization an opportunity to review the medical evidence and correct any errors made in the consideration of the staff member's claim under Appendix D;

e. The Applicant's claim under Appendix D was rejected on medical grounds. The MSD advised the ABCC that the Applicant's claimed injuries were "neither 'physiologically plausible' nor consistent with the incident". The ABCC accepted this medical advice, and concluded that "there [was] no credibility whatsoever to the incident as related by the claimant or to the injuries alleged to have been sustained as a result thereof";

f. The Applicant relies on medical grounds to contest the decision in his application. These grounds are: (i) the decision was not based on sound medical expert reasoning; (ii) the Medical Director improperly took into account the CCTV footage of the incident; (iii) there was a failure to properly evaluate the Applicant's injuries and illnesses; and (iv) the Medical Director's advisory opinion was not based on independent tests or sound medical reasoning, and does not accord with the opinions of medical experts. On 19 June 2015, Applicant's Counsel wrote to the Secretary-General requesting management evaluation of the contested decision. At the request of the MEU, the Applicant completed a management evaluation request form. On 22 June 2015, the ABCC Secretary informed Applicant's Counsel by email that, following the submission of the Applicant's request for management evaluation, he would not take any further action on his request for reconsideration pending the management evaluation by the MEU;

g. The Applicant's allegations in the application regarding the circumstances in which he sought management evaluation are denied. The ABCC Secretary has never had a conversation with Applicant's Counsel. By letter dated 15 July 2015, the Officer-in-Charge of MEU informed the Applicant that his request for management evaluation was not receivable and the proper recourse "would be to proceed with an appeal under article 17 of Appendix D". The MEU Officer-in-Charge also noted that the "ABCC Secretary had offered to present new medical reports to the ABCC for reconsideration";

h. The Applicant has not followed the guidance provided by the MEU on the correct procedures to challenge the contested decision. The ABCC Secretary has confirmed that, since 15 July 2015, he has not received any communication from the Applicant regarding the request for reconsideration procedure under art. 17 of Appendix D (establishment of a medical board) or by submitting new medical reports to the ABCC for its reconsideration;

i. Accordingly, the Dispute Tribunal does not have competence to review the contested decision as the Applicant has failed to exhaust his internal remedies under Appendix D.

Applicant's submissions on receivability

24. In the Applicant's 1 December 2015 response to Order No. 289 (NY/2015), his Counsel included extensive submissions related both to the receivability and merits of the application. Those of relevance to the question of receivability may be summarised as follows:

a. The application should be found receivable No requirement of exhaustion of internal remedies exists for the impugned administrative decision. The Tribunal has clear precedents on similar applications contesting administrative decisions taken pursuant to advice of the ABCC, which were found receivable, without the decisions first being subjected to management evaluation (*Simmons* UNDT/2012/167, *Baron* UNDT/2011/174 and *Wamalala* UNDT/2012/052). It would be unfair and unjust to the Applicant if the receivability of the Applicant's application would unjustly be tied to the management evaluation request or MEU's response. In the management evaluation, the Respondent clearly and explicitly acknowledged that administrative decision taken pursuant to advice from technical bodies like ABCC are appealable directly to the Tribunal;

b. The contested decision was taken on the recommendations of ABCC, a technical body. It was therefore not necessary for the Applicant to request management evaluation, and MEU's response is irrelevant to the receivability of the application;

c. The Respondent's evidence does not demonstrate with specificity when ABCC's alleged 482nd meeting took place, indicating that this meeting, more often than not, never took place. It is allegedly signed by a person, who was not the Medical Director, or the occupier of the position of the Medical Director of the United Nations, or properly and lawfully authorized to discharge the role of the Medical Director pursuant to the now abolished ST/SGB/2004/8 (Organization of the Office of Human Resources Management), art, 7.3;

d. It would be unfair and unjust to oblige the Applicant to seek medical reconsideration of a decision that was taken based on procedural illegalities, procedural errors of law, procedural errors of fact, and due process violations of the Applicant' s rights.

Consideration

Applicable law

25. Appendix D to the Staff Rules, arts. 1 and 17, provide as follows:

> *Article 1. Applicability*
>
> (a) These rules shall apply to all staff members appointed by the Secretary-General except as provided in paragraph (b) of this article.
>
> (b) The Secretary-General may, in appropriate cases, arrange for the coverage of staff members who are locally recruited under an applicable national social security scheme, in which case the provisions of these rules shall not apply to such staff members.

(c) These rules shall not apply to internes nor to persons under contract with the United Nations by special service agreement unless otherwise expressly provided by the terms of their appointments.

Article 17. Appeals in case of injury or illness

(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);

(b) A medical board shall be convened to consider and to report to the Advisory Board on Compensation Claims 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;

(c) The Advisory Board on Compensation Claims shall transmit its recommendations together with the report of the medical board to the Secretary-General who shall make the final determination;

(d) If after reviewing the report of the medical board and the recommendations of the Advisory Board on Compensation Claims, 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;

(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 report shall be utilized to the extent possible for the purposes of this article.

Findings

26. The Tribunal notes that, as results from the uncontested facts, by letter dated 8 May 2015, the ABCC Secretary informed the Applicant that his claim for compensation under Appendix D to the Staff Rules was considered by the ABCC at its 482nd meeting held on 14 April 2015. To this letter was appended the ABCC's recommendation by which it was recommended to deny the Applicant's following requests: (a) the request that his multiple injuries and illnesses be recognized as service-incurred; (b) the request for special sick leave credit under art. 18(a) of Appendix D; (c) the request for permanent loss of function of the whole person under art. 11.3 (c) of Appendix D; (d) the request for compensation under art. 11.1(c) of Appendix D and for total disability and for partial disability under art. 11.2(d) of Appendix D. On 6 May 2015, on behalf of the Secretary-General, the Controller approved by his countersignature the ABCC's recommendation.

27. On 29 May 2015, within 30 days from the date of notice of the decision, Counsel for the Applicant emailed the MEU, copying the ABCC, a letter by which he requested the Secretary-General to reconsider his case pursuant to art. 17 of Appendix D to the Staff Rules.

28. On 19 June 2015, the Applicant filed the application before the Tribunal in the present case, contesting the Secretary-General's decision, notified to him on 8 May 2015, to deny his claims under Appendix D to the Staff Rules.

29. It results that before filing the present application before the Dispute Tribunal, the Applicant also filed a request for reconsideration to the Secretary-General. The Respondent has indicated that there is no decision taken by the Secretary-General regarding the request for reconsideration, and the Tribunal considers that the request for reconsideration filed on 29 May 2015 is still therefore pending as confirmed by the parties. The Applicant has at no time during the proceedings before the Tribunal indicated that he is willing to withdraw his request for reconsideration.

30. The Tribunal underlines that, in *Karseboom* 2015-UNAT-601, the Appeals Tribunal decided as follows (footnotes omitted):

> …
>
> 32. Mr. Karseboom had requested [the Department of Field Services], the ABCC, the Pension Fund and [United Nations Organization Mission in the Democratic Republic of the Congo] to reconsider the ABCC's recommendation of 12 October 2009 in order that the injuries to his back could be recognised as service-related and compensation awarded. In response, the ABCC adopted a long-standing practice of requesting an independent medical evaluation at the cost of the Organization. This practice advantages claimants in that, if a medical board is convened and if it upholds the Secretary-General's decision, the claimant would be obliged to pay certain medical fees and expenses, which could be considerable.
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> 33. The [Dispute Tribunal] held that this procedure was "in breach of the fundamental rule of administrative law that the parties are bound by the rules of the Organization".
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> 34. The [Dispute Tribunal] elaborated on this finding in paragraphs 80 and 81 of its Judgment as follows:
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> > … The practice adopted by the ABCC is in clear contravention of art. 17. The Secretary-General is required by art. 17(c) to make a decision on the request for reconsideration on the basis of the ABCC recommendations together with the report of a medical board. In this case, a medical board was not convened and the decision was made without such a report.
> >
> > … The Applicant has demonstrated that the correct procedures required by art. 17 were not followed by the ABCC. Instead, the ABCC relied on a process that is not mandated by any regulation or rule of the Organization. As the decision of the Secretary-General on the request for reconsideration was made on the basis of an invalid process it is unlawful and therefore void.
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> …
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> 36. The Secretary-General does not contest the [Dispute Tribunal's] finding that the provisions of Article 17 relating to a medical board were not followed. However, he argues that the [Dispute Tribunal] erred in law by making medical findings which it was not competent to do, such as: "From the date of the October 2006 accident until now, the Applicant has been seriously disabled with a

100% permanent loss of function caused principally by his spinal injuries."

…

41. The Secretary-General submits that the [Dispute Tribunal], upon determining that the proper procedure had not been followed, should have remanded the case back to the ABCC to convene a medical board to re-examine Mr. Karseboom's case. Instead, the [Dispute Tribunal] erred in effectively placing itself in the place of the medical expert and the decision-maker.

42. The Appeals Tribunal agrees with this submission.

43. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
>
> …
>
> In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review

> because due deference is always shown to the decision-maker, who in this case is the Secretary-General.
>
> 44. The [Dispute Tribunal] was faced with a case in which there was conflicting medical evidence. Moreover, the [Dispute Tribunal's] own observations on the shortcomings of the medical evidence indicated a need for a medical board.
>
> 45. In this regard, the [Dispute Tribunal] found that the ABCC could not lawfully rely on Dr. Pestana's report as it had not been prepared for the purposes of a medical board. It also considered that the references in Dr. Sosa's report to a fractured vertebra warranted further investigation by the ABCC. The [Dispute Tribunal] further determined that Dr. Sosa's opinion about Mr. Karseboom's back injury could have influenced the outcome of the latter's request for reconsideration had it been properly considered and that a medical board could have evaluated his opinion alongside any conflicting medical opinions. The [Dispute Tribunal] found that the failure of the ABCC to convene a medical board deprived Mr. Karseboom of the full medical evaluation to which he was entitled under article 17 of Appendix D. In addition, Mr. Karseboom had submitted to the [Dispute Tribunal] that the ABCC should have convened a medical board.

31. The Tribunal considers that, as results from the title of art. 17 and arts. 17(a) and 17(b) of Appendix D to the Staff Rules, a staff member has the option ("may") of requesting reconsideration of the Secretary-General's decision on the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability and such a request is an administrative appeal. Once a request for reconsideration is filed, a medical board must ("shall") be convened to consider and to report to the ABCC on the medical aspects ("a medical board shall be convened to consider and to report to the [ABCC] on the medical aspects of the appeal").

32. In the present case, the MEU noted that "the ABCC Secretary had also offered to present new medical reports to the ABCC for reconsideration". The Applicant exercised his right to file a request for reconsideration before the Secretary-General and, during the proceedings before the Tribunal, he filed new documents related to the disputed medical aspects of his case. He also indicated the name of the medical doctor who is to represent him on the medical board.

33. The Tribunal considers that the Secretary-General has the exclusive competence to decide on the Applicant's request for reconsideration based on the recommendations made to the ABCC by the medical board and to take the final decision on the Applicant's claims.

34. The Tribunal further considers that, in light of the binding jurisprudence of the Appeals Tribunal, it cannot interfere with the Secretary-General's discretion in the present pending matter and has no competence to legally review it before the final decision is taken by the Secretary-General. When a staff member himself/herself has initiated a particular administrative appeal, the Secretary-General, after following the required procedure, has the right to make a final administrative decision, based on the particular circumstances of each case, by either changing entirely or in part the contested decision or upholding it based on the recommendations of the ABCC and the medical board's report.

35. The Tribunal concludes that the present application, even if it was diligently filed by the Applicant, is premature and is to be rejected.

36. The Tribunal underlines that, during the proceedings in the present case before the Tribunal, the Applicant provided the Secretary-General with additional information regarding the name of the medical doctor to represent the Applicant on the Medical Board and all the medical documentation together with a new medical report from his medical doctor, necessary for the Medical Board to be convened. As required, the Applicant is to refile the medical report to the Secretary-General, with the clear indication that the report has been prepared for the purposes of convening a medical board by the ABCC.

Conclusion

37. In the light of the foregoing, the Tribunal DECIDES:

The application is rejected as premature and the present judgment is without prejudice to any further proceedings before the Tribunal.

(*Signed*)

Judge Alessandra Greceanu

Dated this 16th day of March 2016

Entered in the Register on this 16th day of March 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York