UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/055
Judgment No.: UNDT/2016/024
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 Gonzales

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

Introduction

1. The Applicant, a former Security Officer with the Security and Safety Services ("SSS") in the Department of Safety and Security, contests the "correctness, lawfulness, reasonableness and fairness of the Administrative Decision of 11 August 2015 taken by the Secretary-General … regarding the negligent conduct of the Administration, in respect to an incident that occurred on 27 July, 2013".

2. In his reply, the Respondent claims that the application is not receivable *ratione materiae*. The Respondent, in essence, contends that the Applicant does not contest an administrative decision under art. 2.1(a) of the Statute. The Respondent submits that the Applicant is challenging the letter of 11 August 2015 from the Office of Legal Affairs ("OLA"), which merely provided information on the legal framework concerning his claims.

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. The Applicant stated that he suffered personal property damage and personal injuries and illness, eventually leading to his early service termination for reasons of incapacity. In his application, the Applicant detailed his views regarding the factual and legal circumstances as well as the consequences of this event.

4. On 22 July 2015, Counsel for the Applicant wrote a letter to the Respondent regarding the 27 July 2013 accident with the headline,

> Re: Tortious Liability on the Organization as a result of Gross negligence, Willful Misconduct and Wanton Misconduct of the Administration, proximately causing personal injury and property

> damage to [the Applicant], out of acts, or omissions of The Administration at UN Headquarters District in New York.

5. In this letter, Counsel for the Applicant detailed his views regarding the factual and legal circumstances and the consequences of this event.

6. Counsel for the Applicant requested, *inter alia*, the Respondent "to consent to Arbitration as provided for under UN tort Claims and this claim should serve as your notice to arbitration. We further propose that this dispute be determined through sole arbitrator" and stated that it would be in the interest of both parties that this dispute be amicably resolved by arbitration or mediation.

7. In response, on 11 August 2015, OLA wrote to Counsel for the Applicant as follows:

> I refer to your letter, dated 22 July 2015, in which you advanced a claim on behalf of your client, former United Nations staff member [the Applicant], in the amount of US$5,631,132.10, arising from an incident at the United Nations Headquarters on 27 July 2013. In your letter, you alleged that on said date, [the Applicant] suffered personal injury and damage to his vehicle while passing through the arm barrier at the main gate at United Nations Headquarters. You further alleged that said loss occurred as a result of the gross negligence, willful and wanton misconduct on the part of the United Nations. You also advised that your letter should serve as a Notice of Arbitration, and propose that the dispute be determined by way of sole arbitrator.
>
> We note that your client applied for relief to the United Nation Claims Board ("UNCB") in respect of his vehicular claim and to the Advisory Board on Compensation Claims ("ABCC") in respect of his personal injuries claim. Subsequently, on 9 October 2014, your client submitted to the United Nations Dispute Tribunal ("UNDT"): (a) an appeal of the outcome of the UNCB in respect of the vehicular claim; and (b) a motion seeking leave of the UNDT to introduce three causes of action in said appeal, namely, "negligent security", serious and willful misconduct and wanton misconduct of the United Nations. In addition, your client has received a management evaluation of the outcome of the claim before the ABCC, and has not submitted an appeal to the UNDT, to date.

> In respect of your client's respective claims, you may wish to observe that General Assembly resolution 41/210 [(Limitation of damages in respect of acts occurring within the Headquarters district)], which you cite, does not establish a recourse mechanism for staff members or former staff members to pursue claims against the Organization. Rather, the United Nations General Assembly established a two-tier formal system of administration of justice, comprising a first instance [UNDT] and an appellate instance United Nations Appeal Tribunal as from 1 January 2009 pursuant to resolution 62/228.
>
> Since the system, as established by the General Assembly, does not provide for recourse to arbitration for the resolution of former staff members' claims, no legal basis exists for submitting your client's claims to arbitration. Indeed, if the Secretary-General were to consent to submitting this matter to arbitration, he would be acting in contravention of the legal framework established by the General Assembly. We note that your client has already availed himself of the recourse mechanism available to him under the UN system of administration of justice in respect of his vehicular claim and made a motion with respect to alleged tortious liability of the Organization in relation to the incident on 27 July 2013.
>
> In the light of the foregoing, any additional recourse your client may wish to seek in respect of this matter, including the outcome at the ABCC, must be made to the UNDT, within applicable limitation periods.
>
> Please note that this communication is not to be construed as an admission of facts or of liability for any purposes whatsoever. In addition, nothing in this communication shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations, including its subsidiary organs, which are hereby expressly maintained.

8. On 20 August 2015, the Applicant requested management evaluation of "the decision of the Secretary-General … in respect with tort claims" as conveyed in the letter from OLA dated 11 August 2015.

9. By letter dated 10 September 2015, the Officer-in-Charge of the Management Evaluation Unit ("MEU") informed the Applicant that his request for management evaluation had been found not receivable because, amongst other reasons:

> The MEU noted that your request for management evaluation contests the contents of a letter informing you that staff members or former staff members do not have the right to pursue claims against the Organization outside the formal system of administration of justice and that there is no recourse which allows submission of claims to arbitration. Assuming that this response could be considered a unilateral decision taken in your individual case, the MEU noted that the decision in question failed to produce direct legal consequences to your former contract of employment or terms of appointment. The MEU found this to be the case given that access to arbitration is not a statutory right provided to staff members anywhere in the Staff Regulations and Rules or any administrative issuance and therefore, cannot be deemed to be part of your former contract of employment or terms of appointment.
>
> Your counsel had argued that ST/SGB/230 entitled "Resolution of Tort Claims" dated 8 March 1989 provided you recourse to arbitration. The MEU, however, considered that the provisions in the ST/SGB/230 indicated otherwise. Specifically, paragraph 4 of ST/SGB/230 provides for the establishment of a Tort Claims Board to review and make recommendations on terms of settlement of tort claims brought by non-staff members against the United Nations from acts occurring in the United States for which the Organization is not insured. You were a staff member at the material time, and thus this Bulletin is not germane to your case.

Procedural background

10. On 16 September 2015, the application was filed.

11. On 17 September 2015, the application was transmitted to the Respondent instructing him to file the reply.

12. On 19 October 2015, the Respondent duly filed his reply claiming, *inter alia*, that the application is not receivable *ratione materiae*.

13. By Order No. 273 (NY/2015) dated 22 October 2015, the Tribunal (Duty Judge) instructed the Applicant to file a response, if any, to the contentions on receivability raised in the Respondent's reply on or before 9 November 2015. The Applicant filed his response on 30 October 2015.

14. The case was assigned to the undersigned Judge on 18 September 2015.

15. By Order No. 288 (NY/2015) dated 12 November 2015, the Tribunal ordered 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. At the CMD, the parties were instructed to summarize their respective contentions on the question of receivability. Both parties agreed that, taking into account also the oral contentions made at the CMD, no further written submissions were needed on the question of receivability, which was therefore ready to be determined by the Tribunal on the papers before it.

16. By Order No. 304 (NY/2015) dated 9 December 2015, the Tribunal ordered that it would "proceed to determine the preliminary issue of receivability of the application based on the record already before it, including the parties' oral submissions made at the CMD on 8 December 2015".

Summary of the parties' submissions on receivability

17. The Respondent's contentions on receivability may be summarized as follows:

a. In his letter to the Secretary-General of 22 July 2015, Applicant's Counsel demanded arbitration of claims arising from the incident. In response, OLA's 11 August 2015 letter informed Applicant's Counsel that the Organization could not assent to the arbitration demand, because the Applicant does not have a right as a former staff member to arbitrate his claims against the Organization. Rather, he must pursue any and all such claims through the established system of internal justice;

b. The 11 August 2015 letter does not constitute a "decision" within the plain meaning of the term, because the letter only provided

information on the relevant legal framework *vis-à-vis* the Applicant's claims. The letter simply informed the Applicant that there was no legal basis for his arbitration demand;

c. Assuming *arguendo* that the letter may be construed as a decision, the alleged decision did not have "direct legal consequences" or "direct legal affect" on the Applicant's terms of appointment. The Applicant does not have a right under the terms of his appointment to arbitration of claims against the Organization. The Staff Regulations and Rules do not confer any right to staff members to have recourse to arbitration of claims against the Organization;

d. The Applicant's claim that General Assembly resolution 41/210 establishes a right to have recourse to arbitration of claims against the Organization is misconceived in respect of acts or omissions occurring within the Headquarters district. The resolution does not apply to claims brought by staff members, and the General Assembly has not established such a right. General Assembly resolution 41/420 established a limitation on compensation or damages payable by the Organization in respect of tort claims brought by third parties;

e. As is clear from the legislative history, the General Assembly intended that its resolution 41/420 apply only to claims in tort brought against the Organization by third parties and that current and former staff members do not fall within the scope of the term "third parties";

f. The General Assembly adopted resolution 41/420 in response to increases to the Organization's insurance premiums in the 1980s for third party claims. In his report to the General Assembly, the Secretary-General proposed that the General Assembly approve a proposal to introduce self-insurance for general liability coverage and a draft regulation to limit the

Organization's legal liability for such claims. The draft regulation was adopted by the General Assembly in resolution 41/210;

18. The Applicant's contentions on receivability, included in his 30 October 2015 response to the reply, may be summarized as follows:

a. Article 23 of the Universal Declaration of Human Rights, General Assembly resolution 41/210, Report of the Secretary-General A/C.5/41/11 of 10 October 1986, ST/SGB/230 (Resolution of tort claims), and staff regulations 1.1(c) and 1.2(c) apply to the case and, under art. 2.1(a) of the Statute of the Dispute Tribunal, grant the Applicant the right to have his claims made in his Counsel's 22 July 2015 letter reviewed by arbitration;

b. The letter of 11 August 2015 constituted an administrative decision that has a direct legal consequence for him because it violated his right of due process and led to an unfair and unjust determination of his claims. Furthermore, in consequence, the Applicant would have to bear all damages resulting from the Administration's alleged wrongdoing(s);

c. In his 22 July 2015 letter, the Applicant submitted a request for arbitration to the Respondent without which the Administration would not have raised the issue. Had the Respondent not replied, the Applicant would have had access to the Dispute Tribunal on this basis;

d. As a matter of equity and justice, the application should be considered receivable. If not, the Applicant would have nowhere else to seek legal redress. The Applicant's substantive claims raised in the present case are not being considered anywhere else.

19. At the CMD held on 8 December 2015, the parties summarized their contentions on receivability as follows:

a. Applicant's Counsel submitted that, in its 11 August 2015 letter, OLA had rejected his request for arbitration filed on 22 July 2015 and that this denial constitutes an administrative decision according to the Dispute Tribunal's jurisprudence;

b. Counsel for the Respondent stated that, based on the arguments presented in the reply, the letter received by the Applicant from OLA is not an administrative decision and the application is therefore not receivable.

Consideration

20. Pursuant to art 2.1(a) of the Statute of the Dispute Tribunal:

> **Article 2**
>
> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> *(a)* To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance;

21. It follows from the consistent jurisprudence of the United Nations Appeals Tribunal that, for an application to be receivable by the Dispute Tribunal, an applicant must identify, or define, a specific administrative decision capable of being reviewed and which has a direct and adverse impact on her/his contractual rights (see, for instance, *Planas* 2010-UNAT-049, *Chrichlow* 2010-UNAT-035, *Appellant* 2011-UNAT-143 and *Wasserstrom* 2014-UNAT-457).

22. Regarding the definition of what constitutes an "administrative decision" in terms of art. 2.1(a) of the Dispute Tribunal's Statute, the United Nations

Appeals Tribunal stated in *Andati-Amwayi* 2010-UNAT-058 (in line herewith, see also *Bauza Mercere* 2014-UNAT-404, *Obino* 2014-UNAT-405, *Ngokeng* 2014-UNAT-460, *Nguyen-Kropp & Postica* 2015-UNAT-509, *Terragnolo* 2015-UNAT-517, *Pedicelli* 2015-UNAT-555 and *Birya* 2015-UNAT-562) that:

> 17. What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.
>
> 18. In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.
>
> 19. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

23. In *Gehr* 2014-UNAT-475, the Appeals Tribunal, referring to *Wasserstrom* 2014-UNAT-457 and the former United Nations Administrative Tribunal's Judgment No. 1157, *Andronov* (2003), further stated that (footnotes omitted):

> 16. The former Administrative Tribunal's definition of an administrative decision that is subject to judicial review has been adopted by the Appeals Tribunal:
>
> > A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences.
>
> 17. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral

> and of individual application, and they carry direct legal consequences …
>
> 18. The key characteristic of an administrative decision subject to judicial review is that the decision must "produce[] direct legal consequences" affecting a staff member's terms or conditions of appointment. "What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision." …

24. On 10 October 2014, the Applicant filed an application before the Dispute Tribunal, contesting the 23 April 2014 decision of the Controller, on behalf of the Secretary-General, to approve the recommendation of the UNCB to deny his claim for compensation for damage to his vehicle. The case was registered as Case No. UNDT/NY/2014/061.

25. By letter dated 22 July 2015, Counsel for the Applicant wrote to the Respondent regarding the alleged tortious liability of the Organization with regard to the Applicant's alleged personal injury and property damage. The Applicant requested the Secretary-General "to consent to [a]rbitration as provided for under [United Nations] tort [c]laims" and indicated that "this claim should serve as your notice to arbitration".

26. On the same day, Counsel for the Applicant filed an application before the Dispute Tribunal which was registered under Case No. UNDT/NY/2015/046 contesting the decision of the Controller, on behalf of the Secretary-General and on the ABCC's recommendation, to deny the Applicant's claim for compensation under 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).

27. The Tribunal notes that, as results from the Applicant's claim of 22 July 2014, his Counsel indicated as the legal basis for his arbitration notice: the provisions of General Assembly resolution 41/210 of 11 December 1986; the

procedures set out in para. 2 of ST/SGB/230 (Resolution of tort claims) of 8 March 1989; art. 20 of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules (as revised in 2010); and the Appeals Tribunal's judgment in *Wamalala* 2013-UNAT-300. The abovementioned legal provisions are:

28. General Assembly resolution 41/210:

> Limitation of damages in respect of acts occurring within the Headquarters district
>
> *The General Assembly*
>
> *Adopts*, within the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, in accordance with the provisions of General Assembly resolution 481(V) of 12 December 1950, and for the purpose of placing reasonable limits on the amount of compensation or damages payable by the United Nations in respect of acts or omissions occurring within the Headquarters district, the following regulation:
>
> 1. In any tort action or in respect of any tort claim by any person against the United Nations or against any person, including a corporation, acting on behalf of the United Nations, to the extent that the United Nations may be required to indemnify such person, whether such person is a member of its staff, an expert or a contractor, arising out of any act or omission, whether accidental or otherwise, in the Headquarters district, no person shall be entitled to:
>
> (a) Compensation or damages for economic loss, as defined herein, in excess of:
>
> (i) The limits prescribed for death, injury or illness in the Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations applied mutatis mutandis;
>
> (ii) Reasonable amounts for damaged, destroyed or lost property;
>
> (b) Compensation or damages in excess of $100,000 for any non-economic loss;
>
> (c) Any punitive or moral damages.

2. As used in this regulation:

(a) "Economic loss" means the reasonable cost of repairing or replacing property, and, in respect of death, injury or illness, any reasonable past, present and estimated future:

(i) Health care expenses;

(ii) Rehabilitation expenses;

(iii) Loss of earnings;

(iv) Loss of financial support;

(v) Cost of homemaker services;

(vi) Transportation expenses;

(vii) Burial expenses;

(viii) Legal expenses.

(b) "Headquarters district" means the district by that name as defined in section 1 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, of 26 June 1947.

29. ST/SGB/230, in relevant parts:

Submission of claims

1. Any accident or other occurrence in the Headquarters district that is likely to result in a tort action or claim by any person, other than a staff member or a member of a commission, committee or similar body listed in annex A to ST/SGB/107/Rev.4 and Amend.1, must be reported to the United Nations Security and Safety Service immediately in order to permit a timely investigation.

2. All tort actions or claims shall be addressed to the Legal Counsel, Office of Legal Affairs, Room S-3427, United Nations, New York, N.Y. 10017.

Preliminary review of claims

3. If, upon its preliminary review of all the facts and circumstances, the Office of Legal Affairs is of the view that a claim is justified and can be settled by payment of a sum not in excess of $5,000, it shall so report to the Controller and, subject to his approval, negotiate an appropriate settlement. Any claim not so settled shall be reported to the Tort Claims Board referred to below.

Tort Claims Board

4. There is hereby established at Headquarters a Tort Claims Board to review the relevant facts and circumstances and to make recommendations on appropriate terms of settlement of tort claims against the United Nations arising from acts occurring in the United States of America in respect of which the Organization is not insured, and which are not brought by a staff member or by a person covered by bulletin ST/SGB/103/Rev.1 (members of United Nations commissions, committees or similar bodies in respect of whom the United Nations pays a daily subsistence allowance or annual remuneration) or settled in accordance with paragraph 3 above. If, after having conducted such a review, the Board concludes that the Organization may be held liable for the personal injury, death or property damage which occurred, it shall recommend to the Controller a maximum amount of compensation that may be offered to the claimant. If the Controller agrees, such offers shall be made and the negotiations shall be conducted by the Office of Legal Affairs, under the guidance of the Board.

…

Arbitration

6. In the event that negotiations with a claimant do not result in an amicable settlement of the claim, the claimant shall be offered the option to submit the claim to arbitration. Such arbitration shall be held under the auspices of the American Arbitration Association, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law in force, and taking into account, as appropriate, Headquarters Regulation No. 4 on limitation of damages in respect of acts occurring within the Headquarters district (General Assembly resolution 41/210 of 11 December 1986). The place of arbitration shall be New York City. Any award pursuant to such arbitration shall be binding on the parties as the final adjudication of the claim.

30. The UNCITRAL Arbitration Rules (as revised in 2010), in relevant parts:

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration

Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

…

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(c) Notification of the appointment of an arbitrator referred to in article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the

notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

(b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in article 9 or 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;

(f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The

> claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.
>
> 2. The statement of claim shall include the following particulars:
>
> *(a)* The names and contact details of the parties;
>
> *(b)* A statement of the facts supporting the claim;
>
> *(c)* The points at issue;
>
> *(d)* The relief or remedy sought;
>
> *(e)* The legal grounds or arguments supporting the claim.
>
> 3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
>
> 4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

31. *Wamalala* 2013-UNAT-300, paras. 24–27, where the Appeals Tribunal stated that (footnotes omitted):

> 24. Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. These rules apply to all staff members appointed by the Secretary-General with the exception of locally recruited staff covered by applicable national social security schemes, interns, and persons serving on special service agreements, unless otherwise explicitly provided for by the terms of their appointments.
>
> 25. The [Dispute Tribunal's ("UNDT")] finding that there was one single claim with two heads of damages, one relating to the gross negligence by the Administration and one relating to the amount of compensation awarded to Mr. Wamalala, is seriously flawed. The Appeals Tribunal is of the view that Mr. Wamalala's claim of negligence constitutes a separate basis for compensation outside the framework of Appendix D, which is a workers' compensation system. A workers' compensation system is a no fault insurance or scheme whereby employers must cover occupational injury or

> illness. Employees do not have to prove employers negligence in order to obtain benefits.
>
> 26. The goal of a workers' compensation system is to reduce disputes and litigation arising from work-related injuries and illnesses. The system also sets fixed awards for employees who suffer work-related injuries or illnesses.
>
> 27. Accordingly, a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.

32. It results from the above considerations that, on 22 July 2015, the Applicant filed two separate claims:

> a. A claim regarding "tortious liability of the Organization as a result of gross negligence". This claim was filed with OLA and also intended to serve as a notice of arbitration, which, pursuant to art. 3 of UNCITRAL Arbitration Rules, constitutes the initiation of the recourse to arbitration. As results from para. 27 of *Wamalala*, a claim for gross negligence against the Administration is a separate action which is not to be included in a claim made by the staff member under Appendix D;
>
> b. An appeal before the Dispute Tribunal contesting the decision of the Controller, on behalf of the Secretary-General and based on the ABCC's recommendation, to deny the Applicant's claim for compensation under Appendix D to the Staff Rules.

33. These two claims cannot form part of the same application before the Dispute Tribunal, as stated by the Appeals Tribunal in *Wamalala*.

34. The Tribunal notes that, in its 11 August 2015 letter, OLA stated, *inter alia*:

> We note that your client applied for relief to the [UNCB] in respect of his vehicular claim and to the [ABCC] in respect of his personal injuries claim. Subsequently, on 9 October 2014, your client submitted to the United Nations Dispute Tribunal

> ["UNDT"]: (a) an appeal of the outcome of the UNCB in respect of the vehicular claim; and (b) a motion seeking leave of the UNDT to introduce three causes of action in said appeal, namely, "negligent security", serious and willful misconduct and wanton misconduct of the United Nations. In addition, your client has received a management evaluation of the outcome of the claim before the ABCC and has not submitted an appeal to the UNDT to date.
>
> In respect of your client's respective claims, you may wish to observe that General Assembly resolution 41/210 [Limitation of damages in respect of acts occurring within the Headquarters district], which you cite, does not establish a recourse mechanism for staff members or former staff members to pursue claim against the Organization. Rather, the United Nations General Assembly established a two-tier formal system of administration of justice, comprising a first instance [UNDT] and an appellate instance United Nations Appeal Tribunal as from 1 January 2009 pursuant to resolution 62/228.
>
> Since the system, as established by the General Assembly, does not provide for recourse to arbitration for the resolution of former staff members' claims, no legal basis exist for submitting your client's claims to arbitration. Indeed, if the Secretary-General were to consent to submitting this matter to arbitration, he would be acting in contravention of the legal framework established by the General Assembly. We note that your client has already availed himself of the recourse mechanism available to him under the UN system of administration of justice in respect of his vehicular claim and made a motion with respect to alleged tortious liability of the Organization in relation to the incident on 27 July 2013.
>
> In the light of the foregoing, any additional recourse your client may wish to seek in respect of this matter, including the outcomes of [ABCC], must be made to UNDT, within applicable limitation period".

35. Having reviewed OLA's 11 August 2015 letter, the Tribunal considers that the first part of this document only indicated the opportunities that were available to the Applicant for pursuing his claims through the formal part of the United Nations internal justice system and referred exclusively to claims under Appendix D to the Staff Rules, which are not subject to arbitration. The Tribunal considers that the fact that the Applicant was not informed about the informal part of the internal justice system and the services of the Office of the Ombudsman

and Mediation Services had no legal consequences and did not violate any of the Applicant's rights. The Tribunal further observes that the Applicant has not, in his other two cases currently before the Tribunal (Case Nos. UNDT/NY/2014/061 and UNDT/NY/2015/046), mentioned that he is willing to resolve his claims informally by mediation. Pursuant to art. 10.3 of the Statute of the Dispute Tribunal and arts. 15.1 and 15.3 of the Rules of Procedure, once a case is before the Tribunal, if any of the parties on their own initiative decide to seek mediation they *shall* inform the Registry in writing thereof for the Tribunal to refer the case to "the Mediation Division" and suspend the proceedings during mediation.

36. In *Wamalala*, para. 30, the Appeals Tribunal stated:

> 30. 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".

37. The Tribunal concludes that OLA's letter of 11 August 2015 is not an administrative decision in the form of a settlement provided by the Administration based on OLA's preliminary review of the Applicant's claim for gross negligence pursuant to art. 3 of ST/SGB/230 or in the form of an offer to submit the claim to arbitration pursuant to art. 6 from ST/SGB/230. Even if OLA's letter of 11 August 2015 were to be considered, as submitted by the Applicant, as a response to his "notice of arbitration", the Tribunal would have no competence to review it. As clearly results from arts. 3.1, 3.2, 3.5, and art. 4.5 of the UNCITRAL Arbitration Rules, any notice of arbitration must ("shall") be finally resolved by the arbitral tribunal and a response to the notice of arbitration is part of the procedure before such a tribunal.

38. Consequently, the contested letter is not an administrative decision which can be subject to a legal review before the Dispute Tribunal and the application is not receivable *ratione materiae*.

Conclusion

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

The application is rejected as non-receivable.

(*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