



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PEGLAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Alan Gutman, ALS/OHRM

Introduction

1. The Applicant has challenged a decision of the Advisory Board on Compensation Claims (ABCC) dated 12 November 2013 to reject his request for compensation for an injury which he alleges he suffered in the course of his duties.

Procedural history

2. The Applicant filed the current Application with the Tribunal on 2 June 2015. The Respondent filed his Reply on 2 July 2015.

3. Pursuant to Orders No. 351 (NBI/2015) and 374 (NBI/2015) the parties submitted a joint statement of facts and points in issue on 20 November 2015.

4. On 13 and 14 April 2016, the parties made submissions on the issue of receivability, which had been raised by the Tribunal in its Order No. 188 (NBI/2016).

5. The Respondent submitted additional information on the composition of the ABCC and the identity of those present at the Board meeting on 14 October 2014. Following this, the Tribunal decided that there was sufficient evidence on file to determine the merits of the case without an oral hearing.

6. The Tribunal obtained official translations into English of annexes to the Application¹ and the Respondent's Reply² which were in French.

7. With two exceptions³ the Respondent confirmed his acceptance of the accuracy of the translated document. The Applicant did not provide any views on

¹ Annexes C, E, F and G.

² Annexes 9 and 14.

³ The Respondent indicated that the first page of Annex C which refers to "mon portable Nokia à 3 puces" was translated as "my three-inch cellular phone" although this statement refers to a cell phone that accepts three SIM cards, not to the size of the phone itself. Additionally, the last page of exhibit F which refers to: (i) "le pretium doloris peut être évalué à important" was translated as "significant damages may be awarded for the pain and suffering incurred" but a more accurate translation is "the pain and suffering experienced is significant/great; and (ii) "le prejudice esthétique peut être évalué à très léger" was translated as "very low damages may be awarded for the disfigurement caused" but a more accurate translation is "aesthetic damages/disfigurement is light/slight".

the translated documents.

Receivability

8. In Order No. 188 (NBI/2016), the Tribunal raised an issue of receivability. It noted that the evidence that had been submitted did not demonstrate that upon receiving the determination of the ABCC, the Applicant had sought reconsideration of that determination as provided by art. 17 of Appendix D to the United Nations Staff Rules (Appeal in case of injuries or illness).

9. The parties provided the following submissions on the issue of receivability.

Respondent's submissions

10. In *Simmons* UNDT/2012/167, the Dispute Tribunal clarified that a request for review under art. 17 is limited to the medical aspect of an ABCC recommendation. The contested decision in this case is not based on a medical determination by the ABCC.

11. The ABCC did not recognize the Applicant's injuries as attributable to the performance of his official duties. The ABCC concluded that there was no nexus between the Applicant's employment with the United Nations and the alleged injuries and illness.

Applicant's submissions

12. Article 17(b) of Appendix D to the Staff Rules specifically indicates that the purpose of a Medical Board is to "report to the Advisory Board on Compensation Claims on the medical aspects of the appeal".

13. In the instant case, there are no medical elements to the appeal. The issues in the case are factual and legal. The ABCC's determination that the injury received was not work incurred was not a question of medical evidence regarding causation. No medical information was taken into account in their decision.

14. A Medical Board is constituted of medical practitioners. Since such professionals would have no expertise in considering the legal issues raised in the Applicant's challenge it is submitted that a requirement that appeal be to a Medical Board would be manifestly unreasonable. A challenge under art. 17 was not required in the current case. The Applicant urges the Tribunal to follow the reasoning in *Simmons*.

Considerations

15. The case of *Simmons* concerned the receivability of the applicant's claim that she was unlawfully denied compensation for injuries sustained as a result of a vehicular accident while on official duty. The ABCC had rejected the applicant's claim on the basis that she did not travel by the most direct route possible between her office at the United Nations and her residence when the accident occurred. The respondent in that case contended that the application was not receivable because the Applicant had not exhausted the administrative process of seeking reconsideration of her claim pursuant to art. 17 of Appendix D.

16. The Tribunal observed that the grounds upon which the applicant's claim was refused were not medical in nature and concluded that the procedure outlined in art. 17 of Appendix D was not applicable. The Tribunal held that:

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

17. This Tribunal respectfully adopts the reasoning in *Simmons* and finds that in the present case, the Applicant was not required to seek a reconsideration of his claim under art. 17 of Appendix D as a prerequisite to challenging the decision of

the ABCC. This is because the contested decision in this case is not based on a medical determination by the ABCC.

Decision

18. The Application is receivable.

Merits

Facts

19. The following is taken from the parties' joint statement of facts supplemented with facts taken from the pleadings and documents submitted by the parties.

20. The Applicant is a former staff member of the Opération des Nations Unies en Côte d'Ivoire (ONUCI)⁴. He was a locally recruited staff member who served as a Broadcast Technician.

21. In 2011, Côte d'Ivoire was in the midst of a political crisis which resulted in a general breakdown of law and order characterized by general acts of violence. The Applicant considers that the breakdown in law and order included incidents targeting United Nations staff such as a rocket attack on a United Nations armoured personnel carrier on 2 April 2011 injuring four soldiers and a sustained attack on the Seboko Abidjan Headquarters resulting in the evacuation of essential staff from Abidjan on 3 April 2011.

22. On 6 April 2011, the Applicant was attacked and sustained injury. The ONUCI Security Operations Centre (SOC) daily log dated 6 April 2011 recorded a message timed at 1555 hours that the Applicant "sustained injuries to his head after being hit with rifle butts when armed individuals entered to loot his home at Adjame 220 Logements...POC, Watchkeeper and MOC notified".

23. The Tribunal notes further documentary evidence from the same source which was not referred to in the statement of facts. The SOC daily log included a

⁴ United Nations Operation in Côte d'Ivoire (UNOCI).

message that was initially timed at 0845 hours and was repeated at regular intervals during the next 24 hours. The message read:

In the wake of the operation just carried out by the Impartial Forces, the likelihood of attacks against UN staff, especially Caucasians, is very high. Any staff still in Abidjan should remain indoors. The extraction and relocation plan remains in effect and will be carried out as soon as possible.

24. This message was echoed in the transcripts of ONUCI Security Advisories which were broadcast on 30 March and 12 April 2011. These transcripts were produced to the Tribunal as annexes to the Respondent's Reply. It is not apparent whether these were before the ABCC when they considered the Applicant's claim. The first broadcast instructed that all staff (ONUCI and agencies) must remain home from 31 March and wait for further security instruction. The second was broadcast the day after the end of hostilities on 11 April. It stated: "Notwithstanding, I would like to draw your attention on the residual resentment on part of many people against the UN and the international community at large".

25. The SOC daily log also recorded calls on 6 and 7 April for assistance by other staff members due to threats and intrusions into their homes by armed attackers. One staff member who lived at a different address but in the same location as the Applicant, called SOC three times between midday and 3 p.m. After 4:40 p.m., six other staff members called for assistance through the night of 7 April.

26. Neither the host country law enforcement nor the ONUCI Security Investigations Unit carried out an investigation into these incidents or those reported by the Applicant.

27. On 7 April 2011, the Applicant visited the Medical Centre of ONUCI and was admitted to Hospital until 9 April. The Medical report of that visit states:

This is to confirm that [the Applicant] 48 years old ID: Lo-4210127 (National of Côte d'Ivoire) was evacuated to Medical Seboko on 7 April 2011 at around 15h. Patient declared to have been victim of attack in his accommodation of Adjamé on 6 April 2011 at around 18h30. He claims to have been attacked by 6 to 7

people of FROI members (Force Republicaine de Côte d'Ivoire) who beat him using blunt objects (the stock of Kalashnikov) over his head, and the left side of his abdomen. There was no loss of consciousness. He was complaining of left neck pain and headache. The physical examination shows a superficial cut (3 cm) at the scalp.

He is fully conscious; there is no neurological sign of head injury.

No active bleeding, no sign of internal bleeding.

As past history, [the Applicant] sustained neck injury due to an aggression during the crisis of November 2004 in Abidjan.

He received: dressing of the wound, he continues using the neck collar he came with.

The general condition of the patient is stable. He is put in observation in the Level 1 plus.

28. The Applicant states that on 9 April, fearing for his life and having been refused a salary advance, he submitted a Movement of Personnel request which was denied. This is when he first attempted to commit suicide.

29. On 10 April 2011, the Applicant emailed an incident report to the ONUCI Chief Security Adviser, copied to six others at ONUCI including KB. The document contained a list of the personal belongings stolen or damaged during these events. To this was added a letter entitled "Attack and Attempted execution report which described the attacked in detail". He stated: "In conclusion I would like to emphasise that since the start of the hostilities, I have been threatened (sic) a number of times by the Groupement patriotique pour la paix (GPP) militia wing to my affiliation with UNOCI".

30. On 13 of April 2011, KB approved the Applicant's Movement of Personnel request for "Liberty Travel". He travelled by United Nations plane to Accra, Ghana. He later moved to Togo where he claimed asylum.

31. On 14 July 2011, a doctor at the Centre Hospitalier Universitaire Campus in Lome, Togo, provided a medical report describing the psychological treatment received by the Applicant.

32. The Applicant was seen by a consultant on 18 July 2011 at the Neurology service of Centre Hospitalier Universitaire Campus in Lomé, Togo. The report indicated in relevant part that:

Psychological Care Report

We have been treating [the Applicant] ..., following the recent post-electoral sociopolitical crisis.

At the time of his first consultation, he was in state of severe shock which required medical and psychological care.

His state of health has now significantly improved and continues to move in the right direction with follow-up care. However, he still needs medical and psychological assistance.

33. The Applicant was psychologically evaluated on 24 and 27 December 2012 and 3 January 2013 by a clinical psychologist at Sylvanus Olympio University Teaching Hospital in Togo. He was diagnosed with chronic post-traumatic stress disorder (PSTD) related to the physical and psychological violence that he suffered during the sociopolitical events following the 2011 elections in Côte d'Ivoire.

34. On 14 February 2013, the Applicant filed a claim for compensation for injuries and losses attributable to the performance of his official duties as a United Nations staff member.

35. In his statement that accompanied the claim, the Applicant stated that he sustained his injuries and illness after members of the national army, Forces Republicaines de Côte d'Ivoire (FRC) came to his house and attacked him on 6 April 2011. According to his statement, the soldiers returned to his house the next day to execute him and his entire family pursuant to an order from an official of ONUCI. However his neighbors had successfully intervened and stopped the execution. The claimant alleges that the soldiers told him that the informant in ONUCI had informed them that he was a collaborator for the rebels and revolutionary forces. The claimant was instructed by the commander of the FRC to flee the country and on 13 April 2011, he was evacuated on a United Nations airplane to Accra, Ghana.

36. On 23 July 2013, the Secretary of the ABCC requested advice from the Medical Services Division (MSD) about the Applicant's claim as to: "Whether the claimant's illness/injuries (head, neck, and back soft tissue injuries, psychological trauma,) can be considered to be directly related to the incident that occurred on 6 and 7 April 2011?"

37. On 13 November 2013 MSD answered: "No. There is no clear evidence that the incident occurred as described, or that it was directly related to the performance of his official duties. In particular there is no incident report and investigation as required".

38. The Secretary of the ABCC also asked MSD: "Whether the claimant has any degree of permanent loss of function" and "whether the claimant may be granted total or partial disability".

39. MSD answered to both: "As the incident is not considered service incurred, no recommendation is made".

40. The ABCC met twice to consider the claim. The Respondent submitted a letter from the Secretary of the ABCC which advised that the long standing practice of ABCC is to conduct its business on the basis of a quorum consisting of at least a majority of its members i.e. four out of six of its voting members.⁵

41. The first meeting was on 14 October 2014. The minutes listed the six ABCC members who were present. As advised by the Respondent, these consisted of the three members nominated by the Administration and the three nominated by the Staff.

42. Also in attendance at that meeting were the ABCC secretary and two of the ABCC secretariat members as well as three persons described by the Respondent as "non-voting *ex officio* experts comprising the legal adviser to the

⁵ In response to an order from the Tribunal the Respondent provided information on the persons and their positions who were in attendance at the meetings.

ABCC, a person from the Office of Legal Affairs (OLA) and the Senior Legal Officer of the United Nations Joint Staff Pension Fund (UNJSPF).

43. The substantive minutes of the 14 October 2014 meeting commenced by stating that that [the ABCC] had “considered the materials and issues attached” in relation to all the claims for compensation before it.

44. The material attached in relation to the Applicant’s claim was a paper (author unknown) which described the claim and the Applicant’s justification for the delay in submitting it. In summary the paper provided the Board with the following information:

a. An incident report from ONUCI advised that the Applicant had reported the attack at his residence on 6 April 2011 at a time when there was a breakdown of law and order and when all staff members were advised by radio to remain at their residences. ONUCI did not conduct an investigation into the incident other than the Security Operation Centre report record of the incident.

b. A previous compensation claim by the Applicant for an injury following an attack on him while driving a United Nations vehicle in 2004 had been granted.

c. The ONUCI medical form reflected that the Applicant received medical attention for his injuries on 7 April and was seen at a hospital in Togo in July for psychological and neurological issues.

d. The MSD response to the claim form in a memorandum dated 13 November 2013 which advised that the claimant’s injuries and illness are not directly related to the incident that occurred on 6 April 2011. It stated that “there is no clear evidence that the incident occurred as described, or that it was directly related to the performance of his official duties.”

45. The minutes recorded the following interim decision about the Applicant’s claim:

[The Applicant] (6691): deferral of case for consideration to seek clarification from ONUCI on whether other staff members were targeted threatened or similarly assaulted due to their affiliation with the UN at the time of the Ivory Coast political crisis in 2011.

46. The next meeting of the ABCC was held on 11 November 2014. It was attended by five of the six ABCC members, the MSD *ex-officio* medical adviser (by Phone), the *ex-officio* legal adviser to the ABCC a person from OLA, one from UNJSPF and three members of the ABCC secretariat.

47. A revised paper concerning the Applicant referred the ABCC to three annexes and summarised their contents as follows:

a. Annex 1 was the unchanged paper that had been presented to the ABCC at its previous meeting.

b. Annex 2 was the 17 October 2014 response from the Department of Safety and Security in ONUCI (DSS/ONUCI), which had enquired “with services likely to have had insight into this and other claim cases, namely Legal Advisors Office, CMS’s office, Claims office and SIU but none have recorded any related incident during that time”. The response further stated that: (i) there were no other similar incidents of assaults, threats, and/or targeting of UN staff at that time (local, internationals, volunteers etc) as a result of their affiliation with the Organization; and (ii) there were no other complaints or allegations of assaults/ threats resulting from informants working in ONUCI telling the national army that the staff members were collaborators for the rebel and the revolutionary forces.

c. Annex 3 was the SLS historical report which reflects that on 1 April 2011 the security level was set as 5-High in Abidjan.

48. The minutes of the 11 November 2014 meeting recorded the following decision by the ABCC and reasons for it:

[The Applicant] (6691). Waiver of time limit for submission of claim; denial of injuries and illness as service barred.

The board considered the claimants statements, the brief prepared on behalf of the claimant by his OSLA legal officer, the ONUCI Security operation Centre Daily log recording of the claimed incident, the ONUCI Security Section incident report which states that “this alleged incident happened during the Ivorian Political Crisis period when there was a breakdown of Law and Order and when all staff members were informed/advised by SOC through Radio Communication to remain at their respective residences due to the then prevailing Ivorian Crisis, especially in the Abidjan Sector”, the lack of corroborating investigation into the circumstances surrounding the incident, and MSD’s advice that there is no clear evidence that this occurred as described, or that it was directly related to the performance of his official duties.

The board had sought additional information from the Department of Safety and Security in ONUCI which advised that there were no similar complaints or incidents reported by other staff members in the mission at the time of the Ivory Coast political crisis and that “[t]he incident was reported to SOC (Security Operations center)...However no investigation has established circumstances surrounding this incident and the allegations made by the claimant.

49. These minutes were approved by the Chair of the ABCC on 9 December 2014.

50. A formal recommendation to the Secretary-General was signed by the Chair of the ABCC on 13 November 2014 and approved without alteration on behalf of the Secretary-General by the Officer-in-Charge, Office of Programme Planning, Budget and Account (OPPBA) on 16 November 2014.

51. On 26 March 2015, the Applicant received the decision denying his claim.

Issues

52. The issues for determination by the Tribunal are:

- a. Was the ABCC properly constituted at the time of its deliberations and recommendations?
- b. Did the ABCC process the Applicant’s claim for compensation in a proper, reasonable and lawful manner?

c. Did the ABCC properly determine the nexus between the Applicant's employment with the United Nations and his injuries and illness?

d. Was the decision to deny the Applicant's claim for compensation well founded?

Submissions on the Merits

Applicant's submission

53. It does not appear disputed that the Applicant sustained an injury which resulted in partial disability within the meaning of para 11.2 of Appendix D and that it resulted in permanent loss of function within the meaning of para 11.3 of Appendix D.

54. The disputed issue is whether the injury sustained by the Applicant was attributable to the performance of his official functions.

55. The decision is founded on a recommendation which is manifestly unreasonable and puts the entire process into disrepute. The ABCC provided four reasons for its recommendation to deny the claim.

a. The incident occurred during the Ivory Coast political crisis where there was a breakdown of law and order. This is irrelevant and does not undermine the truthfulness or accuracy of the Applicant's story. The negative inference drawn was unreasonable.

b. The lack of investigative corroboration. The ABCC drew a negative inference against the Applicant's claim based on the Secretary-General's failure to investigate his timely incident reports.

c. No other similar complaints or incidents were reported by other staff members. This was an irrelevant consideration.

d. The advice from MSD that “there is no clear evidence that the incident occurred as described, or that it was directly related to the performance of his duties.” This was a question of fact and law. The medical officer did not have the expertise or authority on such issues. The opinion fettered the judgment and discretion of the ABCC.

56. The ABCC initiated its own fact finding mission without informing the Applicant of it and, in breach of the *audi alteram partem* principle, relied on extrinsic evidence without providing the Applicant an opportunity to comment or to respond. It relied on the daily log, the ONUCI security incident report, communication from DSS/ONUICI and the opinion of the medical director on a non-medical matter. These documents formed the basis for the recommendation of the ABCC but were not disclosed to the Applicant before the recommendations were made. The ABCC ignored the Applicant’s account. If it was of the view that he was not credible it had an obligation to state so and provide reasons for disbelieving him.

57. The decision-maker (the official who endorsed the recommendation of the ABCC) fettered his judgment by endorsing the recommendation of the Board. The recommendation of the ABCC is so fundamentally flawed that no reasonable person exercising independent judgment could possibly have endorsed it.

58. There is no evidence that the ABCC was properly constituted.

59. The Applicant requests that the decision to deny his claim is set aside and the matter be remanded to the Secretary-General for a fresh determination.

Respondent’s submissions

60. The decision of the Controller was based on the recommendation of the ABCC. The Dispute Tribunal may review the recommendation of the ABCC to determine whether it was unreasonable for the ABCC to draw its conclusions based on the evidence before it. The Dispute Tribunal may also review whether

the ABCC made a material mistake of fact or considered extraneous factors in its evaluation of the Applicant's claim.

61. The ABCC assessed the Applicant's claim, found that the Applicant's injuries were not service incurred and made a recommendation to that effect.

62. In accordance with art. 16(c) of Appendix D, the ABCC may decide on the procedures it considers necessary for discharging its responsibilities. It conducts its business on the basis of a quorum of at least a majority of its members.

63. Based on the information obtained by the ABCC after its first meeting it concluded that the veracity of the Applicant's claim could not be confirmed.

64. The medical and other reports submitted by the Applicant do not corroborate his claims about the alleged events as they are all repetitions of his claims without independent verification. The ABCC is entitled to obtain additional information from ONUCI and DSS concerning the alleged event as it is within the Organization's control. There is no requirement for such documents to be provided to the claimant for his or her review.

65. The Applicant informed ONUCI that he was attacked in his home by thieves. He did not report that it was because of his performance of his official duties or affiliation with the United Nations. This information contradicts the Applicant's current claim

Considerations on the Merits

66. The contested decision before the Dispute Tribunal is the decision of the Controller on behalf of the Secretary-General, dated 16 November 2014, to deny the Applicant's claim for compensation under Appendix D to the Staff Rules for injuries and illnesses attributable to the performance of official duties on behalf of the Organization. This decision was based on the recommendation of the ABCC.

67. In a challenge to a decision concerning a claim for compensation, it is for the Applicant to demonstrate that the process in the relevant article was disregarded.⁶

68. In *Sanwidi* 2010-UNAT-084, the United Nations Appeals Tribunal (the Appeals Tribunal) held that:

Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.⁷

69. It is the role of the UNDT to assess whether the applicable Regulations and Rules have been applied in accordance with the legal principles in administrative law referred to in *Sanwidi* but not to substitute its decision for that of the Administration.

Compensation claims under Appendix D

70. Article 2(a) of Appendix D sets out the principles and definitions which govern the operation of these rules concerning the compensation payable to a staff member or his/her dependents in the event of death, injury or illness attributable to the performance of official duties on behalf of the Organization.

71. There are two elements to such a claim which must be established. One is the medical assessment of whether the claimant suffered from the injury or illness as alleged. The other is the non-medical factual determination whether the illness or injury was attributable to the performance of official duties on behalf of the Organization (causation).

72. In considering the first element, the ABCC is required by art. 13 to determine the injury or illness and the type and degree of disability on the basis of

⁶ *Frechon* 2010-UNAT-003.

⁷ Affirmed in *Hersh* 2014-UNAT-433.

reports obtained from a qualified medical practitioner or practitioners and art. 14 may require the medical examination of any person claiming or in receipt of a compensation for injury or illness under these rules.

73. The second requirement is governed by art. 2 (principles of awards). Article 2(b) states that death, injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any willful misconduct or willful intent when:

- (i) The death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations; or
- (ii) The death, injury or illness was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards to the staff member's health or security, and occurred as the result of such hazards or
- (iii) The death, injury or illness occurred as a direct result of traveling by means of transportation furnished by or at the expense or direction of the United Nations in connexion with the performance of official duties; provided that the provisions of this sub-paragraph shall not extend to private motor vehicle transportation sanctioned or authorized by the United Nations solely on the request and for the convenience of the staff member;

74. Claims are considered in the first instance by the ABCC which was established by art. 16 of Appendix D to make recommendations to the Secretary-General. Art. 16(d) provides that the Board shall consist of: (i) Three representatives of the Administration appointed by the Secretary-General; (ii) Three representatives of the staff appointed by the Secretary-General on the recommendation of the Staff Committee who should have the necessary expertise in administrative and personnel matters; and pursuant to (e) a Secretary shall be designated by the Secretary-General who may not, at the same time, be a member of the Advisory Board on Compensation Claims.

75. Pursuant to art. 16(c), the ABCC may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under the provisions of this article.

76. Article 15 provides that every person claiming under these rules or in receipt of compensation under these rules shall furnish such documentary evidence as may be required by the Secretary-General for the purpose of determination of entitlements under these rules.

Was the ABCC properly constituted at the time of its deliberations and recommendations?

77. Article 16(d) of Appendix D specifies the constituent members of the ABCC but does not specify a quorum for the Board meetings.

78. In *Rouche* UNDT/2015/044 the Tribunal held:

A quorum is generally the minimum number of members of an entity authorised to cast a vote, and who must be present at a meeting to lawfully conduct business in the name of the entity. In the absence of a specific provision in this regard, the minimum quorum is 50% of its members. Voting members may vote in favour, against or abstain. Entities may alter the definition of a quorum to suit their particular purposes by specifying the nature and number of a quorum in any particular case.

79. The evidence of the ABCC Secretary is that ABCC conducts its business on the basis of a quorum consisting of at least a majority of its members, that is, four out of six of its voting members. The full complement of six members of ABCC was present at its 14 October 2014 meeting and five of the six were present at the 11 November 2014 meeting when the final recommendation was made. The Tribunal finds that there were sufficient ABCC members present at both meetings to meet the quorum requirements. The others who attended the meetings were either secretariat or *ex-officio* in a non-voting, advisory capacity. The Tribunal holds that the ABCC was properly constituted at each of the relevant meetings.

Did the ABCC process the Applicant's claim for compensation in a proper, reasonable, and lawful manner?

80. The first question is whether the documents and evidence ABCC had in its possession, which were adverse to the Applicant's claim for compensation, and relied on when it made its recommendation, should have been provided to the Applicant for his explanation.

81. The art. 15 requirements for a claimant to furnish documentation required by the ABCC for the purpose of determination of entitlements under these rules logically implies that the ABCC is entitled to request such information as it requires in fulfilling its role. Article 15 is silent on whether the ABCC should share such information. In the absence of a governing rule or principle, it is within the discretionary powers of the ABCC to set its own procedures including how it uses such information as it obtains. These powers are subject to the principles relating to the exercise of such discretion.

82. In the different context of the reclassification of posts, the Appeals Tribunal recognized that the Secretary-General's wide discretion may be fettered by principles of universal application when it stated:⁸ "The Secretary-General has wide discretion in the reclassification of posts. But like any discretion, it may not be exercised in an arbitrary, capricious, or illegal manner". As an example the Appeals Tribunal held that there is no discretion to violate the principle of equal pay for equal work.

83. The principle of *audi alteram partem* is a universal principle of natural justice which applies to administrative decisions. It has been well expressed as follows: "It is a breach of the *audi alteram partem* principle for a decision maker to base a decision on information that has not been disclosed to the party adversely affected".⁹

⁸ *Chen* 2011-UNAT-107.

⁹ Donald J. M. Brown and Honourable Justice John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto, Ontario: Canvasback Publishing, 2011) (looseleaf updated 2014) Vol. 2, Chapter 12:2100.

84. The principle ensures that a party adversely affected has the right to know, the opportunity to comment on and the ability to answer the case against him or her.

85. In the present case, ABCC had information before it that was adverse to the Applicant's claim when it reached its recommended decision.

86. First was the 3 November 2013 answer from MSD to the ABCC's request for its advice as to whether the claimant's illness/injuries (head, neck, and back soft tissue injuries, psychological trauma,) could be considered to be directly related to the incident that occurred on 6 and 7 April 2011.

87. The advice from MSD that "there is no clear evidence that the incident occurred as described, or that it was directly related to the performance of the Applicant's official duties", went to the heart of the factual question of the causation of the medical problems reported by the Applicant after the incident on 6 and 7 April. It was relied on as one reason for denying the Applicant's claim. That advice was not conveyed to the Applicant by the ABCC.

88. Second, at its first meeting, the ABCC acted within its discretion to require further information from DSS/ONUCCI before making a final recommendation.

89. Aspects of the information received from DSS/ONUCCI were cited by ABCC to justify the recommendation to deny the claim. It was therefore adverse to the Applicant.

90. Natural justice required that the Applicant should have been given the opportunity to see and comment on these two aspects of adverse material. In failing to afford him this basic right the ABCC violated the principle of natural justice.

91. Another fundamental principle of administrative law is that the exercise of discretion must be consistent and not arbitrary.

92. The failure of the ABCC to advise the Applicant of the adverse material may be contrasted with the exercise of its discretion in another case.

93. *Simmons* UNDT/2013/059 concerned a claim for compensation for injuries sustained in an accident while the staff member was commuting to work in New York. The ABCC wanted to know from the staff member why she was not travelling to work on the most direct route when the accident happened in order to establish if her injuries were attributable to the performance of her official duties.

94. The Judgment reveals that in addition to the Secretary of the ABCC speaking personally with the claimant about her claim, on more than one occasion the Applicant was told of the ABCC's recommendation and was asked for further information both oral and documentary.

95. The Dispute Tribunal found that "it was reasonable for the ABCC to require from the Applicant an explanation supported by appropriate documentation, if available, about her trip from work to home since she was not traveling via the most direct route", but [the claimant] "consistently refused to provide all the information requested".

96. The obvious inconsistency between the natural justice rights afforded to the ultimately unsuccessful claimant in that case and the absence of any natural justice afforded to the Applicant raises the presumption that the ABCC's discretion has been arbitrarily exercised. If it was reasonable for the ABCC to request further information for a claimant in New York, why was it unreasonable or unnecessary to proceed in the same manner in respect to the Applicant in West Africa?

97. The Tribunal concludes that the ABCC processed the Applicant's claim in breach of the principle *audi alteram partem* and treated his claim inconsistently from other claims. It therefore failed to act in a proper, reasonable, and lawful manner.

Did the ABCC properly determine the nexus between the Applicant's employment with the United Nations and his injuries and illness?

98. Article 2 of Appendix D states that, "...compensation shall be awarded in the event of death, injury or illness of a staff member **which is attributable to the performance of official duties** on behalf of the United Nations" (emphasis added).

99. As submitted by the Respondent, the contested decision was not based on a medical determination by the ABCC but on its conclusion that there was no nexus between the Applicants employment with the United Nations and the alleged injuries and illness.

100. However, in its formal recommendation, approved as the decision on 16 December 2014, the ABCC referred to the advice of the MSD medical advisor (referred to by the Respondent as a non-voting expert consulted to provide advice on medical matters) that "...There is no clear evidence that the incident occurred as described, or that it was **directly related to the performance of his official duties**" (emphasis added).

101. It is clear that it was not within the competence of the MSD medical advisor to provide advice on whether the incident alleged by the Applicant occurred as described because that is patently not a medical matter.

102. In addition, the questions posed by the Secretary of the ABCC to MSD were neither framed nor answered in terms of the principles in Appendix D relating to compensation for injury. The question is not whether the incident was "directly related to the performance of official duties" but whether the injury or illness is "attributable to the performance of official duties".

103. The first formulation applies a stricter test than the one in Appendix D.

104. The Tribunal concludes that the ABCC relied on the advice of MSD which it was not competent to give and which was not in accordance with the correct test

set out in Appendix D. The advice was neither expert nor well founded on the correct principle prescribed by art. 2 of Appendix D.

105. The other evidence relied on by the ABCC was the material sent by DSS/ONUCI. Again the scope of the answers given was determined by the questions asked by ABCC. It asked for clarification from ONUCI on whether other staff members were targeted threatened or similarly assaulted due to their affiliation with the United Nations at the time of the political crisis in Côte d'Ivoire in 2011.

106. However the issue it was considering was whether the attack on the Applicant at the relevant time was attributable to the performance of his official duties. The ABCC did not request DSS/ONUCI to investigate or obtain information about the particular circumstances of the Applicant whose claim it was considering.

107. Notwithstanding the lack of an official investigation by DSS/ONUCI after his original complaint that may have corroborated his account, contemporaneous emails show that the Applicant was in constant communication with a number of senior colleagues at or shortly after the relevant time seeking their assistance. That information was not considered by the ABCC which rejected his claim on the grounds or that it was not corroborated.

108. In addition, the Tribunal observes from the information provided by DSS/ONUCI that on the night of the alleged incident, United Nations staff were warned that the likelihood of attacks against them was very high. Even after hostilities concluded the advice was that there was residual resentment against United Nations staff. This evidence was before the ABCC as part of the SOC daily log and the transcript of DSS broadcasts but there is no indication that ABCC took it into account. Without evaluating the merits of this evidence it is apparent to the Tribunal that it is relevant to the Applicant's claim that his injuries were attributable to the performance of his duties with the United Nations and that it should have been considered by ABCC.

109. Finally, the ABCC relied on information provided to it that the Applicant did not report that the attack on him was because of his performance of his official duties or affiliation with the United Nations. It did not refer to or take into account the incident report emailed by the Applicant to the ONUCI Chief Security Adviser, copied to six others at ONUCI on 10 April 2011 in which he expressly links the attack with his affiliation with ONUCI.

110. The Tribunal concludes that the ABCC did not properly determine the nexus between the Applicant's employment with the United Nations and his injuries and illness. Some of the material it relied on was derived from the opinion of a non-expert who did not apply the correct principle in art. 2 of Appendix D for determining the nexus between the Applicant's employment with the United Nations and his injuries and illness. In addition, it considered irrelevant evidence and did not take into account relevant evidence that was available to it.

111. The Tribunal holds that the recommendation of the ABCC to deny the Applicant's claim for compensation was unlawful.

Was the decision to deny the Applicant's claim for compensation well founded?

112. There is no evidence that the official who endorsed the recommendation of the ABCC on behalf of the Secretary-General exercised any independent judgment in the matter but relied on the flawed and unlawful recommendation of the ABCC

113. The decision of the Secretary-General is therefore similarly unlawful.

Decision

114. The decision of the Secretary-General to deny the Applicant's claim for compensation for injury and illness is rescinded and the case is remanded to the ABCC for a full and proper reconsideration of the Applicant's claim. This includes giving the Applicant the opportunity to see and comment on any adverse material to be considered by the ABCC; considering all and only material that is

relevant to the claim; and applying the correct principle in art.15 of Appendix D to determine if there was a nexus between the Applicant's employment with the United Nations and his injuries and illness.

(Signed)

Judge Coral Shaw

Dated this 13th day of May 2016

Entered in the Register on this 13th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi