



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

LIKUKELA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application submitted via email on 24 August 2015 and completed on 27 November 2015, the Applicant, a former investigator (P-3) with the United Nations Integrated Mission in Timor-Leste (“UNMIT”), contests the decision by the Secretary-General to uphold the recommendation of the Advisory Board on Compensation Claims (“ABCC”) rejecting her claim for compensation under Appendix D of the Staff Rules (“Appendix D”) for alleged injuries incurred during the course of a medical examination conducted at UNMIT on 3 August 2011.

2. The Tribunal notes that this matter involves a detailed account of the Applicant’s medical condition. To protect her right to privacy, the Tribunal finds it necessary that this information, which is of no public interest, be kept confidential. The Tribunal, therefore, hereby directs its Geneva Registrar, pursuant to art. 11.6 of its Statute, to redact any reference to the Applicant’s medical condition from the version of the decision that will be made available to the public.

Facts

3. On 3 August 2011, the Applicant attended a consultation with UNMIT Medical Services Section. The examination revealed that [REDACTED]

[REDACTED]

4. On the same day, the Applicant reported to the UNMIT Security Special Investigations Unit that she had been victim of an incident during her medical examination [REDACTED]

[REDACTED].

5. On 31 August 2011, the Applicant underwent an ultrasound at Darwin Private Hospital; [REDACTED].

6. On 11 July 2012, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

7. On 26 June 2013, the Applicant was admitted to Mediclinic Welcare Hospital for diagnostic surgery; [REDACTED]
[REDACTED].

8. By memorandum of 10 March 2015, Dr. R. of the Medical Services Division, New York, in consultation with the Medical Director, advised the ABCC as to whether the Applicant's condition could be considered to be directly related to the medical examination that was conducted on 3 August 2011. He stated in his report that "the Medical Director ... confirmed that there [was] no evidence of medical malpractice and, in this case, no evidence of sexual assault". Regarding the Applicant's specific claims, Dr. R. found that:

- a) The practice of [REDACTED] to [REDACTED] is reasonable and appropriate medical practice for a patient presenting with [REDACTED];
- b) No evidence was found of [REDACTED]
[REDACTED]; and
- c) The pathology examination following surgery confirmed that [the Applicant] had a developmental condition (present from birth) that was consistent with the findings, [REDACTED]
[REDACTED].

9. On 12 May 2015, the ABCC, at its 483rd meeting, reviewed the Applicant's claim for compensation under Appendix D. Having considered the medical reports and the advice of the Medical Director, Medical Services Division, the ABCC recommended that "[the Applicant]'s request that her injuries/illness [REDACTED]
[REDACTED] be recognized as service-incurred be denied".

10. On 5 June 2015, the Secretary-General approved the above-mentioned recommendation to deny the Applicant's claim.

11. On 1 July 2015, the Applicant filed a request for management evaluation concerning the “ABCC recommendation for [her] injury compensation claim”.

12. By letter dated 6 July 2015, the Management Evaluation Unit advised the Applicant that her request was not receivable in view that the ABCC is a technical body and, therefore, no request for management evaluation was required pursuant to staff rule 11.2(b).

13. On 24 August 2015, the Applicant submitted her application to the Tribunal by email. She completed it on 27 November 2015.

14. Given the Applicant’s inability to access the Tribunal’s eFiling portal (“CCMS”), the Registry uploaded the application in CCMS on 8 December 2015, and served it on the Respondent on the same day.

15. The Respondent submitted his reply on 6 January 2016.

16. On 11 January 2016 , as well as on 15, 17, 19, 21 and 22 February 2016, the Applicant submitted comments and amended comments to the reply, together with nine additional documents, with leave from the Tribunal.

17. After consultation with the parties, the Tribunal decided that it was appropriate to adjudicate the matter based on the papers without an oral hearing.

Parties’ submissions

18. The Applicant’s principal contentions are:

a. She was injured during the course of a medical examination conducted at UNMIT on 3 August 2011;

b. The ABCC erred in finding that there was no sufficient evidence to support her allegations that she sustained an injury while serving at UNMIT;

c. The ABCC recommendation is a product of an alleged transnational serious and organized white collar criminal network that colluded and conspired to defraud her of her injury compensation benefit entitlement;

- d. The Applicant seeks the following remedies:
 - i. “Settlement” of her compensation claim under Appendix D and “indefinite maternal health care by the Organization”;
 - ii. Compensation for her “[constructive] dismissal from the [United Nations]”; and
 - iii. Moral damages.

19. The Respondent’s principal contentions are:

- a. The Dispute Tribunal will not overturn a factual determination of the ABCC unless there is “prejudice, material mistakes of fact or other extraneous factors”;
- b. The medical reports before the ABCC demonstrate that the Applicant has a developmental condition; there is no evidence to support her claim that she sustained an injury during the course of the medical examination conducted on 3 August 2011 at UNMIT;
- c. On the basis of the information available to it, the ABCC correctly recommended that the Applicant’s claim be denied, and the Secretary-General correctly approved the recommendation;
- d. The Applicant’s allegations concerning an alleged “International Conspiracy” are irrelevant and without merit; and
- e. Consequently, the Respondent requests the Tribunal to dismiss the application.

Consideration

20. Appendix D of the Staff Rules governs compensation for injury attributable to the performance of official duties. Pursuant to its art. 2, “[c]ompensation shall be awarded in the event of ... injury ... of a staff member which is attributable to the performance of official duties on behalf of the United Nations”.

21. Section IV of Appendix D covers administration and procedures for claimants to enter initial claims. Art. 13 provides that “the determination of [an] injury ... shall be made on the basis of reports obtained from a qualified medical practitioner or practitioners”. Under art. 14, the Secretary-General can require the medical examination of any claimant and, under art. 15, the claimant is obliged to “furnish such documentary evidence as may be required by the Secretary-General for the purpose of making a determination under [the] rules”.

22. Art. 16 establishes a Board, the ABCC, consisting of representatives of the Administration and three staff representatives with necessary expertise to make recommendations to the Secretary-General concerning compensation claims. The Secretary-General makes the final decision.

23. Finally, art. 17 entitled “Appeals in case of injury or illness” provides, in its relevant part, that:

(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.

24. It is well established that the reconsideration procedure set forth in art. 17 of Appendix D is neither exclusive nor mandatory, but rather stands as an alternative to challenging a decision of the Secretary-General taken pursuant to Appendix D before the Dispute Tribunal (see, e.g., *Baron* UNDT/2011/174; *Kisia* UNDT/2016/023). That said, the two avenues offer different prospects.

25. The reconsideration procedure under art. 17 of Appendix D essentially provides for a review of the medical aspects of the case, through the constitution of a medical board composed of three medical practitioners qualified to make expert recommendations to the ABCC. This procedure allows a claimant to challenge the medical findings upon which a decision of the Secretary-General pursuant to Appendix D was based (*Peglan* UNDT/2016/059; *Simmons* UNDT/2012/167; *Christensen* UNDT/2012/094).

26. In turn, the judicial review before the Dispute Tribunal focusses on the procedure that led to the issuance of the Secretary-General's decision. The standard of review of administrative decisions has been clearly set by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084:

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.

27. The Appeals Tribunal further held in *Karseboom* 2015-UNAT-601 that when seized of an application challenging a decision under Appendix D, the Dispute Tribunal shall examine whether the proper procedure had been followed, and that it cannot put itself in the place of the medical expert or of the decision-maker. The Appeals Tribunal stressed in *Karseboom* that the Dispute Tribunal is not competent to make medical findings (see also *Baron* UNDT/2011/174; *Wamalala* UNDT/2014/133).

28. In the present case, the Applicant challenges the decision taken by the Secretary-General based on the recommendation of the ABCC, which, in turn, was supported by the medical advice provided by the Medical Services Division to the ABCC. She argues that Dr. R. erred in concluding that the UNMIT doctor who examined her on 3 August 2011 did not commit malpractice, and that she did not suffer any injury as a result of this examination but was rather affected by a developmental condition. These are medical conclusions and opinions, which the Tribunal does not have jurisdiction to review. As recalled above, the Tribunal is not allowed to substitute its appreciation of medical issues for that of a medical practitioner, nor would it have the expertise to do so. The proper way for the Applicant to request reconsideration of the conclusions reached by the Medical Services Division was to make use of art. 17 of Appendix D, to have the matter re-examined by a group of medical experts.

29. The Applicant also alleges that the ABCC's recommendation was part of "an alleged transnational serious and organized white collar criminal network". She seeks to relate this recommendation to a payment of USD587,428.65 that was allegedly made to her account with the United Nations Federal Credit Union ("UNFCU") and for which the UNFCU is seeking recovery on the basis that it was made in error.

30. The Tribunal recalls that any issue related to the recovery of payment by the UNFCU falls beyond the scope of the present proceedings and cannot be considered. Insofar as the Applicant seeks to establish a link between the payment allegedly made to her UNFCU account and the recommendation made by the ABCC to deny her claim for service-incurred injury, the Tribunal finds that the

ABCC's recommendation is based on the opinion provided by the medical practitioner, as clearly indicated in the report of its 483rd meeting of 12 May 2015, and that the Applicant's allegations of bias are not substantiated by any evidence.

31. Finally, the Tribunal notes that the Applicant did not point out any procedural irregularity that would vitiate the contested decision. Having carefully examined the documents submitted by the parties, the Tribunal finds no indication that the procedure set forth in Appendix D for determining the Applicant's claim for compensation was not followed. Rather, it appears that the matter was reviewed by a medical practitioner and the Medical Director of the Medical Services Division based on the documentation submitted by the Applicant, that the ABCC made its recommendation on the grounds of advice provided by the medical practitioners and that the Secretary-General, in turn, endorsed the ABCC recommendation, in compliance with arts. 13, 14, 15 and 16 of Appendix D.

Conclusion

32. In view of the foregoing, the Tribunal hereby DECIDES to reject the application in its entirety.

(Signed)

Judge Rowan Downing

Dated this 30th day of September 2016

Entered in the Register on this 30th day of September 2016

(Signed)

René M. Vargas M., Registrar, Geneva