



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SHARIFPOUR-HICKS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Neil Hicks

Counsel for the Respondent:

Kong Leong Toh, UNOPS

Introduction and procedural history

1. The Applicant is a former staff member of the United Nations Office for Project Services (UNOPS) in Iraq.
2. On 23 March 2016, her husband filed an application on her behalf contesting the decision of the Advisory Board on Compensation Claims (ABCC) to deny her compensation for loss of her capacity to earn. In her application, the Applicant states that the contested decision was taken on 9 September 2014 and that she became aware of it on 8 October 2014 and 29 January 2016.
3. The Respondent filed his reply on 25 April 2016 in which he argued that the application is not receivable *ratione temporis*.
4. During the period 29 March through 4 August 2016, the parties made several filings concerning receivability as a preliminary issue.
5. On 30 June 2016, the parties were informed that the case had been transferred to docket of Judge Agnieszka Klonowiecka-Milart, following the completion of Judge Boolell's seven year tenure with the United Nations Dispute Tribunal (UNDT).
6. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required to determine this case and that it is sufficient to rely on the parties' pleadings and written submissions.

Facts

7. On 19 August 2003, the Applicant was injured in the bombing of the United Nations Headquarters in Iraq.
8. In April 2005, the Secretary-General recognized that the Applicant's illness can be attributed to the performance of official duties on behalf of the United Nations.¹

¹ Annex 1 to the application.

9. On 1 February 2006, the Secretary-General awarded the applicant compensation under art. 11.2(d) of Appendix D to the Staff Rules for loss of earning capacity for the period 1 February 2004 through 10 July 2005.²

10. On 6 July 2009, the Applicant was awarded compensation in the amount of USD128,946.40 equivalent to a 55% permanent loss of function of the whole person for a Class 4 mental impairment under art. 11.3(c) of Appendix D to the Staff Rules.³

11. On 25 August 2009, the Applicant's request for compensation under art. 11.2(d) of Appendix D to the Staff Rules for the loss of earning capacity was denied based on her tax returns for the years 2006 – 2008.⁴

12. On 9 February and 6 May 2011, the Applicant was awarded compensation for a 50% loss of earning capacity under art. 11.2(d) of Appendix D. For the benefit to continue, the Applicant was required to undergo an independent psychiatric evaluation under art. 14 of Appendix D.⁵

13. On 28 June 2012, the ABCC recommended to the Secretary-General that, as the Applicant's degree of permanent loss of function constituted a partial disability with 100% loss of earning capacity, she be awarded compensation under art. 11.2(d) of Appendix D from 1 January 2011 to the UNOPS retirement age applicable to her subject to certain conditions and information to be provided by the Applicant. The ABCC recommendation was approved on behalf of the Secretary-General on 5 July 2013.⁶

14. The Applicant was informed of the ABCC recommendation of 28 June 2012 on 13 July 2012.⁷

15. On 20 June 2013, the ABCC recommended to the Secretary-General that the Applicant's request for resumption of loss of 100% earning capacity disability benefits be denied due to lack of evidence documenting a loss of earnings

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Annex 2 to the application.

capacity. The ABCC recommendation was approved on behalf of the Secretary-General on 16 July 2013.⁸

16. On 17 September 2014, the ABCC again recommended to the Secretary-General that the Applicant's request for resumption of loss of 100% earning capacity disability benefits be denied.⁹ The ABCC recommendation was approved on behalf of the Secretary-General on 30 September 2014. Part of this recommendation reads as follows:

...(viii) that the board has considered the claimant's case twelve times for a variety of issues including multiple considerations of eligibility for disability compensation; (ix) the board's approach in other disability cases, where a case is adjudicated on the matter of disability (generally only after one consideration); (x) the board's determination that it did not intend an annual review of the claimant's claim be undertaken and that the claimant has exhausted her recourse to the ABCC; (xi) the board's determination that it will not consider any further review of the claimant's claim for disability benefits and (xii) *the board's instruction to the claimant that, if she wishes to contest the board's decision, her sole recourse is to follow the ABCC appeals process which consists of filing an application to the UN dispute Tribunal; (Emphasis added)*

Recommends to the Secretary-General that the claimant's request for loss of earning capacity (disability) benefits be denied.

17. The Applicant was informed of the ABCC recommendation and the Secretary-General's approval of 30 September 2014 on 8 October 2014.¹⁰ The relevant part, authored by the ABCC Secretary is reproduced below.

I wish to inform you that your claim for compensation under Appendix D to the Staff Rules for (sic) was considered by the Advisory Board on Compensation Claims at its 476th meeting, held on 9 September 2014.

I am attaching a copy of the Secretary-General's decision of 30 September 2014 for your information.

18. The Secretary-General's decision was the denial of the Applicant's request for resumption of loss of earning capacity (disability) benefits.

⁸ Annex 3 to the application.

⁹ Annex 4 to the application.

¹⁰ Annex 5 to the application.

19. On 25 January 2016, the Applicant again wrote to the ABCC requesting for a resumption of her disability benefits. The ABCC's response was communicated to her on 29 January 2016. She was informed that her case had already been considered by the ABCC 13 times and that the last Secretary-General's decision on her case had informed her that her only further recourse was to the UNDT and that the ABCC was unable to consider her claim for disability compensation any further.

Respondent's submissions on receivability

20. The Respondent makes the following submissions on receivability:

a. The application is not receivable because it was filed after the deadline specified in art. 8.1.(d)(iii) of the UNDT Statute. The reiteration in 2016 of the time-barred decision did not restart the time limit.

b. If this application can be considered as one filed by a person making claims in the name of an incapacitated staff member, art. 8.1(d)(iii) of the UNDT Statute states that the deadline for filing such an application is one year from the date the contested decision was received.

c. Since the Applicant was notified of the decision on 8 October 2014, the deadline for filing the application was 8 October 2015. However, the application was filed only after the deadline expired on 23 March 2016.

d. The application refers to the ABCC Secretary's e-mail of 29 January 2016 but this was merely a reiteration of the earlier decision. The e-mail quoted the 2014 decision. The United Nations Appeals Tribunal (UNAT) has stated, for example in *Kazazi* 2015-UNAT-557, that reiteration of a decision does not restart the time limit.

e. The fact that the ABCC recommendation, which was approved on 30 September 2014 on behalf of the Secretary-General, expressly stated that if the Applicant wished to contest the Board's decision, her sole recourse was to follow the ABCC appeals process which consists of filing

an application to the United Nations Dispute Tribunal, clearly means that the ABCC was by September 2014 no longer willing to reconsider its recommendation and therefore, the time limit had clearly started to run.

Applicant's submissions

21. The Applicant's submissions on receivability may be summarized as follows:

a. She had good reasons to regard statements from the ABCC with respect to the finality of the decisions it communicated to her as non-binding and arbitrary. Specifically, the Board's determination that the Secretary-General's decision of 16 July 2013 as final was demonstrably not the case. There was extensive communication between the Applicant and various staff members including the Secretary of the ABCC, the ABCC Finance Officer and the Director of the Office of the Under-Secretary-General for Management, among others, leading to the reconsideration of her case by the ABCC on 9 September 2014.

b. The ABCC has a history of communicating decisions to the Applicant and then reversing them upon receipt of further documentation.

c. The supposed final nature of the Secretary-General's decision of 16 July 2013 was not communicated to her until 8 October 2014 by which time the ABCC had already demonstrated by its own actions the irrelevance of its determination.

d. The unreliability of decisions communicated to her by the ABCC over many years and its willingness to reverse such decisions in the past gave her no reason to give credence to the Board's instruction that her sole recourse was to file an application with the UNDT.

e. She meets the requirement to receive loss of earnings compensation in accordance with the ABCC's decision of 20 April 2012 until the present. However, the ABCC has never communicated any reason

for denying her eligibility for loss of earnings compensation for those years focusing instead on the tax year 2011.

f. As she has received no communication indicating that the ABCC has made any considered determination on her eligibility to receive loss of earning compensation for the period from 2012 to the present, the time limit for filing applications with respect to this claim cannot have been reached. For the time limit for filing a dispute to be invoked, there must be a decision to contest that has been communicated to an applicant.

g. She has not received due consideration for her claim nor any clear decision from the ABCC with respect to it.

h. In response to the *Kazazi* case cited by the Respondent, the Applicant submits that she never received a final decision in her case that she could regard as definitive and she has received no decision at all with respect to the second part of the remedy she seeks.

Considerations

22. The sole legal issue arising for consideration at present is whether this application is receivable *ratione temporis*.

23. It is clear from the application that the contested decision is the decision to deny the Applicant compensation for loss of earnings capacity taken during the ABCC's 476th meeting of 9 September 2014. The Secretary-General approved a recommendation to this effect by way of decision of 30 September 2014 and it was communicated to the Applicant by letter dated 8 October 2014.

24. Article 8.1(d)(ii) of the UNDT Statute stipulates that an application shall be receivable, in cases where a management evaluation is not required,¹¹ within 90 calendar days after an applicant's receipt of the administrative decision. Pursuant to art. 8.1(d)(iii) of the UNDT Statute, the deadline provided for in

¹¹ Pursuant to staff rule 11.2(b), a staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies (such as the ABCC in this case), as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

subparagraphs (d) (ii) shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

25. Applying the law to the facts in the present case, the application which was filed on behalf of the incapacitated Applicant by her spouse, ought to have been filed within one year of 8 October 2014, that is, by 8 October 2015. It was instead filed on 23 March 2016.

26. The Applicant's essential argument is that the decision communicated to her on 8 October 2014 was not the definitive final decision based on her past interactions with the ABCC. This argument is not sustainable. Consistent with the large discretion that the administration has in reconsidering its own decisions, insofar as it does not infringe on acquired rights, it was up to the Secretary-General to review his previous decision of 16 July 2013, in particular if it had not been ever communicated to the Applicant. Moreover, the administration may, and should, react to any new fact or argument presented on the issue. The ABCC and the Secretary-General apparently acted in the direction of affording full consideration to the Applicant's case. Notwithstanding, however, what would have been the reason for reviewing of the decision of 16 July 2013, at the latest, on 8 October 2016, the Applicant was unequivocally informed in the terms summarized at paragraph 16 above that the administration had denied her request as well as being informed in unambiguous terms that "her sole recourse [wa]s to follow the ABCC appeals process which consists of filing an application to the UN dispute Tribunal". In this context, on 8 October 2014 the Applicant had in her possession all information needed to appeal before the UNDT the Secretary-General's decision of 30 September 2014 based on the said ABCC recommendation.

27. The Appeals Tribunal has repeatedly held that it has been strictly enforcing, and will continue to strictly enforce, the various time limits and stressed that the old internal justice system was perhaps too generous in extending

or waiving time.¹² Further, as held by UNAT in *Kazazi*, the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather, time starts to run from the date on which the original decision was communicated.

Judgment

28. The application was filed out of time and is not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 9th day of November 2017

Entered in the Register on this 9th day of November 2017

(Signed)

Eric Muli
Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi

¹² *Mezoui* 2010-UNAT-043; *Reid* 2013-UNAT-389; *Laeijendecker* 2011-UNAT-158.