



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BARBER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Support Office in Somalia (UNSOS).
2. On 9 January 2018, he filed an application with the Tribunal contesting the decision “not [to] follow the rules laid out in [A]ppendix [D], to protect a SM”¹.

Facts

3. On 19 April 2015, the Applicant joined the Organization as a Close Protection Officer at the FS-4/Step 6 level, on a fixed-term appointment.
4. On 7 June 2015, the Applicant injured his back whilst on duty with UNSOS in Mogadishu². Due to the injury, the Applicant was on periods of certified sick leave with full pay between August 2015 and May 2017, on sick leave with half pay between May 2017 and August 2017³ and on special leave with half pay effective 16 August 2017, pending a decision on his disability claim⁴.
5. On 15 March 2016, the Applicant submitted a claim for compensation under Appendix D to the Advisory Board on Compensation Claims (ABCC) for degeneration and destruction of intervertebral discs in the lumbar spine.⁵
6. On 13 November 2017, the Applicant requested management evaluation concerning the lack of resolution of his appendix D claim for reimbursement of medical expenses for his service-related injury, and of the subsequent recording of his certified sick leave.
7. By letter dated 16 November 2017, the Secretary of the United Nations Staff Pension Committee (UNSPC) informed the Applicant that he had been determined

¹ Application, section V, para.1.

² Application, section VII, para.1.

³ Reply, annex 5.

⁴ Reply, annex 7.

incapacitated for further service and that he was entitled to a disability benefit pursuant to article 33 of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF).⁶ The Applicant's appointment was terminated due to health reasons pursuant to staff regulation 9.3(a)(iii) effective 28 November 2017. The Applicant was informed that he would receive termination indemnity, compensation in lieu of the 30 calendar days' notice required for termination and disability benefits.

8. On 9 January 2018, the Applicant filed the present application.

9. On 18 January 2018, the ABCC issued a decision on the Applicant's claim for compensation authorizing payment of medical expenses in the amount of EUR1,313.92 (USD1,425.07) as well as payment for 32 days of special sick leave credit.⁷

10. By email dated 31 January 2018, the Kuwait Joint Support Office (KJSO) notified the Applicant of the ABCC decision on his claim for compensation.⁸

11. By letter dated 7 February 2018, the Chief of the Management Evaluation Unit (MEU), Office of the Under-Secretary-General for Management, informed the Applicant that in view of the ABCC decision on his claim for compensation, his request for management evaluation was rendered moot.⁹

12. On 13 February 2018, the Respondent filed his reply to the application.

13. On 17 and 18 April 2018, the Applicant filed his comments on the reply and several documents in support of his application.

⁶ Reply, annex 8.

⁷ Reply, annex 1.

⁸ Reply, annex 2. Effective 1 December 2017, the KJSO is the focal point for Appendix D claims for staff members serving in the peacekeeping and political missions.

⁹ Reply, annex 3.

14. On 19 April 2018, the Tribunal held a case management discussion aimed at establishing the precise nature of the Applicant's request.

Applicant's submissions

15. Even if the Applicant had been on certified sick leave for several months, the Administration failed to inform him of the possibility of claiming compensation under Appendix D in relation to his service-related injury.

16. The failure of the Administration to properly record the Applicant's balance of certified sick leave and to process his medical evacuation from the mission, forced him to use a combination of rest and recuperation (R&R) and annual leave to travel on his own to Cyprus and receive proper medical treatment.

17. The failure of the Administration to properly record his balance of certified sick leave and to remove him from the danger payroll also caused him to face huge deductions in his salary leaving him with only USD152 as salary for one month.

18. The delay of the ABCC in dealing with the Applicant's claim for compensation caused him serious economic and personal problems which worsened his health condition.

19. As the Applicant had been terminated due to health reasons, he has lost his career 25 years early.

20. The Applicant requests as remedies the resolution of his appendix D claim, the "acknowledgement" of the "mental and financial suffering" that the delay of the process has caused him and his family, the "acknowledgement" of the fact that he has lost his career 25 years early, the completion of the Appendix D process in a timely manner and the reimbursement of his entitlement to certified sick leave.

Respondent's submissions

21. The application is not receivable *ratione materiae*. First, the Applicant has not identified any specific decision that has had direct and adverse effects on his contractual rights. The Applicant acknowledges that at the time of his application, there had been no decision on his claim for compensation and did not identify any provision of Appendix D that he claims was violated. Second, the application is moot. The Applicant requests resolution of his Appendix D claim and since the ABCC has issued a decision in this regard, he has received the relief he requested.

22. On the merits, the procedures set forth in Appendix D were followed. The ABCC has granted the Applicant reimbursement of his claimed medical expenses in accordance with art. 11 of Appendix D. He has also been granted a special sick leave credit of 32 days pursuant to art. 18(a) of Appendix D. Once the Medical Services Division determines that the Applicant has reached maximum medical improvement, it will assess whether he has suffered any permanent loss of function.

23. The Applicant has received the requested relief and the Administration has also acknowledged the impact of the Applicant's injury on his career through the granting of his Appendix D claim, as well as the decision to award disability benefits and to pay him termination indemnity.

24. The Applicant has not pointed to any breach of substantive or procedural rights. He also has not presented evidence to support a claim for compensation for moral harm. He is not entitled to compensation for alleged delay in the issuance of a decision on his claim. The Administration has processed his claim within a reasonable time period. In fact, Appendix D does not set a time limit for the processing of a staff member's claim.

Considerations

25. The Tribunal faced problems in fully comprehending the Applicant's claim, beyond that he was complaining about lengthiness of processes surrounding his injury and the related claim for compensation.

26. The Tribunal is mindful of the Appeals Tribunal's consistent jurisprudence, according to which an applicant must identify, or define, a specific administrative decision capable of being reviewed (*Planas* 2010-UNAT-049, *Crichlow* 2010-UNAT-035, *Appellant* 2011-UNAT-143 and *Reid* 2014-UNAT-419).

27. At the same time, it is the Appeals Tribunal's consistent jurisprudence that when deciding on the scope of the case, the Tribunal is not limited to the parties' own identification and definition of the contested administrative decision(s) and may, based on the submissions, seek to identify the subject(s) of judicial review by itself. For instance, the Appeals Tribunal in *Fasanella* 2017-UNAT-765, para. 20, stated:

[.] Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed [...]

28. Furthermore, in the case of *Zachariah* 2017-UNAT-764, para. 22, the Appeals Tribunal stated on the role of the Dispute Tribunal in characterizing the claims a staff member raises in an application necessarily encompasses the scope of the parties' contentions:

... The duties of [the Dispute Tribunal] prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions.

Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task. ...

... Thus, the authority to render a judgment gives the [Dispute Tribunal] an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review.

29. Among others, the nature and contents of a management evaluation response is indicative of what matters were considered in answer to a request for management evaluation (*Lemonnier* 2016-UNAT-679, para. 47).

30. Therefore, in order to individualize and define the administrative decision which has been impugned, the Tribunal undertook to obtain from the Applicant the content of his management evaluation request and the response received, which, albeit listed in the application, had not been filed along with it. These documents confirmed that the subject of the request was the lack of response regarding his disability benefits.

31. The Tribunal also held a case management discussion where the Applicant articulated that his application was directed against the inaction of the United Nations Administration in relation to disability claims before ABCC but not (yet) to receive compensation for any harm resulting from the delay. The parties also confirmed that, following the ABCC decision, adjustments in payments related to his termination have started to be sent to the Applicant's account. The Tribunal informed the Applicant, who was not represented by counsel, about the deadline to appeal the ABCC decision, should he be not satisfied with the outcome; about the lack of obligation to seek management evaluation of such decision; about the need to distinguish this decision from any other decisions related to termination which need to be submitted for management evaluation; and about a possibility of requesting compensation for financial and moral harm occasioned by late issuance of a decision, if such can be proven. The Tribunal impressed upon the Applicant that the matter was urgent because of the deadline to appeal the ABCC decision

approaching, and to the fact that he may request assistance from the Office of Staff Legal Assistance.

32. Having had the impugned decision individualized and defined, the Tribunal finds that, the ABCC decision having been issued, the present application is moot.

Conclusion

33. In view of the foregoing, the present application is not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 25th day of April 2018

Entered in the Register on this 25th day of April 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi