



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NY/2018/011
UNDT/NY/2018/032
Judgment No.: UNDT/2019/098
Date: 29 May 2019
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

PAPATHANASSIOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Bart Willemsen, UNICEF

Introduction

1. The Applicant, a Programme Specialist with the United Nations Children’s Fund (“UNICEF”) at the P-4 level, contests: (a) the Advisory Board Compensation Claims’ (“ABCC”) decision rejecting his claim for compensation for Post-Traumatic Stress Disorder (“PTSD”) as time-barred, but conditional upon a reassessment upon submission of additional documentation demonstrating medical incapacity (Case No. UNDT/NY/2018/032); and (b) the ABCC Secretary’s subsequent rejection of his claim on the basis that the Medical Service Division had concluded that there was insufficient evidence concerning the Applicant’s medical incapacity such as to grant a waiver for late submission (Case No. UNDT/NY/2018/011).

2. The two cases being subject to an order for joinder and consolidation, the parties submit that they agree on the facts and the law of the matter, including that the Secretary of ABCC did not have the authority to reject the Applicant’s claim, and jointly request the Tribunal to issue a summary judgment to the effect, *inter alia*, that the ABCC reassess the claim, also taking into account the newly submitted and additional documentation. The parties, however, disagree as to whether the Applicant is entitled to compensation for procedural delays.

Factual and procedural history

3. In the parties’ joint submission dated 21 December 2018, they set out the agreed facts of the present cases as follows:

1. On or around January 2016, the Applicant submitted a claim with the ABCC for compensation for service-incurred injuries, in particular PTSD, in connection with his work for UNICEF between February 2008 and 2012.

2. In a memorandum dated 9 November 2017, the Secretary to the ABCC informed UNICEF that the Applicant’s claim was dismissed on the

basis that it was “time-barred and non-receivable” (the “First ABCC Decision”).[reference to annex omitted] However, in this memorandum, the Secretary to the ABCC stated that, with reference to Article 2.1(e) of Appendix D, a waiver of the deadline may be granted for medical incapacity, and should (additional) medical documentation demonstrating such medical incapacity be submitted, the claim may be considered further.

3. On 15 December 2017, the Applicant submitted a request for management evaluation of the ABCC’s decision(s).

4. On 12 January 2018, UNICEF informed the Applicant that the Secretary to the ABCC had informed UNICEF that the ABCC would revisit the decision(s) upon receipt of further information to be submitted by the Applicant, and that, as such, the request for management evaluation was moot.

5. On 1 February 2018, the Applicant submitted to the ABCC a full medical report outlining his condition and the reasoning for the delay in submitting his claim.

6. In order to preserve his rights, on 26 February 2018, the Applicant filed an application contesting the First ABCC Decision. The Tribunal registered the case as UNDT/NY/2018/011.

7. On 14 March 2018, the parties jointly filed a motion for suspension of the proceedings on the basis that the ABCC had committed to reassess the Applicant’s claim. In Order No. 57 (NY/2018), the Tribunal granted the joint motion and suspended the proceedings until 11 May 2018.

8. On 4 May 2018, the Secretary to the ABCC informed UNICEF that a waiver of the deadline was not granted (“Second ABCC Decision”). [reference to annex omitted] The Secretary to the ABCC clarified that this determination was premised on the recommendation by the Medical Service Division (MSD) that “*there [were] significant periods of time when the claimant was considered fully fit for work,*” and as such, the Applicant could have filed his ABCC claim for compensation in time.

9. On 10 May 2018, the parties requested a Case Management Discussion [“CMD”]. On 18 June 2018, a CMD was held. The Applicant’s counsel informed that he had submitted a request for a management evaluation against the Second ABCC Decision. Both counsel requested that the proceedings in UNDT/NY/2018/011 be suspended until UNICEF informed the Applicant of the outcome of the management evaluation with respect to the Second ABCC Decision.

10. On 19 June 2018, the parties submitted a joint request for a suspension of the proceedings, which the Tribunal granted in Order No. 127 (NY/2018).

11. On 11 July 2018, the parties requested a further suspension of proceedings in view of the fact that the Respondent had sought an opinion from the Office of Legal Affairs (OLA) on the applicable version of Appendix D to the Staff Rules (to the Applicant's ABCC claim), and the purported (delegated) authority of the Secretary to the ABCC with respect to the determination that the Applicant's ABCC claim was time-barred.

12. On 12 July 2018, in Order No. 146 (NY/2018) the Tribunal granted the joint request.

13. In order to preserve his rights, on 18 July 2018, the Applicant filed an application against the Second ABCC Decision. The Tribunal registered this case as UNDT/NY/2018/032.

14. On 24 July 2018, counsel for the Respondent received OLA's opinion, which was copied to the Secretary to the ABCC, and which included the view that the Applicant's request for a waiver of the time-limit to submit his ABCC claim should be considered by the ABCC (and that the Secretary to the ABCC does not have the authority to decide on requests for such a waiver).

15. On 31 July 2018, the Parties filed a joint submission for a joinder of the two aforementioned proceedings, and for a suspension of the proceedings until 1 October 2018 for the ABCC to render its decision.

16. In Order No. 150 (NY/2018), the Tribunal granted the request for a joinder, and for a suspension of the proceedings until 1 October 2018.

17. On 21 November 2018, Counsel for the Respondent submitted his reply with respect to the Applicants' submissions in both cases. Specifically, with respect to the Applicant's position that the Secretary to the ABCC did not have the authority to rule on the Applicant's request for a waiver of the time-limit and that, assuming *arguendo* the Secretary to the ABCC had such authority, he applied the incorrect version of Appendix D, the Respondent stated that he "*has no comment.*" [reference to annex omitted]

4. The parties' above chronology of facts, set out in a joint submission of 21 December 2018, followed a CMD held on 12 December 2018 (postponed from 29 November 2018), at which the parties agreed to file a submission regarding the further

proceedings of the present cases and their agreement as to the liability issues, and having the compensation claim reassessed by the ABCC.

5. The parties also filed a “request for summary judgment and compensation” with respect to both cases. The Applicant submits that “in view of the fact that the Tribunal is not vested with the authority to rule on the merit of any ABCC claims”, he also seeks an order stating that: (a) “the Applicant’s claim for a waiver of the time-limit should be considered by the ABCC, as the Secretary to the ABCC does not have the authority to consider such claim”; and (b) “the version of Appendix D applicable to the Applicant’s claim is the version in force prior to 1 January 2017”. In response, the Respondent submits that he has “no comment on the Applicant’s request for such order”.

6. The Applicant further seeks leave “to amend both submissions to include compensation of three months’ net-base salary in relation to each case”. Both Applicant and Respondent submit that “in this highly unusual case, the Tribunal is able to issue a summary judgment with respect to both matters currently before its docket. No dispute as to the facts or the law are raised by either party”.

7. The Applicant submits that the Secretary of the ABCC in acting beyond the scope of his authority in refusing the request for a waiver of the time-limit, and not applying the correct Appendix D provisions, has caused delay and harm to the Applicant. The Respondent on the other hand submits that any order on compensation for a delay in procedure would be premature without a decision under Appendix D on the merits of the Applicant’s claim before the ABCC, alternatively that he has not demonstrated that he has suffered harm as the result of the time it took for the Secretary to respond. In other words, it being agreed that the exercise of discretion was wrongful in this case, is the Applicant entitled to three months’ compensation or any other compensation as a result at this juncture, or at all?

Consideration

Summary judgment

8. Under art. 9 of the Tribunal's Rules of Procedure, a party may move for summary judgment where there is no dispute as to material facts of the case, and the party is entitled to judgment as a matter of law, if the Tribunal determines on its own initiative whether it is appropriate. The appropriateness of an application for summary judgment was discussed in *Cooke* UNDT/2011/216, wherein the Tribunal indicated that if the receivability of a case is being challenged, the Tribunal cannot determine the facts of the application on the merits or even consider whether such facts are common cause or contested, highlighting that summary judgment is a judgment on the merits and a party cannot ask for it if the full facts have not been pleaded. The Tribunal found in that case that the appropriate procedure would be to deal with the matter as a receivability issue. (*Cooke* UNDT/2011/216 was subsequently vacated in *Cooke* 2012-UNAT-275, in which the Appeals Tribunal found that the application was not receivable, but made no pronouncements regarding the Dispute Tribunal's observations regarding the nature of a summary judgment).

9. The contextualization of an application for summary judgment, whilst determined by individual jurisdictional experience and familiarity, will also no doubt entail some general principles commonly adopted in various jurisdictions with a view to expediting proceedings where facts are not in dispute and the law is clear. A cursory overview of common law jurisdictions is indicative of the position that summary judgment is normally granted on the filing of affidavits on substantive claims and is not a procedure normally used for disposal of matters on receivability or admissibility or other preliminary matters.

10. The Tribunal will therefore have to determine whether summary judgment is an appropriate course of action in this instance.

11. In addition to art. 9 of the Rules of Procedure on summary judgments, the Tribunal notes that art. 10.4 of the Tribunal's Statute reads as follows (emphasis added):

4. *Prior to a determination of the merits of a case*, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months net base salary.

12. In the joint submission dated 21 December 2018, the Respondent states that he “does not dispute the Applicant’s view” that the “Secretary to the ABCC did not have the authority to refuse the waiver of the time-limit for [the Applicant’s] request for compensation, and that, assuming *arguendo* that the Secretary to the ABCC had such authority, he applied the incorrect version of Appendix D provisions”. The Tribunal understands that the parties therefore agree that a procedural irregularity occurred when the ABCC Secretary rejected the Applicant’s compensation request as time barred as such decision-making authority is properly vested with the ABCC itself. It is further agreed that the ABCC Secretary applied the incorrect version of Appendix D.

13. Similarly, when the Respondent indicates that he has “no comment on the order sought” by the Applicant to the effect that, with reference to art. 10.4 of the Dispute Tribunal’s Statute and para. 31 of *Baracungana* 2017-UNAT-725, the consolidated cases be remanded to the ABCC “explicitly indicating that the Secretary to the ABCC does not have the authority to grant or refuse a request for a waiver of the time-limit to submit a claim under Appendix D”, the Tribunal understands this to mean that the parties agree that the cases should rightly be remanded to the ABCC for institution or correction of the required procedures prior to a determination of the merits and assessment of the Applicant’s compensation claim.

14. The Tribunal, however, observes that art. 10.4 of its Statute applies in instances “[p]rior to a determination of the merits of a case” and that the Tribunal cannot order any remedies and/or compensation other than pursuant to art. 10.4 whereby an applicant may be awarded compensation for any loss as may have been caused by the procedural delays, but not exceeding three months net base pay.

15. In the final analysis, The Tribunal understands the parties’ submissions, including those made at the CMD, to mean that they agree that it was incorrect that the ABCC Secretary rejected the Applicant’s second compensation claim as he does not have such authority, and that the claim should rightly be remanded to the ABCC for its reassessment, taking into account the additional documentation that the Applicant has submitted, and the appropriate Appendix D being the version in force prior to 1 January 2017.

Compensation

16. The Applicant submits that, in addition to referral of his claim to the ABCC, he seeks monetary compensation for the delay that occurred as a result of the procedural failures. In support of this claim, although referring to art. 10.4 of the Dispute Tribunal’s Statute and *Applicant* 2018/UNDT/115, the Applicant submits that:

- a. The Applicant filed his initial request to the ABCC on 20 January 2016 having to continually re-live the trauma in order to submit the information requested;
- b. Subsequent to this filing, the Applicant suffered bouts of illness which led to him being readmitted into hospital;
- c. No decision on the Applicant’s case was made until 1 December 2017, almost two years after the initial request had been made. During this time, no communication took place between the ABCC and the Applicant. As agreed

between the parties, the basis of the decision to refuse the Applicant's claim for consideration by the Secretary of the ABCC was unlawful;

d. Following express confirmation from the Administration that the Secretary of the ABCC will reassess the Applicant's claim, "with application of the standard enunciated in the pre-2017 version of Appendix D", the Applicant filed additional material. However, despite this express promise, the Secretary of the ABCC proceeded to review the claim under the new ABCC provisions and acted *ultra vires* in not bringing the matter before the ABCC itself;

e. On 4 May 2018, the Secretary of the ABCC again refused the request of the Applicant to consider his claim;

f. Subsequently, it has become apparent that despite discussions within the Administration, the Secretary of the ABCC has refused to place the matter before the ABCC;

g. Because of the Applicant's PTSD, he has suffered extreme bouts of depression and hospitalisation, and the delay in seeking consideration of this matter simply adds to an inability to seek closure. Whilst it is accepted that the Applicant is currently receiving disability benefits, the concerns of having to reopen the causes of PTSD in order to seek compensation from the ABCC almost three years after submitting his claim is extremely difficult and must be managed by his attending psychiatrist;

h. Based on the above submissions, the Applicant seeks compensation of three months' net-base salary in relation to each case, for the failure of the Secretary of the ABCC in acting beyond the scope of his authority in refusing the request for waiver of the time-limit and then in not applying the correct Appendix D provisions after an express promise had been made.

17. The Respondent submits that any order on compensation for a delay in procedure would be premature without a decision under Appendix D on the merits of the Applicant's claim before the ABCC. In the alternative, the Respondent submits that the Applicant did not demonstrate that he has suffered actual harm as a result of the time it took for the Secretary to the ABCC to render a decision. Further, in the alternative, the Respondent submits that the Tribunal cannot compensate for a delay in procedure for the period that the proceedings in the (two) appeals were suspended at the parties' request, which in parallel addresses the Applicant's request for compensation for delay in procedure "in each case", i.e., should the Tribunal order compensation for delay in procedure, this would be applicable only to the handling of the Applicant's ABCC claim between the date he submitted the claim and the date the Secretary to the ABCC dismissed the same. With respect to the period prior to the initiation of the proceedings in the (two) appeals, the Respondent notes that the Applicant did not request compensation for a delay in procedure until after the Respondent filed his reply in the (two) appeals. The Respondent submits that there is no ostensible link between the resumption of the proceedings (on 1 November 2018) and harm to the Applicant for delay in procedure. In different terms, any delay in procedure would have occurred prior to the filing of the Applicant's appeals, and as such, the Applicant's request to amend his submissions should be dismissed.

18. As the parties concur that the correct procedure for the ABCC was not applied and the cases should be remanded to the ABCC for institution or correction of the required procedure, the Tribunal will, by consent, so order. However, since art. 10.4 of the Statute explicitly states that such remand shall be done "prior to a determination of the merits of the case", the Tribunal is not in a position to pronounce on the substance of the cases (at least Case No. UNDT/NY/2018/011, concerning the ABCC's initial rejection of the compensation claim and not the subsequent rejection by its Secretary), and to issue a summary judgment.

19. It follows that summary judgment under art. 9 of the Rules of Procedure is not suitable in this instance, since such is a judgment on the merits. While the facts regarding what the Tribunal considers to be preliminary and procedural matters are fully pleaded and not disputed, the merits of the substantive issues are not before the Tribunal. Furthermore, the parties disagree on the facts and the law relating to compensation under art. 10.4; and the Applicant's submissions on the delays are inextricably woven with disputed facts and/or facts which may require proof by evidence. As the Tribunal is not in a position to award the Applicant any compensation at this juncture, this finding is without prejudice to the Applicant's rights to seek compensation for any delay, or for any other compensation howsoever arising, which right is hereby reserved. The Tribunal therefore grants leave to the Applicant to amend both applications with a claim for compensation of three months net-base salary, to be determined and assessed later, unless otherwise resolved by mutual agreement.

Conclusion

20. In light of the above, the Tribunal holds that:

a. By consent and with the concurrence of the Secretary-General, the claims are remanded to the ABCC for institution or correction of the required procedure in accordance with the parties' submissions and art. 10.4 of the Dispute Tribunal's Statute;

b. The Applicant's compensation claims in connection with his medical condition shall be considered by the ABCC within three months, also taking into account the additional documentation that the Applicant has submitted;

c. The Applicant's request for leave to amend each of the claims to include compensation of three-month net base salary for procedural delay under art. 10.4 is hereby granted. Consideration of these claims under art. 10.4 for procedural delay is reserved, unless settled by *inter partes* agreement;

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of May 2019

Entered in the Register on this 29th day of May 2019

(Signed)

Nerea Suero Fontecha, Registrar