



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 6 July 2019, the Applicant filed an application contesting the Secretary-General's decision dated 1 May 2019 to deny his claim for compensation under Appendix D to the Staff Rules ("Appendix D") for injuries and illnesses in relation to an incident that occurred on 27 July 2013. The decision was communicated to the Applicant by the Secretary of the Advisory Board on Compensation Claims ("ABCC").

2. On 10 July 2019, the Respondent filed a motion for summary judgment on the basis that the application is not receivable because the Applicant has not requested management evaluation of the contested decision. The Respondent states that the application does not fall within the two exceptions to the requirement to seek management evaluation contained in staff rule 11.2(b).

Factual and procedural background

3. The following outline of facts only reflects those circumstances of this case that are relevant to the issue of the receivability.

4. On 27 July 2013, the Applicant was involved in a car accident at the main entrance of the United Nations Headquarters in New York.

5. On 25 November 2013, the Applicant submitted a claim for compensation under Appendix D to the ABCC.

6. On 8 May 2015, the Secretary of the ABCC informed the Applicant that the Secretary-General denied his claim for compensation under Appendix D.

7. On 29 May 2015, the Applicant requested the Secretary-General to reconsider the Applicant's case pursuant to art. 17 of Appendix D.

8. On 19 June 2015, the Applicant also submitted a request for management evaluation of the denial of his claim for compensation under Appendix D.

9. On 15 July 2015, the Management Evaluation Unit notified the Applicant that his request for management evaluation was considered not receivable on the grounds that art. 17 prescribes a specific procedure for reconsideration of the decision based on the ABCC recommendation and that the Applicant requested reconsideration under art. 17 of Appendix D.

10. On 22 July 2015, the Applicant filed the first application before the Tribunal contesting the decision to deny his claim for compensation under Appendix D (Case No. UNDT/NY/2015/046).

11. On 16 March 2016, the Dispute Tribunal rejected the above-mentioned application as premature in *Kisia* UNDT/2016/023, considering that the Applicant had requested reconsideration under art. 17 of Appendix D and the final decision had not been taken by the Secretary-General. The Dispute Tribunal stated that the judgment was “without prejudice to any further proceedings before the Tribunal”.

12. On 4 October 2016, the Applicant filed the second application contesting the same decision after withdrawing his request for reconsideration under art. 17 of Appendix D (Case No. UNDT/NY/2016/048).

13. On 7 February 2019, in *Kisia* UNDT/2019/019, the Dispute Tribunal found the application receivable and rescinded the contested decision and remanded the Applicant’s case to the ABCC for reconsideration.

14. On 1 May 2019, the Applicant was informed that his claim under Appendix D was denied by the Secretary-General’s decision based on the ABCC recommendation.

15. On 6 July 2019, the Applicant filed the present application contesting the Secretary-General’s decision denying his claim under Appendix D.

Consideration

16. In the present case, the Respondent moved for summary judgement on the grounds that the application is not receivable due to the Applicant's failure to request management evaluation, submitting that, for the present case, it is a mandatory step before seeking recourse before the Dispute Tribunal. The Respondent contends that the Applicant's case does not fall within the exceptions to the requirement to seek management evaluation under staff rule 11.2(b). The Respondent submits that the ABCC is not a technical body under ST/AI/2018/7 (Technical bodies) dated 18 May 2018.

17. Article 9 of the Dispute Tribunal's Rules of Procedure provides that a party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law.

18. Staff rule 11.2(b) provides that "[a] staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General ... is not required to request a management evaluation", and the Respondent submits that the ABCC is not a technical body according to ST/AI/2018/7.

19. ST/AI/2018/7 was promulgated to clarify staff rule 11.2(b) and it provides as follows:

2. The list of technical bodies being referred to under staff rule 11.2 (b) are as follows:

(a) Medical boards or independent medical practitioners duly authorized to review medical decisions or medical recommendations, including reconsiderations referred to in article 5.1 of appendix D to the Staff Rules;

(b) Classification Appeals Committees.

20. The Tribunal notes that unlike art. 2(b) of ST/AI/2018/7, which spells out the name of the technical body (meaning Classification Appeals Committees), art. 2(a) states in a general term that medical boards are technical bodies. The question is then

whether the ABCC is a medical board “duly authorized to review medical decision or medical recommendations, including reconsiderations referred to in article 5.1 of appendix D to the Staff Rules”.

21. To understand the meaning of art. 2(b) of ST/AI/2018/7, the Tribunal will review art. 5.1 of Appendix D as it is directly referenced in connection with medical boards mentioned in ST/AI/2018/7.

22. The Tribunal notes that ST/AI/2018/7 refers to the revised Appendix D which took effect on 1 January 2018. In the revised Appendix D, sec. V sets forth the procedures for reconsideration, review and appeal (emphasis in the original):

Section V

Reconsideration, review and appeal

Article 5.1

Reconsideration of medical determinations

Claimants wishing to contest a decision taken on a claim under the present rules, when that decision is based upon a medical determination by the Medical Services Division or the United Nations Medical Director, shall submit a request for reconsideration of the medical determination under conditions, and by a technical body, established by the Secretary-General.

Article 5.2

Review and appeal of administrative decisions

Claimants wishing to contest a decision taken on a claim under the present rules, to the extent that the decision was based on considerations other than a medical determination, shall submit to the Secretary-General a written request for management evaluation in accordance with staff rule 11.2.

...

23. Under the revised Appendix D, a claimant wishing to contest a decision based upon a medical determination shall submit a request for reconsideration of the medical determination by a technical body. On the other hand, a claimant wishing to

contest a decision based on considerations other than a medical determination shall submit a written request for management evaluation.

24. The language of ST/AI/2018/7, which took effect after the revision of the Appendix D, can be understood in light of the revision of the appeal procedures in the Appendix D. Under the previous iteration of Appendix D, the appeal procedure was governed by art. 17, which caused considerable procedural uncertainties that were only resolved by the Appeals Tribunal's recent judgments. This Tribunal summarized the jurisprudence of the Appeals Tribunal in *Kisia* UNDT/2019/019 as follows:

39. ... it is well established that the ABCC is a technical body and hence, pursuant to staff rule 11.2(b), a staff member can appeal the ABCC's recommendation directly with the Dispute Tribunal, without requesting management evaluation (see *Dahan* 2018-UNAT-861, para. 21, citing *Baron* 2012-UNAT-257, para. 6). ...

...

41. In *Baracungana* 2017-UNAT-725, the Appeals Tribunal held that art. 17 of Appendix D does not require a staff member to request that a medical board be convened, but merely provides an option to bring his or her case before a medical board and instituting such a request is not a condition of receivability of the application for judicial review:

...

25. The revised Appendix D makes either a reconsideration process under art. 5.1 or a management evaluation process mandatory. In other words, a claimant needs to request either a reconsideration of medical determinations or a management evaluation of the decision that is "based on considerations other than a medical determination" under the revised Appendix D. Considering that the revised Appendix D took effect on 1 January 2018, the question is then whether the revised Appendix D is applicable to the Applicant's case whose incident occurred in 2013.

26. Article 6.1 of the revised Appendix D states (emphasis added):

Transitional measures

(a) For claims filed for incidents occurring after the entry into force of the present revised rules, such revised rules will be applied.

(b) *For claims filed for incidents that occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied, except that annual compensation for widows or widowers under the former article 10.2 will continue to be payable provided that the widow or widower has not remarried prior to the entry into force of the present revised rules.*

27. The Applicant's claim concerns an incident that occurred on 27 July 2013 which is clearly prior to the entry into force of the present revised rules, and thus the previous Appendix D applies. Therefore, the Appeals Tribunal's judgments regarding the previous Appendix D are applicable in this case. Therefore, in the particular circumstances of this case, as this Tribunal stated in *Kisia* UNDT/2019/019, the ABCC is a technical body and a reconsideration process under art. 17 of the previous Appendix D is not mandatory. Hence, pursuant to staff rule 11.2(b), the Applicant can appeal the decision based on the ABCC's recommendation directly with the Dispute Tribunal, without requesting management evaluation or reconsideration under art. 17 of the previous Appendix D.

28. Accordingly, the Respondent's motion for summary judgment and request to vacate the deadline for the filing of a reply are denied.

Conclusion

29. The Tribunal finds that the application is receivable and denies the Respondent's motion for summary judgment.

(Signed)

Judge Joelle Adda

Dated this 19th day of July 2019

Entered in the Register on this 19th day of July 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York