



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AWWAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Ibrahim Faye

Counsel for the Respondent:
Elizabeth Gall, AAS/ALD/OHR

Background

1. The Applicant commenced employment with the Organization on 28 May 2006 as a Security Officer in the Security and Safety Section in the former United Nations Mission in Sudan (UNMIS) on a fixed-term appointment.
2. On 26 March 2009, the Applicant injured both of his legs having slipped in a drain water hole. He lodged a claim for compensation under Appendix D, the subject of this application.
3. The Applicant also alleges that while working in Khartoum he was exposed to a dusty environment causing lung inflammation. Later, after a temporary assignment to Bentiu, South Sudan, the Applicant reported that he was exposed to mold and other unsanitary conditions in his container lodging causing lung infection for which he sought medical treatment and subsequent application for compensation under Appendix D¹.
4. On 6 December 2017, the Advisory Board on Compensation Claims (ABCC) informed the Applicant that the Medical Services Division (MSD) had found no evidence supporting direct linkage between his illness and the claimed exposure. Therefore, his claim for compensation had been denied.²
5. On 1 January 2018, the Applicant requested management evaluation of the decision.
6. On 30 January 2018, UNMISS, informed the Applicant that the ABCC decision of 6 December 2017 was in relation to his claim for pulmonary illness only and that no decision had been taken yet in relation to his claim for leg injuries³.

¹ Reply, para. 6.

² Application, annex 22.

³ Reply, annex 5, page 129.

Claims before the UNDT

7. On 15 May 2018, the Applicant, filed an application before the Dispute Tribunal challenging the decision to reject his claims for compensation under Appendix D to the Staff Rules in relation to two claims: (i) a claim in relation to injuries to his legs and (ii) a pulmonary illness claim.

8. The Respondent filed a reply on 19 June 2018 arguing, *inter alia*, that the application is not receivable *ratione materiae* in part because a final administrative decision on the leg injury under Appendix D is still under consideration before ABCC and that a decision has only been taken with respect to the Applicant's pulmonary illness claim under Appendix D.

9. In relation to the pulmonary injury claim, the Respondent submits that the application is not receivable *ratione temporis* because the Applicant did not file his application within 90 days in accordance with art. 8.1(d)(ii) of the Dispute Tribunal's Statute.

10. The Applicant was exempt from requesting management evaluation of the contested decision under staff rule 11.2(b). The decision of the Secretary of the ABCC to deny the pulmonary illness claim was based on medical advice from the MSD, which is a technical body for the purposes of staff rule 11.2(b).

Respondent's submissions on receivability

Receivability *ratione materiae*

11. Only a final administrative decision, taken at the end of an administrative process, may be subject to judicial review by the Dispute Tribunal.

12. The Applicant submitted two claims for compensation under Appendix D at the same time: one with respect to injuries to his legs, and the other with respect to pulmonary illness. The contested decision concerns the Applicant's pulmonary illness claim only. The Mission clarified this matter with the Applicant in January 2018.

13. A final decision has not been taken with respect to the Applicant's injuries

to legs claim, which remains under consideration. Accordingly, there is no administrative decision with respect to that claim capable of review under art. 2.1(a) of the UNDT Statute.

Receivability ratione temporis

14. The Applicant did not meet the 90-day time deadline to file the application under art. 8.1(d)(ii) of the UNDT Statute.

15. The Applicant was exempt from the requirement to request management evaluation, as the decision on the pulmonary illness claim was “taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General” in accordance with staff rule 11.2(b).

16. ST/AI/2018/7 (Technical bodies) entered into force on 18 May 2018. For administrative decisions taken prior to that date, the jurisprudence of the Appeals Tribunal concerning what constitutes a technical body under staff rule 11.2(b) applies.

17. The Management Evaluation Unit’s (MEU) consistent practice has been to treat decisions on claims under Appendix D on the basis of a medical determination from MSD as a decision taken pursuant to advice of a technical body under staff rule 11.2(b). MEU has the authority to determine what constitutes a technical body in accordance with ST/SGB/2010/9 (Organization of the Department of Management). In accordance with ST/SGB/2011/4 (Organization of the Office of Human Resources Management), MSD is established within the Office of Human Resources Management.

18. The decision by the Secretary of the ABCC on the pulmonary illness claim was based directly upon MSD’s medical advice that the Applicant’s illness is not service-incurred. Accordingly, the Applicant was exempt from the requirement to request management evaluation under staff rule 11.2(b).

19. The Applicant was required to file his application within 90 days of the contested decision under art. 8.1(d)(ii) of the Statute. The time limit expired on 8 March 2018, 90 days after the date of notification of the decision. The Applicant

did not make a prior written request for an extension of the time limit by the Dispute Tribunal. As the application was not filed within the 90-day time limit, the Dispute Tribunal does not have competence to hear the application.

Applicant's submissions on receivability

20. The Applicant's main argument is that the application should be receivable because the ABCC decided to dispose the matter of the pulmonary illness first rather than the leg injury case which took place before the pulmonary disease whereas both claims were submitted at the same time.

21. According to the Applicant, the Respondent's submission that no final decision has been taken with respect to the injuries to his legs claim is "not an acceptable defense of non receivability *rationae materiae*" for the following reasons.

The decision to classify the order in which the two claims submitted at the same time, would be reviewed, is part of that discretionary power of the Respondent and by extension of its advisory bodies such ABCC and MSD. It is that irrationality, capriciousness and selectiveness in which the Respondent decides on how it chose to delay the review of the evidently more straightforward claim of the leg injury while finding the need to prioritizing the more challenging matter of the pulmonary disease claim that makes this Application receivable.

22. The Applicant concedes that the MEU's "consistent practice has been to treat decisions on claims under Appendix D on the basis of a medical determination from MSD as a decision taken pursuant to advice of a technical body under staff rule 11.2(b)"⁴ and that therefore,

the Respondent cannot claim that [he] did not meet the 90-day time deadline to file Application under Article 8(l)(d)(ii) of the Statute. By acknowledging that ABCC reviewed first the claim 6924, the Respondent cannot then apply the requirement of a normal claim principle for the claim 6923 still pending before ABCC.

23. Time limits are intended to give the Organization timely notice of a possible claim and not to "trick" staff into foreclosing their right of recourse or as

⁴ Applicant's response to the receivability issues raised by the Respondent, para. 6.

a way for the Respondent to claim premature application based on the fact that a claim is still under review.

24. If the Respondent and his advisory bodies are allowed to be able to selectively prioritize cases based solely on the prospect of success of the Applicant's claim and use the delay tactic in adjudicating and deciding on claims that have no prospect of success, they would obviously fail in their obligation to afford due process to applicants.

25. For these reasons, the Applicant submits that his application is receivable *rationae materiae* and *rationae temporis*.

Considerations on receivability

26. The Applicant filed his application on 15 May 2018 contesting the decision of the ABCC 'denying [my] rights for compensation claim for [my] claims which submitted in 2013'. The Applicant came to know about the decision on 8 December 2017. He requested a management evaluation of the decision on 1 January 2018.

Receivability *Rationae Temporis* on decision regarding Pulmonary Injury

27. The decision to deny the Applicant compensation for pulmonary illness claim was based on a recommendation by the MSD which is a designated technical body within the meaning of staff rule 11.2(b). As per ST/SGB/2011/4, MSD is established within the Office of Human Resources Management with its Director acting as medical adviser on matters pertaining to the ABCC. The core functions of MSD are to advise on, *inter alia*, medico-administrative matters, including medical aspects of the provision of medical advice to the ABCC. Professional staff members in MSD with medical qualifications are responsible for providing medical advice on claims under Appendix D. As such, MSD acts as a technical body in providing medical advice on claims under Appendix D.⁵

28. This being the case, the Applicant was required under staff rule 11.2(b) to submit his application against the ABCC's decision directly to the UNDT without

⁵ ST/SGB/2011/4, section 8.

first having recourse to MEU for review.

29. The fact that the Applicant took his case before MEU for evaluation does not in itself render the application irreceivable. It is the delay in filing the application with the UNDT that is an issue.

30. Staff rule 11.4(b) provides that:

Where a staff member is not required to request a management evaluation, pursuant to staff rule 11.2(b), he or she may file an application directly with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received notification of the contested administrative decision.

31. The Applicant presented his application to the UNDT for consideration on 15 May 2018. This was outside the statutory 90-day period. In such cases, UNAT jurisprudence stipulates that the UNDT should not receive the application. Time limits are meant to be adhered to strictly unless the rules provide for exceptions.⁶

32. In this application, the Applicant has not shown any exceptions to the general rule on time limits neither has he shown that he had prior leave from the UNDT to file his application beyond the statutory time limit.

33. The application relating to the decision of the ABCC on compensation for pulmonary illness is rejected for being time-barred.

34. It is accordingly dismissed.

Receivability *Rationae Materiae* on the injuries to the Applicant's legs claim

35. The Applicant concedes in his response to the question of receivability that the ABCC has not made a decision relating to the injuries to his legs claim. He, however, is wondering why it has taken longer for the ABCC to review and make a decision on the injuries to his legs which occurred earlier than the pulmonary illness and also, according to him, the injuries to the legs claim is less complicated than the pulmonary illness claim. The Applicant is of the view that the ABCC 'selectively prioritizes cases based solely on the prospect of success of

⁶ *Cooke* 2012-UNAT-275, para. 26; *Mezoui* 2010-UNAT-043, para. 21.

the Applicant's claim and use the delay tactic in adjudicating and deciding on claims that have no prospect of success'. He argues that if allowed to do this, [ABCC] 'would obviously fail in their obligation to afford due process to applicants'.

36. These are questions and issues which only the ABCC can address. This Tribunal is restrained from making any comment or observation on the alleged undue delay and the other allegations because it has not heard the ABCC's side of the story regarding the Applicant's accusations.

37. The Tribunal's competence is restricted to making a determination on an application that has been properly and regularly brought before it. In this regard, art. 2.1(a) of the Statute of the UNDT provides that:

The Tribunal shall be competent to hear and pass judgment on an application filed by an individual...(a) to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment... (emphasis added).

38. The key element in the UNDT's jurisdiction, under the circumstances of this case, is that there must be an administrative decision to appeal against. In the absence of an administrative decision no appeal can lie to the UNDT.

39. Consequently, where the issue of whether a sickness is service-incurred is pending before the ABCC pursuant to Appendix D of the Staff Rules, any challenge on that issue before the UNDT, or UNAT, is premature.⁷

40. On the basis of the Applicant's own admission that no decision has been made in relation to his claim for the injuries to his legs and considering the relevant statutory provisions and jurisprudence, the claim against the Secretary-General under this head must be dismissed on the ground that it is premature.

41. It is so dismissed.

⁷ *Samuel Thambiah* 2013-UNAT-385, para. 46.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 22nd day of November 2019

Entered in the Register on this 22nd day of November 2019

(Signed)

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