



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member with the Department of Safety and Security (“DSS”), contests the Secretary-General’s decision 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 notified to the Applicant on 1 May 2019 by the Secretary of the Advisory Board on Compensation Claims (“ABCC”).

2. The complex procedural history relating to the Applicant’s claim to the ABCC under Appendix D is set forth in Judgment No. UNDT/2019/019 issued on 7 February 2019, which was rendered by another Judge of the Dispute Tribunal in a separate case (Case No. UNDT/NY/2016/048). In this judgment, the Dispute Tribunal rescinded the Secretary-General’s decision of 8 May 2015 to deny the Applicant’s claim relating to the incident on 27 July 2013 and remanded his case to the ABCC for reconsideration. Accordingly, the ABCC reconsidered the Applicant’s case and the contested decision was notified to him on 1 May 2019.

3. On 6 July 2019, the Applicant filed the present application.

4. For the reasons below, the Tribunal finds that the Secretary-General properly exercised his discretion in denying the Applicant’s claim and therefore the application is dismissed.

Facts

5. A detailed factual background of the case relating to the Secretary-General’s first review and denial of the Applicant’s claim on 8 May 2015 is set forth in Judgment No. UNDT/2019/019. The following outline of facts reflects those circumstances that are relevant to the present case.

6. On 7 February 2019, by Judgment No. UNDT/2019/019, after considering numerous allegations of procedural violations raised by the Applicant, the Tribunal

found that the ABCC failed to act in a proper, reasonable, and lawful manner for the following reasons, as summarised in para. 86 of UNDT/2019/019:

(a) [the ABCC] failed to provide adverse material ([closed-circuit television (“CCTV”)] video footage) to the Applicant to view and comment; (b) it did not consider his prior medical history relevant in reviewing his Appendix D claim; and (c) it considered [the United Nations Compensation Board (“UNCB”)]’s recommendation and related documentation without demur.

7. Accordingly, the Dispute Tribunal rescinded the contested decision and remanded the Applicant’s case to the ABCC for reconsideration:

87. ... the case is remanded to the ABCC for a full and proper reconsideration of the Applicant’s claim. This includes giving the Applicant the opportunity to access and comment on any adverse material to be considered by the ABCC, including the CCTV video footage of the incident, and considering the Applicant’s prior medical history and removing any documentation related to the UNCB recommendation.

8. On 26 February 2019, the ABCC sent an email to the Applicant stating that the CCTV video footage of the incident was already provided to his Counsel and asked for his comments. On 5 March 2019, the ABCC sent a letter by courier reiterating the request in the 26 February 2019 email.

9. On 11 March 2019, the Applicant provided his comments to the ABCC via email. In the email, he asserted, among other things, that the CCTV video footage was edited to conceal the fact that the barrier at the post 103 south entrance by the United Nations Headquarters in New York, where the incident occurred on 27 July 2013, was broken seven days prior to the incident, which created risky and unsafe conditions at the entrance and, in any event, the CCTV video footage is not a reliable source to make a medical determination. He requested to review the video footage as captured in the original recording source, accompanied by an expert of his choosing. He also claimed that he did not receive the CCTV video footage through his Counsel. He further claimed that the Secretary of the ABCC is biased against him and thus should be excluded from the handling of his case since the Secretary of the ABCC

had been responsible for allegedly not providing all the Applicant's medical reports to the ABCC previously.

10. On 13 March 2019, noting that it appeared that the Applicant's Counsel had not provided him with the CCTV video footage, the ABCC provided the Applicant with a copy of the video footage via courier, requesting him to provide comments by 22 March 2019.

11. On 25 March 2019, the ABCC informed the Applicant that it had sent a copy of the CCTV video footage of the incident to the Applicant's residence via courier. The ABCC, providing a tracking number, informed him that a delivery attempt was made on 15 March 2019, and yet nobody was available to accept the delivery, which was then sent to an office of a courier company where he could pick it up. The ABCC also sent an email to the Applicant with a link to the CCTV video footage available in a cloud storage service. The ABCC asked him to provide his comments immediately.

12. On the same day (25 March 2019), in a reply email, the Applicant reiterated his assertion that the CCTV video footage was edited with ill-intent and he would like to have a chance to see it from the recording source accompanied by an expert.

13. The ABCC reconsidered the Applicant's claim at its 514th meeting on 9 April 2019. According to the ABCC's recommendation, the ABCC considered the following for its recommendation:

Having considered at its 514th meeting on 9 April 2019, and previously at its 482nd meeting, the claim submitted by the above-referenced claimant for compensation under Appendix D to the Staff Rules for multiple injuries and [i]llnesses (*inter alia*, back and neck pain, lateral hearing loss, lateral tinnitus, carpal tunnel right wrist, branchial neuritis, reduced speech discrimination, vestibular deficit, vision abnormality, and [post-traumatic stress disorder ("PTSD")]) in connection with an incident with his vehicle at the security stinger barrier located at the main entrance gate (post 103) of the UNHQ compound on 27 July 2013 when he was reporting to work;

Having also considered the documentation submitted by the claimant, the circumstances surrounding the incident, the DSS Investigation

report, the impact and damage to the claimant's vehicle; the security video footage of the incident, the medical reports submitted by the claimant; and the advice of the Medical Director,

14. The ABCC concluded that "there is no credibility whatsoever to the incident as related by the claimant or to the injuries alleged to have been sustained as a result thereof" and recommended to deny the Applicant's compensation claim on the following grounds:

Having (i) viewed the video footage of the incident three times, noting that the contact with the security barrier was minor and that the claimant was walking around and bending immediately after the event without showing any signs of injury, (ii) noted the distance from the car at full stop to the barrier was about one meter, precluding acceleration sufficient to cause the collision alleged by the claimant, and (iii) considered the conclusion of [the Medical Services Division ("MSD")] that (a) on review of the security video, the speed at which the car was moving was less than 4 km/h (less than the average walking pace of 5 km/h) and that the cushioning nature of the front bumper as seen in the video tape would reduce any impact and (b) the impact was minor and the injuries are neither "physiologically plausible" nor consistent with the incident,

Having further considered pursuant to the [Dispute Tribunal] order ... (a) the recent comments submitted by the claimant, including those regarding the video footage of the incident, in particular his allegations of the doctoring of the video for which the claimant provided no support, (b) the recent opinion of [a medical doctor, name redacted] of MSD, which considered the claimant's prior medical history, and (c) the assessment and award of the [the United Nations Joint Staff Pension Fund ("UNJSPF")] disability benefit to the claimant (noting, of course, that the UNJSPF applies a different standard under a different statute and is not charged with determining whether an injury or illness is service-incurred and therefore eligible for workers' compensation),

Noting MSD's statement that both its opinions (the one prepared for the previous consideration of the case by the ABCC, and the one prepared further to the [Dispute Tribunal's] judgment) were based upon medical reports submitted by the claimant, the prior medical history of the claimant, the nature of the injuries, the lack of coherence of the same, their development over time, the video footage of the incident, and the self-reporting nature of virtually all of them (which are pain-related and subjective)—all of which rendered the injuries and

conditions implausible to have resulted from the incident at the security barrier;

Being resolute in its findings as stated above in reviewing the claimant's assertions (including his initial report about the incident) and in re-examining the video footage;

15. On 29 April 2019, on behalf of the Secretary-General, the Controller countersigned the ABCC's recommendation.

16. 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's recommendation.

Consideration

The applicable legal framework and the issues of the case

17. In the present case, as stated above, by Judgment No. UNDT/2019/019, the Dispute Tribunal fully considered the merits of the Applicant's various allegations, and remanded the case to the ABCC for a full and proper reconsideration of the Applicant's claim. The Dispute Tribunal directed the ABCC to (a) give the Applicant the opportunity to access and comment on any adverse material to be considered by the ABCC, including the CCTV video footage of the incident, (b) consider the Applicant's prior medical history and (c) remove any documentation related to the UNCB recommendation, to rectify the procedural irregularities found in the Judgment.

18. The Tribunal notes and adopts the applicable legal framework as set forth in paras. 56 to 62 of Judgment No. UNDT/2019/019. In particular, the Tribunal notes that there are two elements that must be established for a claim under Appendix D: (a) whether a claimant suffered from the injury or illness as alleged, and (b) whether the illness or injury was attributable to the performance of official duties on behalf of the Organization. The Tribunal notes that the ABCC is established to make recommendations to the Secretary-General concerning claims for compensation and

can decide on procedures it considers necessary for the purpose of discharging its responsibilities (see art. 16 of Appendix D). In reviewing the Secretary-General's exercise of discretion in the Appendix D matters, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

19. In light of the parties' submissions in the present case, Judgment No. UNDT/2019/019 and the applicable legal framework, the Tribunal will address the following issues:

- a. Did the ABCC rectify the procedural irregularities as directed by the Dispute Tribunal in Judgment No. UNDT/2019/019?
- b. Was the contested decision to deny the Applicant's claim the result of a lawful exercise of discretion?

Did the ABCC rectify the procedural irregularities as directed by the Dispute Tribunal?

20. Having reviewed the full record of the ABCC's consideration of the Applicant's claim and the Secretary-General's decision to deny the Applicant's claim based on the ABCC's recommendation, the Tribunal finds that the ABCC rectified the three procedural irregularities as directed by the Tribunal as the record shows that:

- a. The ABCC provided the CCTV video footage of the incident to the Applicant, via email and courier, and provided him with an opportunity to

comment. The Applicant provided his comments by email on 11 and 25 March 2019;

b. The medical doctor of MSD provided his medical opinion to the ABCC, in which he considered, among other things, medical reports submitted by the Applicant and the prior medical history of the Applicant;

c. The ABCC no longer considered any documentation related to the UNCB recommendation.

21. Therefore, the Tribunal finds that the ABCC rectified the procedural irregularities as directed by Judgment No. UNDT/2019/019 in its reconsideration of the Applicant's claim.

22. However, the Applicant also alleges that the contested decision was procedurally irregular, unlawful, and improper and was tainted with improper considerations and factual errors, and was based on violations of due process rights of the Applicant. The Tribunal will review these allegations as below.

Was the contested decision to deny the Applicant's claim the result of a lawful exercise of discretion?

23. Having reviewed the application, in light of the standard of review set forth in *Sanwidi*, the Tribunal considers that the Applicant challenges the contested decision on the following five grounds: (a) the alleged procedural irregularities related to the handling and review of the CCTV video footage; (b) the alleged failure to consider relevant materials, namely his medical reports and a witness statement provided during the investigation of the incident occurred on 27 July 2013; (c) the consideration of allegedly irrelevant materials, namely the medical opinion of the medical doctor of MSD and the CCTV footage for a medical determination; (d) the allegation that the decision was tainted with improper considerations; and (e) the Controller's alleged failure to make an independent and reasoned decision.

24. The first issue raised by the Applicant is related to the CCTV video footage. He argues, in essence, that: (a) the retrieval of the CCTV video footage and related investigation were conducted improperly in violation of ST/SGB/2004/15 (Use of information and communication technology resources and data); (b) it was wrong for the ABCC to rely on a layperson's observation of a possibly edited and manipulated CCTV video footage; (c) it was wrong for the ABCC to rely on the CCTV video footage to make a medical determination of the existence and degree of injuries and illnesses; and (d) he was improperly not allowed to view the CCTV video footage from the original recording sources.

25. The Applicant already raised these allegations previously, which were all considered by the Tribunal in Judgment No. UNDT/2019/019, at paras. 67 to 75. In that Judgment, the Tribunal found that it was appropriate for the ABCC to consider the CCTV video footage for a review of his claim, and after considering various allegations raised by the Applicant, only found the ABCC's failure to provide him with the CCTV video footage unlawful and directed the ABCC to provide a copy of the CCTV video footage to the Applicant to see and comment. It is noted that the Dispute Tribunal did not order the ABCC to allow the Applicant to view the CCTV video footage from the original recording resource as he requested. Since the ABCC reconsidered the Applicant's claim and rectified the procedural irregularity relating to the handling of the CCTV video footage pursuant to Judgment No. UNDT/2019/019, this Tribunal will not entertain allegations related to the handling of the CCTV video footage again. Having found that the ABCC provided the Applicant with the CCTV video footage and gave him an opportunity to comment, the Tribunal rejects the Applicant's allegations in this regard.

26. The second issue raised by the Applicant is that the ABCC did not consider all relevant matters, namely his medical reports and a witness statement obtained during the investigation of the incident occurred on 27 July 2013. In particular, the Applicant argues that the ABCC completely disregarded the medical reports of his treating medical practitioners and ignored a statement from a security officer obtained during

the investigation, who heard a loud banging sound at the moment of the incident which could explain his hearing injuries.

27. As already noted above, the Tribunal finds that the ABCC received and considered a medical opinion of the medical doctor of MSD, who reviewed medical reports submitted by the Applicant along with his prior medical history. The Tribunal therefore rejects the Applicant's allegations in this regard. With regard to the alleged failure to consider a security officer's statement obtained during the investigation of the incident, the Tribunal notes that the ABCC reviewed the DSS investigation report and thus finds that this allegation is without merit.

28. The third issue raised by the Applicant is that the ABCC considered irrelevant materials, namely the medical opinion of the medical doctor of MSD and the CCTV footage, for a medical determination. In particular, the Applicant argues that it was wrong for the ABCC to rely on advice from a medical doctor who did not treat or evaluate the Applicant and that it was wrong for the ABCC to rely on the CCTV video footage to make a medical determination of the existence and degree of injuries and illnesses and ABCC should have used medical imaging techniques to evaluate his injuries.

29. The Tribunal notes that, as mentioned above, there are two elements that must be established for a claim under Appendix D: (a) whether a claimant suffered from the injury or illness as alleged, and (b) whether the illness or injury was attributable to the performance of official duties on behalf of the Organization. And the basis for the denial of the Applicant's claim in this case was not that the Applicant did not suffer injuries or illnesses as documented in his medical reports, but that they were not attributable to the performance of official duties on behalf of the Organization. Therefore, the Applicant is incorrect to say that the ABCC relied on the CCTV video footage to make a medical determination of the existence and degree of his injuries and illnesses. The CCTV video footage clearly shows that the Applicant was not injured during the incident, which formed a basis for the ABCC's conclusion that his injuries and illnesses are not service-incurred. Therefore, the allegation that art. 13 of

Appendix D, which provides that “[t]he determination of the injury or illness and of the type and degree of disability shall be made on the basis of reports obtained from a qualified medical practitioner”, was breached is irrelevant to the issue in the present case. Moreover, ordering a medical evaluation is an option, not a requirement, for the Secretary-General to evaluate injury or illness under art. 14 of Appendix D.

30. Further, while it is true that the medical doctor of MSD did not evaluate the Applicant’s injury or illness, his opinion was as to whether the injury or illness as alleged was service-incurred. The Tribunal notes that art. 16 of Appendix D provides that the ABCC “may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under the provisions of this article”, and finds that the ABCC properly decided to rely on the medical doctor of MSD to review the Applicant’s medical reports and prior medical history to make that determination.

31. The fourth issue raised by the Applicant is that the contested decision was tainted with improper considerations because of the involvement of the medical doctor of MSD and the Secretary of the ABCC. In particular, the Applicant argues that the medical doctor had an improper ulterior motive to reject his claim as he had been allegedly in charge of the occupational safety at the time of the incident, which allegedly occurred due to the Organization’s failure to repair the broken barrier at the post 103 south entrance. The Applicant claims that the Secretary of the ABCC was biased which was shown by his alleged failure to provide the full medical reports to the ABCC and his violation of the Applicant’s right to medical confidentiality in relation to a review of his original claim. The Applicant also alleges that the investigation of the incident conducted by the DSS in 2013 was ill-motivated.

32. Under the well-established jurisprudence, the burden of proving any allegations of ill-motivation rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38). While the Applicant made the above allegations of improper considerations, he did not provide any

supporting evidence and hence the Tribunal finds that these allegations are without merit.

33. Finally, the fifth issue raised by the Applicant is that the Controller failed to make an independent and reasoned decision separate from the ABCC recommendation, the claim which was previously rejected by the Dispute Tribunal in Judgment No. UNDT/2019/019, paras. 84-85. In short, “there is no express provision requiring the Controller to make a distinct pronouncement and thus simply referring to and approving a reasoned recommendation by the ABCC was sufficient” (para. 85).

Conclusion

34. In light of the foregoing, the Tribunal rejects the present application.

(Signed)

Judge Joelle Adda

Dated this 18th day of December 2019

Entered in the Register on this 18th day of December 2019

(Signed)

For Nerea Suero Fontecha, Registrar, New York