



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/107

Judgment No.: UNDT/2020/091

Date: 19 June 2020

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GILES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Michael P. Giles, Esq.

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Nusrat Chagtai, AAS/ALD/OHR

Background

1. On 12 October 2018, the Applicant, a former FS-4 Security Officer with the United Nations Organization Mission in the Democratic of the Congo (“MONUSCO”), filed an application before the Dispute Tribunal contesting the Advisory Board on Compensation Claims’ (“ABCC”) letter of 29 December 2017 denying/discontinuing his ABCC disability benefit. He filed an amended application on the same day.

2. The Respondent filed a reply on 13 December 2018 in which it is argued that the application is not receivable *ratione materiae* and *ratione temporis*.

Facts

3. The Applicant was initially appointed to the Organization on 8 March 2007. On 27 April 2010, while serving with MONUSCO, he sustained an injury at work. His appointment was terminated for health reasons effective 27 December 2011.¹ In November 2011, the United Nations Joint Staff Pension Fund (“UNJSPF”) awarded him a disability benefit under art. 33 of the Regulations, Rules and Pension System of UNJSPF (“the UNJSPF Regulations”).

4. On 18 December 2012, the ABCC recommended to the Secretary-General that, pursuant to Appendix D to the Staff Regulations and Rules: (i) the Applicant’s injury be recognized as service-incurred, resulting in a 12% permanent loss of function of the whole person and he be awarded compensation under art. 11.3(c) of Appendix D; and (ii) the permanent loss of function be recognized as a partial disability with 100% loss of earning capacity and he be awarded an annual compensation under art. 11.2(d) of Appendix D.²

5. On 19 February 2013, the Secretary-General approved the ABCC’s recommendation.³

¹ Reply, annex 2.

² Amended Application, annex 3, (ABCC recommendation of 18 December 2012).

³ Amended Application, annex 3, at page 7.

6. On 9 October 2014, Mr. Kevin James, Chief Executive Officer, Hostile Control Tactics LLC, issued a letter to attest that the Applicant had never been an employee of their company and that he was featured on their website as a freelance, independent contractor (see paragraph 23 below).⁴

7. On 18 February 2015, UNJSPF's Chief, Legal and Compliance Unit, wrote to the Applicant's Counsel requesting that he submit copies of tax returns for 2011, 2012, 2013 and 2014 and any other documentation that he deemed relevant as proof of the amount of his earnings since he started to receive a disability benefit from the UNJSPF as well as a sworn statement detailing the exact periods and the nature of the work that he had undertaken since his separation from the United Nations.⁵

8. By letter dated 13 March 2015, the Applicant's Counsel provided affidavits as requested but did not provide copies of his tax returns for the years 2011 to 2014, noting that those tax returns contained personal information which was not his alone and, as such, their contents were subject to federal and state privacy laws.⁶

9. On 5 May 2015, UNJSPF's Chief, Legal and Compliance Unit, wrote to the Secretary of the ABCC with a summary of its review of the Applicant's case including information provided regarding his prior employment, i.e., (i) September 2011 to October 2012 - work as an Instructor for the United States Federal Air Marshalls teaching two 45-minute classes per week, and (ii) January 2013 to May 2014 – Watcher Federal Law Enforcement Training Center, where he stated that the duties were performed sporadically. She noted that the Applicant did not provide information on the amount earned in either capacity and declined to provide tax returns, as they contained information pertaining to his wife. She also indicated the decision of the UNJSPF Standing Committee to suspend its disability benefits payment to the Applicant as of 1 August 2015 pending further review in November 2015.⁷

⁴ Amended application, annex 3, at page 31.

⁵ Reply, annex 4.

⁶ Ibid.

⁷ Reply, annex 5.

10. On 12 May 2015, at its 483rd meeting, the ABCC recommended that the previously awarded disability benefit of 100% partial disability be discontinued based on the evidence regarding his earning capacity and internet research results showing that he actively promoted his work capabilities in the security field employment. The recommendations were approved on behalf of the Secretary-General on 5 June 2015.⁸

11. On 25 June 2015, the Applicant was informed that his benefit of 100% partial disability previously awarded had been discontinued.⁹

12. At the request of the United Nations Medical Officer, the Applicant was seen for an independent medical evaluation (“IME”) on 22 November 2016.¹⁰

13. On 22 December 2016, the UNJSPF notified the Applicant that, based on the results of the IME, his disability benefits that had been suspended by the decision of its Staff Pension Committee (“SPC”) at its April 2015 meeting, would be reinstated as of 1 November 2016. The reinstatement was pending further consideration by the Committee at its next meeting in April 2017 of the earnings he declared pursuant to art. 33(f) of the UNJSPF Regulations.¹¹

14. On 3 February 2017, the Applicant’s Counsel informed the ABCC of UNJSPF’s decision to reverse its previous decision to suspend the Applicant’s disability benefit and requested that the ABCC follow suit and reinstate his compensation benefits retroactively to the date of the initial suspension on 5 June 2015. The Applicant followed up on his request on 18 February, 10 March and 25 April 2017¹².

15. On 25 April 2017, UNJSPF informed the Applicant that it had considered his case at its 323rd meeting held on 12 April 2017 and had decided to pay the disability benefit that was suspended between August 2015 and October 2016. He was further

⁸ Reply, annex 3 and application, annex 3, at page 9.

⁹ Reply, annex 6.

¹⁰ Amended application, annex 3, at page 27.

¹¹ Ibid., at page 10.

¹² Ibid., at pages 6 and 12.

informed that for purposes of the Fund's records and in order to effect payment of the retroactive amount, he was required to provide a sworn statement stating that he had not undertaken any paid employment besides the employment he declared that he undertook in 2012.¹³

16. On 27 April 2017, the Applicant's Counsel transmitted the Applicant's sworn and signed statement as requested to UNJSPF.¹⁴ The information was also shared with the ABCC for its consideration as part of the Applicant's on-going request for a reversal of its previous decision.

17. On 25 May 2017, the Secretary of the ABCC responded to the Applicant's Counsel and explained that the findings of the ABCC are independent of those of the UNJSPF. He also explained that the ABCC decision of 5 June 2015 was subject to review for consideration of continuing loss of earning capacity. The Applicant's Counsel was invited to provide evidence regarding the ABCC's conclusions on his earning capacity for consideration.¹⁵

18. On 14 June 2017, the Applicant's Counsel requested the ABCC to reconsider its decision and provided: medical reports from October and November 2016; a sworn statement stating that the Applicant had not undertaken any employment other than that previously declared to the UNJSPF; and the email of 9 October 2014 from the Chief Executive Officer of Hostile Control Tactics LLC stating that the Applicant had not worked for the company.¹⁶

19. By letter dated 29 December 2017, the Secretary of the ABCC informed the Applicant's Counsel that the Applicant's claim was considered at its 505th meeting and that the ABCC had not changed its decision from the 483rd meeting discontinuing a disability benefit. The Secretary further advised that the ABCC may consider the Applicant's case prospectively, but not retroactively, upon submission of his complete

¹³ Ibid. at page 14.

¹⁴ Ibid., at page 22.

¹⁵ Ibid., at page 16.

¹⁶ Ibid., at page 18.

and true income tax returns filed with the United States Internal Revenue Service for 2011.¹⁷

20. By letter dated 19 February 2018, the Applicant requested for management evaluation of this 29 December 2017 decision.¹⁸

21. On 16 July 2018, the Management Evaluation Unit upheld the contested decision.

Considerations

Receivability

22. The submission that the application is not receivable *rationae materiae and rationae temporis* is without merit and is rejected. Contrary to the Respondent's assertion, the ABCC's letter of 29 December 2017 is an administrative decision given that it was arrived at after the Applicant, in response to the ABCC's email of 25 May 2017 inviting him to furnish new evidence. He furnished new evidence relating to each of the issues raised, provided documents to support his request for reinstatement of the award and the ABCC went ahead to assess the fresh evidence.

23. The fresh evidence was extensive as it included medical reports from October and November 2016, a sworn statement stating that the Applicant had not undertaken any employment other than that previously declared to the UNJSPF and the email dated 9 October 2014 from the Chief Executive Officer of Hostile Control Tactics LLC stating that the Applicant had not worked for the company. This rendered the process completely new and it could have even led to a reversal of the decision. That the decision was not reversed does not render it a reaffirmation of an earlier decision, which was taken without considering the fresh evidence.

24. The Tribunal finds that the fresh information which the Applicant provided to

¹⁷ Amended application, annex 2.

¹⁸ Amended application, annex 3.

the ABCC with his renewed request of 14 June 2017 made the request a new one, and so the 29 December 2017 decision was an administrative decision. The Applicant's challenge to it was within 90 days of it in accordance with staff rule 11.4(b). The application is receivable *rationae materiae* and *rationae temporis*.

25. The key issue for determination is whether the ABCC properly determined that the Applicant does not qualify for the Appendix D benefit under art. 11.2(d).

26. Since this determination was a matter of discretion on the part of the ABCC, in line with established legal principles,¹⁹ the Tribunal will only examine whether the decision is legal, rational, procedurally correct and proportionate and whether relevant matters were ignored and irrelevant matters considered in making the contested decision.

27. The Applicant laid five arguments for challenging the decision and they will be resolved in the order in which they were presented.

28. In the first ground the Applicant maintains that the benefits in both the UNJSPF and the ABCC are governed by a claimant's "earning capacity", and since the UNJSPF reinstated the benefit to the Applicant, the ABCC should follow suit to avoid inconsistency in a situation where the applicable standards are the same.

29. The Respondent countered that the system for the award of compensation under Appendix D to the staff regulations and rules is distinct from the award of disability benefit under art. 33 of the UNJSPF Regulations. That being so, the fact that the UNJSPF awarded the Applicant a disability benefit under art. 33 of its regulations does not entitle him to a benefit under art. 11.2(d) of Appendix D.

30. The Tribunal's jurisprudence²⁰ has clarified that the UNJSPF and the ABCC are independent bodies, with different benefits, are governed by different legal

¹⁹ See for example *Karseboom* 2015-UNAT-601.

²⁰ *Massi* UNDT/2016/100.

frameworks and that they also have different decision-makers.

31. A cursory reading of the legal provisions relevant to the issue will lead to the same position. Article 11.2(d) of Appendix D provides thus;

Where, upon the separation of a staff member from United Nations Service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity, he shall be entitled to receive such proportion of the annual compensation provided for under article 11.1 (c) as corresponds with **the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience.**(Emphasis added).

Article 33(a) of the UNJSPF's regulations on the other hand provides thus;

... a disability benefit shall be payable to a participant who is found by the [UNJSPF's] Board **to be incapacitated for further service in a member organization due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration**". (Emphasis added).

It is clear that while art. 11.2(d) requires proof of an adverse effect upon earning capacity in an applicant's normal occupation or an equivalent occupation appropriate to his qualifications and experience art. 33(a) does not require proof that an applicant suffered a loss of earning capacity.

32. The Applicant's argument that the issue of whether the injury he sustained had an impact on his earning capacity can be resolved without ruling out the possibility that he can earn is a fallacy and it is premised on an erroneous assumption that "incapacitation" is synonymous with "loss of earning capacity". "Incapacitation" is a purely medical factor while "earning capacity" is a mixed medical and "loss of earnings factor". One only requires medical evidence to prove incapacitation, while medical evidence of disability and a finding as to loss of earning capacity is required to prove loss of earning capacity.

33. Article 11.2(d) to Appendix D which requires proof of an adverse effect upon

earning capacity has different applicable standards from art. 33(a) of the UNJSPF Regulations which require proof of incapacitation. The Tribunal finds that the ABCC correctly interpreted and applied the law.

34. The Applicant's second argument that the ABCC did not reinstate the award, yet the UNJSPF on whose decision ABCC relied to suspend the benefit reinstated theirs has been answered by the finding that the two bodies are governed by different legal regimes whose standards differ.

35. The assertion that the ABCC relied on the UNJSPF's decision is even denied by the ABCC who maintain that the recommendation to the Secretary-General to discontinue the Appendix D benefit was based on their own investigations. The finding that ABCC applied the law correctly overrides the argument that they did not act as the UNJSPF did.

36. The third argument still seeks to link UNJSPF and ABCC for purposes of decision-making. The Applicant asserts that the ABCC benefit is subject to review for consideration of continuing loss of earning capacity, which is the periodic disability review of the UNJSPF, not the ABCC, and that UNJSPF has now reviewed his continuing loss of earning capacity and his continuing eligibility to receive the ABCC benefit and concluded he continues to have 100% loss of earning capacity, and, as such, is still eligible to receive the ABCC benefit. The argument has no legal basis and it is rejected.

37. In his fourth argument, the Applicant submits that rather than proving that he had earning capacity during 2012 and 2013, his earnings during that period only prove that he in fact did not have earning capacity because in each case he had to cease his efforts to earn compensation because his physical disability/incapacity would not allow him to perform the duties and functions of the positions he attempted. This, he claims, is supported by his most recent medical reports, both from his treating physician and the doctor he was sent to see by the UNJSPF, which both establish that he is totally disabled and incapacitated. His lack of earning capacity is also supported by the fact

that he has no other earnings since his most recent failed attempt back in 2013. He has no earnings from 2014 to date.

38. The argument that the Applicant's earnings during 2012 and 2013 only prove that he did not have earning capacity is not for the Tribunal to determine since the answer to it would only be relevant to the decision to grant or not to grant the award which is not in the mandate of the Tribunal.

39. The issue of proof of the Applicants earning capacity was obviously considered by the ABCC before arriving at the impugned decision. It is clear from the Applicant's argument that his views as to the nature of evidence which would be relevant to such proof differ from those of the ABCC. The ABCC sought to review the Applicant's tax returns which the Applicant declined to avail. It was not for the Applicant to determine the nature of proof that was necessary in the circumstances, since the law (art. 15 of Appendix D) gives that mandate to the ABCC.

40. The Applicant's tax returns are in fact relevant evidence in the determination of the question of his earning capacity in view of the evidence that he had worked part-time in 2011-2012 as an instructor at United States Federal Air Marshall and 2013-2014 as a Watcher at the Federal Law Enforcement Training Center. The Applicant's failure to produce the tax returns overrides all matters of pleading and forms the basis for a finding as the Tribunal does, that all relevant matters were considered by the ABCC before arriving at the impugned decision.

41. In the fifth argument, the Applicant denies that he actively promoted his work capabilities in the security field on-line and posted pictures of himself posing with heavy weaponry to showcase his skills and capacities in the security field in connection with employment. He maintains that the posts and pictures were outdated having been taken and posted before he sustained the injuries. And, that they were posted by Hostile Control Tactics, LLC.

42. The ABCC doesn't deny that the impugned decision was partly based on that evidence. The Tribunal cannot assail the decision given the Applicant's failure to avail

his tax returns by which the ABCC would have established the quantum and source of the Applicant's earnings during the period in issue.

43. On the whole, the Tribunal finds that the ABCC considered all relevant matters in arriving at the decision, and that the impugned decision is legal, rational, and procedurally correct.

Conclusion

44. The application is dismissed.

(Signed)

Judge Margaret Tibulya

Dated this 19th day of June 2020

Entered in the Register on this 19th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi