



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/022

Judgment No.: UNDT/2020/167

Date: 14 September 2020

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

FORTEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member with the Department of Management, Strategy, Policy and Compliance in New York, contests the Administration's decision of 11 January 2019 to deny his claim for compensation under Appendix D to the Staff Rules ("Appendix D") on the basis that it was time-barred and that there were no exceptional circumstances to warrant the acceptance of the late claim. The Applicant also claims that the Organization breached its duty of care towards him.

2. For the reasons stated below, the application is rejected.

Facts

3. While serving in the United Nations Office in Burundi, the Applicant contracted malaria. He was hospitalized at the Nairobi Hospital from 4 March 2005 to 3 April 2005. According to the discharge summary, the Applicant suffered from falciparum malaria which was complicated by acute renal failure and anemia. The hospital performed a 2-D echocardiogram when he had pulmonary congestion and it showed that he had global hypokinesia and a mild pleural effusion. The Applicant was seen by a cardiologist and started taking medications.

4. According to the Applicant, after he recovered from malaria, he was medically cleared as fit for duty in 2005 for his service in Burundi and again medically cleared in 2006 for his service in Haiti.

5. In 2011, the Applicant had recurrent congestive heart failure requiring hospitalization. The Applicant submits that he was diagnosed with chronic heart failure for the first time in 2011. Since 2011, the Applicant has received extensive medical therapy relating to his congestive heart failure.

6. In 2015, the Applicant had a defibrillator/pacemaker implanted.

7. On 14 and 22 September 2017, the Applicant's cardiologist provided a letter on his medical condition. The doctor wrote that the Applicant suffered heart failure in 2005 when he contracted malaria and further noted that he had recurrent congestive heart failure in 2011 and had a defibrillator implanted in 2015. The letter also showed the results of echocardiogram measured in 2011, 2013, 2014, and 2016.

8. On 25 September 2017, the Applicant filed a claim for compensation under Appendix D. In the memorandum attached to his claim form, the Applicant wrote, "Recently and for the first time since I joined this Organization I became aware of the existence of Appendix D". He wrote that nobody advised him that compensation under Appendix D existed when he suffered extremely difficult trauma in 2005 and that the Burundi office failed to inform the Headquarters of his illness, which then could have been forwarded to the Advisory Board on Compensation Claims ("ABCC") for review.

9. On 26 October 2017, the Applicant was notified that the Secretary of ABCC denied the claim on the basis that his claim was time-barred.

10. On 14 March 2018, the Applicant requested that his late claim be accepted on the ground of exceptional circumstances.

11. Following management evaluation, the Applicant filed an application with the Dispute Tribunal (Case No. UNDT/NY/2018/040). After the Secretary of ABCC informed the Applicant on 25 October 2018 that he decided to rescind the decision and would reconsider a claim, the Applicant withdrew his application in Case No. UNDT/NY/2018/040 and the case was closed by Judgment No. UNDT/2018/119.

12. On 16 November 2018, the Secretary of ABCC requested medical advice from the Director, Medical Services Division ("MSD") to determine the deadline of the Applicant's claim and whether exceptional circumstances exist in this case.

13. On 6 December 2018, Dr. Rowell, a Senior Medical Officer of MSD, sent a memorandum to the Secretary of ABCC. In response to a question as to when the date

of onset of the Applicant's heart condition was, Dr. Rowell wrote that the Applicant's cardiac symptoms were diagnosed on 8 March 2005 and likely developed in 24-48 hours prior to the diagnosis. Dr. Rowell also noted that since the Applicant continued to have ongoing regular reviews with cardiologists, who ordered cardiac testing and prescribed cardiac medication, it would be unlikely for such treatment to have continued over 10 years from March 2005 without a medical provider enquiring about, commenting on or explaining the reason for ongoing cardiac investigations and the use of heart failure medication in a relatively young man. Dr. Rowell also wrote that there was no medical support provided for exceptional circumstances.

14. On 11 January 2019, the Secretary of ABCC informed the Applicant that there were no exceptional circumstances that warranted the late acceptance of the claim ("the contested decision"). In the contested decision, the Secretary of ABCC wrote that his office consulted MSD and both his office and MSD reviewed all the materials, medical reports, e-mails and the letter the Applicant submitted since 2017. Reiterating what Dr. Rowell wrote in the memorandum dated 6 December 2018, the Secretary of ABCC concluded that onset of the illness was March 2005 and thus the Applicant's claim was over 11 years past the deadline (i.e. four months from onset of illness) and time-barred.

15. The Secretary of ABCC also noted that while the Applicant claims that his cardiologist only connected malaria to his heart condition in September 2017, the doctor's note of September 2017 does not state so. It was also noted that the Applicant received further treatment for his heart condition in 2011 and 2015.

16. On 6 February 2019, the Applicant requested management evaluation of the contested decision and the Administration's alleged breach of duty of care.

17. By letter dated 15 March 2019, the Administration upheld the contested decision.

18. On 10 April 2019, the Applicant filed the present application with the Dispute Tribunal.

Consideration

Receivability

19. The Respondent argues that the Applicant's claim of breach of care is not receivable. Therefore, the Tribunal will consider this issue first.

20. In this case, the Applicant claims that the Organization breached its duty of care towards him. First, the Applicant argues that there was no proper follow-up medical treatment and advice after his hospitalization in 2005 despite the seriousness of his illness caused by malaria. Second, the Administration failed to provide any advice regarding his entitlements under Appendix D even though the Manager's Guides to Appendix D recognize the managers' roles in facilitating Appendix D claims. The Applicant submits that these failures violate staff regulation 1.2(c), which directs the Secretary-General "to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them".

21. In his reply, the Respondent submits that the Applicant's claim of breach of duty of care is not receivable *ratione materiae*. The Respondent submits that the Appeals Tribunal has held that a claim of negligence cannot be made under Appendix D, and a claim of negligence must be submitted to the Organization for a decision and subsequently for management evaluation. The Respondent submits that the Applicant has not followed this process and therefore this claim is not receivable.

22. In response, the Applicant submits that the Organization's duty of care is an ongoing obligation and may involve failure to act as well as written administrative decisions. The Applicant argues that the decision rejecting the Applicant's claim under Appendix D represents a rejection of the Organization's duty of care towards the Applicant. In addition, the Applicant submits that his claim of breach of duty of care was submitted for management evaluation and yet was not addressed.

23. In *Wamalala* 2013-UNAT-300, the Appeals Tribunal held that “a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D” since Appendix D is a workers’ compensation system, which “is a no fault insurance or scheme whereby employers must cover occupational injury or illness” (paras. 25, 27).

24. The Appeals Tribunal further held that a claim of gross negligence should be submitted “to the Secretary-General for consideration and decision and subsequently for management evaluation” for the claim to be considered receivable (*Wamalala*, para. 31).

25. The Tribunal notes that the Applicant raised claims of negligence or breach of duty of care in his submission for Appendix D claim. However, as the Appeals Tribunal held, a claim of negligence is a “separate action which cannot be included in a claim” under Appendix D and should be submitted separately “to the Secretary-General for consideration and decision”.

26. The record shows that the Applicant did not submit a separate claim for breach of duty of care to the Secretary-General for consideration and decision. Therefore, under the clear jurisprudence of the Appeals Tribunal, the contested decision by the Secretary of ABCC cannot constitute an implied decision to reject the Applicant’s claim of breach of duty of care.

27. While it is true that the review of the breach of duty of care claim is requested in the Applicant’s request for management evaluation, this does not cure the procedural defect which is the Applicant’s failure to request the Secretary-General’s consideration and decision.

28. Accordingly, the Applicant’s claim of breach of care is not receivable.

The applicable legal framework and the issues of the case

29. Appendix D was revised by ST/SGB/2018/1 which took effect on 1 January 2018. According to art. 6.1 (transitional measures), “[f]or claims filed for incidents that

occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied”. In this case, since the incident in question occurred in 2005, the previous Appendix D is applicable (“the applicable Appendix D”).

30. Article 12 of the applicable Appendix D (Time limit for entering claims) provides that “Claims for compensation under these rules shall be submitted within four months of the death of the staff member or the injury or onset of the illness; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a claim made at a later date”.

31. The Secretary of ABCC rejected the Applicant’s claim under Appendix D on the basis that a claim was not submitted within four months from onset of the illness and that there were no exceptional circumstances that warranted the late acceptance of the claim.

32. The Applicant raises two main arguments to contest the decision. First, the Applicant claims that the Secretary of ABCC did not have the proper delegated authority to make the contested decision. Second, the Applicant claims that the contested decision was made due to an incomplete and flawed understanding of the nature of the Applicant’s medical condition and therefore should be rescinded.

33. The Tribunal will address each claim in turn.

Did the Secretary of ABCC have the proper delegated authority to make the contested decision?

34. The Respondent submits that the Secretary of ABCC took the contested decision under the delegation of authority from the Controller which is set forth in the memorandum dated 22 May 2017. In the memorandum, the Controller delegated authority to the Secretary of ABCC to “waive, or deny, requests for waiver of the deadline for filing claims under Appendix D”.

35. The Applicant submits that such authority cannot be delegated to the Secretary of ABCC via memorandum from the Controller since the memorandum is not a promulgated instruction or rule and cannot supersede the requirement of Appendix D which directs the Controller to obtain an advisory opinion of ABCC to make a decision on behalf of the Secretary-General.

36. Under ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), the authority concerning “[g]rant of compensation for death, injury or illness up to \$25,000” was delegated to the Controller.

37. ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules) modified the delegation of authority system, but sec. 4.2 provides that “the delegations of authority which currently exist through administrative issuances, memorandums or other written communications shall continue to be applicable” unless stated otherwise. In sec. 2.3, it provides that “[d]elegated authority may be further delegated, unless such further delegation has been excluded in writing”.

38. Therefore, in 2017, the Controller, who had the valid delegated authority relating to Appendix D claims up to \$25,000 in accordance with ST/AI/234/Rev.1, could further delegate such authority as provided in ST/SGB/2015/1, which the Controller did via memorandum dated 22 May 2017. Contrary to the Applicant’s argument, there is no requirement that such subdelegation is only valid when it is done through promulgated rules or regulations.

39. The Applicant further argues that such delegation is not lawful on the ground that Appendix D requires the Secretary-General to obtain an advisory opinion of ABCC. However, art. 16 of the applicable Appendix D only states that the ABCC “may be consulted by the Secretary-General on any matter connected with the implementation and administration of these rules”. Therefore, contrary to the Applicant’s argument, the Controller is not required to obtain an advisory opinion of ABCC in all circumstances.

40. Then the question is whether the delegation of authority to the Secretary of ABCC was still valid when the contested decision was made on 11 January 2019, after the delegation of authority system was further updated by ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules) effective 1 January 2019.

41. By ST/SGB/2019/2, the Secretary-General “rescind[ed] all existing delegations of authority and subdelegations of authority”.

42. On 30 December 2018, two days before ST/SGB/2019/2 took effect, the Secretary-General sent the document entitled “Delegation of Authority” to all heads of entities. In this document, it provides that, as a transitional measure, “the United Nations officials in the entity performing functions under a delegation of authority which was in effect as at 31 December 2018 are hereby sub-delegated, under this delegation, the authority to perform the same functions through 31 March 2019, unless and until this sub-delegation is expressly changed by the head of entity”.

43. Accordingly, the Tribunal finds that on the date of the contested decision, the Secretary of ABCC had the valid delegated authority to take decisions with respect to the approval, payment and denial of Appendix D claims, as had previously been delegated to him by the Controller on 22 May 2017.

Did the Secretary-General reasonably exercise his discretion by taking the contested decision?

44. The next question is whether the contested decision was lawful.

45. As the Appeals Tribunal held in *Karseboom* 2015-UNAT-601, paras. 40-47, the Dispute Tribunal’s judicial review of the Secretary-General’s decision relating to Appendix D matters is guided by the well-established jurisprudence in *Sanwidi* 2010-UNAT-084. That is, when judging the validity of the exercise of discretionary authority,

... 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.

46. When it comes to a medical issue, the Appeals Tribunal held in *Karseboom* 2015-UNAT-601 that the Dispute Tribunal is not competent to make medical findings, and therefore, if there is any procedural flaw relating to a medical issue, the Dispute Tribunal must remand the case to a competent medical body.

47. The Applicant claims that congestive heart failure, which is the subject of his claim, is a progressive disease and it may not manifest itself at the time of the original causal event, like in this case. The Applicant submits that he was never diagnosed or treated for congestive heart failure until 2011 and he only became aware of the connection between the 2005 illness and his congestive heart failure in the fall of 2017 when his cardiologist reviewed his full medical file.

48. The Respondent submits that the Secretary of ABCC reasonably concluded, based on advice from MSD, that the date of onset of the Applicant's illness was in March 2005, as demonstrated by the 2005 medical report. The Respondent further submits that the decision that there were no exceptional circumstances is reasonable in view of the length of the delay, the responsibility of staff members to be aware of the time limit to submit claims under Appendix D, and the medical advice provided by MSD.

49. Having reviewed the record on file and the parties' submissions, the Tribunal finds that the Secretary-General reasonably exercised his discretion to conclude that the Applicant's claim was time-barred and no exceptional circumstances existed in this case.

50. The Tribunal notes that in the contested decision, the Secretary of ABCC wrote that he reviewed all the materials, medical reports, e-mails and the letter the Applicant submitted since 2017 and considered the opinion of MSD. Therefore, the Tribunal finds that the Secretary of ABCC considered all relevant materials, as required under *Sanwidi*.

51. The Secretary of ABCC concluded, based on advice from MSD, that the date of onset of illness was March 2005. As the Appeals Tribunal held in *Karseboom*, the Tribunal is not competent to make medical findings and can only decide if there was any procedural flaw in reaching medical findings.

52. The record shows that MSD considered the discharge summary of the Nairobi Hospital in 2005 and other medical reports submitted by the Applicant and concluded that the onset of illness was March 2005. The Tribunal does not find any procedural flaw in MSD's medical findings.

53. Even if the Tribunal accepts the Applicant's claim that he fully recovered from cardiac symptoms in 2005 and onset of the illness was in 2011, his claim was still six years late.

54. Then the question is whether the Secretary of ABCC lawfully concluded that there were no exceptional circumstances in this case.

55. The Appeals Tribunal recently examined the question of whether exceptional circumstances exist for suspension or waiver of the court deadlines in *Gelsei* 2020-UNAT-1035. In *Gelsei*, the Appeals Tribunal stated that “[t]he relevant circumstances in which such an extension or waiver should be allowed by the [Dispute Tribunal] are variable and highly fact-dependent, so long as they are ‘exceptional’” (para. 23). While the Appeals Tribunal stated that “the interests of justice” and “a balancing of the rights and interests of the parties” should be considered in determining the exceptional circumstances (para. 24), it stated that the circumstances should meet “the test of untypicality or unusualness” (para. 34). The Appeals Tribunal also cited

Sylvester 2018-UNAT-872 in which it held that the applicant's lack of knowledge of the relevant rules was not an excuse for the delay and thus there were no exceptional circumstances in such case (para. 30).

56. In this case, the Secretary of ABCC concluded that there were no exceptional circumstances to allow the late acceptance of the Applicant's claim, relying on MSD's advice. MSD noted that the Applicant continued to have ongoing regular reviews with cardiologists, and thus it was unlikely that a medical provider did not enquire about, comment on or explain the reason for ongoing cardiac investigations over 10 years.

57. In response to the Applicant's claim that he only became aware of the connection between the 2005 illness and his congestive heart failure in the fall of 2017, the Secretary of ABCC noted that the doctor's note of September 2017 submitted by the Applicant does not support such claim.

58. The record shows that the Applicant was hospitalized for congestive heart failure in 2011, had a defibrillator implanted in 2015, and had echocardiogram in 2011, 2013, 2014, and 2016. Despite these ongoing reviews of his heart conditions, the Applicant claims that his doctor was only able to connect the 2005 illness to his congestive heart failure in the Fall of 2017. However, the Tribunal agrees with the Secretary of ABCC's conclusion that the doctor's note submitted by the Applicant does not support his claim. His cardiologist simply stated that the Applicant suffered heart failure in 2005 when he contracted malaria and he received further treatment thereafter.

59. The Tribunal further notes that in the Applicant's submission of the Appendix D claim of 25 September 2017, he wrote, "Recently and for the first time since I joined this Organization I became aware of the existence of Appendix D". It appears that this is the real reason why the Applicant submitted his claim in September 2017. As the Appeals Tribunal stated, the Applicant's lack of knowledge of the relevant rules does not constitute exceptional circumstances.

60. Therefore, the Tribunal finds that the Secretary-General did not abuse his discretionary authority in concluding that there were no exceptional circumstances warranting the acceptance of the Applicant's late claim.

Conclusion

61. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 14th day of September 2020

Entered in the Register on this 14th day of September 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York