



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2020/024  
UNDT/NBI/2020/062  
Judgment No.: UNDT/2020/200  
Date: 3 December 2020  
Original: English

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**Before:** Judge Margaret Tibulya  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

ASLAM

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Marcos Zunino, OSLA

**Counsel for the Respondent:**  
Nicole Wynn, AAS/ALD/OHR, UN Secretariat  
Rosangela Adamo, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant serves on a continuing appointment at the P-5 level as the Chief Procurement Officer at the United Nations African Union Hybrid Operation in Darfur (“UNAMID”).

## **The application**

2. On 31 March 2020, the Applicant filed an application before the United Nations Dispute Tribunal in Nairobi to challenge the Respondent’s decision to reject his claim for compensation under Appendix D of the United Nations Staff Rules and Regulations as time-barred. The decision was made by the Claims and Entitlements team at the Kuwait Joint Support Office (“KJSO”).

3. On 30 April 2020, the Respondent filed a motion for receivability to be determined as a preliminary issue, and with that for the deadline for his submissions on the merits to be deferred.

4. On 5 May 2020, the Tribunal issued Order No. 087 (NBI/2020) granting the motion and deferred the filing of the deadline for the Respondent’s reply until receivability had been determined. The Tribunal also directed the parties to make further submissions on a series of issues.

5. Both parties complied with the directions in Order No. 087 (NBI/2020) and filed their respective submissions on 11 May 2020.

6. On 11 August 2020, the Registry received a second application from this Applicant, and registered it as UNDT/NBI/2020/062. Here, the Applicant seeks to challenge the ABCC’s decision to reject his compensation claim as time barred.

7. On 6 October 2020, the Tribunal issued Order No. 196 (NBI/2020) finding Case No. UNDT/NBI/2020/024 receivable.

8. On 14 October 2020, the parties met for a case management discussion. The Tribunal asked for their views pertaining to consolidation of Case Nos. UNDT/NBI/2020/024 and UNDT/NBI/2020/062 seeing as both cases stem from the same set of facts and seek the same relief.<sup>1</sup> The Tribunal also sought the parties' views on their willingness to resolve this matter *inter partes* and/or whether they would prefer that this matter be referred to the United Nations Ombudsman and Mediation Services ("UNOMS") for resolution of this dispute without recourse to further litigation.

9. On 16 October 2020, the Tribunal issued Order No. 204 (NBI/2020) consolidating the two cases and directing the parties to engage in settlement discussions, with or without the assistance of UNOMS.

10. The parties informed the Tribunal that the Respondent has taken the position that he "does not believe that the case is amenable to a settlement."

11. The Tribunal then issued Order No. 223 (NBI/2020) vacating the order suspending proceedings, and directed the parties to advise on whether they wished for an oral hearing in this matter. The parties jointly advised the Tribunal that they are amenable to this matter being decided on the basis of their written submissions.

## **Considerations**

### **Receivability**

12. The Respondent requested the Tribunal to determine the receivability of this application as a preliminary matter pursuant to art. 19.1 of the UNDT Rules of Procedure. The Tribunal found that the application is receivable, and hereby gives reasons for its decision.

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<sup>1</sup> Case No. UNDT/NBI/2020/024 challenges the decision by the Claims and Entitlements team at the Kuwait Joint Support Office, which rejected the Applicant's Appendix D claim as time-barred. In UNDT/NBI/2020/062, filed on 11 August 2020, the Applicant challenges the ABCC's decision to reject his compensation claim as time barred.

13. The Respondent argues that:

a. the application is not receivable *ratione materiae* under staff rule 11.2(c) and art. 8.1(c) of the UNDT Statute since the Applicant did not request management evaluation of the 6 June 2019 decision to reject his 26 May 2019 claim; and that,

b. it is also not receivable *ratione materiae* as moot.

14. Art 8.1(c) of the UNDT Statute provides that an application shall be receivable if the Applicant has previously submitted the contested administrative decision for management evaluation, where required.

15. Staff rule 11.2(c) provides that a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

**Whether the application is not receivable *ratione materiae* under staff rule 11.2(c) and art. 8.1(c) of the UNDT Statute.**

16. That management evaluation of the 6 June 2019 decision was not sought is not disputed. The only issue is whether the email of 6 June 2019 constituted an administrative decision within the meaning of staff rule 11.2(c) and art 8.1(c) of the UNDT Statute so that since it was not submitted for management evaluation, the Applicant's claim for compensation would not be receivable.

17. The Tribunal rejects the Respondent's arguments that the 6 June 2019 constituted an administrative decision principally because Appendix D requires that compensation claims must be submitted using a signed ABCC claim form (art. 2.1(b)) which the Applicant's 26 May 2019 email was not. That email was moreover generic

and was addressed to a number of senior officials of different offices and divisions and covering a range of issues (e.g., placing him in a duty station suitable to someone with his condition, reimbursing his medical expenses, granting him sick leave and recognising his condition as service-incurred), and so cannot be regarded as an Appendix D claim.

18. With respect to the assertion that the email of 6 June 2019<sup>2</sup> constituted a reviewable administrative decision because it unequivocally informed the Applicant that the receipt of his claim was past the deadline set out in art. 12 of Appendix D, and that it had direct legal consequences on the Applicant's rights, i.e., rejecting his claim for compensation, the Tribunal looked at the first sentence of the email which states; "Thank you for bringing this matter to our attention" meaning that the Applicant's email of 26 May 2019) only **brought a matter to the attention** (emphasis added) of the ABCC. It cannot by any standards be taken to have been a claim document.

19. The arguments that the 10 December 2019 email merely reiterates the administrative decision of 6 June 2019 since it refers to it, and that the 6 June 2019 administrative decision was unequivocal in that it clearly stated that the Applicant's claim was time-barred in accordance with the timelines set out in art. 12 of Appendix D are without merit.

20. The Applicant's email of 26 May 2019 was not an Appendix D claim. The fact that to his email of 26 May 2019 the Applicant attached supporting documents for the assessment of his claim for compensation in terms of art. 1.8 of Appendix D, is not sufficient to place it under the category of a compensation claim in view of the format in which it was in.

21. The argument that neither the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH") medical officer nor the Management Evaluation Unit has the authority to determine what constitutes an Appendix D claim

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<sup>2</sup> Application, annex 16.

does not negate the Applicant's valid argument that since the MEU is an integral part of the Secretariat<sup>3</sup>, its 8 November 2019 decision that the Applicant had not properly submitted an ABCC claim<sup>4</sup> and that the ABCC had confirmed to it on 18 July 2019 that there were no claims submitted by the Applicant to the ABCC is relevant in determining the key issues in this application. The fact that the Respondent's arguments contradict what the MEU relayed to the Applicant should be resolved in favour of the Applicant given that the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary.<sup>5</sup> The fact that Dr. Bernhard Lennartz of DHMOSH did not consider the 26 May 2019 email as an Appendix D claim and recommended that the Applicant submit one, explaining to him the process of an Appendix D claim must also be resolved in the Applicant's favour.<sup>6</sup>

22. For the above reasons, the Tribunal determines that the 6 June 2019 email was not in response to a compensation claim by the Applicant and did not therefore constitute a decision to reject his claim for compensation. The Applicant was correct in not submitting it for management evaluation.

23. It is in evidence that the Applicant submitted an Appendix D claim on 4 December 2019 and a decision was made and communicated to him on 10 December 2019. He submitted that decision for management evaluation in accordance with staff rule 11.2(c) and art. 8.1(c) of the UNDT Statute.<sup>7</sup> On the basis of these facts, the Tribunal finds that this application is receivable *ratione materiae*.

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<sup>3</sup> *Simmons* 2012-UNAT-221.

<sup>4</sup> Application, annex 15.

<sup>5</sup> *Farzin* 2019-UNAT-917.

<sup>6</sup> Application, annexes 17 and 18.

<sup>7</sup> Application, annexes 17 and 18.

**Whether the application is not receivable *ratione materiae* as moot.**

24. The Respondent maintains that there is no longer a live issue upon which the Tribunal is competent to pass judgment as relief, since the Applicant is requesting the Tribunal to remand his case to the ABCC to make a new determination. As the ABCC reconsidered the Applicant's claim on 31 January 2020, he has been granted the relief he requested.

25. The Tribunal determines that there is a live issue upon which it is competent to pass judgment, given that the ABCC on all occasions only considered the issue of receivability and not the merits of the Applicant's claim.

26. Since the Tribunal has found that application is receivable, the merits of the application must be considered. This application is not moot.

**Considerations on the merits.**

27. In keeping with Tribunal jurisprudence,<sup>8</sup> the Tribunal will determine whether the decision to reject the Applicant's Appendix D claim is legal, rational, procedurally correct, and proportionate. The Tribunal will also consider whether relevant matters were ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse.

28. The Applicant's claim was rejected on a finding that it was not receivable because he did not seek management evaluation of the 6 June 2019 decision. The Tribunal's finding that the 10 December 2019 decision of the KJSO was the relevant administrative decision for purposes of determining the issue of receivability of the claim, a fact not considered by the ABCC means that relevant matters were ignored and irrelevant matters considered in rejecting the Applicant's claim.

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<sup>8</sup> *Sanwidi* 2010-UNAT-084, para. 40.

29. The Respondent maintains that the Applicant's claim relates to alleged injuries from 1996 when the Applicant was not a staff member, and that those from 2017 are out of time. Further, that there were no exceptional circumstances warranting a waiver of the deadlines. Specifically, the Respondent submits that the fact of suffering from post-traumatic stress disorder does not mean that he was incapable of filing a claim; and that he was fit to work and functional according to his own physicians.

30. The Tribunal has carefully perused the Applicant's claim form (Annex 18) and found that the Applicant is in fact not seeking compensation for injuries he sustained in 1996, but for those he sustained on "17 March 2017; 10 July 2019 and continuing."

31. The Respondent's determination that the alleged 15 March 2017 x-ray incident is untimely was made without considering the Applicant's argument that he could not beat the deadline due to incapacity. Further, there is no indication that the Applicant was requested to avail evidence to support his assertion that he has been incapacitated since March 2017; or that he was unable to file a timely claim owing to his incapacitation.

32. While the Advisory Board on Compensation Claims may adopt procedures as it considers necessary for discharging its functions (article 1.4 of Appendix D), there is a valid assumption that in assessing a claim, the ABCC will require the Applicant to furnish evidence to clarify areas which they deem to be unclear. This assumption is based on the article 1.8 obligation on a claimant to provide the evidence necessary to fully support a claim for compensation and to fully and promptly comply with any request by the United Nations in connection with a claim. In this case, the Applicant's views were not sought before conclusions that his claim that the x-ray machine fell on his knee was not corroborated by the Special Investigation Unit's ("SIU") investigation or any other independent evidence; that neither the Royal Care Hospital admissions form from Khartoum nor any medical report attribute the Applicant's longstanding knee injury to the x-ray machine falling on his knee, among others, were arrived at.



33. The ABCC determination that the deadline for filing a claim runs from the date of the incident is only partly true. Both the repealed 2017 and the 2018 Appendices D in art. 2.1(c) provide that the time limitation shall run from the date of the incident or the date on which the staff member *becomes aware, or reasonably should have been aware of such injury* (emphasis added). The Tribunal accepts that in this case, the Applicant became aware of the full extent of the injury he sustained on 10 July 2019.

34. The Tribunal finds that there were fundamental flaws in the processing of the Applicant's Appendix D claim, including the failure to consider relevant matters and to obtain the Applicant's comments about key evidence which formed the basis of the Respondent's decision.

35. The Tribunal determines that this is an appropriate case in which to invoke art. 10.4 of the UNDT Statute to remand the case for institution or correction of the correct procedure.

### **Conclusion**

36. Pursuant to art. 10.4 of the UNDT Statute it is ordered that the case be remanded, with the concurrence of the Secretary-General, for determination of the merits of the Applicant's claim. The Applicant should be allowed to make further observations to the ABCC before it reviews his claim.

37. The Applicant's motion seeking leave to adduce evidence supporting a claim for compensation for harm pursuant to art. 10.5(b) of the statute is rejected. The fact that an order remanding the case has been issued prevents the Tribunal from deliberating on the merits of the case, and so the Tribunal cannot order art. 10.5 compensation.

Case Nos.: UNDT/NBI/2020/024

UNDT/NBI/2020/062

Judgment No.: UNDT/2020/200

*(Signed)*

Judge Margaret Tibulya

Dated this 3<sup>rd</sup> day of December 2020

Entered in the Register on this 3<sup>rd</sup> day of December 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi