



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2021/101

Judgment No.: UNDT/2022/046

Date: 18 May 2022

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

BARBER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**  
Shubha Suresh Naik, OSLA

**Counsel for the Respondent:**  
Yehuda Goor, AAS/ALD/OHR, UN Secretariat

## **Introduction and procedural background**

1. The Applicant is a former staff member who served as a Close Protection Officer in the United Nations Support Office in Somalia (“UNSOS”), in Mogadishu, Somalia. On 30 November 2021, he filed an application seeking the rescission of the implied administrative decision taken by the Advisory Board on Compensation Claims (“ABCC”) not to process his review filed pursuant to art. 17 of Appendix D to the Staff Rules (Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on Behalf of the United Nations), (“the contested decision”).

2. The deadline for submission of the reply was on 31 December 2021.

3. On 8 December 2021, the Respondent filed a motion for summary judgment requesting the Tribunal to address receivability as a preliminary matter pursuant to art. 19 of the United Nations Dispute Tribunal (“UNDT”) Rules of Procedure. In said motion, the Respondent also requests the Tribunal to dismiss the application as not receivable and suspend the Respondent’s deadline to file a reply pending the Dispute Tribunal’s determination of this motion.

4. The case was assigned to the present Judge for the purpose of a ruling on the motion on 9 December 2021. By Order No. 259 (NBI/2021), the deadline for the reply was suspended until the case was assigned to a judge who would rule on whether receivability would be determined as a preliminary matter.

5. On 12 April 2022, following a deployment to Nairobi, the case was once again assigned to the present Judge for a ruling on the Respondent’s 8 December 2021 motion.

6. Pursuant to directions from the Tribunal, the Applicant filed a response to the Respondent’s motion on 19 April 2022.

### **Summary of the relevant facts**

7. The Applicant joined UNSOS on 19 April 2015 as a Close Protection Officer at the FS-4/Step 6 level, on a fixed-term appointment.<sup>1</sup>

8. On 7 June 2015, he injured his back whilst on duty in Mogadishu. On 15 March 2016, he submitted a claim under former Appendix D to the ABCC for the injuries that he sustained whilst on duty.<sup>2</sup>

9. On 16 November 2017, the Secretary of the United Nations Staff Pension Committee (“UNSPC”) informed the Applicant that he had been determined incapacitated for further service and that he was entitled to a disability benefit pursuant to art. 33 of the Regulations of the United Nations Joint Staff Pension Fund (“UNJSPF”). His appointment was terminated due to health reasons pursuant to staff regulation 9.3(a)(iii) effective 28 November 2017.<sup>3</sup>

10. On 18 January 2018, the ABCC issued a decision on the Applicant’s claim for compensation authorizing payment of medical expenses in the amount of USD1,425.07 as well as payment for 32 days of special sick leave credit. However, his claim of permanent loss of function and loss of earnings were yet to be decided.<sup>4</sup>

11. On 15 January 2019, the ABCC rated the Applicant’s impairment at 12% whole person and awarded him USD37,723 as compensation.<sup>5</sup>

12. On 6 February 2019, the Applicant requested the Kuwait Joint Support Office (“KJSO”) to communicate to ABCC that he wished to contest the impairment rating and compensation granted. KJSO forwarded his correspondence to the ABCC.<sup>6</sup>

13. On 13 February 2019, the Applicant submitted a request for a management

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<sup>1</sup> Application, para. VI(4).

<sup>2</sup> Ibid., at para. VI(5).

<sup>3</sup> Ibid., at para. VI(9).

<sup>4</sup> Ibid., at para. VI(10).

<sup>5</sup> Ibid., Annex 1.

<sup>6</sup> Ibid.

evaluation challenging what he considered to be an incorrect assessment of his medical condition and the rating level of impairment by the ABCC in its 15 January 2019 decision. On 13 March 2019, the Management Evaluation Unit (“MEU”) issued its decision explaining that challenges to decisions taken by the ABCC based on art. 5.1 of Appendix D are considered decisions taken pursuant to advice from a technical body and were thus outside of MEU’s scope of review.<sup>7</sup>

14. On 30 November 2021, the Applicant filed another request for a management evaluation challenging the contested decision.<sup>8</sup>

15. On 14 January 2022, MEU determined that the Applicant’s 30 November 2021 management evaluation request was not receivable.<sup>9</sup>

### **Parties’ submissions on receivability**

#### ***The Respondent***

16. The Respondent’s submissions on receivability are summarized below.

a. The application is not receivable *ratione materiae* because the Applicant failed to await a response to his MEU request and the time for MEU to respond has not yet expired. On the same day he filed the present application, 30 November 2021, the Applicant submitted a request for management evaluation with MEU.

b. The obligation to await the results of management evaluation as a condition to receivability is trite law. The Appeals Tribunal repeated the rationale underlying this rule time and again, explaining 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 and that for this goal to be met it is

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<sup>7</sup> Ibid., Annex 9. (Pages 1 and 2 of the management evaluation dated 14 January 2022).

<sup>8</sup> Respondent’s motion for summary judgment, Annex R/1.

<sup>9</sup> Application, Annex 9.

essential to clearly identify the administrative decision the staff member disputes.

c. It is well established that a matter cannot be before the MEU and the Dispute Tribunal simultaneously. As the Applicant has already filed his management evaluation request, he must now wait for MEU to respond before turning to the Dispute Tribunal. It would also be more efficient to await MEU's response before expending judicial resources on the present application, which is premised on facts that may become stale. Once the Applicant has the benefit of MEU's response in due course, he would be free to file a new application based on the new facts.

d. Even assuming that management evaluation is not required here, the application is still not receivable *ratione materiae* because the Applicant never appealed or properly requested reconsideration of the ABCC Secretary's decision. The Applicant concedes that he had 30 days to challenge the Secretary's decision, commencing on 16 January 2019. The Applicant now claims that in an email dated 6 February 2019 he timely appealed the decision. That is not the case. The Applicant's 6 February 2019 email cannot be regarded as an appeal or a formal request for reconsideration of the Secretary's decision pursuant to art. 17(a) of former Appendix D.

e. The Applicant's 6 February 2019 email suffers from deficiencies far worse than those identified by the Appeals Tribunal in *Kollie* 2021-UNAT-1138. The Applicant, who was represented by Counsel at all relevant times, did not reference art. 17(a). His purported request was raised together with various other issues in an email he sent to KJSO, not a specified letter to ABCC. And even assuming *arguendo* that a reconsideration request can be made to KJSO, the Applicant did not formally seek reconsideration of the Secretary's decision. Rather, in the 6 February 2019 email to KJSO the Applicant merely expressed his disappointment of the Secretary's decision, indicated that he contemplates appealing it and requested advice and guidance on next steps. Further, the

Applicant did not follow former Appendix D's requirements for seeking reconsideration, which mandate that the request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board.

f. The 6 February 2019 email cannot be regarded as an appeal of the Secretary's decision or a request to reconsider it. The Applicant, who was represented by Counsel at all relevant times, cannot rely on the Organization to provide him with advice on how to exhaust his legal rights vis-à-vis the Organization. By merely seeking guidance from KJSO and inquiring regarding his legal rights the Applicant has not submitted an appeal against the Secretary's decision.

g. The only administrative decision made regarding the Applicant is the Secretary's 15 January 2019 decision. As the Applicant acknowledged, he had 30 days to contest that decision by filing a request for reconsideration pursuant to art. 17(a) of former Appendix D. If the application seeks to contest the Secretary's 15 January 2019 decision, it is manifestly not receivable *ratione temporis*. It was filed outside the time limits of art. 8(1)(d) of the UNDT Statute and staff rules 11.2 and 11.4, whether or not management evaluation was required.

h. Under the Appeals Tribunal's consistent jurisprudence, new time limits will only start to run when the Administration reconsiders a decision at a later stage and issues a fresh administrative decision. In the present case, no new and fresh administrative decision was issued. It is undisputed that the Secretary-General (or the Controller on his behalf) did not review and reconsider the matter. The same applies here. No decision was made regarding the Applicant other than the one made by the Secretary on 15 January 2019.

***The Applicant***

17. The Applicant's submissions on receivability are summarized below.

a. In this case, there are two separate determinations that were required to be made: a) a purely legal determination by the Secretary-General to carry out the review of the ABCC claim since the wording of art. 17(a) of Appendix D is "Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties....at a later date"; b) a medical determination made by the ABCC after consideration of the medical report of the medical board as seen in arts. 17(b) and (c) of Appendix D. The first determination is not made by a "technical body" at all and almost certainly not by a technical body operating in the capacity for which it is has been consulted (medical advice), is not subject to the exception in staff rule 11.2(b).

b. The former Appendix D (which is applicable in the current case) is silent on the issue of approaching MEU for non-medical determination. On the other hand, the Manager's Guide on Appendix D issued in 2017 provides that decision of the ABCC which are not medical in nature can be challenged by way of management evaluation. Further, the new Appendix D provision contains a specific provision under art. 5.2 to cater to such situations. A management evaluation request was therefore, filed to address any potential receivability concerns and protect the rights and interests of the Applicant.

c. The potential concerns of the Applicant were not unfounded as seen from the MEU response dated 14 January 22 wherein they concluded that the request was not receivable as it was a decision of a technical body although the Applicant had not sought for medical determination but for compelling the Secretary-General to carry out a review of the Appendix D claim granted to the Applicant. In view of the management evaluation request now being disposed as not receivable, the present application is receivable *ratione materiae*.

d. There is a fundamental difference between *Kollie* and the Applicant's case and that lies in the fact that in *Kollie* the ABCC/Administration had responded to Mr. Kollie's request for reconsideration and even reconsidered it. However, in the Applicant's case there was complete radio silence by everybody involved; KJSO, ABCC, Secretary-General and the Medical Services Division on the review.

e. The present case is a classic example of the Respondent seeking to take advantage of the Organization's failure to follow its own procedures. The Respondent was required at the very least to acknowledge the receipt of the request for review and if such review was not in accordance with the requirements of art. 17, to apprise the Applicant of the same. For nearly three years all authorities represented by the Respondent failed to deal with the review.

f. Regarding the case of *Kollie* and the circumstances which have been equated to the present case, in the 6 February 2019 communication, the Applicant referred to the apparent deadline that he had to meet for the review, this indicates that the Applicant was in fact referring to art. 17 of the Appendix D review. The Respondent further state that it was not a review since it was sent to KJSO and not to ABCC. Towards this, the Applicant submits that the practice then in place to deal with Appendix D claims required KJSO to act as the conduit between ABCC and the staff member. The Applicant on occasion was stonewalled by the ABCC and all his requests had to be routed through KJSO. In some of the emails KJSO refused to give details of direct contact to ABCC and then suddenly after three months told the Applicant to deal directly with ABCC.

g. The Respondent stated that there was no review as Applicant did not seek review of the Secretary's decision but only contemplated filing an appeal and requested guidance for the further steps. Unlike *Kollie* in which the approval was given by the Controller, in the instance case the approval was



given by the Secretary of the ABCC. The forwarding email from KJSO referenced it as a decision of the ABCC. The 6 February 2019 email from the Applicant was a clear indication that he was seeking for review.

h. The Respondent argues that since the Applicant had not suggested a medical practitioner it was not a review since he had failed to fulfil the mandatory criteria of seeking review under art. 17(a). If indeed, the Applicant had not suggested the name which was mandatorily required the same should have been sought by the ABCC to indicate that the application could not be considered and was in fact incomplete. The Respondent is attempting to gain advantage from its apathy. If the 6 February 2019 email was indeed merely a request for further information on filing a review, the said information should have been provided to the Applicant. The Applicant over several months literally begged for information on further steps. The Respondent chose to stay silent rather than address the Applicant's query. Even if the Applicant was aware of the process or was even represented by a Counsel, the Administration cannot shirk away from its responsibility of addressing queries/complaints and reviews from the staff members.

i. The Respondent further argues that the Applicant's subsequent emails also indicate that he was merely seeking guidance on the procedure for review. This is an erroneous conclusion. The Applicant was aware of the deadline for filing review as seen from his 19 January and 6 February 2019 emails and therefore, he would not have engaged with Administration merely to seek guidance long after the deadline was over. On the other hand, it is logical to believe that having filed his review on 6 February 2019 within the deadline of 30 days, the Applicant was seeking guidance on the further steps involved in the process.

## Considerations

### Receivability *ratione materiae*

18. The Applicant is challenging the decision by the ABCC (a technical body) not to review his ABCC claim under the former Appendix D to the ABCC. While he was not legally required to request a management evaluation (staff rule 11.2(b), he requested one, and did so on the same day he filed this application. The Respondent, while acknowledging that the Applicant was not legally required to seek management evaluation, maintains that once he did so, the Applicant effectively waived his rights and that he should have therefore, waited for the MEU's response before filing this application.

19. The Tribunal determines, however, that since the Applicant was by law not required to request a management evaluation, his decision to seek one did not change the legal position and did not expose him to the procedural requirements relating to timelines within which he should have filed his application.

20. Since the Applicant was not required to seek management evaluation before filing his application, any missteps he may have made in his pursuit of a wrong remedy had no bearing on the receivability of his application. The receivability of the application is not affected by the fact that the Applicant requested management evaluation and failed to meet the requirements of that process when he was not legally bound to seek the evaluation in the first place.

21. The Respondent further maintains that the application is not receivable *ratione materiae* since the Applicant has never made any appeal or request to the ABCC for reconsideration of the impugned decision in accordance with art 17(a) of former Appendix D. This argument is based on the fact that the 6 February 2019 email to KJSO-HR-Claims<sup>10</sup>, on which the Applicant based his claim, was not addressed to the

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<sup>10</sup> Application, annex 1.

responsible body, the ABCC.

22. The Tribunal notes that the Applicant's assertion that this was how Appendix D claims were dealt with at the time, and that KJSO was the conduit between ABCC and the staff member, further that the Applicant was stonewalled by the ABCC and all his requests had to be routed through KJSO<sup>11</sup> was not denied by the Respondent. The Tribunal therefore accepts the Applicant's account and finds that the email of 6 February 2019 was addressed to the correct body.

23. It is also argued that the language of the email points to the fact that the Applicant was only seeking information from the addressee as opposed to making an appeal or requesting for reconsideration of a decision. The relevant parts of the email read as follows:

... I know you are just the messengers... with time running out I have no other choice to but to request that KJSO passes on my wish to contest their decision; again I haven't been able to make an informed decision on this action as they have repeatedly failed to provide the information requested, which is something I shall factor in when lodging a case for UNDT but, I have been left with no other choice, I simply can't wait in the hope that they do send an actual report etc. It would be appreciated if you could please talk me through the process of how I contest this decision and, what is involved?

24. In the Tribunal's view, since the Applicant acknowledges the fact that the addressee was only a "messenger", a finding that the email constituted an appeal would be misplaced. An appeal was only to be made to the principal and not a "messenger". This, coupled with the clear language of the email which points to the fact that the Applicant was only seeking guidance, leaves no doubt that the email was not an appeal against a decision or a request for reconsideration of a decision.

25. The Applicant maintains that considering that the addressee of the email never responded to the request for information and never even acknowledged receipt of the request for review, the email should be taken as having constituted an appeal and/or a

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<sup>11</sup> Paragraph 14 (a) of the Applicant's response to the Respondent's motion filed on 8 December 2021.

request for reconsideration of the Secretary's decision. Further, that the silence on the recipient's part should be interpreted as a decision to reject the request.

26. The Tribunal, however, considers that the guidance which was being sought by the Applicant was legal in nature. It for example included a request for information on whether the alleged review was not in accordance with the requirements of art. 17 of former Appendix D. The Applicant maintains that he should have been appraised about the same.

27. The required information should, however, have been sought from the Applicant's legal representatives, since the Applicant had a legal representative at all material times. The Respondent was not under any legal obligation to provide the information. The presumptions which the Applicant alludes to are moreover not legally premised and cannot therefore come into play as the basis for inferring a legal obligation against the Respondent.

28. Based on the above, the Tribunal finds that the Applicant has never made any appeal or request to the ABCC for reconsideration of the impugned decision in accordance with art. 17(a) of former Appendix D. The application is therefore not receivable *ratione materiae* on this count.

### **Receivability *ratione temporis***

29. Since the 6 February 2019 email was not an appeal/request for reconsideration of the Respondent's decision, the Tribunal agrees with the Respondent that the only contestable decision is the one of 15 January 2019. The Applicant had 30 days to contest that decision by filing a request for reconsideration pursuant to art. 17(a) of former Appendix D. But if he seeks to contest the 15 January 2019 decision, the application is manifestly not receivable *ratione temporis*. It was filed outside the time limits of art. 8(1)(d) of the UNDT Statute and staff rules 11.2 and 11.4, whether or not management evaluation was required.

**Judgment**

30. The application is dismissed for not being receivable *ratione materiae* and *ratione temporis*.

*(Signed)*

Judge Margaret Tibulya

Dated this 18<sup>th</sup> day of May 2022

Entered in the Register on this 18<sup>th</sup> day of May 2022

*(Signed)*

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi