



Before: Judge Francis Belle
Registry: Geneva
Registrar: Morten Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Endah Ayuningsih Indini, OSLA

Counsel for Respondent:

Esther Saabel, LPAS, UNOG

Introduction

1. On 11 September 2021, the Applicant, a staff member of the United Nations Department of Global Communications, filed an application with the Tribunal contesting the “lack of decision” from the Advisory Board on Compensation Claims (“ABCC”) on his claim for compensation under Appendix D to the Staff Rules (“Appendix D”). Alternatively, he contested the Administration’s review of his claim as per a memorandum of 9 June 2021.

Facts

2. On 26 November 2015, during a mission for the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) in the Democratic Republic of the Congo, and upon entering a restaurant with a colleague, the Applicant was aggressed by individuals claiming to be victims of extortion by OCHA (“the incident”). As a result of the incident, the Applicant suffered injuries to his right cheek and lower left lip, which required stiches, as well to his shoulder and ribs.

3. On 27 February 2016, the Applicant filed a claim for compensation under Appendix D to the Compensation Claims Unit, United Nations Office at Geneva (“CCU/UNOG”).

4. On 29 July 2016, considering that the claim was not “straight-forward”, CCU/UNOG transferred the claim to the ABCC for consideration, together with relevant factual and medical information.

5. On 26 September 2016, the ABBC informed CCU/UNOG, *inter alia*, that: i) the medical information provided suggested that maximum medical improvement (“MMI”, a determinant factor to consider lumpsum compensation for permanent loss of function (“PLF”)) had not yet been reached; and ii) the claim should be handled by UNOG “until PLF, disability or expenses in excess of the delegation [were] sought”.

6. On 11 October 2016, CCU/UNOG informed the Applicant that the ABCC would only make a recommendation to the Secretary-General “when there [was] a decision to be made” and that, should he submit medical expenses in relation with his claim, they could be covered under Appendix D as long as they be certified as being directly related to the incident.

7. On 30 January 2017, the Applicant asked CCU/UNOG to forward the necessary documentation to the ABCC for deliberation. The Applicant also indicated that he requested recognition of illness being attributable to service to expedite a potential future request for special sick leave credit (“SSLC”). CCU/UNOG transmitted the Applicant’s request to the ABCC the following day.

8. On 3 March 2017, the ABCC informed CCU/UNOG, *inter alia*, that they would not be able to proceed on the case “if no actual compensation (medical expenses, disability or sick leave credit) was being sought”.

9. On 9 March 2017, following the advice provided by the ABCC on the Applicant’s claim, CCU/UNOG, *inter alia*, informed him that there was no decision “in principle” on his Appendix D claim and that this was “a long-standing ABCC policy”. CCU/UNOG further clarified that “if there [was] no compensation to decide on, cases [were] not submitted to the [B]oard until such time as there [was] a decision to be made”. CCU/UNOG also reassured the Applicant that since he had filed the claim within the statutory deadline, he could submit at any time a request for compensation that would then be considered by the ABCC.

10. On 11 April 2017, the Applicant asked CCU/UNOG to submit a SSLC request for a total of 74 working days to the ABCC.

11. On 1 May 2017, CCU/UNOG transmitted the SSLC request to the ABCC along with updated medical information concerning the claim.

12. On 6 July 2017, CCU/UNOG was delegated the authority to, *inter alia*, “[a]pprove and pay, or deny, claims for compensation under Appendix D for funeral expenses, and sick leave credit in their entirety”.

13. On 19 December 2017, CCU/UNOG informed the Applicant that his claim for SSLC had been accorded under Appendix D for the requested period.

14. On 8 May 2018, CCU/UNOG transmitted to the ABCC a medical report established by the UNOG Medical Service for a determination on whether the Applicant was entitled to compensation for PLF due to facial scarring.

15. On 26 February 2020, CCU/UNOG provided the ABCC with additional medical reports, and recalled that the determination on whether the Applicant was eligible for compensation for PLF due to facial scarring was still pending.

16. On 14 May 2020, CCU/UNOG provided the ABCC with two additional pictures of the Applicant's facial scar.

17. On 23 October 2020, CCU/UNOG sent a memorandum to the ABCC clarifying the status of the Applicant's claim. CCU/UNOG indicated that the Applicant's case had been forwarded to the ABCC to consider PLF compensation for facial scarring and PTSD, and noted that all relevant information, including medical reports and photos, had been sent to the ABCC.

18. On 27 October 2020, the ABCC sent a memorandum to the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH"), including medical reports and pictures, for their advice as to whether the Applicant had sustained any degree of PLF due to facial scarring.

19. On 2 June 2021, DHMOSH provided advice to the ABCC on the Applicant's claim concerning a "2-3 cm faint scar without hypertrophy on the right mid cheek extending vertically from jawline". It advised the ABCC that PLF was zero percent of the whole person and that no compensation for PLF was payable.

20. By memorandum of 9 June 2021, CCU/UNOG informed the Applicant that DHMOSH had reviewed his claim for compensation due to facial scarring and determined that he had sustained no PLF due to facial scarring resulting from the incident.

21. On 13 July 2021, the Applicant contacted CCU/UNOG seeking clarifications regarding the 9 June 2021 memorandum. He indicated that unless he received “formal indication” by 13 August 2021 that “the remainder of [his] application [was] still being considered or [was] being reconsidered, [he] shall assume ... that a decision was made to decline [his] application”.

22. On 5 August 2021, the Applicant filed a request for management evaluation of “the failure of ABCC to issue a decision related to [his] claim under Appendix D which was submitted on 26 February 2015 within reasonable period of time”, or, in case it was considered a decision on his claim, of the memorandum of 9 June 2021.

23. On 12 August 2021, the ABCC sent a memorandum to DHMOSH, along with a medical report provided by the Applicant and a memorandum from the UNOG Medical Service. The ABCC requested DHMOSH’s advice as to whether the Applicant had sustained “any degree of PLF of the whole person under [art.] 11.3(c) of Appendix D due to PTSD”.

24. By email of 16 August 2021, CCU/UNOG informed the Applicant that his “application (PLF due to PTSD) [was] still under consideration” and that a decision would be communicated upon receipt of the ABCC’s response.

25. On 4 September 2021, the Applicant filed a motion for extension of time to file an application including a request for anonymity on the basis that the case concerns his medical information.

26. By Order No. 84 (NY/2021) of 7 September 2021, the Applicant’s motion for extension of time to file an application was denied and his motion for anonymity was granted.

27. On 11 September 2021, the Applicant filed the application mentioned in para. 1 above.

28. On 16 September 2021, the Management Evaluation Unit (“MEU”) informed the Applicant that his request for a management evaluation was not receivable as his case was not one “where the Administration altogether failed to respond”, which may give rise to an implied administrative decision subject to review.

29. On 5 January 2022, the Respondent filed his reply to the application.

30. On 15 February 2022, CCU/UNOG informed the Applicant that his file had been reviewed by DHMOSH and that, based on the submitted information, “PLF [could not] be determined. It was deemed that [he is] not yet at ... (MMI) based on the report by [his doctor] dated 01 August 2019”. CCU/UNOG requested the Applicant to provide an “updated report covering current diagnosis, findings, treatment and prognosis, particularly focusing on activities of daily living and symptoms” for a further review of his file.

31. On 1 July 2022, the present case was assigned to the undersigned Judge.

32. On 18 July 2022, the Tribunal held a case management discussion (“CMD”) with the participation of the Applicant, his Counsel and Counsel for the Respondent.

33. By Order No. 67 (NY/2022) of 19 July 2022, the Tribunal ordered the Applicant to file his comments on the reply as well as on the most recent ABCC’s advice of February 2022. It also ordered the Respondent to file his observations on the Applicant’s further submission.

34. On 28 July 2022, the Applicant filed his submission pursuant to Order No. 67 (NY/2022), and on 31 July 2022 he filed a correction to said submission.

35. On 8 August 2022, the Respondent filed his observations on the Applicant’s submission.

Consideration

36. The Applicant contests the “lack of decision” from the ABCC on his claim for compensation under Appendix D or, alternatively, the Administration’s review of his claim as per the memorandum of 9 June 2021.

Receivability

The alleged lack of decision

37. The Applicant claims that the ABCC’s continuing failure to process and assess his claim filed on 26 February 2016, is an implied administrative decision. He argues that while it is understandable that an assessment of a claim for compensation and medical documentation relating thereto might take several weeks, even months, a long inaction of more than five-years on the ABCC’s part as well as its inability to assess when or if they will issue a decision in his case in the foreseeable future, is neither reasonable nor acceptable.

38. The Respondent submits that the application is not receivable *ratione materiae*. He claims that neither the alleged lack of decision from the ABCC nor the 9 June 2021 memorandum constitute an administrative decision subject to review.

39. In this respect, the Tribunal recalls that art. 2.1(a) of its Statute provides that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance [.]

40. The Appeals Tribunal has consistently held that “the key characteristic of an administrative decision subject to judicial review is that the decision must ‘produce ... direct legal consequences’ affecting a staff member’s terms and conditions of appointment” (see *Najjar* 2021-UNAT-1084, para. 29; *Lee* 2014-UNAT-481, para. 49). “What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision” (see *Najjar*, para. 29; *Andati-Amwayi* 2010-UNAT-058, para. 19).

41. The Appeals Tribunal has also held that “not taking a decision is also a decision” (see *Tabari* 2010-UNAT-030, para. 23). However, for an implied administrative decision to be considered as such, the Administration must have “altogether failed to respond” (see *Birya* 2015-UNAT-562, para. 47).

42. Having reviewed the evidence on record, which includes several exchanges of communication between the CCU/UNOG and the ABCC, the ABCC and DHMOSH and, most relevantly, the CCU/UNOG and the Applicant in relation to his claim under Appendix D, the Tribunal finds that no implied decision can be attributed to the Administration.

43. The Applicant requests a decision “in principle” concerning the recognition of his claim under Appendix D.

44. The Respondent states that Appendix D does not allow the ABCC to give a “blanket” or “in principle” recognition of service incurred illness or injury.

45. In this respect, the Tribunal notes that if a claim is submitted timely, the Administration opens the case under the framework of the Appendix D, which remains open as compensation may be awarded any time after the original incident. However, for a compensation to be awarded under the framework of the initial claim, there must be a concrete request.

46. Indeed, art. 2 entitled “Principles of award” of the pre-2017 Appendix D, applicable at the time the claim was submitted, provides in para. (a) that “Compensation shall be awarded in the event of death, injury or illness of a staff member attributable to the performance of official duties on behalf of the United Nations”. Furthermore, art. 11, titled “Injury or illness”, provides for the payment of “all reasonable medical, hospital and directly related costs” (arts. 11.1(a) and 11.2(a)), and the payment of a “lump-sum compensation” “in the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function” (art. 11.3(a) and (b)). It also provides for the possibility to place a staff member on special leave following the exhaustion of his or her sick leave (art. 18(a)).

47. It is therefore the Tribunal’s view that for a compensation to be paid or a benefit to be granted under the Appendix D, a staff member must make a specific request such as the reimbursement of medical expenses or the payment of compensation for PLF, which should then be reviewed by the Administration on its own merits, including whether the claim is directly related to the service-incurred incident.

48. The Tribunal notes that in his claim, apart from describing the incident and the context in which it took place, the Applicant indicated the following:

Potential medical, psychological and other consequences [including] the following (erring on the side of caution). I can’t yet know which of these might materialize and when.

Scar injury to right cheek, which required several stitches. This may require micro plastic surgery, if it doesn’t go away by itself.

Minor scar injury on lower left lip, which may nor may not have consequences.

Minor pain ... in right shoulder or/and left rib(s), which may or may not mean anything.

Potential psychological or psychiatric consequences of stress and trauma, potentially including but not limited to [PSTD], (enhanced) depression, stress, anxiety, insomnia, schizophrenia, paranoia, psychosis.

Specific psychiatric consequences of stress and trauma in terms of (enhanced) addiction to prescribed medication, and/or addiction to alcohol.

Potential consequences of stress and trauma in terms of hair loss, weight gain, and faster skin aging.

49. While it is not contested that the Applicant, activated the framework of the pre-2017 Appendix D with the filing of his claim, a plain reading of it shows that he did not include any concrete request to be decided upon by the ABCC under Appendix D.

50. In this respect, the Tribunal notes that the ABCC advised the CCU/UNOG on 3 March 2017 that it would not be able to proceed on the Applicant's case "if no actual compensation (medical, expenses, disability or sick leave credit) was being sought". This information was conveyed to the Applicant on 9 March 2017.

51. The Applicant claims that in the context of a previous claim under Appendix D in 2009, he received recognition that the injury he sustained was considered as service-incurred by the ABCC, which then opened the way to the reimbursement of medical expenses and the granting of other remedies.

52. The Tribunal has reviewed the documents submitted by the Applicant in relation to his 2009 claim and finds that contrary to his argument, his claim was linked to a claim for reimbursement of medical expenses. In its recommendation of 13 October 2010, the ABCC specifically mentioned that "all medical expenses that are certified by the Medical Director as being directly related to the illness and reasonable for the treatment/services provided, may be reimbursed under Appendix D to the Staff Rules". Therefore, the Applicant's argument in this respect fails.

53. In his application, the Applicant also relies on the Tribunal's findings in *Applicant* UNDT/2020/116/Corr.1. However, the legal matter decided in that judgment is different to the matter in the present case. *Applicant* concerns a challenge to a decision taken by the ABCC that no exceptional circumstances were present to allow the Applicant to file his compensation claim after the expiry of the

time limit under Appendix D. Moreover, that judgment was reversed by the Appeals Tribunal, with a dissenting opinion, in *Applicant* 2021-UNAT-1133.

54. Under such circumstances, the Tribunal finds that there is no implied administrative decision in relation to the Applicant's claim.

55. On the contrary, the evidence shows that following the Applicant's request of 11 April 2017 to be granted SSLC for a total of 74 working days (see para. 10 above), the CCU/UNOG reviewed his request under its delegation of authority, and granted him SSLC under Appendix D for the requested period (see para. 13 above). Therefore, the Tribunal considers that, at least on 19 December 2017, there was an implicit recognition of a service-incurred incident. Otherwise, there would be no legal grounds to grant the Applicant SSCL under Appendix D.

The 9 June 2021 memorandum

56. Having said the above, the Tribunal finds that the only decision that could be subject to review at this stage is the 9 June 2021 memorandum, whereby the Applicant was informed that DHMOSH reviewed his claim for compensation due to facial scarring and determined that that the Applicant sustained no PLF due to facial scarring resulting from the incident.

57. In his application, the Applicant states that he never submitted any claim for PLF due to facial scarring, and he argues that the ABCC has not yet issued a decision in relation to his Appendix D claim.

58. The Respondent argues that the request for compensation for PLF was included to serve as a legal basis for compensation under Appendix D, and complement the initial claim in the best interest of the Applicant.

59. The Respondent also claims that since the application lacks clarity as to whether DHMOSH's determination is contested, the Tribunal is not called upon to decide on this matter. However, in the alternative, he submits that DHMOSH's determination does not constitute an administrative decision subject to the

Tribunal's review and that the proper avenue to contest this decision is a review by an independent medical practitioner or a medical board.

60. As the Appeals Tribunal held in *Kisia* 2020-UNAT-1049, para. 33, there are two elements that must be established for a claim under Appendix D:

i) the medical assessment of whether the claimant suffered from the injury or illness as alleged; and ii) the non-medical factual determination [of] whether the illness or injury was attributable to the performance of official duties on behalf of the Organization (causation). To make these determinations, the ABCC may decide on procedures as it may consider necessary in discharging its responsibilities.

61. DHMOSH's determination on PLF for facial scarring falls within a medical assessment of the Applicant's claim.

62. The evidence shows that the ABCC decided to request the advice of DHMOSH as to whether the Applicant had sustained any degree of PLF due to facial scarring. For this purpose, it transmitted to DHMOSH the Applicant's medical information including his "statements, a [memorandum] from Dr. S. B., Medical Service, UNHCR, photographs of facial scarring, and medical reports".

63. DHMOSH advised the following:

PLF is 0% of the whole person

2-3 cm faint scar without hypertrophy on the right mid cheek extending vertically from jawline.

Diagnosis: Scar. Class zero. Table 11-5, p262.

No permanent loss of function is payable.

64. Based on DHMOSH's determination that the Applicant had sustained no PLF due to facial scarring, the ABCC did not consider the Applicant's claim any further.

65. The standard to be applied in reviewing the Secretary-General's exercise of discretion was set out by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084:

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 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 it is the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. ... Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

66. In *Karseboom* 2015-UNAT-601, para. 47, the Appeals Tribunal found that "the UNDT, by making medical findings which it was not competent to make and thereby awarding Mr. Karseboom material and moral damages, exceeded its competence and committed errors of law and procedure" (see also *Abu Salah* 2019-UNAT-974, para. 41).

67. Regarding the judicial review of a medical assessment provided by DHMOSH, the Appeals Tribunal held in *Applicant* 2021-UNAT-1133, para. 59, that the Dispute Tribunal did not have competence to decide that the "medical advice rendered by it to the ABCC was incorrect" and thereby questioned the sufficiency and relevance of a given medical assessment to a certain claim. It also held that since the Dispute Tribunal did not have any medical knowledge, it was not allowed to make its own findings with regard to medical matters. (see *Applicant*, para. 58).

68. In line with the above-mentioned jurisprudence and considering that the 9 June 2021 memorandum was only based on a medical determination by DHMOSH, the Tribunal finds that it is not competent to review the merits of the 9 June 2021 memorandum.

69. Since the Applicant refers in his application to his claim for PLF compensation based on the alleged PTSD, the Tribunal wishes to clarify that the review of that claim is still pending.

70. During the CMD, the Respondent informed the Tribunal that on 14 February 2022, the ABCC advised the CCU/UNOG that DHMOSH reviewed the Applicant's claim and found that PLF could not be determined because based on the medical report of 1 August 2019, MMI had not yet been reached, and that the Applicant should be asked to provide an "updated report covering current diagnosis, findings, treatment and prognosis, particularly focusing on activities of daily living and symptoms" for a further review of his file. This information was conveyed to the Applicant on 15 February 2022 (see para. 30 above).

71. The Tribunal encourages the Applicant to submit the requested medical report and notes the Respondent's commitment to ensure that "any future determination by DHMOSH will be submitted to the Board for review".

Conclusion

72. In view of the foregoing, the Tribunal DECIDES to reject the application.

(Signed)

Judge Francis Belle

Dated this 30th day of September 2022

Entered in the Register on this 30th day of September 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York