



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2024/017

Judgment No.: UNDT/2024/104

Date: 4 December 2024

Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

ASLAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Manuel Calzada

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant was the Chief Procurement Officer with the African Union/United Nations Hybrid Operation in Darfur (“UNAMID”). He held a continuing appointment at the P-5 level and was based in El-Fasher, Sudan. In this application, the Applicant seeks to assert a “Claim for negligence and Absent Duty of Care.”¹ For the reasons set forth below, the application is dismissed.

Facts and Submissions

2. This case is the latest round in the Applicant’s years-long effort to obtain compensation for injuries he alleges are service-related. Those efforts include claims for disability benefits under Article 33 of the United Nations Joint Staff Pension Fund (UNJSPF) Regulations and for benefits under Appendix D to the Staff Rules, in addition to claims for negligence. The essential events related to the negligence claims are set forth below.

3. The Applicant previously served as a military staff officer with the Pakistani Army and was deployed with the Pakistani contingent to the United Nations Verification Mission in Angola (1996). During that deployment, his right leg was injured in a demining accident that required extensive treatment and rehabilitation. He was eventually discharged from treatment with a disability assessment of 2.2% according to South African Armed Forces Scales. His right leg was shortened by 2 cm and deformed. This gave the Applicant a slight limp, but he was able to walk without support.

¹ Negligence is a tort premised on the breach of a duty of care. Black’s Law Dictionary, defines negligence as “1. **The failure to exercise the standard of care** that a reasonably prudent person would have exercised in a similar situation; any **conduct that falls below the legal standard** established to protect others against unreasonable risk of harm...2. A tort grounded in this failure, usually expressed in terms of the following elements: **duty, breach of duty**, causation, and damages.” (emphasis added) As such, it is superfluous to mention both negligence and absent duty of care, as if they were somehow different claims.

4. In 2000, the Applicant joined the United Nations as a staff member. He was an Associate Procurement officer at the Mission in the Democratic Republic of the Congo (MONUC, as it was then known).

5. The UN was aware of the 1996 accident and treatment but issued him an A1 medical clearance to serve with MONUC. Between 2009 and 2018, the Applicant served as a procurement officer at UNAMID at various levels, again with medical clearance.

6. On 15 March 2017, the Applicant was seeking diagnosis and treatment for pain and swelling in his knee. He alleged that the arm of an x-ray machine struck his knee causing injuries which ultimately led to the amputation of his right leg.

7. On 14 November 2019, the United Nations Staff Pension Committee granted the Applicant a disability benefit under Article 33 of the UNJSPF Regulations.

8. The following month, the Applicant filed an Appendix D claim which was also the subject of litigation before the United Nations Dispute Tribunal (UNDT).

9. On 25 April 2023, the Applicant challenged “the Secretary-General’s implied decision not to respond to his complaint of negligence, gross negligence, and a breach of a duty of care.” That application was registered as Case No. UNDT/NBI/2023/038 and dismissed three days later in *Aslam* UNDT/2023/025. The Applicant did not appeal that judgment.

10. Nearly a year later, on 19 March 2024, the Applicant filed the instant case once again contesting “[a] non-decision of the UN Secretary-General to entertain a claim for negligence and absent duty of care by UN officials, including medical officials”.

11. The Respondent’s reply contested the case on both its receivability and merits. The Applicant filed a Rejoinder addressing the issue of receivability.

Considerations

12. The Respondent first argues that this application is not receivable under the doctrine of *res judicata* because the issues were decided in UNDT/2023/025. The Applicant disputes this, arguing that this application is not duplicative of his prior application and that UNDT/2023/025 did not address the merits of his claim.

13. The basis for the prior dismissal is set forth succinctly in a three-page judgment which found that application was not receivable because the Applicant: (1) failed to identify an administrative decision within the meaning of Article 2.1(a) of the Statute of the Dispute Tribunal; (2) failed to seek management evaluation; and (3) assuming *arguendo* that his request for management evaluation of a decision by the Advisory Board on Compensation Claims (ABCC) to reject his Appendix D claim encompassed his negligence claim, failed to file timely.

14. With regard to the failure to identify an administrative decision, the Tribunal notes that the first application identified the contested decision as follow:

To the extent that it is a decision, it is one of the Secretary-General not to respond to a complaint by the Applicant of Negligence, Gross Negligence and Breach of Duty of Care towards the Applicant.

15. In the instant application, he slightly changes his wording but still describes the decision as “[a] non-decision of the UN Secretary-General to entertain a claim for negligence and absent duty of care by UN officials, including medical officials”. This is a difference without a distinction, the prior ruling still applies, and *res judicata* bars this renewed claim.

16. The Respondent also argues that the application is not receivable because the Applicant did not seek management evaluation within 60 days of when he was first notified of the contest decision, citing staff rule 11.2(a) and art. 8(1)(c) of the Dispute Tribunal Statute. To support this argument, the Respondent points out that the Applicant first raised alleged negligence and gross negligence on 14 October 2022, in a request for management evaluation. In a response dated 5 January 2023 the

Management Evaluation Unit said it did not address “issues of alleged dereliction of duty on the part of the Organization and its medical officers.”

17. The Respondent thus claims that when the Applicant filed UNDT/NBI/2023/038, on 25 April 2023, contesting the Secretary-General’s non-response to his claim of negligence, gross negligence and breach of duty of care, he knew or reasonably could have known that his claim would not be addressed outside the Appendix D framework. According to the Respondent, the Applicant’s subsequent submission of his negligence claim to the Secretary-General on 31 May 2024 “was merely a repeat request and did not extend the timelines.” As a result, the management evaluation request filed over five months² after the judgment in UNDT/NBI/2023/038 was untimely.

18. The Applicant does not address this analysis directly. Instead, he says:

There are no established procedures under any UN legislation with respect to claims for negligence or duty of care consideration, which are necessarily made to the Secretary-General, and follows a parallel path required of Applicants challenging a regular administrative decision. As such there is no applicable legislated 60-day deadline.

19. The Applicant cites no authority for this claim, and the 60-day deadline is clearly established in staff rule 11.2(c). According to that provision

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. *Id.*

20. Applying that 60-day deadline to the facts of this case, it is obvious that the management evaluation request on 12 October 2023 was untimely. The Applicant’s repeat request on 31 May 2024 that the Secretary-General again entertain his claim of

² In the instant case, the Applicant claims that he requested management evaluation on 12 October 2023. However, his Annexes 3 and 7 are the same Request for Management Evaluation (of the ABCC decision) dated 14 October 2022, which was deemed insufficient by the Tribunal previously. However, the Applicant also attached Annex 4, which is a management evaluation response dated 21 December 2023. That response references his “request for a management evaluation, dated 12, 14 and 22 October 2023.” Accordingly, the Tribunal accepts that management evaluation was requested on 12 October 2023.

negligence cannot reset the clock to make the October management evaluation request timely. *Kazazi*, 2015-UNAT-557, paras. 31-33.

21. The Applicant’s observation that there are no established procedures regarding claims for negligence is an interesting point, which brings us to the Respondent’s final argument on receivability: that a claim for negligence is not a reviewable decision under Article 2.1(a) of the Dispute Tribunal Statute, and thus the Tribunal lacks jurisdiction to adjudicate that claim.

22. This argument relies on the Appeals Tribunal holding in *Nigam*, 2022-UNAT-1269, where it stated “the UNDT is constrained in its jurisdiction and powers by its Statute, which does not allow causes of action founded on the tort of negligence... . [N]egligence is not a stand-alone statutory cause of action. *Id.*, para. 38.

23. The Applicant’s response to this argument is rather convoluted and ignores the essence of the Appeals Tribunal’s holding:

[T]he Applicant’s view is that while the Tribunal is constrained by its Statute [to] not allowing causes of action founded on the tort of negligence, the Appeals Tribunal stated that this was not to mean that **negligence cannot never** be the basis of a claim brought by a staff member. Whether the claim is eventually successful will depend on the merits and as to whether it is based on administrative decision/s made unlawfully or failed to be made by the Secretary-General, and which had been referred to management evaluation and either rejected or not actioned. This can only be established by the Tribunal examining the substance of the Application. (emphasis in original)

24. However, this ignores the language of *Nigam*, *supra*. To remove all doubt, the Appeals Tribunal made clear that there exists a “fundamental jurisdictional bar to such a claim brought, apparently, as one in the tort of negligence: it does not fall within Article 2(a) of the UNDT Statute as set out above.” *Id.*, para. 40. The Appeals Tribunal expressly rejected the point upon which Applicant now relies. “Contrary to the way in which the Dispute Tribunal dealt with it, this is not a matter of whether a claim in negligence was brought to management evaluation and that if it was not, it could not be advanced before the UNDT.” *Id.*, para. 38. “The preferable analysis of this issue is

that **there is no independent cause of action in the tort of negligence available to staff members** in Mr. Nigam's circumstances and such a claim was thereby irreceivable." *Id.*, para. 41 (emphasis added).

25. It is crystal clear that the Applicant's claim in this case is based on alleged negligence by United Nations officials. That is not a cause of action available to staff members and is beyond the jurisdiction of this Tribunal. The Applicant's effort to clothe this claim as an implied decision by the Secretary-General to deny his negligence claim does not change its essential character.

26. The Tribunal notes that in his rejoinder, the Applicant makes a point of stating that the "Applicant's claim is not vexatious." This is particularly interesting in that the Respondent did not mention anything about the application being vexatious. To paraphrase William Shakespeare, "the [Applicant] doth protest too much, methinks." *See, Hamlet*, Act III, Scene II.

27. In *Nigam*, the Appeals Tribunal expressly observed that it was taking the time to address issues of jurisdiction "because Mr. Nigam is a layperson in such matters and so is unaware of them." *Nigam*, para. 38. On the other hand, the Applicant in this case is, and has been, represented by experienced counsel who should know better than to bring this claim raising these arguments.

28. The term "vexatious" has been used in eleven judgments from the Dispute and Appeals Tribunal, always in the context of art. 10.6 of the Dispute Tribunal Statute or art. 9.2 of the Appeals Tribunal Statute which authorise the award of costs against a party that "has manifestly abused" the proceedings or process. In those cases, "vexatious" is deemed to be an abuse of process and generally synonymous with "frivolous". *See, Bi Bea* 2013-UNAT-370, para. 30; *Mosha* 2014-UNAT-446, para. 20; *Wasserstrom* 2014-UNAT-457, para. 42; *Machanguana* 2014-UNAT-476, para. 13; *Chaaban* 2015-UNAT-554, para. 43; *Toson* 2022-UNAT-1307, para. 23; *Attandi* UNDT/2010/199, para. 16; *Mosha* UNDT/2013/088, paras. 41, 44, 46; *Yakovlev* UNDT/2014/040, paras. 39-40; *Birya* UNDT/2014/141, para. 50. It has also been

described as “outrageous” *Yakovlev, supra*; having “no reasonable chance of success” *Birya, supra*; or contrary to clear jurisprudence. *Igbinedion 2014-UNAT-410*, para. 30.

29. Most apt to the instant case, the Appeals Tribunal noted in *Toson, supra*, that

Mr. Toson has recently advanced unsuccessfully the same argument, albeit in respect of another case altogether. By refusing or failing to be guided by the judgment and reasoning in that earlier case and persisting with precisely the same unmeritorious point in this case, Mr. Toson risks incurring an award of costs against him for vexatious and frivolous conduct of his litigation. The Secretary-General has not sought such an order on this occasion and so, while not making one, we do put Mr. Toson on notice of the risk he runs by employing such strategies in his litigation. *Id.* para. 23.

30. Here, too, the Tribunal observes that the Applicant is advancing the same unsuccessful arguments and refusing to be guided by the reasoning of the earlier case and of settled jurisprudence. Since the Respondent has not sought an award of costs, the Tribunal will not make one. However, the Tribunal hereby puts the Applicant (and his counsel) on notice of the risk he runs by employing this strategy.

Conclusion

31. For the reasons stated above, the Dispute Tribunal Determines that the Application is not receivable, and is DISMISSED as such.

(Signed)

Judge Sean Wallace

Dated this 4th day of December 2024

Entered in the Register on this 4th day of December 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi