



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/049

Judgment No.: UNDT/2014/133

Date: 12 November 2014

Original: English

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**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

WAMALALA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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## **Introduction**

1. The Applicant is a staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). He filed the current Application with the United Nations Dispute Tribunal (the Dispute Tribunal) contesting the decision by the Advisory Board on Compensation Claims (ABCC) to award him \$49,114.03 for permanent loss of function of his right leg as a result of injuries sustained in a road accident. The Applicant further asserted a claim for gross negligence against the Secretary-General for failing to adequately ensure his safety and security in connection with the accident. The negligence claim was dismissed by the United Nations Appeals Tribunal (UNAT) in Judgment No. 2013-UNAT-300.

2. The Applicant is seeking the following remedies:

- a) A declaration that “the contested decision was incorrect, unreasonable and reached without due process and should be rescinded”;
- b) Compensation amounting to 40% total body impairment due to leg injury, and 5% total body impairment due to the Applicant’s dental injuries, and 5% total body impairment due to the Applicant’s scarring. The foregoing total body impairment value should be multiplied by twice the annual amount of the

### **Procedural history**

3. The Applicant filed the current Application on 23 September 2011. On 11 October 2011, he sought leave of the Tribunal to file an amended Application. The Respondent did not object to the motion subject to the computation of time for filing a Reply running from the date on which the amended Application was filed. The Motion was granted and the Applicant filed his amended Application on 25 October 2011.

4. On 25 November 2011, the Respondent filed his Reply.

5. On 23 February 2012, the Respondent filed a “Motion for Leave to Have Receivability Considered as a Preliminary Issue”. In this motion, the Respondent contended that the Applicant’s negligence claim was not receivable because: (i) the Applicant was not contesting an administrative decision; and (ii) even if there was an administrative decision, the Applicant had failed to request management evaluation.

6. On 17 April 2012, the Tribunal ruled in Judp dAn Ju001-6.2(m)4A.0983



below the front right wheel of the vehicle gave way, causing the vehicle to roll down a cliff.

14.

the ABCC requested that the Applicant provide updated information regarding his injuries, namely:

- (a) an updated, detailed dental medical report for review by the Medical Director;
- (b) a medical report (including colour photos of the scars) that links the scarring to the incident; and
- (c) all relevant medical reports related to any other permanent condition he might have as a result of the incident.

19. The Applicant submitted the requested documentation.

20. On 4 March 2011, at its 455th meeting, the ABCC recommended, *inter alia*:

Having also considered the additional medical reports including photos of scars submitted by the claimant and the report of the Medical Director on the case;

Recommends to the Secretary-General that based on the current medical information, as the claimant has not sustained any additional degree of permanent loss of function for the dental injuries and scarring, in accordance with American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides), the claimant's request for additional compensation under article 11.3(c) of Appendix D to the Staff Rules should be denied.

21. On 6 May 2011, the Controller approved the ABCC's recommendation on behalf of the Secretary-General.

## **Issues**

22.

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***Did the ABCC follow the proper procedure during its deliberations on the Applicant's claim for compensation under Appendix D?***

23. According to the Applicant the decision of the Respondent is flawed both on the substance and procedurally.

24. The Respondent avers that the decision of the Respondent was lawful having complied with Appendix D of the Staff Rules and having considered: all the medical reports submitted by the Applicant; and the relevant and only applicable guide, the AMA Guides. The Respondent further submits that Applicant has the burden of proving that the Decision is unlawful<sup>4</sup> but he has not established that the Organization failed to follow its own procedures or violated his due process rights in determining his claim for compensation under article 11.3 of Appendix D.

25. In a medical injuries claim filed under Appendix D of the Staff Rules there are three aspects to consider. First it should be established that the death, injury or illness is attributable to the performance of official duties on behalf of the Organization. This will of course depend on the particular facts of a given case and the task will be that of the ABCC established under article 16 of Appendix D, if a referral is made to it. However, in so doing, the Board should not attempt to embark on legal considerations. This was asserted by the former UN Administrative Tribunal in the case of *Davidson*<sup>5</sup> where that Tribunal held:

Medical Board members, when they address legal questions instead of confining themselves to medical opinions on medical questions, are acting beyond their competence. (Cf. Judgement No. 523, Labben (1991), para. III). The Tribunal has indicated above instances in which the Medical Board, as in this case, has involved



on the Medical Board report by the Respondent will result in his decision being impermissibly influenced by physicians' legal views. Uncritical reliance on such a Medical Board report implies adoption of the physicians' legal views.

26. In regard to the first aspect, there is no dispute that the injuries sustained by the Applicant were attributable to the performance of official duties on behalf of the Organization.

27. The second aspect relates to the substance of the claim which is grounded on injury or illness. This involves a consid

The Tribunal must, however, consider whether the opinion of the UN Medical Director was given on the basis of evidence either inadequate or flawed for any other reason which may have interfered with the full and fair consideration of her claim<sup>7</sup>.

The Tribunal has consistently held that it will not rescind decisions by the Respondent denying compensation which are based on proper Medical Board reports where there is no showing of procedural irregularity, mistake of fact or law, or of arbitrary or extraneous factors flawing the decision. In particular, the Tribunal, having no medical competence, does not enter into medical questions<sup>8</sup>.

31. The Respondent concedes that a medical board was not convened but submits that the Applicant did not ask in his reconsideration request that a Medical Board be convened. Further, he asserts that failure to convene a Medical Board was not a procedural error. In these circumstances, the Administration did not propose that a medical board be convened. The Respondent further submits that if the Secretary-General's initial decision is sustained, the staff member is obliged to assume certain medical fees and expenses under article 17(d) of Appendix D. These fees and expenses may be considerable. Had a medical board been convened in this case, the Applicant would have been required to pay the fees and expenses prescribed under article 17(b). The Administration was therefore not required to convene a medical board under articles 17(a) and (b) of Appendix D.

32. Lastly, the Respondent submits that in "considering a request for reconsideration, the Medical Director, or his representative, provides a verbal report on the medical aspects of the request for reconsideration. This practice was followed in the Applicant's case".

33. The Tribunal considers that this was a flawed procedure which was governed more by administrative convenience than a compliance with the existing rules. Clearly article 17(a) of Appendix D was breached. Nowhere is it stated in that Article that a request for reconsideration must be accompanied by a specific request by the staff member that a medical board be convened. It is clear from the wording of articles 17(a) and 17(b) that once a request for reconsideration is received by the Administration, a medical board should be convened to reconsider the claim of a staff member. Nowhere is it provided for in article 17 that the advice of a Medical Director can be substituted for that of a medical board. Where the meaning of a statutory provision is plain, clear and unambiguous, it is neither for the Administration nor for judges to invent a new meaning as an excuse for failing to give effect to the plain meaning of the statutory provision. Whether the Administration found it inexpedient or impractical to convene a medical board does not give a clean bill of health to its decision.

34. Additionally, falling back on a practice that has no force of law to come to a decision that may have far reaching consequences on the contractual status and life of a staff member is totally anathema to international human rights norms. This Tribunal has on at least two occasions had the opportunity to hold that the reliance on a policy or practice to reach an administrative decision is reprehensible and is not to be condoned. The Administration is and should be guided by the Rules and Regulations and administrative issuances of the Organization. The Administration should not make use of that rather wide and loose term called “policy” or “practice” to justify erroneous decisions. The danger of relying on a policy or practice and ignoring the legal provisions of the Organization has been canvassed in *Manco* UNDT/2012/135<sup>9</sup> and *Valimaki-Erk* UNDT/2012/004<sup>10</sup>.

35. In *Manco*, the Tribunal held that:

Whilst it is perfectly legitimate for the Secretary-General not to ignore a recommendation or stated policy of the General Assembly, the Secretary-General cannot and is not mandated, in the absence of any express statutory provision, to incorporate into the terms of employment of a staff member such policy or recommendations. To condone this would be tantamount to giving both the General Assembly and the Secretary-General an absolute licence to impose or incorporate into terms of employment any item or matter that is not part of the Staff Regulations or Rules.

36. And in *Valimaki-Erk* the Tribunal observed:

[T]he status of United Nations staff and their recruitment conditions are governed solely by the Staff Regulations and Rules and by any administrative instructions issued by the Secretary-General in application thereof.

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<sup>9</sup> Affirmed by the United Nations Appeals Tribunal in *Manco* 2013-UNAT-342.

<sup>10</sup> Affirmed by the United Nations Appeals Tribunal in *Valimaki-Erk* 2012-UNAT-276.

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body which makes recommendations to the Secretary-General concerning claims for compensation under Appendix D. Given its role, the ABCC cannot provide medical or legal advice to a staff member on his or her claim. In considering a claim for compensation, there are no adversarial proceedings before the ABCC and therefore there is no “case to meet” as such.

41. The Secretary of the ABCC provided the Applicant with information regarding the applicable procedures to enable him to file a claim for compensation and a request for reconsideration. After the Secretary-General’s initial decision, the Secretary of the ABCC explained to the Applicant the basis for the assessment of 40% permanent loss of function, and asked him to submit additional reports concerning his dental injuries and scarring in support of his request for additional compensation. The procedures followed by the ABCC ensured that the Applicant’s due process rights were met and his claim was fairly considered.

42. In answer to the Applicant’s contention that the decision of the Secretary-General of 6 May 2011 is conclusory, and provides no reasons to afford a “meaningful appellate/judicial review”, the Respondent submits that the ABCC’s recommendation of 4 March 2011 expressly states the reasons for its recommendation to deny the Applicant’s request for additional compensation: namely that, based on the current medical information, the Applicant has not sustained any additional degree of permanent loss of function for his dental injuries or scarring. Further, the record in this case includes sufficient information for the Dispute Tribunal to judicially review the Decision.

43. The ABCC is a specialized administrative body that is mandated to assess compensation arising out of work related injuries suffered by a staff member or death of a staff member of the Organization. The ABCC is not required to act judicially like a court of law or hold a hearing as a matter of right at which a party would produce witnesses and evidence in support of his/her claim. However, the ABCC is obliged to act on reasonable grounds and that concept includes acting with procedural fairness.

44. Acting fairly and with procedural propriety means providing the staff member with relevant documents like medical repo

**Did the Respondent err in deciding not to grant the Applicant compensation for his claim of permanent loss of function and/or disfigurement associated with his scarring and dental injury?**

48. The Applicant submits that he was awarded an amount of USD49,114.03 after an adjustment was made to the original award of USD120,000. The Applicant contends that the adjustment only follows a policy and is not subject to any Secretary-General's Bulletins and administrative issuances. At any rate even if it was a matter of the discretion of the Secretary-

- a) The permanent impairment to his leg was assessed at 40% and he was awarded an amount of USD49,114.03 after an adjustment was made to the original award of USD120,000. The Applicant contends that the adjustment only follows a policy and is not subject to any Secretary-General's Bulletins and administrative issuances. At any rate even if it was a matter of the discretion of the Secretary-



d) The Respondent failed to take into account loss of alveolar bone (jaw bone that holds teeth or prostheses) characterized by attending professionals as “phenomenal”, “permanent” and resulting in “impaired function”.

49. The Respondent does not dispute that the injuries sustained by the Applicant were work related. However, he submits the following:

a) With regard to the loss of alveolar bone, the ABCC considered the medical reports regarding the Applicant’s dental injuries, which included loss of teeth and alveolar bone loss. The alveolar bone is part of the upper and lower jaw, and is the bone structure that supports and anchors the roots of the teeth. As noted in the minutes of the meeting of the ABCC on 4 March 2011, the Medical Officer advised that “since lost teeth are replaceable, functionality is preserved”. The ABCC accepted the medical advice that there was no permanent loss of function for loss of teeth and loss of alveolar bone in accordance with the AMA Guides. The Respondent also submits that the Applicant has received and will continue to receive dental treatment, and his expenses are reimbursable by the Organization under Appendix D.

b) With regard to the Applicant’s scarring, the ABCC considered the medical reports and photographs submitted by the Applicant. As noted in the minutes of the meeting of the ABCC on 4 March 2011, the Medical Officer advised that the “scars are all well healed, not symptomatic and do not interfere with any normal function” and that “no disfigurement is noticed”. The ABCC accepted the medical advice that the Applicant’s scarring did not result in any permanent loss of function or disfigurement under the AMA Guides.

c) The medical report dated 5 September 2011, on which the Applicant relies in support of his alveolar bone loss and scarring is not relevant as it was obtained after the impugned decision. In determining whether sufficient evidence exists to support the Decision, the Dispute Tribunal may only have

regard to the medical information

most comprehensive, evidence-based and validated guidance available; (ii) they are well-established (now into the 6<sup>th</sup> edition) and are widely used in the United Nations and internationally; and (iii) the use of a single reference also allows for consistency across entities of the United Nations system. As the United Nations has chosen the AMA Guides as its reference it would not be appropriate for claimants to pick and choose the assessment guidelines that suit them. He also expressed the view that the use of the AMA Guides emanates from a Resolution of the General Assembly. As to the Guide that was used by the Applicant, the AAOMS Guidelines, Dr. Rowell was of the opinion that the AAOMS guidelines cannot be used alone and that when they are used, the impairment rating comes from the AMA Guides. He was of the opinion that the AAOMS guidelines are not authoritative and are not formally part of the impairment guidelines used by MSD.

51. The Tribunal does not and cannot direct a medical expert how he/she should proceed to an evaluation of the extent of injuries or level of sickness of a staff member. It is solely within the province of the expert to use his/her judgment and expertise to do so and to rely on any authoritative work that may come in aid in the discharge of that exercise. If the United Nations is using the AMA Guides it is within its sole power and discretion to do so. But to argue that the AMA Guides is the sole authoritative work on how the assessment of physical or impairment should be made is certainly procedurally incorrect. To reject the views expressed in other authoritative works is certainly wrong procedurally. It should be open to any medical expert to reject the views expressed in a work but this must be clearly and rationally reasoned. In the present case the only reason put forward is that the AMA Guides have been used over the years to the exclusion of any other work.

52. It was therefore wrong for the Respondent to reject the medical report submitted by the Applicant because it was based on the AAOMS Guidelines and not on the AMA Guides. Further, it was equally procedurally wrong for the ABCC to reject the Applicant's claim for dental injuries and scarring based solely on the AMA





## **Conclusions**

56. Article 10.4 of the Statute of the Tribunal provides:

61. The permanent impairment to the leg of the Applicant was assessed at 40% and he was awarded an amount of USD49,114.03 after an adjustment was made to the original award of USD120,000. If it was a matter of the discretion of the Secretary-General, reasons should have been given to him for the decision to adjust the amount awarded so that the Applicant would have been in a position to know whether the discretion was properly exercised. No reason was provided for the final amount awarded. Nor was any cogent reason given to explain the method by which the ultimate calculation was done. The Tribunal considers therefore that the claim for compensation by the Applicant for the loss of a limb was not processed in a correct manner. The Tribunal is not here assessing the permanent impairment. It is only reviewing the final award made by the technical body as adjusted by the Secretary-General without giving any reasons for that final award.

62. The Tribunal holds that the compensation as initially calculated in the amount of USD120,000, less the payment of USD49,114.03, should be paid to the Applicant.

63. As regards to the claim of the Applicant on the loss of his teeth and alveolar bone loss, the Tribunal has no jurisdiction to make any evaluation on the degree of impairment or to award any compensation. This is a matter for the technical body. However, since the technical body reached a conclusion adverse to the Applicant without establishing a Medical Board and rejecting the medical certificate provided by the Applicant on the ground that it did not comply with the AMA Guides, the Tribunal concludes that this was a wrong administrative decision and awards the Applicant two months net base salary for the procedural flaws.

*(Signed)*

Judge Vinod Boolell

Dated this 12<sup>th</sup> day of November 2014

Entered in the Register on this 12<sup>th</sup> day of November 2014

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi