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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 T





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



***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

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.

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responsible body, the ABCC.

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