



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/044
Judgment No.: UNDT/2014/135
Date: 19 November 2014
Original: English

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

JAMES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is a staff member of the United Nations Mission in Liberia (UNMIL). He initially filed an incomplete Application on 10 August 2013 and a complete Application on 25 September 2013 challenging the “rejection of [his] claim for compensation for loss of one eye” by the Advisory Board on Compensation Claims (ABCC). He is also contesting UNMIL’s alleged negligence in referring him to a sub-standard medical facility for cataract surgery.

2. The Applicant is seeking the following remedies:

a) An “unequivocal declaration” that UNMIL is fully responsible for the failed cataract surgery, “which resulted in the loss of [his] right eye”;

b) An “unequivocal declaration” that he is fully entitled to benefits under Appendix D of the United Nations Staff Rules (Appendix D) for the loss of his right eye, and rescission of the decision by “the UN authorities” to deny him such benefits;

c) A declaration that pursuant to Appendix D, he is also entitled to compensation for the physical and emotional suffering imposed by this injury, compensation for loss of career, and full reimbursement of all medical and other directly related expenses he has incurred as a result of his injury;

d) Monetary compensation in the amount of USD 2.25 million as full compensation for: the injury to his right eye, reimbursement of medical and other expenses incurred in the process of managing the injury, compensation for the disfigurement to his face, loss of career and for the physical and emotional injuries he has suffered as a result of his injury and the refusal by UNMIL Administration to accept responsibility for his condition.

Procedural history

3. The Respondent submitted a Reply on 25 October 2013 in which he asserted that the claims raised in the Application are not receivable.

4. On 13 November 2013, the Applicant filed a Motion for leave to file a response to the Respondent's Reply. By Order No. 006 (NBI/2014) dated 16 January 2014, the Applicant was granted permission to submit comments solely on the issue of receivability that had been raised in the Respondent's Reply. He filed his response on 17 January 2014.

5. By Order No. 248, the Tribunal instructed: (a) the Applicant to submit copies of emails dated 6 and 7 May 2013 that he sent to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM); and (b) the Respondent to submit his comments and any relevant documentation on paragraphs five and six of the Applicant's response dated 17 January 2014.

6. The Parties' filed their submissions on 12 November 2014 but since the Applicant failed to comply with the directives in Order No. 248, the Tribunal struck out his submissions by way of Order No. 251 (NBI/2014) and gave him an opportunity to comply by 13 November 2014.

7. On 13 November 2014, the Applicant filed a submission that did not fully comply with Order No. 251 (NBI/2014). The Tribunal, by its Order No. 254 (NBI/2014), struck out four paragraphs of this submission because they were not in compliance with Order No. 251.

Facts

8. The Applicant is employed by UNMIL on a fixed-term appointment (FTA) as a Civil Affairs Officer at the NO-B level.

9. On 25 January 2008, the Ophthalmologist at the Level III Hospital, which was run by the Jordanian Military contingent (JORMED III) of UNMIL, diagnosed the Applicant as having a mature cataract in his right eye. The Ophthalmologist discussed the prognosis and complications of surgery with the Applicant and then recommended that the Applicant be transferred to a Level IV hospital for cataract surgery.

10. The Applicant was admitted to the Korle-Bu Teaching Hospital (Korle-Bu) in Accra, Ghana, on 20 February 2008 for cataract surgery and discharged on 26 February 2008. On 11 March 2008, the UNMIL Medical Services Section referred the Applicant to JORMED III for “complication after cataract surgery”. According to the Applicant, as a result of the complications, he returned to Korle-Bu where a second surgical procedure was performed on him.

11. The Applicant was treated at the 37 Military Hospital in Accra on 15 June 2012 based on a referral from JORMED III.

12. On 9 July 2012, the Applicant informed the UNMIL Chief Medical Officer (CMO) that he was convinced his eye condition would be further aggravated by continued use of computers as required by his job with UNMIL and as a result, he had decided to seek early retirement as of 31 December 2012. He then requested compensation for the loss of his eye.

13. On 23 July 2012, the Applicant filed a claim for compensation under Appendix D with the ABCC for the loss of one eye and diminishing vision in the other eye. He indicated in the claim form that the cataract in his right eye was exacerbated by his intensive use of computers for work purposes and that his injury was caused by “professional error” on the part of the eye doctor during the cataract surgery.

14. On 9 August 2012, the ABCC forwarded the Applicant’s claim to the Director of the Medical Services Division (MSD) of OHRM for review and advice.

15. By an email dated 14 November 2012, the UNMIL CMO requested that the Applicant make himself available for a final medical evaluation by a senior ophthalmologist in Accra.

16. On 27 November 2012, the Commander of the 37 Military Hospital convened a medical board (37 Military Hospital Medical Board) in Ghana to examine and report on the condition of the Applicant. The report of the 37 Military Hospital Medical Board, which was finalized on 13 December 2012, indicated that the

the status of his eye. This medical board was not convened at the request of the United Nations and did not comprise of doctors selected by UNMIL;

c) She did not have the capacity to seek special consideration for him in matters pertaining to the administration of the disability provisions of the Pension Fund.

20. On 27 January 2013, the Special Entitlements Unit of the Department of Field Support (DFS) informed the Human Resources Office of UNMIL (UNMIL HRO) of MSD's findings and conclusion that the Applicant's illness was not found to be directly related to the performance of his official duties. This was communicated to the Applicant on 28 January 2013.

21. The Applicant wrote to the ASG/OHRM again on 6 and 7 May 2013². On 23 May 2013, the Director of MSD responded to the Applicant on behalf of the ASG/OHRM. She reiterated that the 37 Military Hospital Medical Board was part of the hospital's internal procedures and had not been convened under the authority of the United Nations. She assured him that the Report of the 37 Military Hospital Medical Board had not been submitted to the ABCC and had not been considered by it during its deliberations. She then advised him that if his medical condition prevented him from performing his duties, MSD could recommend his case to the Pension Fund for consideration.

22. The Applicant responded to the Director of MSD on 27 May, disagreeing with her response of 23 May and reiterating his request for compensation and separation.

23. At its 463rd meeting on 11 June 2013, the ABCC considered the Applicant's claim for compensation under Appendix D and concluded that his injury was not service-incurred.

² These emails were referred to in the response

24. On 16 July 2013, the Controller, on behalf of the Secretary-General, approved the ABCC recommendation of 11 June 2013 to deny the Applicant's request that his illness (bilateral cataracts and loss of vision in the right eye due to corneal damage) be recognized as service-incurred.

Issues

29. The following are the issues for determination by the Tribunal:
- a) Is the Applicant's negligence claim receivable?
 - b) Is the Applicant's claim for separation on health grounds receivable?
 - c) Is the Applicant's claim that the Secretary-General erred in rejecting his claim for compensation under Appendix D receivable?

Considerations

Is the Applicant's negligence claim receivable?

Submissions

30. It is the Respondent's case that the Applicant failed to request management evaluation of this claim. Consequently, it is not receivable.

31. The Respondent avers that a cause of action premised on negligence is receivable only if an applicant has previously submitted the contested decision for management evaluation³. Under staff rule 11.2(a), the Applicant was required to submit a request for management evaluation in order to contest an administrative decision denying his negligence claim. The Applicant did not submit the denial of any such claim for management evaluation, as required.

32. The Applicant submits that his negligence claim is receivable.

Considerations

33. Pursuant to art. 8.1(c) of the Statute of the Dispute Tribunal, the jurisdiction of the Dispute Tribunal can only be invoked in certain cases if a contested administrative decision has been previously submitted for management evaluation.

³ See Wamalala2013-UNAT-300 at para. 30.

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36. Based on the existing jurisprudence, this Tribunal cannot consider the Applicant's claims for negligence and compensation under Appendix D as one single claim. They must stand as separate claims. Thus, the question now is whether the Applicant submitted his negligence claim for management evaluation.

37. Apart from a general rejection of the Respondent's contention that this claim is not receivable, the Applicant did not make any submissions on the issue of receivability in his 17 January 2014 response. The record, however, shows the following communication from the Applicant:

- a) A letter dated 2 January 2013 addressed to the ASG/OHRM setting out his medical condition and requesting the ASG's urgent authorization for his separation from service on health grounds and compensation for the damage to his eye;
- b) Emails dated 6 and 7 May 2013 addressed to the ASG/OHRM rejecting the findings of the 37 Military Hospital Medical Board and of the ABCC and requesting special consideration for separation on health grounds and a recommendation to the Pension Fund for disability payments; and
- c) A letter dated 27 May 2013 addressed to the Director of MSD rejecting her response of 23 May and reiterating his request for compensation and separation.

38. While these communications were addressed to officials within Administration, they did not comply with staff rule 11.2(a) that clearly directs staff, as a first step, to submit a request for management evaluation to the Secretary-General. Pursuant to ST/SGB/2010/9 (Organization of the Department of Management) the Management Evaluation Unit (MEU) is the office mandated to receive management evaluation requests from an aggrieved staff member on behalf of the Secretary-General. Staff rule 11.2(a) does not provide staff members with the

option of writing to the ASG/OHRM or other officials within the Administration to request management evaluation.

39. UNAT held in *Servas* 2013-UNAT-349 that:

A staff member must be familiar with the Staff Rules and understand her obligation to act in conformance with those rules. This means that a request for management evaluation must be submitted prior to bringing an application before the Dispute Tribunal.

40. The Tribunal concludes that the Applicant's negligence claim is not receivable because he was required to request management evaluation of this claim under art. 8.1(c) of the Statute of the Dispute Tribunal but he failed to do so.

Is the Applicant's claim for separation on health grounds receivable? 29506t340.2 Tw [

Is the Applicant's claim that the Secretary-General erred in rejecting his claim for compensation under Appendix D receivable?

Submissions

44. The Respondent asserted in his Reply that: (a) the Applicant was in fact challenging the decision of the Secretary-General, dated 16 July 2013, to approve the recommendation of ABCC that his claim for compensation under Appendix D of the Staff Rules be rejected; and (b) this claim is not receivable for the following reasons:

a) The Applicant's claim for compensation was denied on the basis of MSD's medical opinion that the Applicant's cataract was not due to prolonged use of visual display units. MSD concluded that the Applicant's condition was most likely age related and not service-incurred. Given that the ABCC recommendation and the Secretary-General's decision are based on medical grounds, the appeal procedure set out in article 17 of Appendix D applies⁴.

b) The Applicant failed to exhaust the internal administrative process by requesting reconsideration of the Secretary-General's decision pursuant to article 17 of Appendix D to the Staff Rules.

c) The obligation to exhaust internal administrative remedies before resorting to judicial review is a principle largely recognized in administrative law. The principle places an obligation on an aggrieved party, who desires judicial review of an administrative decision, to exhaust any internal remedies at his or her disposal before approaching a court or tribunal.

d) The General Assembly noted the importance of exhausting internal administrative remedies in resolution 62/228 (Administration of justice at the United Nations).

⁴ See *Simmons*, UNDT/2012/167.

e) Under staff rule 11.2(b), a decision based on advice from a technical body such as the ABCC is not subject to management evaluation. Instead, the appeal procedures set out in article 17 of Appendix D provides the Secretary-General with an opportunity to reconsider his decision, taken on the basis of an ABCC recommendation, before a staff member may seek judicial recourse before the Dispute Tribunal.

45. The Applicant avers that he is not contesting the Secretary-General's decision of 16 July 2013 because this decision was never delivered to him. He is in fact contesting the ABCC decision that was conveyed to him on 28 January 2013.

46. The Applicant further contends that he sought management evaluation of the decision conveyed to him on 28 January 2013 in that he wrote to the ASG/OHRM on two separate occasions seeking review of his case based on the evidence he submitted. He also submits that in addition to the communication between him and the Office of the ASG/OHRM, a Medical Board was set up at the 37 Military Hospital in Accra to review his case. This Medical Board concluded that he was not entitled to any compensation, thereby rendering his case closed as far as the Organization was concerned. Since his case was now considered closed by the Organization, it could not be the subject of any further management review and as such, it would have been futile for him to seek any further management evaluation of his case. Consequently, the only option left was for him to file an application with the Tribunal.

Considerations

47. Appeals against the decision of the Secretary-General in cases of injury or illness are made by a request for reconsideration under article 17 of Appendix D to the Staff Rules. Article 17(a) provides as follows:

Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be

55. In Schook2010-UNAT-013, UNAT remanded the case back to the Dispute Tribunal because no written administrative decision had been communicated to Mr. Schook. UNAT held that:

Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore,

terms of reference for the 37 Military Hospital Medical Board clearly state that this medical board was convened “by the authority of the Commander of the 37 Military Hospital”. Further, the Applicant has not placed any evidence before the Tribunal to show that UNMIL or the United Nations played any role in the constitution of this medical board.

60. In AmanyUNDT/2014/018, this Tribunal emphasized that:

[...] the purpose of the request for management evaluation is to give the Administration an opportunity to set right what would appear to be a wrong decision and to provide an acceptable solution where necessary. This procedure is conducive to good administration and prevents the Tribunal from being clogged with cases unnecessarily.

61. The same is true of the reconsideration process under article 17(a). Since the Applicant’s claim has not been subjected to reconsideration by the ABCC, the Tribunal is not competent to entertain his Application. However, due to the exceptional circumstances of this case, the Tribunal finds that the Respondent should be given an opportunity to correct the omission of not providing the Applicant with a copy of the 16 July 2013, which would have enabled the Applicant to seek reconsideration using the proper channel.

Decision

62. Pursuant to article 19 of the UNDT Rules of Procedure, which allows the Tribunal to issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties, and the exceptional circumstances of this matter, the Tribunal orders the following:

- a) The Respondent is to formally notify the Applicant of the Secretary-General’s decision of 16 July 2013 no later than 28 November 2014
- b) Once the Applicant receives the Secretary-General’s decision, it will be up to him to decide whether or not to seek reconsideration of his claim in

accordance with article 17(a) of Appendix D, which reads in relevant part as follows “[r]econsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision

63. In light of the Tribunal’s findings that the claims presented by the Applicant are not receivable, the current Application is dismissed in its entirety.

(Signed)

Judge Vinod Boolell
Dated this 19th day of November 2014

Entered in the Register on this 19th day of November 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi