



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/022
Judgment No.: UNDT/2017/070/Corr.1
Date: 9 November 2017
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-

9. On 1 February 2006, the Secretary-General awarded the applicant compensation under art. 11.2(d) of Appendix D to the Staff Rules of for loss of earning capacity for the period 1 February 2004 through 10 July 2005.²

10. On 6 July 2009, the Applicant was awarded compensation in the amount of USD128,946.40 equivalent to a 55% permanent loss of function of the whole person for a Class 4 mental impairment under art. 11.3

capacity. The ABCC recommendation was approved on behalf of the Secretary-General on 16 July 2013.⁸

16. On 17 September 2014, the ABCC again recommended to the Secretary-General that the Applicant's request for resumption of loss of 100% earning capacity disability benefits be denied.⁹ The ABCC recommendation was approved on behalf of the Secretary-General on 30 September 2014. Part of this recommendation reads as follows:

...(viii) that the board has considered the claimant's case twelve times for a variety of issues including multiple considerations of eligibility for disability compensation; (ix) the board's approach in other disability cases, where a case is adjudicated on the matter of disability (generally only after one consideration); (x) the board's determination that it did not intend an annual review of the claimant's claim be undertaken and that the claimant has exhausted her recourse to the ABCC; (xi) the board's determination that it will not consider any further review of the claimant's claim for disability benefits and (xii) *the board's instruction to the claimant that, if she wishes to contest the board's decision, her sole recourse is to follow the ABCC appeals process which consists of filing an application to the UN dispute Tribunal; (Emphasis added)*

Recommends to the Secretary-General that the claimant's request for loss of earning capacity (disability) benefits be denied.

17. The Applicant was informed of the ABCC recommendation and the Secretary-General's approval of 30 September 2014 on 8 October 2014.¹⁰ The relevant part, authored by the ABCC Secretary is reproduced below.

I wish to inform you that your claim for compensation under Appendix D to the Staff Rules for (sic) was considered by the Advisory Board on Compensation Claims at its 476th meeting, held on 9 September 2014.

I am attaching a copy of the Secretary-General's decision of 30 September 2014 for your information.

18. The Secretary-General's decision was the denial of the Applicant's request for resumption of loss of earning capacity (disability) benefits.

⁸ Annex 3 to the application.

⁹ Annex 4 to the application.

¹⁰ Annex 5 to the application.

19.

an application to the United Nations Dispute Tribunal, clearly means that the ABCC was by September 2014 no longer willing to reconsider its recommendation and therefore, the time limit had clearly started to run.

21. The Applicant's submissions on receivability may be summarized as follows:

a. She had good reasons to regard statements from the ABCC with respect to the finality of the decisions it communicated to her as non-binding and arbitrary. Specifically, the Board's determination that the Secretary-General's decision of 16 July 2013 as final was demonstrably not the case. There was extensive communication between the Applicant and various staff members including the Secretary of the ABCC, the ABCC Finance Officer and the Director of the Office of the Under-Secretary-General for Management, among others, leading to the reconsideration of her case by the ABCC on 9 September 2014.

b. The ABCC has a history of communicating decisions to the Applicant and then reversing them upon receipt of further documentation.

c. The supposed final nature of the Secretary-General's decision of 16 July 2013 was not communicated to her until 8 October 2014 by which time the ABCC had already demonstrated by its own actions the irrelevance of its determination.

d. The unreliability of decisions communicated to her by the ABCC over many years and its willingness to reverse such decisions in the past gave her no reason to give credence to the Board's instruction that her sole recourse was to file an application with the UNDT.

e. She meets the requirement to receive loss of earnings compensation in accordance with the ABCC's decision of 20 April 2012 until the present. However, the ABCC has never communicated any reason

for denying her eligibility for loss of earnings compensation for those years focusing instead on the tax year 2011.

f. As she has received no communication indicating that the ABCC has made any considered determination on her eligibility to receive loss of earning compensation for the period from 2012 to the present, the time limit for filing applications with respect to this claim cannot have been reached. For the time limit for filing a dispute to be invoked, there must be a decision to contest that has been communicated to an applicant.

g. She has not received due consideration for her claim nor any clear decision from the ABCC with respect to it.

h. In response to the *Kazazi* case cited by the Respondent, the Applicant submits that she never received a final decision in her case that she could regard as definitive and she has received no decision at all with respect to the second part of the remedy she seeks.

Considerations

22. The sole legal issue arising for consideration at present is whether this application is receivable *ratione temporis*.

23. It is clear from the application that the contested decision is the decision to deny the Applicant compensation for loss of earnings capacity taken during the ABCC's 476th meeting of 9 September 2014. The Secretary-General approved a recommendation to this effect by way of decision of 30 September 2014 and it was communicated to the Applicant by letter dated 8 October 2014.

24. Article 8.1(d)(ii) of the UNDT Statute stipulates that an application shall be receivable, in cases where a management evaluation is not required,¹¹ within 90 calendar days after an applicant's receipt of the administrative decision. Pursuant to art. 8.1(d)(iii) of the UNDT Statute, the deadline provided for in

¹¹ Pursuant to staff rule 11.2(b), a staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies (such as the ABCC in this case), as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

subparagraphs (d) (ii) shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

25. Applying the law to the facts in the present case, the application which was filed on behalf of the incapacitated Applicant by her spouse, ought to have been filed within one year of 8 October 2014, that is, by 8 October 2015. It was instead filed on 23 March 2016.

26. The Applicant's essential argument is that the decision communicated to her on 8 October 2014 was not the definitive final decision based on her past interactions with the ABCC. This argument is not sustainable. Consistent with the large discretion that the administration has in reconsidering its own decisions, insofar as it does not infringe on acquired rights, it was up to the Secretary-General to review his previous decision of 16 July 2013, in particular if it had not been ever communicated to the Applicant. Moreover, the administration may, and should, react to any new fact or argument presented on the issue. The ABCC and the Secretary-General apparently acted in the direction of affording full consideration to the Applicant's case. Notwithstanding, however, what would have been the reason for reviewing of the decision of 16 July 2013, at the latest, on 8 October 2016, the Applicant was unequivocally informed in the terms summarized at paragraph 16 above that the administration had denied her request as well as being informed in unambiguous terms that "her sole recourse [wa]s to follow the ABCC appeals process which consists of filing an application to the

or waiving time.¹² Further, as held by UNAT in *Kazazi*, the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather, time starts to run from the date on which the original decision was communicated.

Judgment

28. The application was filed out of time and is not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 9th day of November 2017

Entered in the Register on this 9th day of November 2017

(Signed)

Eric Muli
Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi

¹² *Mezoui* 2010-UNAT-043; *Reid*