
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/049

Judgment No.: UNDT/2019/182

Date: 18 December 2019

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member with the Department of Safety and Security (“DSS”), contests the Secretary-General’s decision to deny his claim for compensation under Appendix D to the Staff Rules (“Appendix D”) for injuries and illnesses in relation to an incident that occurred on 27 July 2013. The decision was notified to the Applicant on 1 May 2019 by the Secretary of the Advisory Board on Compensation Claims (“ABCC”).

2. The complex procedural history relating to the Applicant’s claim to the ABCC under Appendix D is set forth in Judgment No. UNDT/2019/019 issued on 7 February 2019, which was rendered by another Judge of the Dispute Tribunal in a separate case (Case No. UNDT/NY/2016/048). In this judgment, the Dispute Tribunal rescinded the Secretary-General’s decision of 8 May 2015 to deny the Applicant’s claim relating to the incident on 27 July 2013 and remanded his case to the ABCC for reconsideration. Accordingly, the ABCC reconsidered the Applicant’s case and the contested decision was notified to him on 1 May 2019.

3. On 6 July 2019, the Applicant filed the present application.

4. For the reasons below, the Tribunal finds that the Secretary-General properly exercised his discretion in denying the Applicant’s claim and therefore the application is dismissed.

Facts

5. A detailed factual background of the case relating to the Secretary-General’s first review and denial of the Applicant’s claim on 8 May 2015 is set forth in Judgment No. UNDT/2019/019. The following outline of facts reflects those circumstances that are relevant to the present case.

6. On 7 February 2019, by Judgment No. UNDT/2019/019, after considering numerous allegations of procedural violations raised by the Applicant, the Tribunal

found that the ABCC failed to act in a proper, reasonable, and lawful manner for the following reasons, as summarised in para. 86 of UNDT/2019/019:

(a) [the ABCC] failed to provide adverse material ([closed-circuit television (“CCTV”)] video footage) to the Applicant to view and comment; (b) it did not consider his prior medical history relevant in reviewing his Appendix D claim; and (c) it considered [the United Nations Compensation Board (“UNCB”)]’s recommendation and related documentation without demur.

7. Accordingly, the Dispute Tribunal rescinded the contested decision and remanded the Applicant’s case to the ABCC for reconsideration:

87. ... the case is remanded to the ABCC for a full and proper reconsideration of the Applicant’s claim. This includes giving the Applicant the opportunity to access and comment on any adverse material to be considered by the ABCC, including the CCTV video footage of the incident, and considering the Applicant’s prior medical history and removing any documentation related to the UNCB recommendation.

8. On 26 February 2019, the ABCC sent an email to the Applicant stating that the CCTV video footage of the incident was already provided to his Counsel and asked for his comments. On 5 March 2019, the ABCC sent a letter by courier reiterating the request in the 26 February 2019 email.

9. On 11 March 2019, the Applicant provided his comments to the ABCC via email. In the email, he asserted, among other things, that the CCTV video footage was edited to conceal the fact that the barrier at the post 103 south entrance by the United Nations Headquarters in New York, where the incident occurred on 27 July 2013, was broken seven days prior to the incident, which created risky and unsafe conditions at the entrance and, in any event, the CCTV video footage is not a reliable source to make a medical determination. He requested to review the video footage as captured in the original recording source, accompanied by an expert of his choosing. He also claimed that he did not receive the CCTV video footage through his Counsel. He further claimed that the Secretary of the ABCC is biased against him and thus should be excluded from the handling of his case since the Secretary of the ABCC

had been responsible for allegedly not providing all the Applicant's medical reports to the ABCC previously.

10. On 13 March 2019, noting that it appeared that the Applicant's Counsel had not provided him with the CCTV video footage, the ABCC provided the Applicant with a copy of the video footage via courier, requesting him to provide comments by 22 March 2019.

11. On 25 March 2019, the ABCC informed the Applicant that it had sent a copy of the CCTV video footage of the incident to the Applicant's residence via courier. The ABCC, providing a tracking number, informed him that a delivery attempt was made on 15 March 2019, and yet nobody was available to accept the delivery, which was then sent to an office of a courier company where he could pick it up. The ABCC also sent an email to the Applicant with a link to the CCTV video footage available in a cloud storage service. The ABCC asked him to provide his comments immediately.

12. On the same day (25 March 2019), in a reply email, the Applicant reiterated his assertion that the CCTV video footage was edited with ill-intent and he would like to have a chance to see it from the recording source accompanied by an expert.

13. The ABCC 1 0 0398.59 529.39 Tm0 g0 2,5o nBT/F1 12 Tf1 0 0 gq0o footag

report, the impact and damage to the claimant's vehicle; the security
video footage of the i

conditions implausible to have resulted from the incident at the security barrier;

Being resolute in its findings as stated above in reviewing the claimant's assertions (including his initial report about the incident) and in re-examining the video footage;

15. On 29 April 2019, on behalf of the Secretary-General, the Controller countersigned the ABCC's recommendation.

16. On 1 May 2019, the Applicant was informed that his claim under Appendix D was denied by the Secretary-General's decision based on the ABCC's recommendation.

Consideration

The applicable legal framework and the issues of the case

17. In the present case, as stated above, by Judgment No. UNDT/2019/019, the Dispute Tribunal fully considered the merits of the Applicant's various allegations, and remanded the case to the ABCC for a full and proper reconsideration of the Applicant's claim. The Dispute Tribunal directed the ABCC to (a) give the Applicant the opportunity to access and comment on any adverse material to be considered by the ABCC, including the CCTV video footage of the incident, (b) consider the Applicant's prior medical history and (c) remove any documentation related to the UNCB recommendation, to rectify the procedural irregularities found in the Judgment.

18. The Tribunal notes and adopts the applicable legal framework as set forth in paras. 56 to 62 of Judgment No. UNDT/2019/019. In particular, the Tribunal notes that there are two elements that must be established for a claim under Appendix D: (a) whether a claimant suffered from the injury or illness as alleged, and (b) whether the illness or injury was attributable to the performance of official duties on behalf of the Organization. The Tribunal notes that the ABCC is established to make recommendations to the Secretary-General concerning claims for compensation and

can decide on procedures it considers necessary for the purpose of discharging its responsibilities (see art. 16 of Appendix D). In reviewing the Secretary-General's exercise of discretion in the Appendix D matters, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

19. In light of the parties' submissions in the present case, Judgment No. UNDT/2019/019 and the applicable legal fr16.05 1761 0 0 1 466.06 432.72 0 612 792 reW*nBT12 0

comment. The Applicant provided his comments by email on 11 and 25 March 2019;

b. The medical doctor of MSD provided his medical opinion to the ABCC, in which he considered, among other things, medical reports submitted by the Applicant and the prior medical history of the Applicant;

c. The ABCC no longer considered any documentation related to the UNCB recommendation.

21. Therefore, the Tribunal finds that the ABCC rectified the procedural irregularities as directed by Judgment No. UNDT/2019/019 in its reconsideration of the Applicant's claim.

22. However, the Applicant also alleges that the contested decision was procedurally irregular, unlawful, and improper and was tainted with improper considerations and factual errors, and was based on violations of due process rights of the Applicant. The Tribunal will review these allegations as below.

Was the contested decision to deny the Applicant's claim the result of a lawful exercise of discretion?

23. Having reviewed the application, in light of the standard of review set forth in

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