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Before

Case N

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THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2015-UNAT-601

Peacekeeping Section, [Medical Services Division (MSD)], instructed that the Applicant be medically evacuated for treatment in Spain. On 9 November 2006 the Applicant was medically evacuated.

... In March 2007, the Applicant was informed by his traumatologist that his vertebrae required surgical repair and he was placed on a waiting list for surgery.

... On 3 April 2007 the Applicant was notified by Human Resources [HR] at MONUC that his balance of sick leave was now exhausted, and that his salary would be withheld until medical documentation was provided to MONUC and MSD concerning the status of his medical treatment and condition.

... On 16 April 2007, HR MONUC notified the Applicant that a number of medical documents had been received and forwarded to [the MSD] in New York for review and certification. The Applicant was further informed that his salary would continue to be withheld pending the receipt of a decision from MSD.

... On 15 September 2007 the Applicant submitted a claim for compensation under Appendix D to the Staff Rules.

... On 30 September 2007 the Applicant's appointment was permitted to expire.

... On 11 September 2008 the Applicant was informed by Van Breda International, his healthcare insurance provider, that the United Nations had cancelled his coverage.

... On the same day, 11 September 2008, the Applicant was informed by Ms. Lalita Kakrecha, MONUC that he had been separated from his post.

... On 19 September 2008, the Applicant contacted Ms. Lalita Kakrecha, MONUC, to request information on how to receive his separation entitlements.

... On 6 October 2008 Ms[.] Susan Asomaning, [Officer-in-Charge (OIC)] Personnel Section, MONUC, sent the Applicant the forms to finalize his separation from MONUC.

... On 28 October 2008, the Applicant submitted the separation forms to Human Resources Section, MONUC Kinshasa DRC by mail.

... On 12 January 2009 Ms[.] Susan Asomaning emailed the Applicant and informed him as follows:

(a) that he had been separated from the Organization for 'Abandonment of Post' on 30 September 2007; and

(b) that his last working day was marked as 11 October 2006.

... On 4 February 2009 the Applicant was informed by Field Personnel Operations Service, [Field Personnel Division (FPD)/Department of Field Support (DFS)] that he would be contacted once payroll had completed his case.

... On 15 December 2009, the Controller, on behalf of the Secretary-General, approved the [Advisory Board on Compensation Claims (ABCC)]'s recommendation regarding the Applicant's claim following its meeting on 12 October 2009. The ABCC recommended, *inter alia*, the following:

- (a) that only the Applicant's injuries to his left leg and left knee were attributable to the performance of official duties on behalf of the United Nations and that all reasonable medical expenses certified by the Medical Director as directly related to those injuries alone could be reimbursed under Appendix D to the Staff Rules;
- (b) that the Applicant should be granted special sick leave credit for the period from 12 October 2006 to 30 September 2007 (when he was separated from service), as being directly related to the service-incurred injuries, under the provisions of article 18(a) of Appendix D; and that he should be credited for any days of annual leave that he was erroneously charged during that period in order to remain on full pay status; and
- (c) that the Applicant should receive compensation under article 11.2(d) of Appendix D for the loss of earning capacity for the period from 1 October 2007 to 4 August 2008, the compensation to be based on the salary that he was receiving when he separated from service on 30 September 2007...

... On 18 January 2010, the Office of Staff Legal Assistance (OSLA), on behalf of the Applicant, wrote to DFS, ABCC, the United Nations Joint Staff Pension Fund

wrote to the Secretary of the ABCC requesting a recommendation from the ABCC that the Applicant be awarded half pay for the period from 1 October 2007 to 4 August 2008 to supplement his sick leave with half pay over this period ... In early March 2011, the MSD asked Dr. Roberto Perez Pestana, an occupational medicine and work incapacity specialist in Spain, to conduct an independent evaluation of Mr. Karseboom in connection with his request for a disability benefit. Dr. Pestana was also asked to carry out a functional evaluation of the Applicant's left knee in connection with his claim for permanent loss of function under Appendix D...

... On 21 April 2011 Ms. Dulcie Mapondera, Senior Legal Officer at UNJSPF, reverted to the Applicant to notify him that, after consideration of the new medical evidence submitted and pursuant to Article 33(a) of the Fund's Regulations, he was to be awarded a disability benefit.

... On 28 April 2011 the Applicant was informed by FPD/DFS that his reinstatement would be implemented over the next few days.

... On 17 May 2011 Mr. Demetri Gounaris, Secretary of ABCC, advised the Applicant that on 4 March 2011 the ABCC had recommended:

(a) That, pursuant to Article 18(a) of Appendix D, the Applicant be granted special sick leave credit for half days within the period from 1 October 2007 to 4 August 2008;

(b) That sums awarded under article 11.2(d) for the same period be recovered from the Applicant.

... On 29 July 2011, per the Secretary[-]General's decision of 6 May 2011, the Organization recovered 43,929.80 USD from the monies owing to the Applicant, to reflect an adjustment of the sick leave credit at half pay from 1 October 2007 to 4 August 2008 combined with the Applicant's sick leave entitlements at half pay.

... On 13 December 2011 Ms. Maria Clarissa Lijauco-O'Donnell, Chief of Pension Entitlements and Client Service for [the ...] Pension Fund, informed the Applicant that his estimated pension entitlements for incapacity were:

(a) (as per Article 33) a disability payment of \$35,558.00 per year, which would remain in effect for as long as he remained physically incapacitated;

(b) (as per Article 34 and 35) the Applicant's wife would receive a benefit payment of \$17,779.00 per year in the event of the Applicant's death;

(c) (as per Article 36) any of the Applicant's children who were under the age of 21, would, in the event of the Applicant's death receive \$3,186.00 per year.

... On 8 February 2012 Ms. Silvina Colicchia, Administrative Assistant of ABCC, advised the Applicant that following its 458th meeting on 14 October 2011, the ABCC had recommended that:

(a) based on the current medical information, as the claimant has not sustained any degree of permanent loss of function due to his leg and knee injuries in accordance with the 6th Edition of the [American Medical Association (AMA)] guides to permanent impairment, the claimant's request for compensation under Article 11.3(c) of Appendix D be denied; and

(b) the claimant's request that his spinal injury be recognized as service-incurred be denied.

3. On 2 February 2012, the Controller, on behalf of the Secretary-General, approved the recommendation.

4. On 27 April 2012, Mr. Karseboom filed an application before the UNDT contesting the decision to deny his request for compensation on the grounds that he had not sustained any degree of permanent loss of function due to his leg and knee injuries, and that his spinal injury would not be recognized as service-incurred. On 30 July 2012, he submitted an addendum to his application.

5. On 30 October 2014, the UNDT issued its Judgment. The UNDT held that the procedures for reconsideration provided for in Article 17 of Appendix D were not followed by the ABCC. Having received the requests for reconsideration, the Administration did not convene a medical board; instead, it conducted a review of the original determination that the spinal injuries were not service-incurred. In conducting this review, the ABCC relied upon the so-called independent medical evaluation provided by Dr. Pestana. The UNDT concluded that

7. The UNDT further found that the ABCC's failure to convene a medical board which undermined the lawfulness of the Secretary-General's decision on the cause of Mr. Karseboom's spinal injuries, also impugned the decision about the loss of function related to Mr. Karseboom's leg and knee injuries.

8. Turning to the issue of material damages, the UNDT held that had the ABCC found that Mr. Karseboom's spinal injury was service-incurred, he would have been entitled to the

the MSD, the ABCC, the Controller and, ultimately, the Secretary-General. The UNDT was not, however, competent to determine that an injury was service-related, and it was not appropriate for the UNDT to assume that the injury was service-related. Rather, the determination as to whether the injury is service-incurred under Appendix D rests with the ABCC and the Secretary-General. If the UNDT determined upon its review that the proper procedures had not been followed, it should have remanded the case back to the ABCC to convene a medical board to reconsider the original determination.

12. The UNDT further erred in finding that Mr. Karseboom suffered 100 per cent permanent loss of function caused by his spinal injuries and awarding compensation on that basis. While the UNDT acknowledged that it could neither make an award under Appendix D nor substitute its own views for those of the medical service, it essentially did so. It calculated the amount of material damages to be awarded to Mr. Karseboom on the basis of medical findings and by incorrectly applying the schedule relating to permanent loss of function under Article 11(3) of Appendix D to Mr. Karseboom's case.

13. Moreover, the UNDT erred in awarding compensation for loss of opportunity. Contrary to the UNDT's finding that Mr. Karseboom had lost an opportunity to obtain compensation under Appendix D, his claim for compensation for his alleged service-incurred injury had been considered on two occasions by the ABCC and he had also received a disability pension from the UNJSPF. According to the Appeals Tribunal's jurisprudence, loss of opportunity usually applies to cases of selection or promotion and not to the loss of opportunity to obtain compensation under Appendix D.

14. The UNDT erred in awarding moral damages. Contrary to the UNDT's conclusion, there was no procedural violation warranting such compensation. In making its finding, the UNDT relied upon the *Meron* case² to justify an award of compensation for "excessive and inordinate delays, including delay in convening a medical board". The UNDT failed to take into consideration that Mr. Karseboom contributed to at least two years of the delay in processing his claim before the ABCC, by failing to file in a timely manner the relevant documents in support of his claims. The UNDT also failed to take into account the different processes that had to be undertaken in order to deal with Mr. Karseboom's requests, namely two claims before the ABCC and one claim for disability before the UNJSPF.

² *Meron v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/004, affirmed by the Appeals Tribunal in Judgment No. 2012-UNAT-198.

THE UNITED NATIONS APPEALS T

evidence in support of Mr. Karseboom's explanation of causation from Dr. Pestana's report was unreasonable, the UNDT did not need to rely on any opinion expressed by a medical expert. It is also not appealed. If an expert is not asked to address a question in a report, no substantive conclusions can be drawn from his failure to answer it. Drawing the conclusion that this medical opinion was not properly supported was well within the UNDT's jurisdiction.

22. The *Frechon* case is precedent for the type of review the UNDT conducted.⁴ In that case, it was held that the UNDT could legitimately review the opinion provided by the Director of MSD. The circumstances allowing them to do so included the fact that the basis for the Director of MSD's decision did not support her conclusion. By the same token, the UNDT reviewed the express basis for the MSD's decision and found that it did not support the MSD's conclusion.

23. Turning to the Secretary-General's contention that the UNDT erred in awarding compensation for loss of opportunity, Mr. Karseboom maintains that the nature of his injuries was not at issue before the UNDT. Rather, the issue was whether the review as to whether these injuries were service-incurred had been done in a lawful fashion. On 14 July 2014, in response to Order No. 96 (GVA/2014), which requested further particulars on the remedy sought, Mr. Karseboom submitted that the basis for compensation should be his permanent loss of function of the whole person. Under Appendix D, compensation for such a loss of function is twice the annual pensionable remuneration at grade P-4, step V. The Secretary-General did not object to this submission or attempt to adduce evidence to counter the above assertion. He is therefore precluded from raising this argument on appeal.

24. In the alternative, Mr. Karseboom requests that the matter be remanded to the UNDT for a hearing of expert evidence. The fact that the Secretary-General failed to take issue with the above submission during the UNDT proceedings means that Mr. Karseboom was not afforded the opportunity to adduce evidence in this regard. He was therefore deprived of a fair hearing.

25. As to the Secretary-General's argument that the UNDT should have remanded the case to the ABCC, Mr. Karseboom contends that had the UNDT ordered such remand, precedent shows that it "would [...] have been subject to appeal by the Secretary-General using a diametrically opposite pleading". The Secretary-General had previously argued in another case that such an order was outside the UNDT's jurisdiction and, as such, the argument is "opportunistic and ill-conceived".

⁴ *Frechon v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-132.

26. Contrary to the Secretary-General's assertion, loss of opportunity damages are not reserved to selection or promotion cases. Loss of opportunity damages apply to where there is a "loss of opportunity" such as the loss incurred by Mr. Karseboom. The failure to lawfully process Mr. Karseboom's request for reconsideration as to whether his spinal injuries were service-incurred resulted in a loss of opportunity to receive appropriate compensation for those injuries. The very fact that the UNDT was not competent to make medical findings of fact led to damages being calculated in terms of loss of opportunity. Thus, the situation is analogous to that of a recruitment exercise where the actions of the Administration mean the issue was not properly reviewed. In such cases, the UNDT cannot substitute its opinion for that of a selection panel but it can calculate loss of opportunity damages where a staff member has been denied reasonable consideration to which he was entitled as a result of an unlawful decision.

27. Turning to the award of moral damages, Mr. Karseboom contends that the two limbs set out in *Asariotis* are plainly present. The UNDT correctly found procedural and substantive errors in the taking of the contested decision, which breached Mr. Karseboom's right to reasonable consideration of his claim for compensation for a service-incurred injury. The UNDT also heard evidence from Mr. Karseboom on the pain and suffering caused by these errors and excessive and inordinate delays in processing his requests for compensation under Appendix D, and nothing precluded the UNDT from basing its award of moral damages on oral testimony uncontested by the Secretary-General.

28. Moreover, the agreed-upon facts were relevant when considering the impact that the contested decision had on Mr. Karseboom. The nature of the breach of his contractual rights was severe and the delay had serious financial consequences for him. The circumstances of the breach of Mr. Karseboom's rights and the delay in processing his requests make this one

Considerations

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THE UNITED NATIONS APPEALS T

40. The UNDT was not competent to assume that there was a likelihood of the ABCC reaching a different conclusion. Moreover, although the UNDT considered that it was not making a medical assessment, its conclusions for its award of damages were in reality based on its own unqualified diagnoses and prognoses.

41. The Secretary-General submits that the UNDT, upon determining that the proper procedure had not been followed, should have remanded the case back to the ABCC to convene a medical board to re-examine Mr. Karseboom's case. Instead, the UNDT erred in effectively placing itself in the place of the medical expert and the decision-maker.

42. The Appeals Tribunal agrees with this submission.

43. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:¹³

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.

...

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

¹³ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

THE UNITED NATIONS APPEALS TRIBUNAL

concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months.

50. Mr. Karseboom's argument has no merit. Firstly, Article 10(4) has no application to the present case. An order under Article 10(4) can only be made prior to the determination of the merits of a case. In the present case, the UNDT had already determined on the merits that the Secretary-General's decision was unlawful and void. There was thus nothing to prevent it from ordering a remand. Secondly, under Article 9(1) of its Statute, the UNDT "may order production of documents or such other evidence as it deems necessary".

51. For the foregoing reasons, the appeal succeeds.

Judgment

52. The appeal is allowed. The Judgment of the UNDT is set aside and the case is remanded to the ABCC to convene a medical board.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Registry on 30 October 2015 at 11:54 AM. (UNAT/2015/Judgment/601)