
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/046

Judgment No.: UNDT/2016/023

Date: 16 March 2016

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar:

or he may wish to submit further relevant medical information to the ABCC for reconsideration.

With respect to the latter, what is required is new medical reports establishing his medical conditions claimed (*inter alia*, back and neck pain, lateral hearing loss, lateral tinnitus, carpal tunnel right wrist, branchial neuritis, reduced speech discrimination, vestibular deficit, vision abnormality, and PTSD) are a direct result of the incident which has been accepted as service-incurred pursuant to the Secretary-General's decision.

8. By a letter dated 19 June 2015 addressed to the ABCC Secretary, Counsel for the Applicant responded to the Secretary-General, stating, *inter alia*, that:

Having reviewed a letter from [the ABCC Secretary] and analyzed the board's recommendations to the Administration, we believe that it may have been an oversight of the board, or MSD Director regarding due diligence of what was already before both the board and MSD Director.

It is also our concern that certain facts, relevant for fair and independent determination of "injury claims, may not have been made available to the board, or were over-looked by the board in arriving at its recommendations. While there may have been an oversight, it cannot be ruled out that there could have been intentional human errors and omissions.

As you may already know experts rely on degrees of probability as to causation. In medical terms experts talk of probability within a reasonable degree of medical certainty in their opinions which is scientifically and legally acceptable way of drawing expert conclusions.

"injuries and illnesses were documented in his treating medical expert reports and have already been duly submitted to you through the DSS Executive Office. The same reports were also submitted to the MSD Director and have guided the MSD Director's other advisory opinions and decisions. We have however done our due diligence and highlight and spell out to you what must have been over-looked during the boards review:

opinion noted that [the Applicant] showed improvement with time but were the result of the concussion effect of the incident of July 27, 2013. [Dr. A] concluded that [the Applicant], must have suffered a concussion typical of sudden acceleration deceleration accidents [footnote omitted].

2. To validate his expert opinion [Dr. A] referred [the Applicant] for a Glaucoma test which was conducted by [Dr. C], a Glaucoma specialist on March 7, 2014, which revealed that [the Applicant] did not have any glaucoma [footnote omitted].
3. [Dr. D], an expert in interventional pain management has extensively treated [the Applicant] for his injuries and illnesses narrative report dated August 14, 2014, [Dr. D], MD., whose report is medically detailed and sound, opined, within a reasonable time frame, that the Applicant's current condition of chronic pain exacerbation could be as a result of the exacerbation through the motor vehicle accident [footnote omitted] referring to the accident

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19 June 2015 concerned matters related to your alleged illnesses, injuries and disability and the review of your case by MSD. While your counsel stated that certain elements of the board's recommendations raised matters of law, the MEU noted that your

Rules was still pending before the ABCC and no decision had been taken. The parties agreed that, taking into account the contentions made at the CMD regarding the pending procedure before the ABCC,

í First, the Dispute Tribunal does not recognize the right to withdraw an application without prejudice or with conditions (Order No. 115 (NY/2013) and *Sheykhiyani*, UNDT/2009/023). A withdrawal must be full and final, including on the merits (*Giles*, UNDT/2012/194).

í Ugeqpf."v jg"Cr rnkecpvøu"qdugtxcvkqpu"ctg" o ku i wkfgf0"Eqpvtct{" to the Cr rnkecpvøu"enck o."v jg"tgeqpukfgtcvkqp"qh"v jg"Cr rnkecpvøu"enck o" ku"pqv"ørgpfkpiö0"Vjg Cr rnkecpvøu"cvvcej o gpvu"qh"Cppgz"C"cpf"Cppgz" B are insufficient to convene a medical board. In order for the medical board process to proceed, the Applicant must as a first step, not only identify his choice of physician, but also complete and return the forms that were provided to his counsel by the Secretary of the ABCC in June 2015. These forms require the Applicant and his designated physician to acknowledge and agree to the provisions of Article 17(d) of Appendix D (Attachment No. 1). Lastly, any report or document that the Applicant wishes to bring to the attention of a medical board must be submitted to the Secretary of the ABCC, and not as attachments to a motion or as correspondence with the office of the Secretary-General.

22. On 19 December 2015, Counsel for the Applicant commented on the Tgurqpfgpvøu" 3:" Fgego dgt" 4237" tgurqpug" cpf" tgvtevgf" jku" 32" Fgego dgt" 4237" request to withdraw his application.

Respondent's submissions on receivability

23. The contentions of the Respondent on receivability may be summarized as follows:

a. The application is not receivable *ratione materiae* as the Applicant has failed to pursue his internal remedy of reconsideration of the contested decision under art. 17 of Appendix D;

b. The requirement to exhaust internal administrative remedies before seeking judicial review is an established principle of international administrative law and is one that is recognized by the General Assembly in the context of the internal justice system, referring to General Assembly resolution 62/228, para. 51. The Appeals Tribunal has also recognized the principle that a litigant must first exhaust any available internal remedies

e. Vjg" Crrnkecpvøu" enck o" wpfgt" Crrgpfkz" F" ycu" tglgevgt" qp" ogfkecn" grounds. Vjg" OUF" cfxkugf" vjg" CDEE" vjcv" vjg" Crrnkecpvøu" enck o gf" kplwtkgu" ygtg" òpgkvjgt ÷rj {ukqnqikecn{ " rncwukdngø" pqt" eqpukuvgpv" ykvj" vjg" kpekfgpvöø" The ABCC accepted this medical advice, and concluded vjcv" òvjgtg"]ycu" pq" credibility whatsoever to the incident as related by the claimant or to the kplwtkgu" cngigf" vq" jcxg" dggp" uwuvckpgf" cu" c" tguwnv" vjgtgqhö;

f. The Applicant relies on medical grounds to contest the decision in his application. These grounds are: (i) the decision was not based on sound medical expert reasoning; (ii) the Medical Director improperly took into account the CCTV footage of the incident; (iii) there was a failure to properly gxcnwcvg" vjg" Crrnkecpvøu injuries and illnesses; and (iv+ " vjg" Ogfkecn" Fktgevgtøu" advisory opinion was not based on independent tests or sound medical reasoning, and does not accord with the opinions of medical experts. On 19 Lwpg" 4237. " Crrnkecpvøu" Counsel wrote to the Secretary-General requesting management evaluation of the contested decision. At the request of the MEU, the Applicant completed a management evaluation request form. On 22 June 2015, the ABCC Secretary kphqt o gf" Crrnkecpvøu" Counsel by email vjcv. " hqnnqykpi" vjg" uwd o kuukqp" qh" vjg" Crrnkecpvøu request for management evaluation, he would not take any further action on his request for reconsideration pending the management evaluation by the MEU;

g. Vjg" Crrnkecpvøu's allegations in the application regarding the circumstances in which he sought management evaluation are denied. The ABCC Secretary has pgxgt" jcf" c" eqpxgtucvkqp" ykvj" Crrnkecpvøu" Counsel. By letter dated 15 July 2015, the Officer-in-Charge of MEU informed the Applicant that his request for management evaluation was not receivable and the rtqrgt" tgeqwtug" òyqwnf" dg" vq" rtqeggf" ykvj" cp" cr r gcn" wpfgt" ctvkeng" 39" qh" Appendix Dö. The MEU Officer-in-Charge cnuq" pqvgf" vjcv" vjg" òCDEE" Secretary had offered to present new medical reports to the ABCC for tgeqpukfgtcvkqpö;

h. The Applicant has not followed the guidance provided by the MEU on the correct procedures to challenge the contested decision. The ABCC Secretary has confirmed that, since 15 July 2015, he has not received any communication from the Applicant regarding the request for reconsideration procedure under art. 17 of Appendix D (establishment of a medical board) or by submitting new medical reports to the ABCC for its reconsideration;

i. Accordingly, the Dispute Tribunal does not have competence to review the contested decision as the Applicant has failed to exhaust his internal remedies under Appendix D.

Applicant's submissions on receivability

24. On 1 December 2015 response to Order No. 289 (NY/2015), his Counsel included extensive submissions related both to the receivability and merits of the application. Those of relevance to the question of receivability may be summarised as follows:

a. The application should be found receivable. No requirement of exhaustion of internal remedies exists for the impugned administrative decision. The Tribunal has clear precedents on similar applications contesting administrative decisions taken pursuant to advice of the ABCC, which were found receivable, without the decisions first being subjected to management evaluation (*Simmons* UNDT/2012/167, *Baron*

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(c) These rules shall not apply to internes nor to persons under contract with the United Nations by special service agreement unless otherwise expressly provided by the terms of their appointments.

Article 17. Appeals in case of injury or illness

(a) 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 requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date. The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b);

(b) A medical board shall be convened to consider and to report

30. The Tribunal underlines that, in *Karseboom* 2015-UNAT-601, the Appeals Tribunal decided as follows (footnotes omitted):

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32. Mr. Karseboom had requested [the Department of Field Services], the ABCC, the Pension Fund and [United Nations Organization Mission in the Democratic Republic of the Congo] to tgeqpukfgt"vjg"CDEEøu"tgeqo o gpfcvkqp"qh"34"Qevqdt"2009 in order that the injuries to his back could be recognised as service-related and compensation awarded. In response, the ABCC adopted a long-standing practice of requesting an independent medical evaluation at the cost of the Organization. This practice advantages claimants in that, if a medical board is convened and if it upholds the Secretary-I gpgtcnøu" fgekukqp." vjg" enck o cpv" y qwnf" dg" qdnk igf" vq" rc{" egtvcqp" medical fees and expenses, which could be considerable.

33. The [Dispute Tribunal] held that thku"rtqegfwtg"y cu"õkp"dtgcej" of the fundamental rule of administrative law that the parties are dqwpf"d{"vjg"twngu"qh"vjg"Qt icpk|cvkqpö0

34. The [Dispute Tribunal] elaborated on this finding in paragraphs 80 and 81 of its Judgment as follows:

í The practice adopted by the ABCC is in clear contravention of art. 17. The Secretary-General is required by art. 17(c) to make a decision on the request for reconsideration on the basis of the ABCC recommendations together with the report of a medical board. In this case, a medical board was not convened and the decision was made without such a report.

í The Applicant has demonstrated that the correct procedures required by art. 17 were not followed by the ABCC. Instead, the ABCC relied on a process that is not mandated by any regulation or rule of the Organization. As the decision of the Secretary-General on the request for reconsideration was made on the basis of an invalid process it is unlawful and therefore void.

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100% permanent loss of function caused principally by his spinal
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because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

44. The [Dispute Tribunal] was faced with a case in which there was conflicting medical evidence. Moreover, the [Dispute Tribunal]’s own observations on the shortcomings of the medical evidence indicated a need for a medical board.

45. In this regard, the [Dispute Tribunal] found that the ABCC report as it had not been prepared for the purposes of a medical board. It also considered that the report to a fractured vertebra warranted further investigation by the ABCC. The [Dispute Tribunal] further considered that the back injury was a result of a fractured vertebra and that the [Dispute Tribunal]’s reconsideration had

Conclusion

37. In the light of the foregoing, the Tribunal DECIDES:

The application is rejected as premature and the present judgment is without prejudice to any further proceedings before the Tribunal.

(Signed)

Judge Alessandra Greceanu

Dated this 16th day of March 2016

Entered in the Register on this 16th day of March 2016

(Signed)

Hafida Lahiouel, Registrar, New York