
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/090

Judgment No.: UNDT/2016/092

Date: 27 June 2016

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye Berko

BARACUNGANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND
RELIEF

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Karen Madeleine Farkas, UNHCR

Introduction

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (UNHCR).
2. He joined the Organization in May 2005 as a Senior Programme Clerk at the GL-

11. On 20 November 2015, the Tribunal issued Order No. 373 (NBI/2015) granting the App

19. On 7 September 2011, the Applicant contested the rejection of his Appendix D claim that was rendered by the Officer Responsible for Compensation Claims at UNOG.

20. In an email dated 29 September 2011, Christophe Duverger requested the Applicant to furnish detailed reasons as to why his ailment was service related.

21. In a letter dated 5 October 2011, the Applicant provided the Administration with additional information as to why his diagnosis of polyneuritis was attributable to the performance of his duties for the Organization.

22. rd meeting on 11 June 2013. It granted him a waiver of the time limit. However, it recommended a denial of the claim on the basis that his illness was not attributable to his service. The operative part of the email reads

Having also considered ^s statement, medical reports, and the advice of the Medical Director, in particular that there is no

31. There is no evidence whatsoever to suggest that the decision maker reviewed any of the documents submitted by the Applicant or that she exercised her own judgment by endorsing the recommendation.

32. Since the recommendation of the ABCC is entirely devoid of any reasons in support of the recommendation, no reasonable person exercising independent judgment could have possibly endorsed it.

Respondent's submissions

33. The decision maker, in this case the United Nations Controller, did not merely rubber stamp the decision of the ABCC but reviewed the documents submitted by the Applicant. The ABCC Secretariat prepares a presentation to the ABCC in each case for its consideration. All documents material to the case are included in the presentation. The Secretary of the ABCC provides the Controller with a copy of the ABCC minutes together with a copy of the presentation and the recommendation of the ABCC. The Secretary of the ABCC also has discussions with the Co
a preprepared decision is without foundation.

Did the ABCC rely on extrinsic evidence?

Applicant's submissions

34. It is a breach of the *audi alteram partem* principle for a decision maker to base a decision on information that has not been disclosed to the party adversely affected.¹ Even when the information is disclosed, the decision maker has an obligation to give the relevant party a fair opportunity to respond.

35. When performing essentially adjudicative functions as is the case with the ABCC, administrative decision makers are generally precluded from *am parte* fact-finding because they are supposed to exercise their adjudicative functions fairly and independently.

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36. In the present case, the ABCC relied on information and documents to which the Applicant neither had access nor had been given an opportunity to respond to, namely the advice of the Medical Director.

37.

independence from the Administration of the United Nations Secretariat, calling

Respondent's submissions

38. In accordance with art.

procedures as it may consider necessary for the purpose of discharging its

39. In order to discharge its responsibilities, the ABCC seeks advice from the Medical Director, who also attends meetings as *ex officio* member. The

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43. The facts indicate that the ABCC simply chose to ~~select~~ ^{select} from one of the three parties referenced ~~in~~ ⁱⁿ art. 17 to render a decision as to the medical aspects of the case.

ysician or
from a medical practitioner outside of the United Nations.

44. The above-referenced actions by the Organization constitute a gross violation of the Applicant's rights and further call into question the impartiality of the ABCC in the present case.

Respondent's submissions

45. The Applicant never sought reconsideration of the determination of the Secretary General and therefore art. 17 of Appendix D on the convening of a medical board is not applicable.

46. A medical board is convened where there is conflicting evidence on a medical issue. As the Applicant failed to provide evidence to explain why his illness was attributable to the performance of his official duties, there was no conflicting evidence to justify the convening of a medical board.

Was the ABCC properly constituted?

Applicant's submissions

47. The ABCC was not properly constituted in that the ~~four~~ ^{four} *ex officio* members were all from the Administration and there was no one to represent the interests of the Applicant.

48. The composition of the ABCC in the present case was not in compliance with the statutory requirements and in fact was constituted in such a manner that

49. The ABCC is entitled to decide on the procedures it considers necessary for discharging its responsibilities. In this regard it requires technical advice from time to time from experts. There is no evidence that the ~~four~~ *ex officio* persons represented the Organization and not the staff member. These persons attend the

56. In exceptional circumstances the Secretary General may accept a claim for consideration a claim submitted at a late² date

57. The determination of the injury or illness and of the type and degree of disability shall be made on the basis of reports obtained from a qualified medical practitioner or practitioners³

58. The Secretary General may require the medical examination⁴ of any person claiming or in receipt of compensation for injury or illness

59. In case of refusal or failure of a claimant or beneficiary to undergo such examination at such time or times as, in the opinion of the Secretary General, may be reasonably necessary, the Secretary General may bar the claimant or beneficiary from receiving compensation in full or in part⁵

60. Every person claiming under the Appendix D rules or in receipt of compensation under the rules shall furnish such documentary evidence⁶ as may be required by the Secretary General for the purpose of determination of entitlements under these rules

61. The ABCC may be consulted by the Secretary

63. An individual aggrieved by a determination may ask the ~~Secretary~~ ~~General~~ to reconsider his claim within thirty days of the notification. The ~~Secretary~~ ~~General~~ has discretion to accept a late submission for reconsideration of the claim¹⁰.

64. Once the reconsideration is received and accepted a medical board shall be convened to consider and to report to the ABCC on the medical aspects of the appeal¹¹.

65. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a retired W* n q 396.43 788.n

twelve participants at the meeting of the ABCC that determined the case on 11 June 2013. There is no indication at all who the members were and who they were representing. It is not at all possible to gather from the minutes of the 11 June meeting whether there were any representatives of the staff.

79. Admittedly there is a presumption of regularity that administrative matters are taken legally⁹ but that presumption can only be gathered if there is a substratum of facts or evidence that permit such an inference. No such inference can be gathered from the 11

Conclusion

83. Article 10.4 of the Statute of the Tribunal reads:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the 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. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of (emphasis added)

84. Article 10.4 of the Statute of the Tribunal is replicated of 10.2 of the Statute of the former United Nations Administrative Tribunal that read

Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits of the case, order the case remanded for institution or correction of the required procedure. When a case is remanded, the Tribunal may order the payment of compensation, which is not

applicant for such loss as may have been caused by the procedural delay (emphasis added).

85. The substantive difference between the two provisions is the replacement of the word "request" in the former Statute with the word "with the concurrence" in the Statute of the UNDT.

86. The question arises whether the Tribunal should seek and obtain the concurrence of the Secretary-General before correcting a procedural error in the decision making process of the ABCC or the Secretary-General himself. Most of the cases filed before the Tribunal contain averments of procedural flaws.

87. These flaws would invariably be detected prior to the determination of the merits of the case as they may be gathered from the pleadings. Article 10.4 is to be understood as meaning that in such circumstances the Tribunal should refer the matter back to the Secretary-General for correction and institution of the required

procedure this would mean that the powers of the Tribunal on judicial review would be subservient to the willingness of the ~~State~~ ~~Secretary~~ General to agree to a

