

b. Documentation relating to his claim before the United Nations Claims Board (“UNCB”), consisting of the UNCB presentation, memorandum to DSS of the

Having also considered the documentation submitted by the claimant; the circumstances surrounding the incident; the DSS investigation report; the impact and damage to the claimant's vehicle; the security video footage of the incident; the medical reports submitted by the claimant; and the advice of the Medical Director;

14. The

practitioner identified by [the Applicant] must also sign and deliver an undertaking accepting that the claimant, and not the Organization, will

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on whether the receivability issues raised in the Respondent's reply may be dealt with as a preliminary issue on the papers before the Tribunal.

32. On 1 June 2018, both parties filed their respective submissions in which they stated that they have no objections to the receivability issues raised in the Respondent's reply being dealt

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board and instituting such a request is not a condition of receivability of the application for judicial review:

27. In our view, Article 17 of Appendix D does not make it obligatory for the staff-member to request that a medical board be convened to review the Secretary-General's determination, nor does it institute such a request as a condition of receivability of the application for judicial review of the relevant (negative) administrative decision taken on behalf of the Secretary-General. This is just an option afforded to the staff member, if the latter wishes to bring his/her case before a medical board. In other words, the law does not specifically condition the right of the staff member to file an application for judicial review on his/her having prior sought reconsideration of the relevant determination by the Secretary-General. Consequently, as for all conditions of receivability of an application for judicial review, these provisions of Article 17 of Appendix D may not be interpreted so broadly as to hamper a staff member's access to justice, absent clear language to that effect.

42. In the present case, the Tribunal notes that the Applicant withdrew his request for reconsideration under art. 17 of Appendix D before the filing of the present application. Further, in a recent email communication dated 9 September 2018, the Applicant indicated that he did not have any funds to retain a doctor for purposes of the medical board. The Respondent, having previously insisted that the medical board was still seized of the Applicant's reconsideration claim, in a subsequent submission dated 14 September 2018, stated that considering that the Applicant no longer wished to proceed with a medical board, he decided that it would not be appropriate to refer the matter for reconsideration and thus did not convene a medical board.

43. As the Appeals Tribunal held in *Baracungana*, requesting a reconsideration under art. 17 of Appendix D is not a condition of receivability of the application for judicial review. Considering that a reconsideration request under art. 17 of Appendix D is merely an option for a staff member and art. 17 of Appendix D does not prohibit the withdrawal of a reconsideration request, the Tribunal finds that once the Applicant withdrew his reconsideration request under art. 17 of Appendix D, the case was no longer pending the Secretary

44. While the Respondent did not raise this issue, there may be a question whether the Applicant's challenge to the original administrative decision based on the ABCC's recommendation, which was notified to the Applicant on 8 May 2015, is receivable *ratione temporis* as the current application was filed on 4 October 2016, more than a year after the notification of the original administrative decision.

45. The Tribunal recalls that shortly after the original administrative decision was notified to the Applicant, he filed a reconsideration request, and subsequently, as advised by the Secretary of the ABCC, also filed a request for management evaluation within 30 days. Thereafter, he was advised by the MEU that the matter was not receivable with the MEU as the Applicant had, *inter alia*, failed to comply with the procedures under art. 17 of Appendix D, that being a precondition to filing a claim. Within 30 days after receipt of the MEU response, the Applicant filed the first application with the Tribunal under Case No. UNDT/2015/046 challenging the original administrative decision, whereupon the Respondent countered that the Applicant had failed to pursue his internal remedy for reconsideration and was thus not receivable. That

46. Considering the particular circumstances of this case, the Tribunal finds that the current application is receivable *ratione temporis* as the Applicant timeously filed the initial application, which was only rejected as premature to allow the completion of the reconsideration process, “without prejudice to any further proceedings before the Tribunal”, the Applicant having furnished the required documentation during those proceedings. The Applicant having withdrawn his reconsideration request, his case was then ready for judicial review when he filed the current application.

47. The Tribunal finds that it is regrettable that there were various uncertainties surrounding

50. In the present case, the question is therefore whether these proceedings have already been the subject of a final and binding decision on the merits. The Tribunal notes that in *Kisia* UNDT/2016/023, the application was rejected as non-receivable and the judgment was rendered without prejudice to any further proceedings before the Tribunal. Since there was no judgment on the merits and there is still an actual unresolved controversy between the parties, the Tribunal finds that the present application is not barred by *res judicata*.

51. The Tribunal notes that the Applicant also contested the alleged failure to convene a medical board in a timely manner to reconsider the initial decision and the Respondent has not contested the receivability of this claim. However, the Tribunal is competent to review its own jurisdiction whether or not it has been raised by the parties (see, for example, *O'Neill* 2011-UNAT-182, para. 31, *Christensen* 2013-UNAT-335, para. 21, *Chahrour* 2014-UNAT-406, para. 25). Therefore, the Tribunal will consider this claim's receivability as below.

52. The Tribunal notes that the Applicant submitted a reconsideration request pursuant to art. 17 of Appendix D on 29 May 2015, and on 3 June 2015, the Secretary of the ABCC informed4(tar)-14(y)20()] TJETQq0.00000912 0 612 792 reW*nBT/F1 12 Tf1694(med4(tar

not convene a medical board to consider a reconsideration request when the Applicant withdrew his request.

55. It is unfortunate that the Respondent maintained that the medical board was seized of the Applicant's reconsideration request despite the Applicant's withdrawal of such request and yet, at the same time, did not take any step to convene a medical board. Nevertheless, the fact remains that the Applicant, prior to filing these proceedings, withdrew his reconsideration request about three months after he fulfilled all the requirements for a reconsideration request, and also withdrew his current reconsideration request before the Tribunal due to his lack of financial resources to pursue a medical board option. Therefore, there is no longer a live issue for the Tribunal to consider regarding his reconsideration request. Accordingly, the Tribunal finds his claim with respect to a reconsideration request not receivable.

The merits

Applicable law

56. Appendix D governs compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. Appendix D has been revised by ST/SGB/2018/1 effective from 1 January 2018, in which art. 6.1(b) (transitional measures) provides that "[f]or claims filed for incidents that occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied". Therefore, the Tribunal will refer to the relevant provisions of the previous Appendix D that was applicable at the time of the incident.

57. Section II of Appendix D provides principles of award and general provisions, and particularly art. 2(a)-(b) provides: o3857.09 2738-5(s)-1W*in389i-169(be)4(d) provisions,

- (i) The wilful misconduct of any such staff member; or

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review and dissemination of the CCTV footage of the incident was lawful and

arbitrarily exercised due to the inconsistent treatment of claimants before the ABCC (paras. 91-97).

75. In the present case, the ABCC's conclusion that "there is no credibility whatsoever to the incident as related by the claimant or to the injuries alleged to have been sustained as a result thereof" was mainly based on its review of the video footage and the MSD's opinion, which was also based on review of the same video footage, yet without allowing the Applicant access to it. In his reply to the Applicant's previous application, which the Respondent attached to his reply, the Respondent argued that the medical reports submitted by the Applicant did not establish that his injuries and illness were directly attributable to the incident because his physicians formed their opinions based on the circumstances of the incident as "self-reported by the Applicant", not on their review of the video footage of the incident. This argument proffered by the Respondent precisely illustrates that the Respondent's failure to provide this critical evidence to the Applicant prejudiced his right to a fair and reasonable consideration of his claim and thus it was unlawful to not provide the CCTV video footage to the Applicant for him to see and comment.

The Applicant's prior medical history

76. The Applicant also claims that the ABCC did not fully consider the fact that the MSD conducted a complete physical medical examination and medically cleared the Applicant as fit for duty in April 2013 and he had not suffered any injury or illness before the incident, except a previously fractured toe in 2012.

77. There is no dispute that the Applicant was involved in a car accident in July 2013 upon reporting for work. Also, it is not disputed that the Applicant was on sick leave from September 2013 until his separation in December 2014 as he was found to be incapacitated and entitled to a disability benefit. There is no information on record on what basis he was found to be incapacitated, although the Applicant submits that he was found to be incapacitated based on the same medical reports that he submitted to support his Appendix D claim. This has not been denied or rebutted in the

pleadings. The Tribunal notes that under the Regulations and Rules of the United Nations Joint Staff Pension Fund, specifically art. 33, a disability benefit shall be payable to a participant who is found to be incapacitated for further service due to injury or illness. The Tribunal notes that receiving a disability benefit does not necessarily mean that a claimant's injury or illness is service-related. The question then is whether such injury or illness was attributable to the performance of official duties on behalf of the Organization.

78. Article 2(b) of Appendix D provides that "death, injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any willful misconduct or willful intent when: (i) the death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations". The ABCC did not find that the Applicant's injury or illness resulted from any willful misconduct or willful intent. Given that there is no dispute that the Applicant suffered from injury or illness which resulted in a disability benefit, it appears that the ABCC relied on art. 2(b)(i) finding that the injury or illness did not result as 'a natural incident' of performing official duties on behalf of the United Nations as it found that "the injuries are neither "physiologically plausible" nor consistent with the incident".

79. The Applicant claims that he was medically examined by the MSD and declared as fit for duty just a few months prior to the incident and yet about a month after the incident, he was placed on sick leave until his separation due to disability. This prior medical history was not considered for its relevancy and further explored, assessed or specifically excluded by the ABCC. Instead, without explaining how each of the various injuries claimed by the Applicant are not attributable to the performance of official duties on behalf of the United Nations, the ABCC simply wrote that "the injuries

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rescinding the UNCB's recommendation related to non-compliance with specific procedures of the UNCB, not the substances of any documentary evidence presented to the UNCB. Thus, the Applicant's claim on this basis is rejected.

83. In light of the above, the Tribunal finds that the ABCC improperly considered the UNCB's recommendation and related documentation in reviewing the Applicant's Appendix D claim.

Controller's decision based on the ABCC recommendation

84. The Applicant also challenges the contested decision on the grounds that the Controller failed to take a reasoned and independent decision separate from the ABCC's recommendation. This claim was rejected by the Appeals Tribunal in *Kisia* 2018-UNAT-817, the case in which the Applicant raised a similar claim relating to his UNCB claim. The Appeals Tribunal held that "in the absence of an express provision to this effect, no law requires the decision-maker to make a distinct pronouncement, instead of simply referring to and approving a preceding reasoned recommendation, which also ensures the necessary transparency of the decision".

85. In this case, there is no express provision requiring the Controller

Relief

87. As the Appeals Tribunal held in *Karseboom*, the Dispute Tribunal is not

than three months from the release of this Judgment, failing which the Applicant may file for execution of judgment with the Tribunal.

Conclusion

90. In view of the foregoing,

- a. The contested decision is rescinded and remanded to the ABCC;
- b. The ABCC shall promptly reconsider the Applicant's case and the Controller's decision must be communicated to the Applicant no later than three months from the release of this Judgment; and
- c. The Tribunal makes no order for all the Applicant's claims for other remedies.

(Signed)

Judge Ebrahim-Carstens

Dated this 7th day of February 2019

Entered in the Register on this 7th day of February 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York