



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

WAMALALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Miles Hastie, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). He filed the current Application with the United Nations Dispute Tribunal (the Dispute Tribunal) contesting the decision by the Advisory Board on Compensation Claims (ABCC) to award him \$49,114.03 for permanent loss of function of his right leg as a result of injuries sustained in a road accident. The Applicant further asserted a claim for gross negligence against the Secretary-General for failing to adequately ensure his safety and security in connection with the accident. The negligence claim was dismissed by the United Nations Appeals Tribunal (UNAT) in Judgment No. 2013-UNAT-300.

2. The Applicant is seeking the following remedies:

- a) A declaration that “the contested decision was incorrect, unreasonable and reached without due process and should be rescinded”;
- b) Compensation amounting to 40% total body impairment due to leg injury, and 5% total body impairment due to the Applicant’s dental injuries, and 5% total body impairment due to the Applicant’s scarring. The foregoing total body impairment value should be multiplied by twice the annual amount of the pensionable remuneration at the grade P-4/5 level; or
- c) In the alternative to remand the case and employ the correct procedure to review the ABCC decision within three months and compensate the Applicant with three months’ net base salary for the procedural delay; and
- d) Compensation for moral/non-pecuniary damages in an amount equal to 3 years’ net base salary, fixed at USD45,000, for pain and suffering;
- e) Pre-judgment interest set at the US Prime Rate, compounded semi-annually, upon all the pecuniary damages, accruing from 13 February 2009; and
- f) Post judgment interest, accruing for 60 days after the judgment at US Prime Rate, and thereafter at US Prime Rate plus 5%.

Procedural history

3. The Applicant filed the current Application on 23 September 2011. On 11 October 2011, he sought leave of the Tribunal to file an amended Application. The Respondent did not object to the motion subject to the computation of time for filing a Reply running from the date on which the amended Application was filed. The Motion was granted and the Applicant filed his amended Application on 25 October 2011.

4. On 25 November 2011, the Respondent filed his Reply.

5. On 23 February 2012, the Respondent filed a “Motion for Leave to Have Receivability Considered as a Preliminary Issue”. In this motion, the Respondent contended that the Applicant’s negligence claim was not receivable because: (i) the Applicant was not contesting an administrative decision; and (ii) even if there was an administrative decision, the Applicant had failed to request management evaluation.

6. On 17 April 2012, the Tribunal ruled in Judgment No. UNDT/2012/049 that the Application was receivable and that the claim of negligence should be determined together with the compensation issue.

7. The Respondent appealed against Judgment No. UNDT/2012/049 on 15 June 2012. In his appeal, the Respondent requested that UNAT overturn the Dispute Tribunal judgment and find the application not receivable “to the extent that it relates to a claim for conduct constituting gross negligence”¹.

8. On 28 March 2013, UNAT ruled in Judgment No. 2013-UNAT-300 that a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D. Additionally, UNAT held that the Applicant failed to request management evaluation of his claim of gross negligence and as such, this claim was not receivable *ratione*

¹ Wamalala 2013-UNAT-300, paragraph 10.

materiae. Consequently, UNAT set aside the Dispute Tribunal's finding that the claim of gross negligence was receivable.

9. As a result of Judgment No. 2013-UNAT-300, the Tribunal informed the Parties by Order No. 138 (NBI/2013) that it would deliberate only on the claim relating to the amount of compensation awarded to the Applicant upon the recommendation of the ABCC.

10. The Tribunal held hearings in this matter from 15 to 16 July 2014 and heard evidence from: the Applicant and Major J. Mkhabela (on behalf of the Applicant); and on behalf of the Respondent, from Mr. Demetri Gounaris, the Secretary of the ABCC, and Dr. Michael Rowell, a Medical Officer with the Medical Services Division (MSD) in New York.

Facts

11. On 15 February 2006, the Applicant was appointed as an Interpreter at the GS-3/A level with the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC", now "MONUSCO"²) under the former 300-series of the Staff Rules.

12. Following the contractual reforms in July 2009, the Applicant was reappointed under a fixed-term appointment. The Applicant is presently working within the Human Resources National Staff Unit in Beni, the Democratic Republic of the Congo ("DRC").

13. On 13 February 2009, at approximately 1:00 p.m., a convoy of four United Nations vehicles departed from Goma to Kanyati. The Applicant was travelling in one of the vehicles, an armoured personnel carrier, together with the driver and a co-driver. At approximately 5:30 p.m., the vehicle swerved to avoid a "bakkie", a local bus. The United Nations vehicle came to a stop by the side of the road. The ground

² As of 1 July 2010, MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

below the front right wheel of the vehicle gave way, causing the vehicle to roll down a cliff.

14. As a result of the road traffic accident the Applicant sustained serious injuries: a crushed femur, a torn femoral artery, severed femoral vein, a lacerated chin and ten shattered teeth. The injury to his leg was operated on in open surgery. Thereafter he could not move his leg and suffered from kidney failure. He was then evacuated to South Africa to be examined by a specialist. There he lapsed into a five day coma and his leg was amputated above the knee. He remained in the Intensive Care Unit for almost three weeks.

15. On 1 July 2009, the Applicant submitted a claim for compensation under Appendix D to the Staff Rules. MONUC and the Applicant submitted medical reports and photographs for consideration by the ABCC.

16. On 25 June 2010, at its 451st meeting, the ABCC recommended, *inter alia*:

- (a) the injury was service-incurred;
- (b) the Applicant suffered a permanent loss of 40% of his whole body's function, based upon his leg injury (assessed at the maximum loss of function for a leg injury);
- (c) the Applicant was entitled to receive USD49,114.03 under Article 11.3 of Appendix D; and
- (d) no further lump-sum award or compensation was warranted.

17. On 17 August 2010, the Controller approved the ABCC's recommendation on behalf of the Secretary-General.

18. On 13 September 2010, the Applicant submitted a request for reconsideration of the decision of 17 August 2010. On 20 September 2010, the Acting Secretary of

the ABCC requested that the Applicant provide updated information regarding his injuries, namely:

- (a) an updated, detailed dental medical report for review by the Medical Director;
- (b) a medical report (including colour photos of the scars) that links the scarring to the incident; and
- (c) all relevant medical reports related to any other permanent condition he might have as a result of the incident.

19. The Applicant submitted the requested documentation.

20. On 4 March 2011, at its 455th meeting, the ABCC recommended, *inter alia*:

Having also considered the additional medical reports including photos of scars submitted by the claimant and the report of the Medical Director on the case;

Recommends to the Secretary-General that based on the current medical information, as the claimant has not sustained any additional degree of permanent loss of function for the dental injuries and scarring, in accordance with American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides), the claimant's request for additional compensation under article 11.3(c) of Appendix D to the Staff Rules should be denied.

21. On 6 May 2011, the Controller approved the ABCC's recommendation on behalf of the Secretary-General.

Issues

22. The issues for determination by the Tribunal are³:

³ These issues were set out in Order No. 041 (NBI/2014) dated 6 March 2014.

a) Whether the ABCC followed the proper procedure during its deliberations on the Applicant's claim for compensation under Appendix D.

This issue will include a brief examination of the following sub-issues:

- i. Whether the Applicant requested reconsideration of the Contested Decision in accordance with article 17(a) of Appendix D;
- ii. Whether the Administration convened a medical board to reconsider the contested decision and if so, whether the procedure set out in article 17(b) of Appendix D was followed;
- iii. Whether the ABCC heard evidence solely from staff of the United Nations Medical Services Division (MSD) and if so, whether this was a procedural breach;
- iv. Whether the Administration failed to disclose to the Applicant the medical report of the Medical Director or MSD and the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) and if so, whether this was a lawful exercise of discretion; and
- v. Whether the Administration failed to provide the Applicant with information about his "case to meet" in respect to his request for reconsideration and if so, whether this was a lawful exercise of discretion.

b) Whether the Respondent erred in deciding not to grant the Applicant compensation for his claim of permanent loss of function and/or disfigurement associated with his scarring and dental injury; and

c) Whether the adjustment of the compensation provided to the Applicant was a lawful exercise of discretion or a decision taken pursuant to a policy.

Did the ABCC follow the proper procedure during its deliberations on the Applicant's claim for compensation under Appendix D?

23. According to the Applicant the decision of the Respondent is flawed both on the substance and procedurally.

24. The Respondent avers that the decision of the Respondent was lawful having complied with Appendix D of the Staff Rules and having considered: all the medical reports submitted by the Applicant; and the relevant and only applicable guide, the AMA Guides. The Respondent further submits that Applicant has the burden of proving that the Decision is unlawful⁴ but he has not established that the Organization failed to follow its own procedures or violated his due process rights in determining his claim for compensation under article 11.3 of Appendix D.

25. In a medical injuries claim filed under Appendix D of the Staff Rules there are three aspects to consider. First it should be established that the death, injury or illness is attributable to the performance of official duties on behalf of the Organization. This will of course depend on the particular facts of a given case and the task will be that of the ABCC established under article 16 of Appendix D, if a referral is made to it. However, in so doing, the Board should not attempt to embark on legal considerations. This was asserted by the former UN Administrative Tribunal in the case of *Davidson*⁵ where that Tribunal held:

Medical Board members, when they address legal questions instead of confining themselves to medical opinions on medical questions, are acting beyond their competence. (Cf. Judgement No. 523, Labben (1991), para. III). The Tribunal has indicated above instances in which the Medical Board, as in this case, has involved itself in and purported to deal with legal questions for which it lacks competence. Such legal views have no place in a Medical Board report. Otherwise, the legal views expressed therein tend to become so entangled with its medical views that eventual reliance

⁴ *Asaad* 2010-UNAT-021, paragraph 10; *Azzouni* 2010-UNAT-081, paragraph 34; and *Macharia* 2011-UNAT-128, paragraph 128.

⁵ Judgment No. 587, *Davidson* (1993).

on the Medical Board report by the Respondent will result in his decision being impermissibly influenced by physicians' legal views. Uncritical reliance on such a Medical Board report implies adoption of the physicians' legal views.

26. In regard to the first aspect, there is no dispute that the injuries sustained by the Applicant were attributable to the performance of official duties on behalf of the Organization.

27. The second aspect relates to the substance of the claim which is grounded on injury or illness. This involves a consideration of whether in the light of all documentation the appropriate body, the ABCC, came to a correct evaluation of any impairment. The Tribunal has no jurisdiction to make any such assessment and to substitute its own evaluation for the one reached by an expert body like the ABCC. The jurisprudence of the former UN Administrative Tribunal is well settled on this issue.

The Tribunal, having no medical competence, will not seek to substitute its subjective judgment for the judgment of the administrative bodies charged with making medical decisions. The Tribunal, however, can determine whether sufficient evidence exists to support the conclusions reached by those administrative bodies. If sufficient evidence does not exist, the Tribunal is obligated to set aside any decision made by such decision makers. (See Judgments No. 587, Davidson (1993); No. 1078, Bakr (2002); and, No. 1133, West (2003)⁶).

28. The third aspect is related to whether the exercise on the assessment process was procedurally correct. Here the Tribunal has jurisdiction to determine whether the ABCC correctly followed the procedure applicable to medical claims, whether it properly directed its mind to the relevant issues, whether the evidence on which it based its determination was adequate or flawed. In this regard the Tribunal refers to two decisions of the former UN Administrative Tribunal.

⁶ Judgment No. 1162, *Dillett* (2003).

The Tribunal must, however, consider whether the opinion of the UN Medical Director was given on the basis of evidence either inadequate or flawed for any other reason which may have interfered with the full and fair consideration of her claim⁷.

The Tribunal has consistently held that it will not rescind decisions by the Respondent denying compensation which are based on proper Medical Board reports where there is no showing of procedural irregularity, mistake of fact or law, or of arbitrary or extraneous factors flawing the decision. In particular, the Tribunal, having no medical competence, does not enter into medical questions⁸.

Did the Applicant request reconsideration of the Contested Decision in accordance with article 17(a) of Appendix D?

29. The record shows that when the Applicant received the determination of his claim he requested a reconsideration of the decision pursuant to article 17(a) of Appendix D. Though there was a delay in submitting that request the ABCC waived the delay and agreed to accept it.

Did the Administration convene a medical board to reconsider the contested decision and if so, was the procedure set out in article 17(b) of Appendix D followed?

30. The Applicant submits that the decision was procedurally flawed because the legal requirements of procedural fairness in the ABCC claims/reconsideration process were not met. Article 17(b) of Appendix D prescribes the ABCC reconsideration procedure. It provides that a medical board shall be convened to advise the ABCC, the medical board comprising not only the United Nations Medical Director, but a second Applicant-chosen practitioner and a third practitioner chosen by the first two. No medical board was convened in this case. Instead, the reasons of the ABCC appear to disclose that only the Medical Director, a United Nations employee, deliberated, and only his recommendation was considered.

⁷ Judgment No. 505, *Daw Than Tin* (1991).

⁸ Judgment No. 587, *Davidson* (1993).

31. The Respondent concedes that a medical board was not convened but submits that the Applicant did not ask in his reconsideration request that a Medical Board be convened. Further, he asserts that failure to convene a Medical Board was not a procedural error. In these circumstances, the Administration did not propose that a medical board be convened. The Respondent further submits that if the Secretary-General's initial decision is sustained, the staff member is obliged to assume certain medical fees and expenses under article 17(d) of Appendix D. These fees and expenses may be considerable. Had a medical board been convened in this case, the Applicant would have been required to pay the fees and expenses prescribed under article 17(b). The Administration was therefore not required to convene a medical board under articles 17(a) and (b) of Appendix D.

32. Lastly, the Respondent submits that in "considering a request for reconsideration, the Medical Director, or his representative, provides a verbal report on the medical aspects of the request for reconsideration. This practice was followed in the Applicant's case".

33. The Tribunal considers that this was a flawed procedure which was governed more by administrative convenience than a compliance with the existing rules. Clearly article 17(a) of Appendix D was breached. Nowhere is it stated in that Article that a request for reconsideration must be accompanied by a specific request by the staff member that a medical board be convened. It is clear from the wording of articles 17(a) and 17(b) that once a request for reconsideration is received by the Administration, a medical board should be convened to reconsider the claim of a staff member. Nowhere is it provided for in article 17 that the advice of a Medical Director can be substituted for that of a medical board. Where the meaning of a statutory provision is plain, clear and unambiguous, it is neither for the Administration nor for judges to invent a new meaning as an excuse for failing to give effect to the plain meaning of the statutory provision. Whether the Administration found it inexpedient or impractical to convene a medical board does not give a clean bill of health to its decision.

34. Additionally, falling back on a practice that has no force of law to come to a decision that may have far reaching consequences on the contractual status and life of a staff member is totally anathema to international human rights norms. This Tribunal has on at least two occasions had the opportunity to hold that the reliance on a policy or practice to reach an administrative decision is reprehensible and is not to be condoned. The Administration is and should be guided by the Rules and Regulations and administrative issuances of the Organization. The Administration should not make use of that rather wide and loose term called “policy” or “practice” to justify erroneous decisions. The danger of relying on a policy or practice and ignoring the legal provisions of the Organization has been canvassed in *Manco* UNDT/2012/135⁹ and *Valimaki-Erk* UNDT/2012/004¹⁰.

35. In *Manco*, the Tribunal held that:

Whilst it is perfectly legitimate for the Secretary-General not to ignore a recommendation or stated policy of the General Assembly, the Secretary-General cannot and is not mandated, in the absence of any express statutory provision, to incorporate into the terms of employment of a staff member such policy or recommendations. To condone this would be tantamount to giving both the General Assembly and the Secretary-General an absolute licence to impose or incorporate into terms of employment any item or matter that is not part of the Staff Regulations or Rules.

36. And in *Valimaki-Erk* the Tribunal observed:

[T]he status of United Nations staff and their recruitment conditions are governed solely by the Staff Regulations and Rules and by any administrative instructions issued by the Secretary-General in application thereof.

⁹ Affirmed by the United Nations Appeals Tribunal in *Manco* 2013-UNAT-342.

¹⁰ Affirmed by the United Nations Appeals Tribunal in *Valimaki-Erk* 2012-UNAT-276.

Did the Administration fail to disclose to the Applicant the AMA Guides and if so, was this a lawful exercise of discretion?

37. The Applicant contends that the Respondent failed to provide him with the relevant AMA Guides.

38. There is evidence on record that the AMA guides are available to the general public for consultation. They are not kept secret. Nor are they confidential. To that extent it was not incumbent on the Respondent to provide a copy to the Applicant or his legal adviser. Surely it is not expected that the Respondent should or must assist an Applicant or a legal adviser or to make researches, legal or otherwise in the handling of a case by an Applicant or a legal adviser. The only duty resting on a Respondent is to make appropriate disclosure of relevant documents, subject to the confidentiality rule. An Applicant cannot be expected to be spoon-fed by the Respondent or by the Tribunal.

Did the Administration fail to disclose to the Applicant the medical report of the Medical Director of MSD? Did the Administration fail to provide the Applicant with information about his “case to meet” in respect to his request for reconsideration and if so, was this was a lawful exercise of discretion?

39. The Applicant contends that he was never provided with the medical report of the Medical Director, either to provide an opportunity to rebut its content, or understand the reasons for the decision under review. He submits that the Impugned Decision is simply conclusory in that it provides no reasons to afford a “meaningful appellate/judicial review”. He was not given any detailed information about the case he had to meet. When reconsidering his claim, the ABCC only requested that he provide updated “medical reports” and photos. It was not explained to him why his initial claim was denied or why it might be denied upon reconsideration, only permanent loss of function (not disfigurement) was mentioned.

40. As to the argument of the Applicant that he was given no detailed information about the case he had to meet, the Respondent submits that the ABCC is a technical

body which makes recommendations to the Secretary-General concerning claims for compensation under Appendix D. Given its role, the ABCC cannot provide medical or legal advice to a staff member on his or her claim. In considering a claim for compensation, there are no adversarial proceedings before the ABCC and therefore there is no “case to meet” as such.

41. The Secretary of the ABCC provided the Applicant with information regarding the applicable procedures to enable him to file a claim for compensation and a request for reconsideration. After the Secretary-General’s initial decision, the Secretary of the ABCC explained to the Applicant the basis for the assessment of 40% permanent loss of function, and asked him to submit additional reports concerning his dental injuries and scarring in support of his request for additional compensation. The procedures followed by the ABCC ensured that the Applicant’s due process rights were met and his claim was fairly considered.

42. In answer to the Applicant’s contention that the decision of the Secretary-General of 6 May 2011 is conclusory, and provides no reasons to afford a “meaningful appellate/judicial review”, the Respondent submits that the ABCC’s recommendation of 4 March 2011 expressly states the reasons for its recommendation to deny the Applicant’s request for additional compensation: namely that, based on the current medical information, the Applicant has not sustained any additional degree of permanent loss of function for his dental injuries or scarring. Further, the record in this case includes sufficient information for the Dispute Tribunal to judicially review the Decision.

43. The ABCC is a specialized administrative body that is mandated to assess compensation arising out of work related injuries suffered by a staff member or death of a staff member of the Organization. The ABCC is not required to act judicially like a court of law or hold a hearing as a matter of right at which a party would produce witnesses and evidence in support of his/her claim. However, the ABCC is obliged to act on reasonable grounds and that concept includes acting with procedural fairness.

44. Acting fairly and with procedural propriety means providing the staff member with relevant documents like medical reports that the ABCC has relied on or would rely on for the purposes of its determination. It is also the duty of the ABCC to inform the staff member of the case he/she has to meet so that the staff member has an opportunity to provide his/her side of the case. The ABCC should not act in total secrecy like a distant oracle and expect its decision to be considered as reasonable.

45. Though the Staff Rules and Regulations and Appendix D to the Rules are silent on the question of an entitlement to reasons, the Tribunal considers that a party claiming compensation before the ABCC is entitled to reasons for the decision. The reasons must be intelligible and must not consist of mere generalities. Failure to give reasons as to why the ABCC decided as it did may leave the impression that the decision was based on wrong premises or on extraneous factors or that its powers were exercised unlawfully.

46. In the light of the above principles, the Tribunal considers that the ABCC did not act fairly in refusing to provide the Applicant a copy of the Medical Report of the Director. How can a party be expected to exercise his right to challenge the decision of the ABCC by way of judicial review if vital and relevant materials are withheld from that party? Why should the ABCC arrogate to itself a right to act in secrecy in such matters? No proper justification for that stand was forthcoming. It was therefore a wrongful exercise of discretion not to have communicated a copy of the Medical Report to the Applicant.

47. It was equally procedurally incorrect not to have communicated intelligible reasons to the Applicant for the decision of the ABCC taken in March 2011. Reasons like “based on current medical information” are nebulous, general, and do not convey anything to a party. Admittedly the ABCC is not required to provide an elaborate reasoned decision. It would be sufficient if the ABCC provides some reason in a succinct way that explains to a party the justification for its decision, thus enabling that party to pursue any course of action the party deems appropriate.

Did the Respondent err in deciding not to grant the Applicant compensation for his claim of permanent loss of function and/or disfigurement associated with his scarring and dental injury?

48. The Applicant submits that:

a) The permanent impairment to his leg was assessed at 40% and he was awarded an amount of USD49,114.03 after an adjustment was made to the original award of USD120,000. The Applicant contends that the adjustment only follows a policy and is not subject to any Secretary-General's Bulletins and administrative issuances. At any rate even if it was a matter of the discretion of the Secretary-General reasons should have been given to him for the decision to adjust the amount awarded ;

b) Article 11.3 of Appendix D provides a lump sum payment for staff members who incur an injury resulting in permanent disfigurement or permanent loss of a member or function, regardless of any difference in earning capacity. The lump sum is based upon a proportion of what is referred to as "total body impairment/disfigurement", which generates a lump-sum payment of twice the annual amount of the pensionable remuneration at grade P-4, step V. The proportion is assessed by a schedule of lost (use of) body parts, or analogy to them. Finally, "appropriate adjustments in the amount of compensation...may be made by the Secretary-General, taking into account the proportion which the staff member's salary or wage bears to Headquarters rates";

c) Subsequent medical reports have assessed his loss of function at 5% total body impairment assessed in accordance with the AMA Guides and their complements. In addition, the reasons of the ABCC disclose no consideration of "permanent disfigurement" (such as scarring), which disfigurement need not result in a loss of function to be compensable; and

d) The Respondent failed to take into account loss of alveolar bone (jaw bone that holds teeth or prostheses) characterized by attending professionals as “phenomenal”, “permanent” and resulting in “impaired function”.

49. The Respondent does not dispute that the injuries sustained by the Applicant were work related. However, he submits the following:

a) With regard to the loss of alveolar bone, the ABCC considered the medical reports regarding the Applicant’s dental injuries, which included loss of teeth and alveolar bone loss. The alveolar bone is part of the upper and lower jaw, and is the bone structure that supports and anchors the roots of the teeth. As noted in the minutes of the meeting of the ABCC on 4 March 2011, the Medical Officer advised that “since lost teeth are replaceable, functionality is preserved”. The ABCC accepted the medical advice that there was no permanent loss of function for loss of teeth and loss of alveolar bone in accordance with the AMA Guides. The Respondent also submits that the Applicant has received and will continue to receive dental treatment, and his expenses are reimbursable by the Organization under Appendix D.

b) With regard to the Applicant’s scarring, the ABCC considered the medical reports and photographs submitted by the Applicant. As noted in the minutes of the meeting of the ABCC on 4 March 2011, the Medical Officer advised that the “scars are all well healed, not symptomatic and do not interfere with any normal function” and that “no disfigurement is noticed”. The ABCC accepted the medical advice that the Applicant’s scarring did not result in any permanent loss of function or disfigurement under the AMA Guides.

c) The medical report dated 5 September 2011, on which the Applicant relies in support of his alveolar bone loss and scarring is not relevant as it was obtained after the impugned decision. In determining whether sufficient evidence exists to support the Decision, the Dispute Tribunal may only have

regard to the medical information submitted by the Applicant to the ABCC and not to a report forwarded afterwards.

d) In its jurisprudence, the former United Nations Administrative Tribunal recognized the practice of the ABCC of evaluating permanent disfigurement or permanent loss of a member or function by reference to the AMA Guides¹¹. In its jurisprudence, the former UN Administrative Tribunal held that an administrative decision under Appendix D would be found unlawful if the applicant established that there was a procedural irregularity, mistake of fact or law, or the decision was arbitrary or based on extraneous factors. Further, the Tribunal recognized that it had no medical competence and therefore would not seek to substitute its subjective judgment for the judgment of administrative bodies charged with making medical decisions. However, the Tribunal could determine whether sufficient evidence existed to support the conclusions reached by those administrative bodies¹².

e) The Applicant's permanent loss of function is not admissible under article 18 of the Dispute Tribunal's Rules of Procedure as it purports to give impairment ratings based on the American Association of Oral and Maxillofacial Surgeons (AAOMS) guidelines. The AAOMS guidelines are not part of the AMA Guides. Further, the guidelines are not authoritative and are not used by the Medical Director in carrying out impairment assessments.

Considerations

50. The evidence shows that in coming to a determination on physical impairment the Administration stood guided solely by the AMA Guides to the exclusion of any study or work of similar or comparative value or relevance. According to Dr. Rowell, a Senior Medical Officer at MSD who was called by the Respondent, the United Nations uses the AMA Guides as opposed to other guidelines because: (i) they are the

¹¹ Judgment No. 1065, *Massi* (2002), paragraph XI.

¹² Judgment No. 587, *Davidson* (1993), paragraphs XII and XIII; Judgment No. 1078, *Bakr* (2002), paragraphs VI and VII; and Judgment No. 1162, *Dillett* (2004), paragraphs III, IX and X.

most comprehensive, evidence-based and validated guidance available; (ii) they are well-established (now into the 6th edition) and are widely used in the United Nations and internationally; and (iii) the use of a single reference also allows for consistency across entities of the United Nations system. As the United Nations has chosen the AMA Guides as its reference it would not be appropriate for claimants to pick and choose the assessment guidelines that suit them. He also expressed the view that the use of the AMA Guides emanates from a Resolution of the General Assembly. As to the Guide that was used by the Applicant, the AAOMS Guidelines, Dr. Rowell was of the opinion that the AAOMS guidelines cannot be used alone and that when they are used, the impairment rating comes from the AMA Guides. He was of the opinion that the AAOMS guidelines are not authoritative and are not formally part of the impairment guidelines used by MSD.

51. The Tribunal does not and cannot direct a medical expert how he/she should proceed to an evaluation of the extent of injuries or level of sickness of a staff member. It is solely within the province of the expert to use his/her judgment and expertise to do so and to rely on any authoritative work that may come in aid in the discharge of that exercise. If the United Nations is using the AMA Guides it is within its sole power and discretion to do so. But to argue that the AMA Guides is the sole authoritative work on how the assessment of physical or impairment should be made is certainly procedurally incorrect. To reject the views expressed in other authoritative works is certainly wrong procedurally. It should be open to any medical expert to reject the views expressed in a work but this must be clearly and rationally reasoned. In the present case the only reason put forward is that the AMA Guides have been used over the years to the exclusion of any other work.

52. It was therefore wrong for the Respondent to reject the medical report submitted by the Applicant because it was based on the AAOMS Guidelines and not on the AMA Guides. Further, it was equally procedurally wrong for the ABCC to reject the Applicant's claim for dental injuries and scarring based solely on the AMA

Guides without giving any detailed reasons. The report provides the following recommendation to the Secretary-General:

[...] that based on the current medical information, as the claimant has not sustained any additional degree of permanent loss of function for the dental injuries and scarring, in accordance with American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides), the claimant's request for additional compensation under article 11.3(c) of Appendix D to the Staff Rules should be denied.

Was the adjustment of the compensation provided to the Applicant a lawful exercise of discretion or a decision taken pursuant to a policy?

53. The Applicant contends that the adjustment only follows a policy and is not subject to any Secretary-General's Bulletins and Administrative Issuances. At any rate even if it was a matter for the discretion of the Secretary-General, reasons should have been given to him for the decision to adjust the amount awarded. The Respondent submits that the adjustment is based on a formula, which takes into account the proportion which the staff member's salary bears to Headquarters rates, as required under article 11.3(c). As the salary scales for General Service staff members vary according to duty station, the objective of the formula is to standardize the level of compensation awarded to General Service staff members. There is no obligation under the Staff Regulations and Rules to publish the formula.

54. The Respondent submits that:

- a) Under article 11.3(c) of Appendix D, compensation is determined on the basis of a schedule, which establishes compensation by reference to a percentage of a prescribed amount. In the Applicant's case, the percentage figure was 40%. The prescribed amount is twice the annual amount of the pensionable remuneration of a staff member within the Professional category at the P-4, step V, grade. At the time of the accident, the prescribed amount was USD300,208. Under the schedule, the nominal compensation figure was

USD120,083.20 (40% of USD300,208). This amount was adjusted and the final amount awarded was USD49,114.03.

b) Schedule (c) to article 11.3 of Appendix D allows for adjustment in the case of General Service personnel, the case of the Applicant, and other categories of workers. The relevant part of the schedule provides: “appropriate adjustments in the amounts of compensation provided for in this schedule may be made by the Secretary-General, taking into account the proportion which the staff members’ salary or wage bears to Headquarters rates”.

c) Thus, in the case of a General Service staff member, the Secretary-General has the discretion to make appropriate adjustments in the amount of compensation provided for in the schedule. The adjustment is based on a formula, which takes into account the proportion which the staff member’s salary bears to Headquarters rates, as required under article 11.3(c). As the salary scales for General Service staff members vary according to duty station, the objective of the formula is to standardize the level of compensation awarded to General Service staff members. Thus, the exercise of the Secretary-General’s discretion under article 11.3(c) of Appendix D to reduce the compensation award to USD49,114.03 was not arbitrary or an abuse of discretion.

Considerations

55. The use of the word “may” in the schedule clearly indicates that there is no mandatory requirement on the part of the Secretary-General to proceed to an adjustment. It is permissible for him to do so. In these circumstances, reasons should have been given to the Applicant why the adjustment to the compensation was made and the formula used.

Conclusions

56. Article 10.4 of the Statute of the Tribunal provides:

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 three months' net base salary.

57. The above provision affords the Tribunal two options. The Tribunal may choose to decide the case on the merits without the matter being remanded to the Respondent for correction and so without a referral to the Secretary-General. Or the Tribunal may choose to refer the matter to the Secretary-General to allow him to reconsider the procedural flaws pointed out by the Tribunal.

58. The Tribunal assumes that the framers of that provision intended for the Secretary-General to be allowed an opportunity to remedy the procedural flaws detected by the Tribunal. The Secretary-General has two options when the Tribunal invokes art. 10.4 of the Statute. On the one hand, he may agree to take remedial measures and proceed to determine the decision under review by complying with the proper procedures. On the other hand, he may disagree with the Tribunal that there has been a procedural breach of the rules.

59. In the latter situation, the matter must proceed to litigation and the opportunity of having a dispute amicably resolved will have been lost.

60. In the present matter, the Tribunal considers that there is enough evidence to review the final award made in respect of the loss of a limb sustained by the Applicant.

61. The permanent impairment to the leg of the Applicant was assessed at 40% and he was awarded an amount of USD49,114.03 after an adjustment was made to the original award of USD120,000. If it was a matter of the discretion of the Secretary-General, reasons should have been given to him for the decision to adjust the amount awarded so that the Applicant would have been in a position to know whether the discretion was properly exercised. No reason was provided for the final amount awarded. Nor was any cogent reason given to explain the method by which the ultimate calculation was done. The Tribunal considers therefore that the claim for compensation by the Applicant for the loss of a limb was not processed in a correct manner. The Tribunal is not here assessing the permanent impairment. It is only reviewing the final award made by the technical body as adjusted by the Secretary-General without giving any reasons for that final award.

62. The Tribunal holds that the compensation as initially calculated in the amount of USD120,000, less the payment of USD49,114.03, should be paid to the Applicant.

63. As regards to the claim of the Applicant on the loss of his teeth and alveolar bone loss, the Tribunal has no jurisdiction to make any evaluation on the degree of impairment or to award any compensation. This is a matter for the technical body. However, since the technical body reached a conclusion adverse to the Applicant without establishing a Medical Board and rejecting the medical certificate provided by the Applicant on the ground that it did not comply with the AMA Guides, the Tribunal concludes that this was a wrong administrative decision and awards the Applicant two months net base salary for the procedural flaws.

(Signed)

Judge Vinod Boolell

Dated this 12th day of November 2014

Entered in the Register on this 12th day of November 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi