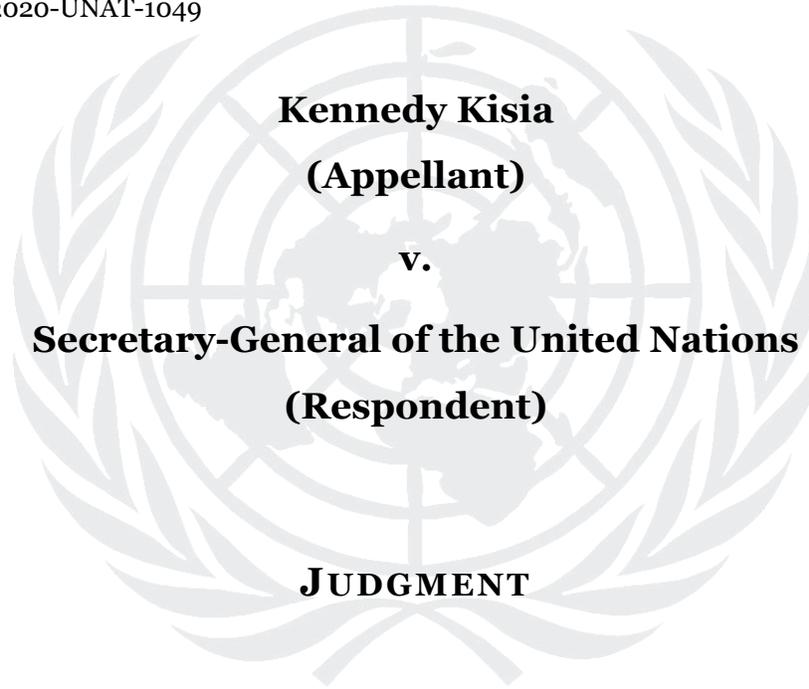




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1049



**Kennedy Kisia
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge John Raymond Murphy
Case No.:	2020-1366
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Mr. Kisia:	Self-represented
Counsel for Secretary-General:	Maryam Kamali

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant, a former Security Officer with the Department of Safety and Security (“DSS”), contests the Secretary-General’s decision to deny his claim for compensation under Appendix D to the Staff Rules (“Appendix D”) for injuries and illnesses that he says resulted from a single motor vehicle incident that occurred on 27 July 2013 (the “incident”).

2. The Appellant disputed the denial in his application to the United Nations Dispute Tribunal (“Dispute Tribunal” or “UNDT”). In Judgment No. UNDT/2019/019 issued on 7 February 2019 (“UNDT First Judgment”), the Dispute Tribunal rescinded the Secretary-General’s decision to deny the Appellant’s claim relating to the incident and remanded his case to the Advisory Board on Compensation Claims (“ABCC”) for reconsideration. The ABCC is established under Appendix D to the United Nations Staff Rules to make recommendations to the Secretary-General concerning claims for compensation under Appendix D.¹ In April 2019, the ABCC reconsidered the case and re-recommended the denial, which the Secretary-General accepted in the impugned decision denying the claim.

3. The Appellant filed a further application to the Dispute Tribunal. In Judgment UNDT/2019/182, issued on 18 December 2019 (“UNDT Second Judgment”), the Dispute Tribunal held that the Secretary-General properly exercised his discretion in denying the Appellant’s claim and dismissed the application. The Appellant appeals the UNDT Second Judgment, arguing, among other things, that the UNDT should have found the ABCC erred in failing to consider relevant evidence. The Respondent says the appeal has been filed out of time, but in the alternative, the denial of the claim by the Secretary-General was a lawful exercise of his discretion.

4. We affirm the impugned Judgment for the reasons below.

¹ Article 16, Section IV, Appendix D, titled “Advisory Board on Compensation Claims” states that: “(a) An Advisory Board on Compensation Claims shall be established to make recommendations to the Secretary-General concerning claims for compensation under these rules”.

Facts and Procedure

5. The facts and background to this appeal are comprehensively dealt with by the UNDT in both Judgments. The following are the relevant findings.

6. In the UNDT First Judgment, the Dispute Tribunal found:²

... On 27 July 2013, the Applicant drove his car through the main entrance of the United Nations Headquarters in New York, at security post number 103, and stopped in front of a security barrier to be cleared for entry. After his car was inspected, the Applicant proceeded forward and collided with the barrier. According to the incident report prepared on the same day, the barrier sustained no damage, but the Applicant's car had some minor scratches on the front bumper. The Applicant also reported the incident on the same day, stating that the half-risen barrier was not visible from his driver's seat and his car suffered a dent and scratch on the front.

... On 28 October 2013, the investigation report of the Special Investigation Unit ("SIU") of SSS found that the Applicant failed to wait until the security officer on duty had completed the process of lowering the barrier and signaling him before proceeding and thus his inattention and negligence caused the vehicle to collide with the barrier. It also noted that there was no mention of injuries sustained in the communications of July and August 2013, and that the Applicant first reported his injuries on 21 October 2013.

... On 25 November 2013, the Applicant submitted a claim for compensation under Appendix D to the ABCC, appending a "Personal Injury claim", for the alleged personal injuries which he claims to have suffered in connection with his car accident on 27 July 2013.

... On 1 December 2014, the United Nations Joint Staff Pension Fund informed the Applicant that the United Nations Staff Pension Committee, at its 318th meeting held on 19 November 2014, determined that he was incapacitated for further service and entitled to a disability benefit.

... On 19 December 2014, the Applicant received a letter from the Assistant Secretary-General for Human Resources Management, which stated that on the advice of the Medical Services Division ("MSD"), a disability benefit was recommended and approved. Therefore, his fixed-term appointment was terminated effective 19 December 2014.

...

² The UNDT First Judgment, paras. 5-9, 12-14 & 18.

... By a letter dated 8 May 2015, the Secretary of the ABCC informed the Applicant that his claim for compensation under Appendix D was considered by the ABCC at its 482nd meeting held on 14 April 2015. To this letter was appended the ABCC's recommendation.

... According to the ABCC's recommendation, the ABCC considered the following for its recommendation:

Having considered at its 482nd meeting on 14 April 2015, the claim submitted by the above-referenced claimant for compensation under Appendix D to the Staff Rules for multiple injuries and illnesses (*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 [post-traumatic stress disorder ("PTSD")]) in connection with an incident with his vehicle at the security stinger barrier located at the main entrance gate (post 103) of the UNHQ compound on 27 July 2013 when he was reporting to work;

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;

... The ABCC concluded 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" and recommended to deny the Applicant's compensation claim on the following grounds:

Having (i) viewed the video footage of the incident twice, noting that the contact with the security barrier was minor and that the claimant was walking around and bending immediately after the event without showing any signs of injury, (ii) noted the distance from the car at full stop to the barrier was about one meter, precluding acceleration sufficient to cause the collision alleged by the claimant, and (iii) considered the conclusion of MSD that (a) on review of the security video, the speed at which the car was moving was less than 4 km/h (less than the average walking pace of 5 km/h) and that the cushioning nature of the front bumper as seen in the video tape would reduce any impact and (b) the impact was minor and the injuries are neither "physiologically plausible" nor consistent with the incident;

...

... By a letter dated 19 June 2015, the former counsel for the Applicant wrote to the Secretary-General, raising concerns regarding the recommendation of the ABCC and highlighting medical experts' opinions of the Applicant's conditions. On the same day, the Applicant also submitted a request for management evaluation challenging "[t]he decision of the Secretary-General, based on the recommendation of [ABCC], and the correctness of ABCC recommendations, denying compensation under Appendix D for [the Applicant's] injuries and illnesses".

7. In the UNDT First Judgment, the Dispute Tribunal held that the ABCC's conclusion that there was no merit to the injuries being service incurred or related to the incident was mainly based on its review of CCTV video footage and the MSD's opinion. However, as the Appellant had not received this evidence nor had the opportunity to respond to it, the Respondent's failure to provide this adverse material prejudiced the Appellant's right to a fair and reasonable consideration of his claim.³ It also held that the ABCC failed to consider relevant matters by not exploring the connection or lack thereof between the incident and the injuries, especially considering that the Appellant was found to be fit for duty prior to the incident and yet placed on sick leave a month after the incident until his separation due to disability.⁴ Finally, the Dispute Tribunal found that the ABCC had improperly considered the United Nations Claims Board's (UNCB) recommendation and related documentation in reviewing the Appendix D claim.⁵

8. In the UNDT Second Judgment, the Dispute Tribunal further found that:⁶

... On 26 February 2019, the ABCC sent an email to the Applicant stating that the CCTV video footage of the incident was already provided to his Counsel and asked for his comments. On 5 March 2019, the ABCC sent a letter by courier reiterating the request in the 26 February 2019 email.

... On 11 March 2019, the Applicant provided his comments to the ABCC via email. In the email, he asserted, among other things, that the CCTV video footage was edited to conceal the fact that the barrier at the post 103 south entrance by the United Nations Headquarters in New York, where the incident occurred on 27 July 2013, was broken seven days prior to the incident, which created risky and unsafe conditions at the entrance and, in any event, the CCTV video footage is not a reliable source to make a medical determination. He requested to review the video footage as captured in the original recording source, accompanied by an expert of his

³ Impugned Judgment, para. 75.

⁴ *Ibid.*, para. 79.

⁵ *Ibid.*, para. 83.

⁶ UNDT Second Judgment, paras. 8-16.

choosing. He also claimed that he did not receive the CCTV video footage through his Counsel. He further claimed that the Secretary of the ABCC is biased against him and thus should be excluded from the handling of his case since the Secretary of the ABCC had been responsible for allegedly not providing all the Applicant's medical reports to the ABCC previously.

... On 13 March 2019, noting that it appeared that the Applicant's Counsel had not provided him with the CCTV video footage, the ABCC provided the Applicant with a copy of the video footage via courier, requesting him to provide comments by 22 March 2019.

... On 25 March 2019, the ABCC informed the Applicant that it had sent a copy of the CCTV video footage of the incident to the Applicant's residence via courier. The ABCC, providing a tracking number, informed him that a delivery attempt was made on 15 March 2019, and yet nobody was available to accept the delivery, which was then sent to an office of a courier company where he could pick it up. The ABCC also sent an email to the Applicant with a link to the CCTV video footage available in a cloud storage service. The ABCC asked him to provide his comments immediately.

... On the same day (25 March 2019), in a reply email, the Applicant reiterated his assertion that the CCTV video footage was edited with ill-intent and he would like to have a chance to see it from the recording source accompanied by an expert.

... The ABCC reconsidered the Applicant's claim at its 514th meeting on 9 April 2019. According to the ABCC's recommendation, the ABCC considered the following for its recommendation:

Having considered at its 514 the meeting on 9 April 2019, and previously at its 482nd meeting, the claim submitted by the above referenced claimant for compensation under Appendix D to the Staff Rules for multiple injuries and [i]llnesses (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 [post-traumatic stress disorder ("PTSD")]) in connection with an incident with his vehicle at the security stinger barrier located at the main entrance gate (post 103) of the UNHQ compound on 27 July 2013 when he was reporting to work;

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.

... The ABCC concluded 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” and recommended to deny the Applicant’s compensation claim on the following grounds:

Having (i) viewed the video footage of the incident three times, noting that the contact with the security barrier was minor and that the claimant was walking around and bending immediately after the event without showing any signs of injury, (ii) noted the distance from the car at full stop to the barrier was about one meter, precluding acceleration sufficient to cause the collision alleged by the claimant, and (iii) considered the conclusion of [the Medical Services Division (“MSD”)] that (a) on review of the security video, the speed at which the car was moving was less than 4 km/h (less than the average walking pace of 5 km/h) and that the cushioning nature of the front bumper as seen in the video tape would reduce any impact and (b) the impact was minor and the injuries are neither “physiologically plausible” nor consistent with the incident,

Having further considered pursuant to the [Dispute Tribunal] order ... (a) the recent comments submitted by the claimant, including those regarding the video footage of the incident, in particular his allegations of the doctoring of the video for which the claimant provided no support, (b) the recent opinion of [a medical doctor, name redacted] of MSD, which considered the claimant’s prior medical history, and (c) the assessment and award of the [the United Nations Joint Staff Pension Fund (“UNJSPF”)] disability benefit to the claimant (noting, of course, that the UNJSPF applies a different standard under a different statute and is not charged with determining whether an injury or illness is service-incurred and therefore eligible for workers' compensation),

Noting MSD’s statement that both its opinions (the one prepared for the previous consideration of the case by the ABCC, and the one prepared further to the [Dispute Tribunal’s] judgment) were based upon medical reports submitted by the claimant, the prior medical history of the claimant, the nature of the injuries, the lack of coherence of the same, their development over time, the video footage of the incident, and the self-reporting nature of virtually all of them (which are pain-related and subjective)—all of which rendered the injuries and conditions implausible to have resulted from the incident at the security barrier;

Being resolute in its findings as stated above in reviewing the claimant’s assertions (including his initial report about the incident) and in re-examining the video footage;

... On 29 April 2019, on behalf of the Secretary-General, the Controller countersigned the ABCC's recommendation.

... On 1 May 2019, the Applicant was informed that his claim under Appendix D was denied by the Secretary-General's decision based on the ABCC's recommendation.

9. In the UNDT Second Judgment, the Dispute Tribunal held that:⁷

... The first issue raised by the Applicant is related to the CCTV video footage. He argues, in essence, that: (a) the retrieval of the CCTV video footage and related investigation were conducted improperly in violation of ST/SGB/2004/15 (Use of information and communication technology resources and data); (b) it was wrong for the ABCC to rely on a layperson's observation of a possibly edited and manipulated CCTV video footage; (c) it was wrong for the ABCC to rely on the CCTV video footage to make a medical determination of the existence and degree of injuries and illnesses; and (d) he was improperly not allowed to view the CCTV video footage from the original recording sources.

... The Applicant already raised these allegations previously, which were all considered by the [Dispute] Tribunal in Judgment No. UNDT/2019/019, at paras. 67 to 75. In that Judgment, the [Dispute] Tribunal found that it was appropriate for the ABCC to consider the CCTV video footage for a review of his claim, and after considering various allegations raised by the Applicant, only found the ABCC's failure to provide him with the CCTV video footage unlawful and directed the ABCC to provide a copy of the CCTV video footage to the Applicant to see and comment. It is noted that the Dispute Tribunal did not order the ABCC to allow the Applicant to view the CCTV video footage from the original recording resource as he requested. Since the ABCC reconsidered the Applicant's claim and rectified the procedural irregularity relating to the handling of the CCTV video footage pursuant to Judgment No. UNDT/2019/019, this Tribunal will not entertain allegations related to the handling of the CCTV video footage again. Having found that the ABCC provided the Applicant with the CCTV video footage and gave him an opportunity to comment, the Tribunal rejects the Applicant's allegations in this regard.

10. As for the other irregularities, the Dispute Tribunal held that the ABCC considered the medical reports and the investigation of the incident which included the witness statements. It received and considered a medical opinion of the medical doctor of MSD, who had reviewed the Appellant's medical reports along with the prior medical history. The Dispute Tribunal found that there was no merit to the allegation that the ABCC failed to consider the security officer's statement obtained during the investigation of the incident as

⁷ *Ibid.*, paras. 24-25.

the ABCC reviewed the DSS investigation report that contained the statement.⁸ The UNDT did not agree with the Appellant that the ABCC had relied on the CCTV video footage to make a medical determination of the existence and degree of his injuries and illnesses. The ABCC properly relied on the medical doctor of MSD to review the Appellant's medical reports and prior medical history to make its determination. Finally, the Dispute Tribunal dispensed with the allegations of improper motive as unsupported.

Submissions

Appellant's Appeal

11. The Appellant submits the Dispute Tribunal erred in not finding that the ABCC failed to properly consider the security officer's statement that he heard a "loud bang", which is consistent with the damage to the car and lateral hearing loss and lateral tinnitus. He says the ABCC ignored this evidence. The loud bang heard by the security officer on duty is the only link that the Appellant's hearing injuries were directly and proximately caused by the incident and therefore, service incurred. The security officer's statement of a loud banging at the point of contact of the Appellant's vehicle with the barrier contradicts the CCTV video footage which is what the ABCC erroneously relied on.

12. The Appellant submits that the Dispute Tribunal erred in not finding that the ABCC failed to consider as relevant that he had been medically evaluated prior to the incident and medically cleared. As a result, there cannot be any other cause for his injuries but the incident.

13. The Appellant says he was treated with "indifference" after the incident, denied access to review the video footage from the recording source and noted the footage was "manipulated, edited to mislead and disseminated by former Chief SSS to various offices" with "systematic alteration of material evidence including the initial post log book entry of the incident". The ABCC failed to investigate these claims.

14. In addition, the Appellant advises that there were security and safety breaches on the entrance reported to the Chief SSS and the broken barriers created occupational hazards at the entrance. He says there was an "ulterior motive" as confirmed by the "edited" and "extracted" CCTV video footage (which the Appellant was not allowed to review from the

⁸ *Ibid.*, para. 27.

source), the failure of the Chief SSS to investigate the Appellant's report of "systematic manipulation of evidence", the security officer's account of loud banging impact, the medical practitioner's findings supporting his claim and the investigator's report finding there was damage to the Appellant's vehicle, and the investigator's recommendations that proved the barriers were broken, which the Administration knew without taking any remedial action prior to the incident.

15. Finally, the Appellant says he should have been allowed to review the video "at the recording source" and be given a copy of such video.

The Secretary-General's Answer

16. The Secretary General says the appeal is not receivable as it is time-barred. Article 7(1)(c) of the United Nations Appeals Tribunal Statute (the "Statute") provides that a staff member must file an appeal "within 60 calendar days of the receipt of the judgement of the Dispute Tribunal". Here, the impugned Judgment was issued on 18 December 2019 and transmitted to the Appellant on the same day by e-mail. However, the appeal was filed to the Appeals Tribunal on 18 February 2020, beyond the 60-day deadline.

17. In the alternative, the Secretary-General submits that the Dispute Tribunal properly found that the ABCC was correct in rejecting the Appellant's claim because his injuries and illnesses were not attributable to the performance of official duties under Article 2(a) of Appendix D.

18. The UNDT correctly considered each of the Appellant's challenges as without merit and correctly determined that the ABCC had rectified the procedural irregularities in the ABCC process identified by the Dispute Tribunal in the UNDT First Judgment.

19. The Secretary-General submits that the Dispute Tribunal reviewed the legal framework for compensation cases under Appendix D and correctly determined that the denial of the Appellant's claim was a lawful exercise of the Secretary-General's discretion.

20. Finally, the Secretary General maintains that the Appellant is only repeating the arguments that he already raised before the UNDT without identifying any errors in the Judgment. As the Appellant has failed to identify a single error of fact or law, jurisdiction or procedure and is re-arguing his case, the appeal should be dismissed.

Considerations

I. Appellant's Receivability Response and Request for Suspension, Waiver or Extension to Time Limit to Appeal (the "Request")

21. The Appeals Tribunal gave the Appellant an opportunity to respond to the Respondent's submissions on the receivability of the appeal. On 1 September 2020, the Appeals Tribunal issued Order No. 378 granting the Appellant 30 days to file his written response to the Secretary-General's argument that his appeal is not receivable and an opportunity to seek a waiver of the time limit per Article 30 of the United Nations Appeals Tribunal Rules of Procedure (the "Rules").

22. The Appellant filed the Request on or about 2 September 2020. In the Request, the Appellant stated that he had been in poor health and was discharged from hospital on 18 February 2020, the day he filed the appeal. He provided a medical note from a cardiac and thoracic surgeon from the hospital that confirmed that around 14 February 2020, the Appellant developed health symptoms and the surgeon conducted a medical procedure in the hospital on 17 February 2020 with a discharge on 18 February 2020.

23. The Respondent argues that the Appellant did not file the Request at the time the appeal was filed. As he has filed several cases before the UNDT and UNAT, the Appellant is aware of the deadlines for filings and should have requested a waiver of time limit at the time of the appeal being filed on 18 February 2020.

24. The deadline for filing an appeal to the Appeals Tribunal is set out in Article 7(1) of the Statute:

(c) The appeal is filed within 60 calendar days of the receipt of the judgement of the Dispute Tribunal ... or, where the Appeals Tribunal has decided to waive or suspend that deadline in accordance with paragraph 3 of the present article, within the period specified by the Appeals Tribunal.

25. The Appellant does not contest that, by filing the appeal on 18 February 2020, the appeal is beyond the 60-day filing deadline required by Article 7(1)(c) of the Statute. Rather, the Appellant files the Request pursuant to Article 7(3) of the Statute and Rule 7(2) of the Rules, both of which provide that, in exceptional cases, the Appeals Tribunal may decide in

writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time.

26. In addition, Article 30 of the Rules allow “the panel hearing a case [to] shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require”.

27. In this instance, we find that there were exceptional circumstances to waive the time limit and accept the appeal submitted on 18 February 2020. As supported by the medical note from the cardiac and thoracic surgeon, the Appellant was suffering from a medical condition on or about 14 February 2020 and was hospitalized until 18 February 2020. He could not have filed the appeal during that time period. He was unable to file the appeal on a timely basis but filed the appeal as soon as he was able.

28. As a result, we find that interests of justice require that the appeal deadline be waived and therefore, the appeal filed on 18 February 2020 is receivable.

II. Merits of the Appeal

29. The Appeals Tribunal’s authority in reviewing the Dispute Tribunal’s judgments is to hear and pass judgment on an appeal in which it is asserted that the Dispute Tribunal a) exceeded its jurisdiction or competence; b) failed to exercise jurisdiction vested in it; c) erred on a question of law; d) committed an error of procedure, such as to affect the decision of the case; or e) erred on a question of fact, resulting in a manifestly unreasonable decision.⁹

30. An appellant has the burden of asserting and proving the Dispute Tribunal committed these defects in its judgment rather than repeat arguments made before the Dispute Tribunal. The function of the Appeal Tribunal on an appeal is not to re-try the case or make its own findings of fact.¹⁰

31. In the present appeal, the Appellant largely repeats the submissions and allegations raised before the Dispute Tribunal. He disagrees with the findings made by the Dispute Tribunal without identifying the specific errors of law or errors of fact that resulted

⁹ See Article 2(1) of the Statute of the Appeals Tribunal.

¹⁰ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051; *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035.

in a manifestly unreasonable decision. Simply rearguing the appeal or disagreeing with the Dispute Tribunal's findings is not sufficient for the purposes of an appeal to the Appeals Tribunal.

32. Specifically, the Appellant argues the Dispute Tribunal should have found the ABCC erred when it:

- i) Relied on the CCTV video footage which was “manipulated”, “edited” and “altered” by the Chief SSS and which originally sourced version was not provided to the Appellant,
- ii) Failed to “consider” the “loud bang” heard by the security officer and the Appellant's medical reports (attached to the UNDT application) as evidence for a finding that the incident was connected to the Appellant's injuries, and,
- iii) Failed to explain how each of his injuries was not attributable to the performance of official duties on behalf of the United Nations, particularly as he had been medically cleared before the incident.

33. There are two elements that must be established for a claim under Appendix D: i) the medical assessment of whether the claimant suffered from the injury or illness as alleged; and ii) the non-medical factual determination whether the illness or injury was attributable to the performance of official duties on behalf of the Organization (causation). To make these determinations, the ABCC may decide on procedures as it may consider necessary in discharging its responsibilities. There is no dispute that the Appellant suffered from the alleged injuries and illnesses. The issue was whether the illness or injury was service incurred, which the ABCC found it was not. The other question is whether the procedures decided on by the ABCC respected the Appellant's rights to due process and natural justice.

34. After the UNDT First Judgment, the matter was remanded to the ABCC to correct three procedural irregularities in its first recommendation:

- (a) Give the Appellant the opportunity to access and comment on any adverse material to be considered by the ABCC, including the CCTV video footage of the incident. There is no dispute that the Appellant received and commented on the

CCTV video footage which was provided to him via e-mail and courier. The Dispute Tribunal did not err when it found this procedural irregularity was rectified. The Appellant, however, claims the footage had been manipulated and edited. This claim will be dealt with below.

(b) Consider the Appellant's prior medical history. The ABCC did consider this as the medical doctor of MSD provided his medical opinion to the ABCC, in which he considered, among other things, the medical reports submitted by the Appellant and the prior medical history of the Appellant. In its Recommendation of 4 April 2019, the ABCC further noted "MSD's statement that both its opinions (the one prepared for the previous consideration of the case by the ABCC, and the one prepared further to the [Dispute Tribunal's] Judgment) were based upon medical reports submitted by the claimant, *the prior medical history of the claimant*, the nature of the injuries ...".¹¹ The Dispute Tribunal correctly held that this irregularity had also been rectified as the prior medical history had been considered by the ABCC in its Recommendation. What the Appellant disputes is the weight the ABCC put on this evidence in its considerations and the inferences it drew from this evidence. This will be dealt with below.

(c) Remove any documentation related to the UNCB recommendation. The Dispute Tribunal correctly held that "[t]he ABCC no longer considered any documentation related to the UNCB recommendation".¹²

35. In regards to the CCTV video footage, the Appellant argues (a) the retrieval of the CCTV video footage and related investigation were conducted improperly; (b) it was wrong for the ABCC to rely on a layperson's observation of a possibly edited and manipulated CCTV video footage; (c) it was wrong for the ABCC to rely on the CCTV video footage to make a medical determination of the existence and degree of injuries and illnesses; and (d) he was improperly not allowed to view the CCTV video footage from the original recording sources.

36. These allegations have been litigated previously and decided upon. In the UNDT First Judgment, at paragraphs 67 to 75, the Dispute Tribunal found that it was appropriate for the ABCC to consider the CCTV video footage for a review of his claim, and after considering the

¹¹ Emphasis added.

¹² UNDT Second Judgment, para. 20(c).

various allegations raised by the Appellant, only found the ABCC's failure to provide him with the CCTV video footage procedurally unfair and directed the ABCC to provide a copy of the CCTV video footage to the Appellant to see and comment. The Dispute Tribunal did not order the ABCC to allow the Appellant to view the CCTV video footage from the original recording resource as he had requested. Since the ABCC reconsidered the Appellant's claim and rectified the procedural irregularity relating to the handling of the CCTV video footage pursuant to the UNDT First Judgment, the Dispute Tribunal in the UNDT Second Judgment rightly did not entertain allegations related to the handling of the CCTV video footage again.

37. The Appellant says he should have been given the video from the original recording source. This request was also made before the Dispute Tribunal in the UNDT First Judgment which was not appealed. The Dispute Tribunal did not make a determination on the allegation, but held that the CCTV video footage should be provided to the Appellant and the Appellant be given an opportunity to comment, which was done.¹³

38. Under the well-established jurisprudence, the burden of proving any allegations of ill-motivation rests with the applicant.¹⁴ While the Appellant has made the above allegations of improper motives on the part of the ABCC and the SSS, including intentional doctoring of the CCTV video footage and the log entries to support his request to see the video from the original recording source, he has provided no supporting evidence and hence, these are mere allegations that can have no merit.

39. The ABCC clearly considered the CCTV video footage and the Appellant's prior medical history as relevant to the issues in this case. It made observations from the video footage including the contact with the security barrier, the claimant walking around and bending immediately afterward, and the distance from the car to the barrier, which led (along with other evidence before it such as the MSD's conclusions) to its finding that the contact with the security barrier was "minor" and to the subsequent inference that the Appellant's injuries and illnesses were not service-incurred. There is no requirement that the ABCC can *not* rely on a layperson's observations of the video footage. However, its Recommendation indicates that the ABCC also relied on the expert opinion evidence of the MSD who had also reviewed the video footage and concluded the impact was minor and the injuries alleged were

¹³ *Ibid.*, para. 74.

¹⁴ See, for instance, *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 38; *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081, para. 35.

neither “physiologically plausible” nor consistent with the incident. This was within the ABCC’s competence to make this finding on the evidence before it.

40. In regards to the failure to consider the statement of the security officer of the “loud bang” heard, the Dispute Tribunal in the UNDT Second Judgment correctly found that the “ABCC reviewed the DSS investigation report and thus finds that this allegation is without merit”.¹⁵ A review of the Recommendation indicates that the ABCC reviewed the investigation report (and the medical reports submitted by the claimant) which contained witness statements including the evidence of the “loud bang”. What the Appellant disputes is that the ABCC did not put sufficient weight on this evidence in its determination. However, weighing the evidence is within the discretion of the ABCC and, in turn, the Secretary-General.

41. The standard to be applied in reviewing the Secretary-General’s exercise of discretion was set out by the Appeals Tribunal in *Karseboom*:¹⁶

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.

42. In the UNDT Second Judgment, the Dispute Tribunal reviewed the ABCC’s Recommendation and the Secretary-General’s decision in this context. Having rectified the procedural irregularities from the first Recommendation, the Dispute Tribunal held that the exercise of the Secretary-General’s discretion after the Second Recommendation was lawful, rational, procedurally correct, and proportionate. In doing so, the Dispute Tribunal did not err in law or fact that resulted in a manifestly unreasonable decision. The ABCC (as well as the Secretary-General in acting on its Recommendation) considered all relevant matters and did not consider irrelevant matters, in weighing the evidence and making its

¹⁵ Impugned Judgment, para. 27.

¹⁶ *Karseboom v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-601, para. 43, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

findings and inferences on that evidence. The impugned decision is not absurd, perverse, but rational and lawful.

43. It is not the role of the Dispute Tribunal (or the Appeals Tribunal) to review the correctness of the impugned decision, which is essentially what the Appellant seeks to do.

Judgment

44. The appeal is dismissed and Judgment No. UNDT/2019/182 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 3rd day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar