



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

JOBRANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Daniel Trup, OSLA

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM

Sarahi Lim Baró, ALS/OHRM

Introduction

1. The Applicant has challenged a decision of the Advisory Board on Compensation Claims (ABCC) dated 12 November 2013 to reject his request for compensation for an injury which he alleged he had suffered in the course of his duties.

Procedural history

2. The Applicant filed the current Application with the United Nations Dispute Tribunal (the Tribunal) in Nairobi on 21 February 2014.

3. The Registry served the Application on the Respondent on 25 February 2014 with a deadline of 27 March 2014 for a Reply to be submitted.

4. On 26 February 2014, the Applicant filed a Motion to submit additional evidence pursuant to art. 36.1 of the Dispute Tribunal's Rules of Procedure. By Order No. 036 (NBI/2014), dated 4 March 2014, the Tribunal granted the Applicant's Motion and granted the Respondent an extension of time to 7 April 2014 to file his Reply.

5. The Applicant filed the additional evidence on 4 March 2014.

6. The Respondent filed his Reply on 3 April 2014.

7. In accordance with Order No. 140 (NBI/2015), dated 5 May 2015, the Parties advised that the matter could be decided by the Tribunal without an oral hearing and submitted a statement of agreed facts. In the light of the submissions filed by the Parties, the Tribunal agrees and will determine the case on the papers.

8. The Applicant filed a number of documents in French.¹ The Tribunal obtained official translations of those documents into English which the Parties accepted.²

¹ Annexes F, G, H, L and M to the Application.

² The translations were provided by the Documentation Division of the Department of General Assembly and Conference Management (DGACM) at United Nations Headquarters in New York.

9. In compliance with Order No. 316 (NBI/2015), on 16 October 2015 the Respondent produced the Applicant's medical records from September 2009.

10. On 19 October 2015, the Applicant responded to the Tribunal's Order No. 327 (NBI/2015) directing him to comment on his failure to submit evidence of his medical treatment from September 2009 to the ABCC.

11. The Tribunal held a case management discussion on 22 October 2015.³

The Facts

12. The Applicant is currently in service with the African Union/United Nations Hybrid Operation in Darfur (UNAMID). The events relevant to the contested decision occurred while he was working as a Supply Assistant with the United Nations Mission in the Central African Republic and Chad (MINURCAT).

13. The Applicant's responsibilities at MINURCAT included loading and off-loading supply material from aircraft servicing the Mission at the airport in Birao. Birao is located at the extreme north of the Central African Republic, some 1,067 kilometres from the capital Bangui.

14. The Applicant claims that on 12 August 2009 he sustained injuries to his shoulder as a consequence of his work responsibilities in off-loading supplies. He did not report this incident to the Regional Security Officer who was stationed in Birao, to Human Resources in MINURCAT or his supervisor. He said this was due to the absence of reporting structures at his remote location.

15. The Applicant says that due to the pain and injury sustained he immediately visited the Medical Unit of the Togolese Contingent based in Birao. However, the limited availability of treatment meant that he was simply prescribed medication to alleviate the symptoms of his injury.

16. Despite the incident the Applicant continued his work as a Supply Assistant. He claims that he reduced the amount of lifting, yet continued to suffer from his shoulder ailment.

³ See Order No. 343 (NBI/2015).

17. Based on a medical report from the MINURCAT Medical Clinic dated 20 July 2010 treatment could not be effected in the Mission area so he requested and was granted home leave between 16 August 2010 and 17 September 2010.

18. On 6 September 2010, the Applicant visited a Magnetic Resonance Imaging (MRI) centre in Tunisia. The report from the MRI centre found damage to his shoulder and in particular tissue damage and tearing of tendons.

19. The Applicant underwent surgery. Dr. FM, who performed the operation on the Applicant's shoulder, noted in his post-operative report that the injury had been difficult to repair due to the delay in diagnosis.

20. The Applicant asserts that on 4 October 2010, based on the MRI report and an examination at the University Hospital in Tunisia by a Dr. NM, it was concluded that he had suffered damage to his shoulder as a result of his work and the repeated heavy lifting that he was required to undertake. The Respondent observes that this opinion was based on the acceptance of the Patient's history.

21. On 6 October 2011, the Applicant filed a request for compensation to the Officer-in-Charge (OiC) of the UNAMID Human Resources Section, Ms. DM. His claim was forwarded to the ABCC. The documentation submitted with his claim included his memorandum dated 6 October 2011, two medical reports dated 2 March 2011, a medical report dated 20 July 2010 and a report entitled "MINURCAT's Medical Report". The 20 July 2010 report referred to an ultrasound done in September 2009 "which confirmed the diagnosis". At no stage did the Applicant provide a copy of the ultrasound results to ABCC.

22. On 17 December 2011, the ABCC through the Department of Field Support (DFS) requested the Applicant to provide the following additional documentation: (i) ABCC claim form P.290; (ii) the Applicant's personnel action (PA) form at the time of the injury; (iii) an incident report; (iv) sick leave certification; (v) x-rays at the time of the accident; (vi) x-ray taken on 31 March 2010, which formed the basis for the doctor's report regarding the range of motion of left shoulder; and (vii) x-ray used to determine permanent disability.

23. On 6 February 2012, the Applicant responded to the UNAMID Human Resources Section as follows:

Dear DM,

Thank you for your note of 19 December 2011 in which you requested additional information to be provided to ABCC, in order to process my claim for compensation.

I attached the P290 form duly completed.

There is no PA at the time of the injury because the injury occurred during a long period of time. As you know part of my job is loading and down-loading goods. So what happen to my left shoulder was in fact because of the type of physical work I do for the use of the mission personnel.

There is no incident report as well because of the reason mention[ed] above.

The sick leave was already provided to you and it is in my medical file.

I attached the X-ray done by my medical doctor who determined my permanent disability.

Finally please note that the injury in my shoulder was in fact detected by the doctor of the Norwegian Deployable Hospital in MINURCAT II, Abeche as you can see from the medical records by Dr. Lt. Col. GM.

The treatment provided by the Norwegian Deployable Hospital MINURCAT II, Abeche was not up to the task to provide the necessary relieve (sic).

I was therefore requested to undergo further examination it was Professor N who through X-rays and further analyses determined the permanent injury on my left shoulder as attested by the X-rays and reports from this Dr.

I remain ready to provide you any further information so as to help the ABCC to process my claim.

24. To this email the Applicant attached the following documents: (i) the x-ray taken on 6 September 2010; (ii) sick leave certification from 13 September 2010 through 17 March 2011; (iii) a Medical report dated 28 September 2010 from Dr. FM; (iv) an MRI of his left shoulder on 6 September 2010; (v) four medical records from the Norwegian Deployable Hospital in MINURCAT II, Abeche; and (vi) ABCC claim form P.290.

25. On 13 March 2012, UNAMID informed the Applicant that UNHQ in New York had notified it that:

[...] since you were unable to provide an incident report, it may be difficult for Medical Services Division and ABCC to assess whether the injury is service-incurred as the only evidence that your injury is service incurred is your statement on form P.290 that the injury occurred while loading and down-loading goods and the most contemporaneous report is a year after the alleged incident. Therefore, they are requesting you to provide a witness statement, supervisor's statement or contemporaneous medical report, and supervisor description of your duties (sic).

26. On 11 April 2012, the Applicant replied that when he arrived in Birao: “[...] aucune infrastructure n’existait à l’époque et aucune section n’était représentée sur place” and “Je vous le répète et insiste encore une fois que je n’ai pas fait de rapport d’accident car il n’y avait pas d’agent de sécurité à l’époque sur place”.⁴

27. To this reply he attached the following documents: (i) email statements from Captains KA and AA from the Togolese contingent; (ii) a document dated 12 August 2009, which he entitled “prescription” from a Togolese doctor; and (iii) a partial copy of his performance appraisal from MINURCAT for the reporting period 2009 to 2010.

28. On 24 March 2013, the Medical Services Division (MSD) at United Nations Headquarters in New York advised the ABCC on whether the Applicant's injuries (torn supraspinatus tendon and frozen shoulder) could be considered to be directly related to the incident that occurred on 12 August 2009. MSD observed that there was a seven month gap between the claimed incident and the first record of the injury, and that the corroborating witness statements did not sufficiently compensate for the absence of any evidence demonstrating the occurrence of the claimed injury. MSD stated that it was not possible to establish that the Applicant's claimed injury was directly related to his duties as required by Appendix D.

⁴ “[...] No infrastructure existed at that time and no section was represented on site” and “I and would reiterate yet again that I did not make an incident report because no security guard was on site at the time” (translation by the Documentation Division, DGACM).

29. On 12 November 2013, the ABCC met at its 468th meeting to consider the Applicant's claim requesting compensation under Appendix D for an injury he claimed to have sustained in August 2009 while on mission in Birao.

30. In its determination, the ABCC stated that it had considered the following aspects of the Applicant's claim: (i) the lack of investigation/incident report; (ii) the Applicant's statements; (iii) the corroborating statement from two individuals obtained several years after the claimed incident; (iv) medical reports; and (v) the advice from MSD, in particular, that there was insufficient evidence that the injury was directly related to the claimed August 2009 incident because there is a gap of seven months from the date of the event to the first record of the injury.

31. Accordingly, the ABCC recommended that the Secretary-General: (i) waive the provisions of article 12 of Appendix D concerning the time limit of four months to submit claims for compensation; and (ii) that the Applicant's request that his injury be recognized as service-incurred be denied.

32. On 10 December 2013, the Controller, on behalf of the Secretary-General, approved the ABCC's recommendation. The Applicant was informed of the decision on the same day. The ABCC considered:

[...] the lack of investigation/incident report, the claimant's statements, the corroborating statements from two individuals obtained several years after the claimed incident, medical reports, and the advice from the Medical Director, in particular, that the claimant's injury was not directly related to the claimed August 2009 incident since there is a gap of seven months from the date of the event to the first record of injury;

33. On 21 February 2014, the Applicant filed the present Application with the Dispute Tribunal. On the same day, he requested that the ABCC reconsider his claim under Article 17 of Appendix D.

34. On 25 February, the Secretary of the ABCC informed the Applicant's Counsel that:

With respect to a medical board [...] it is discretionary: a claimant must articulate the substantive medical issues they want considered

and the ABCC considers the request, based upon MSD's advice, and issues a recommendation (followed by a S-G decision) regarding a claimant's request for a medical board. The ABCC's determination was based on evidentiary and not medical grounds. Where the issues in contention are not medical issues, a medical board is not appropriate.

In [the Applicant's] case, the ABCC recommendation and the S-G's decision were made on evidentiary and not medical grounds. Accordingly, the request for a medical board is not appropriate.

Issues

35. There is no dispute that the Applicant suffered an injury which resulted in a disability. The question for the ABCC was whether the injury was caused by the performance of the Applicant's official duties. The issues for the Tribunal to determine are:

a. Was it lawful for the ABCC to recommend the denial of the Applicant's claim based on evidentiary grounds? Specifically, did the ABCC give the Applicant a sufficient opportunity to present evidence in support of his claims? In particular, whether the ABCC was obliged to call a hearing and allow the Applicant to call witnesses to test the evidence.

b. Did the ABCC go beyond its authority by specifying the exact documentation necessary for an applicant to produce in order to be considered for compensation?

Legal framework

36. In a challenge to a medical decision, it is for the Applicant to demonstrate that the process in the relevant article was disregarded.⁵

37. Appendix D of the Staff Rules governs compensation for injury attributable to the performance of official duties. The principles and definitions governing the operation of the Rules are in Section II. The following provisions in art. 2 are relevant to this case:

⁵ *Frechon* 2010-UNAT-003.

(a) Compensation shall be awarded in the event of ... injury ...
of a staff member which is attributable to the performance of
official duties on behalf of the United Nations ...

...

(b) Without restricting the generality of paragraph (a) ... injury ...
of a staff member shall be deemed to be attributable to the
performance of official duties on behalf of the United Nations ...
when:

(i) The ... injury ... resulted as a natural incident of performing
official duties on behalf of the United Nations

...

38. Article 13 provides that, “the determination of the injury ... and the type
and degree of disability shall be made on the basis of reports obtained from a
qualified medical practitioner or practitioners”.

39. Article 14 entitles the Secretary-General to require the medical
examination of any claimant, and the claimant is required to furnish such
documentary evidence as may be required by the Secretary-General for the
purpose of making a determination under the rules.

40. Article 16 establishes an ABCC consisting of representatives of the
Administration and three staff representatives with necessary expertise to make
recommendations to the Secretary-General concerning compensation claims. The
Secretary-General makes the final decision.

41. iSeek contains a document entitled “Manager’s Guide to Appendix D and
the Advisory Board on Compensation Claims (ABCC): Claims for injury, illness
or death directly attributable to service” (the Guidelines). It lists the documentary
requirements for making a claim under Appendix D as: (i) a completed and signed
P.290 form; (ii) medical reports relating to the specific injury or illness being
claimed; (iii) documentation of medical expenses; and (iv) “any other
documentation, information or data requested which is relevant to assessing the
claim”.

42. Further documentation to be provided by the claimant’s
Administrative/Executive Office, upon notification of injury or illness includes:

(i) a personnel action form which includes index number, functional title, duty station, type of appointment, grade level, EOD, date of birth, marital status, recognised dependents and whether the staff member is enrolled in the UNJSPF; (ii) an official accident/investigation/security report which describes the circumstances of the accident/incident and which states if the claimant was on official duty at the time of the accident/incident”; (iii) direct or indirect witness statements (these should be signed and dated); and, (iv) documentation for special sick leave. The sick leave must be directly related to the injury or illness that is being claimed under Appendix D.

Issue 1 - Was it lawful for the ABCC to recommend the denial of the Applicant’s claim based on evidentiary grounds? Specifically, did the ABCC give the Applicant a sufficient opportunity to present evidence in support of his claims and was the ABCC obliged to call a hearing and allow the Applicant to call witnesses to test the evidence.

Applicant’s submissions

43. Where the veracity of evidential material is being challenged, steps must be taken to allow the Applicant to establish the genuine nature of the evidence. Such steps could include, for example, the provision of live evidence in the case of witnesses to ensure the Applicant his rights to a fair hearing.

44. Since the ABCC took it upon itself to consider the weight of the evidence presented, the Applicant submits that the ABCC effectively became a tribunal in civil proceedings rather than a technical body evaluating medical material.

45. In such circumstances, therefore, the refusal to consider calling for the live corroboration of witnesses or the medical testimony of the Tunisian medical expert, Dr. NM, prevented the Applicant from presenting his case in a fair and equitable manner.

46. The Applicant accepts that the medical documents from September 2009 are evidence of injury. However the ABCC rejected the claim on evidentiary

grounds, specifically that the injury was not work related. Therefore the presence of the medical documentation from September 2009 would not in itself have satisfied the ABCC that the Applicant had injured his shoulder at work.

Respondent's submissions

47. On two occasions, the Applicant was provided with the opportunity to demonstrate that his injuries were service-incurred. The facts indicate that there is a seven month gap from the date of the alleged injury to the first record of the alleged injury.

48. While the Applicant sought pain medication for a shoulder ailment on 12 August 2009, this does not establish the date that he first sustained the injury and/or whether he did so while discharging work responsibilities.

49. The ABCC is tasked with finding the facts in order to determine whether a claimed injury or illness is service-incurred. Such determination includes reviewing contemporaneous documentation, including an incident report, medical reports, and other documentation.

50. Article 15 of Appendix D provides that claimants must provide "such documentary evidence as may be requirement by the Secretary-General for the purpose of determination of entitlements under these rules".

51. The Guidelines were posted on iSeek in mid-2013, but a more simplified version had been posted many years previously. Focal points, Executive Offices, and the ABCC have always been available to explain how to document and corroborate a claim.

52. It was lawful and reasonable for the ABCC to require a claimant, such as the Applicant, to submit contemporaneous documentation. There is infrastructure in place to report work-related injuries, including in this case, reporting the matter to the Regional Security Officer who was stationed in Birao, reporting the matter to Human Resources in MINURCAT or his

supervisor, and submitting contemporaneous medical records. The Applicant did not do any of these things.

53. Over one year after the alleged injury on 12 August 2009, the Applicant had an MRI on September 2010 and on 4 October 2010. The Applicant has not put forward any contemporaneous documentation to demonstrate that his injuries were service-incurred on 12 August 2009.

Considerations

54. In assessing the Applicant's claim for compensation, the principle issue for the ABCC was whether the injury (the existence of which was not in dispute) resulted as a natural incident of performing duties on behalf of the United Nations. This was a question of fact to be established by evidence.

55. The ABCC requested that the Applicant provide more information on two occasions. The first on 17 December 2011 asked for contemporaneous information that was necessary to establish the circumstances of the injury. The Applicant was unable to provide, as requested, a PA from the time of the incident or an incident report or an x-ray taken at the time of the incident although he gave reasons for this which were based on the circumstances at the duty station at the time.

56. The second request by email dated 13 March 2012 not only sought more information but explained to the Applicant that MSD was having difficulty in assessing whether his injury was service incurred. It pointed out the problems with the information he had already provided and requested that he provide, *inter alia*, statements or a contemporaneous medical report.

57. The Tribunal finds that the Applicant was given a fair opportunity to present evidence in support of his claims but the evidence he presented was found not to be sufficient to establish that the injury was a natural incident of his work.

58. The Tribunal rejects the Applicant's criticism that in undertaking this assessment the ABCC was acting outside its role as a technical body. The

functions of ABCC include making recommendations to the Secretary-General on claims for compensation. When reaching a decision on a claim for compensation, the Secretary-General must consider two elements namely did the claimant suffer an injury and was the injury attributable to the performance of official duties on behalf of the United Nations.

59. To properly exercise its functions and make sound recommendations, the ABCC must gather and evaluate the evidence in relation to both of these elements. The Tribunal holds that in this case it acted in accordance with its obligations.

60. In relation to the medical aspects of the claim, Appendix D provides for the convening of a Medical board upon a request for reconsideration of the decision by the Secretary-General of the existence of an injury or illness attributable to official duties or the type and degree of disability. But Appendix D does not oblige the ABCC to call a hearing and allow the Applicant to call witnesses to test the evidence about the cause of the injury.

61. It was within the mandate of the ABCC to evaluate the Applicant's claim on the basis of the evidence proffered by him. He did not include details of the September 2009 ultra sound, although it was referred to in one of the other medical reports he had submitted to the ABCC. In any event, the Applicant accepted that that report could not, of itself, have satisfied the ABCC that his injuries were work related.

62. The Applicant did not provide the ABCC with any official or unofficial contemporaneous evidence of a work related incident in August 2009 which caused his injury. The first medical report on file is dated 20 July 2010 from the MINURCAT Medical section. The second was a report of an MRI dated 6 September 2010. The Applicant said that conditions in the mission area meant he was unable to provide contemporaneous evidence of the incident, yet in 2012, nearly three years after the event, he produced statements from persons who claimed to be eyewitnesses. He did not provide them when he was first asked in December 2011 for contemporaneous evidence.

63. Given the gap in time between the date of the alleged injury during which the Applicant continued to work, and in the absence of any reliable contemporaneous corroborating evidence of the alleged incident the Tribunal finds that it was lawful and reasonable for the ABCC to recommend that the Applicant's claim be denied on the basis that it did not have sufficient evidence to attribute the injury to the performance of official duties.

Issue 2 - Did the ABCC go beyond its authority by specifying the exact documentation necessary for an applicant to produce in order to be considered for compensation?

Applicant's submissions

64. The ABCC determined that because of the lack of an incident report as well as associated statements and medical reports there was insufficient evidence to satisfy the requirement of establishing a work related injury. It is submitted that no requirements in the Appendix D rules specify the exact type of documents that need to be submitted.

Respondent's submissions

65. On two occasions, the Applicant was provided with the opportunity to demonstrate that his injuries were service-incurred.

66. The facts show that there was a seven month gap from the date of the alleged injury to the first record of the alleged injury.

67. The ABCC is tasked with finding the facts in order to determine whether a claimed injury or illness is service-incurred. Such determinations include reviewing contemporaneous documentation, including an incident report, medical reports, and other documentation.

68. It was lawful and reasonable for the ABCC to require claimants, such as the Applicant, to submit contemporaneous documentation considering that there is infrastructure in place to report work-related injuries, including in this

case, reporting the matter to the Regional Security Officer who was stationed in Birao, reporting the matter to Human Resources in MINURCAT or his supervisor, and submitting contemporaneous medical records. The Applicant did not do any of these things.

Considerations

69. Art. 15 of Appendix D states that: “Every person claiming under these rules... shall furnish such documentary evidence as may be required by the Secretary-General for the purpose of determination of entitlements under these rules”.

70. The only limitation on the documents that an applicant may be required to furnish is that they are for the purpose of the determination of entitlement. A request for documents that were irrelevant for this purpose would not be lawful.

71. The Guidelines lists the documentation required to support a claim. All of the documents listed are either for establishing the injury or the cause of the injury.

72. There is no evidence that either of the two requests made of the Applicant was not for the purpose of or was otherwise irrelevant to his claim. The Tribunal finds that MSD and ABCC made reasonable efforts to obtain evidence from the Applicant to support his claim that his injuries were attributable to his work.

73. In December 2011 he was asked to supply basic evidence including a claim form. The 13 March 2012 request in particular explained the reasons why the documents or evidence being requested were needed.

74. The Tribunal holds that the ABCC did not go beyond its authority by specifying the exact documentation necessary for an applicant to produce in order to be considered for compensation. The documents it requested were relevant to the purpose of determination of entitlements under Appendix D.

Conclusion

75. The decision of the Secretary-General to reject the Applicant's claim for compensation for injury attributable to the performance of his official duties was lawful and reasonable. The ABCC conducted itself in accordance with its responsibilities and the procedure in Appendix D by requesting relevant evidence from the Applicant and evaluating such evidence as provided by him. The Applicant has not established that in doing this the ABCC disregarded relevant evidence or otherwise acted unlawfully.

Judgment

76. The Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 16th day of November 2015

Entered in the Register on this 16th day of November 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi