



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Antonio Gonzalez

Counsel for Respondent:

Alan Gutman, ALS/OHRM

Elizabeth Gall, ALS/OHRM

Introduction

1. The Applicant, a former Security Officer with the Security and Safety Services (“SSS”) in the Department of Safety and Security (“DSS”), contests the decision of the Assistant Secretary-General, Controller, Office of Programme Planning, Budget and Accounts, Department of Management (“ASG/Controller”) to approve the recommendation of the United Nations Claims Board (“UNCB”) to deny his claim for compensation of USD2,277.53 for damage to his car following an accident that occurred on 27 July 2013 at security post no. 103, United Nations Secretariat building, New York.

2. The Respondent, in essence, contends that the application is without merit as the Applicant is not entitled to compensation for the damage to his vehicle under ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service).

Facts and procedural history

3. On 27 July 2013, the Applicant was involved in an accident at the main entrance by security post no. 103 at the United Nations Headquarters in New York where his car collided with a so-called “stinger” security arm barrier. By email of the same date, the Applicant reported the accident to a number of United Nations colleagues, including a Sergeant of the Special Investigation Unit (“SIU”). An “Incident Report” of the same date was made by an “S/O” from “1st Platoon” to the Assistant Chief of SSS.

4. By email of 31 July 2013, the Applicant sought the advice of the Chief of SSS and provided his views on the 27 July 2013 accident.

5. By email of 11 August 2013 to the SIU Sergeant, copied to the SSS Chief, the Applicant sought a status update on his “complaint”.

6. By “Claim for Loss of or Damage to Personal Effects Attributable to the Performance of Official Duties” dated 3 September 2013, the Applicant requested USD2,277.53 in compensation for the alleged damages to his car from the 27 July 2013 accident.
7. By an investigation report dated 28 October 2013, a Senior Security Officer of SIU provided the SSS Chief with SIU’s findings regarding the 27 July 2013 accident.
8. By interoffice memorandum dated 7 November 2013 to the UNCB Secretary, the SSS Chief forwarded the investigation report for the UNCB Secretary’s review and possible action.
9. In a case summary dated 20 February 2014, the UNCB Secretary set out his views on the circumstances surrounding, and the process leading up to, UNCB’s consideration of the Applicant’s claim. On the same date, UNCB held its 343rd meeting at which it considered the Applicant’s claim regarding his car.
10. By interoffice memorandum dated 4 April 2014 to the ASG/Controller, the UNCB Secretary forwarded the undated minutes of the 343rd UNCB meeting on 20 February 2014 for the ASG/Controller’s consideration in accordance with ST/AI/149/Rev.4, requesting that, if she approved of UNCB’s recommendation, she indicate this on the interoffice memorandum.
11. On 23 April 2014, the 4 April 2014 interoffice memorandum was countersigned. However, the actual name of the signer is not written on the document and illegible from the signature.
12. By interoffice memorandum dated 25 April 2014 to the Executive Officer of DSS, the UNCB Secretary informed that the UNCB had recommended that the Applicant’s claim be denied and instructed that the Applicant be advised accordingly.
13. By interoffice memorandum dated 12 May 2014, the acting Executive Officer of DSS forwarded the 25 April 2014 interoffice memorandum to the Applicant.

14. By a request for management evaluation dated 8 July 2014, the Applicant appealed the contested decision and requested that the Secretary-General:

... rescind the decision of [UNCB], or order a fresh, fair, impartial and complete investigations on [the Applicant's] accident, or accept liability for the actions or inactions of management of both security and safety and facilities and Commercial services Division, as well as of the post officer, and his duty supervisor, under doctrine of *respondeat superior*.

15. On 5 September 2014, the Under-Secretary-General for Management informed the Applicant that, upon his request for management evaluation, the Secretary-General had decided to uphold the contested decision.

16. On 10 October 2014, the Applicant filed the application.

17. On 12 October 2014, the Applicant filed a motion for production of documents and a motion “to introduce causes of action”.

18. On 15 October 2014, the Tribunal (Duty Judge) transmitted the filings to the Respondent and suspended the deadline for the filing of the reply, pending a Case Management Discussion (“CMD”) to be held on 21 October 2014 to clarify the issues and various causes of action put forth by the Applicant in his application and subsequent motion.

19. Following the CMD, by Order No. 283 (NY/2014) dated 22 October 2014, the Tribunal instructed the Respondent to file a reply by 21 November 2014, and informed the parties that consideration of the two motions filed by the Applicant on 12 October 2014 would be held in abeyance until further notice.

20. The Respondent duly filed his reply on 21 November 2014.

21. By motion dated 28 November 2014, the Applicant sought leave to amend the application.

22. By legal representative authorization form signed by the Applicant on 29 May 2015 and his current Counsel on 31 May 2015, the Applicant notified the Tribunal and the Respondent that Mr. Gonzalez would represent the Applicant in the present case.

23. By motion of 1 July 2015, the Applicant requested leave to amend his application and appended the proposed revised application.

24. The case was assigned to the undersigned Judge on 22 July 2015.

25. By Order No. 202 (NY/2015) dated 28 August 2015, as corrected by Order No. 202/Corr.1 (NY/2015) dated 1 September 2015, the Tribunal ordered: (a) the Respondent to file a response to the Applicant's motions filed on 12 October 2014, 28 November 2014 and 1 July 2015, and (b) the parties to attend a CMD on 16 September 2015 to discuss further proceedings in the present case.

26. On 4 September 2015, the Respondent duly filed his response to Order No. 202 (NY/2015). He raised no objections to the Applicant's request for leave to introduce causes of action and amend the application on the basis that the Respondent would be granted leave to file an amended reply to the revised application within 30 days. As for the Applicant's motion for production of documents, the Respondent stated that this motion should be rejected as a number of the requested documents had already been produced by the Respondent and that the remainder of the documents were not relevant.

27. By motion dated 7 September 2015, the Applicant requested leave to file an observation to the Respondent's response to Order No. 202 (NY/2015).

28. At the CMD on 16 September 2015, Counsel for the Applicant confirmed that his motion for filing an amended application of 1 July 2015 superseded his client's previous motions of 12 October and 28 November 2014 to introduce causes of action and amend the application. Counsel for the Applicant further requested that the present case be joined with his other two cases before the Tribunal, namely

UNDT/NY/2015/046 and UNDT/NY/2015/055. The Tribunal informed the parties that the Applicant's other cases were yet to be assigned to a Judge.

29. By Order No. 234 (NY/2015) dated 17 September 2015, considering that the Respondent had no objections to the Applicant's request for filing an amended application, the Tribunal granted leave to the Applicant to file an amended application. The Tribunal further granted leave to the Respondent's correlated request for leave to file an amended reply within 30 days, and instructed the Applicant to file a response to this reply within two weeks after its filing. In connection with these pending submissions, the Tribunal ordered the parties to comment on the applicability of secs. 3, 4 and 5 of ST/AI/149/Rev.4. The Tribunal also informed the parties that it would only consider the Applicant's motion for production of documents after the filing of the other submissions ordered by the Tribunal.

30. The Respondent filed his amended reply on 16 October 2015 and the Applicant filed his response to the Respondent's reply on 30 October 2015.

31. By Order No. 290 (NY/2015) dated 12 November 2015, the Tribunal instructed the parties to attend a CMD on 7 December 2015 which, at the request of the Applicant, was subsequently rescheduled to 8 December 2015.

32. By motion dated 7 December 2015, the Applicant requested leave to file an addendum to his response filed in accordance with Order No. 234 (NY/2015) on the amended reply, arguing that he had not been able to access the amended reply before 7 December 2015.

33. At the CMD on 8 December 2015, the Applicant was present personally and assisted by his Counsel, Mr. Gonzalez, while the Respondent was represented by Mr. Gutman. The Tribunal instructed the parties to indicate if any further documents would be relevant to decide the present case. In accordance with his motion dated 12 October 2014, the Applicant further requested the Respondent to be ordered to produce the Standing Operating Procedures and the logbook for security post no. 103 in force on 27 July 2013. The Respondent objected to the request, submitting that it

was irrelevant because of the Tribunal's limited scope of judicial review. The Tribunal rejected the Applicant's request for these additional documents to be produced by the Respondent, remarking that the requested documentation was related to the merits of the Applicant's claim before UNCB and therefore not necessary for determining the present case. The Tribunal found that the case could be determined on the papers and instructed the parties to file their closing submissions based exclusively on the documents on record.

34. By Order No. 302 (NY/2015) dated 9 December 2015, the Tribunal instructed the parties to file their closing submissions based exclusively on the documents on record by 27 January 2016. The parties duly did so.

Applicant's submissions

35. In his 1 July 2015 amended application, the Applicant lists his "[g]rounds for contesting the [d]ecision" and the relief which he seeks the Tribunal to award him.

36. In the amended application, the Applicant submits that the contested decision was lawful because it was: "influenced by conflict of interests"; "incorrect, unfair, and unlawful"; "based upon pure speculation, subjective observations, general assumptions and suppositions; "based on unlawful acts or lack thereof, violating applicant's rights, and due process rights"; "based on act of recklessness and conscious disregard to safety rights of Applicant"; "based on altered Official records of the Organization; "based on actors that lacked authority and/or abused their discretionary authority"; "based on acts of serious misconduct"; and "arbitrary and capricious and never based on any sound investigative expert reasoning and analysis or sound [closed-circuit television, "CCTV"] data forensic expert analysis.

37. The Applicant also contends that the decision violated his "entitlement", that "the outcome of the investigation, and the recommendations of UNCB were pre-determined and intended to deny justice to [him]", and that he had "been prejudiced".

38. The Applicant further requests the Tribunal to “find” on “law, fact or equity”, as well as in most instances also on “procedure”, that:

- a. “the case presented by the Applicant is exceptional in nature”;
- b. “[the] Applicant was entitled to compensation and that the Respondent is liable for the Applicant’s damages”;
- c. “[the SSS Chief] acted with conflict of interest”;
- d. “the alterations of post log book entry, and the extraction of CCTV video from the original recording sources without [the Applicant’s] presence in a witnessed manner, was incorrect, unlawful and in violation of [the] Applicant’s rights”;
- e. “the investigation, was inadequate, unreliable, unfair and lacked credibility and integrity”;
- f. “CCTV data were inappropriately and incorrectly extracted, edited, and disseminated and/or that the potential for same was available as procedure was not followed”;
- g. “[a Sergeant] acted incorrectly by declining the Applicant’s request for the Investigation Report”;
- h. “the words ‘before being told to go’, which was reported but never investigated, formed the core of the findings of the investigators, of the decision, and UNCB recommendations to the Administration”;
- i. “the words ‘before being told to go’ were maliciously, or in bad faith, inserted into the post log book to deny justice”;
- j. “insertion of the words ‘before being told to go’ (which were subsequently inserted into the post log book) or similar words that were used to form the basis of the investigator’s findings, [the SSS Chief’s] memo, the

Agenda item as presented before UNCB by [the UNCB Secretary], and the Administration's decision and [the Management Evaluation Unit's] response was improper”;

k. “the [A]dministration, acted with willful misconduct, wanton misconduct and/or gross misconduct”;

l. “the UNCB Secretary erred in exposing the Applicant's medical records to UNCB”;

m. “the UNCB did not conduct an independent and fair review of the Applicant's claims but simply took the position of [the SSS Chief] and the investigation”;

n. “the Applicant[’s] rights and entitlements have been violated by the decision and the actions or lack thereof of the [A]dministration”;

o. “the language used by drafters of General Assembly Resolution A/Res/41/121 of 11 December 1986 ‘ ... arising out of any act or omission, whether accidental or otherwise in the Headquarters district ...’ As appropriate, and find on law that “for all accidental incidents happening at the headquarters, this General Assembly Resolution is superior in language and relevance, to language and relevancy, of any Administrative law relating to accidents or occurrences happening at [the United Nations Headquarters] district”;

p. “the Applicant's accident happened at [the United Nations Headquarters] district”;

q. “there was serious misconduct, willful misconduct and wanton misconduct, which amounted to too gross negligence;

r. “the Applicant’s accident was attributable to his presence at [the United Nations Headquarters] district which was solely for reason of work and was therefore work related;

s. “the Applicant did not negligently cause his property damage and even if negligence was to be established on the part of the Applicant, it would still not be a bar to recovery under Workers’ Compensation law”;

u. “the Administration acted with recklessness and conscious disregard to safety, rights and life of the Applicant, and that the property damage suffered by the Applicant was foreseeable by the Administration but consciously disregarded;

v. “the Administration acted with gross negligence, willful misconduct, and or wanton misconduct”;

w. “the Administration acted with reckless disregard of their manifest duty of ensuring a secure and safe working environment which included entry paths and grounds of [the United Nations Headquarters] district; and

x. “the decision was based on subjective observations, general assumptions, speculations and suppositions of: [the SSS Chief], the Investigator, [the] Secretary of UNCB, or of the board, which they cannot substitute for the actual facts of what occurred”.

39. As relief, the Applicant requests the “recovery for all damages sustained” and the Tribunal to: “[r]emand, or set aside as null and void the investigations report”; “[r]emand or set aside as null and void the recommendations of [the SSS Chief] to Secretary of UNCB/ABCC”; “[r]emand or set aside as null and void the recommendations of UNCB to the Administration”; “[r]escind all incorrect, and improper recommendations”; “[r]escind the decision”; “[o]rder liability on the Respondent”; “[o]rder compensation in the amount of two years net base salary for the Applicant’s emotional distress and anxiety”; “[o]rder compensation in the amount

of two years net base salary for violations of the Applicant's due process rights"; "[o]rder compensation in the amount \$7,000.00 for the repair cost of the Applicant's vehicle damages and wear brought about by such damages"; "[o]rder an award for costs including reasonable attorney's fees"; and "[g]rant any other reliefs and order any other direction as the Tribunal may seem appropriate and in the interest of justice".

Respondent's submissions

40. The Respondent's contentions may be summarized as follows:

a. At the case management discussion held on 27 October 2014, the Applicant confirmed that the administrative decision in issue in this case is the decision to reject his claim for compensation under ST/AI/149/Rev.4, and the only relief he seeks is the payment of \$2,277.53 for the damage to his vehicle;

b. In his application, the Applicant contends that the Respondent is liable to pay compensation to him under various causes of actions, for example premises liability. These claims are misconceived;

c. The Dispute Tribunal has competence only to hear and determine appeals against administrative decisions under art. 2 of its Statute. The General Assembly did not vest the Dispute Tribunal with jurisdiction to hear other types of claims. The Applicant has not identified an administrative decision with respect to the claims pleaded in the application. Furthermore, any such decision must be contested by the Applicant by submitting a request for management evaluation under staff rule 11.2(c) (citing *Wamalala* 2013-UNAT-300). In the absence of an administrative decision and submission of the same to management evaluation, the Dispute Tribunal has no jurisdiction with respect to such claims;

d. ST/AI/149/Rev.4 defines the terms, conditions and limits of staff members' entitlements under staff rule 6.5 to reasonable compensation in the event of the loss of, or damage to, their personal effects, which is determined to be directly attributable to the performance of official duties on behalf of the United Nations;

e. ST/AI/149/Rev.4 also sets out the procedures for the submission and examination of claims in connection with such loss or damage (sec. 1). Sections 3 to 5 establish the conditions of entitlement to compensation. Section 3 sets out the circumstances in which loss of or damage to the personal effects of a staff member shall be considered to be directly attributable to the performance of official duties. Sections 4 and 5 are also relevant. Section 12 concerns notification of loss and presentation of a claim for compensation;

f. The Applicant's claim for compensation was properly considered by the UNCB and the ASG/Controller under ST/AI/149/Rev.4. UNCB carefully considered all of the evidence before it concerning the incident;

g. The Applicant was well aware of the presence of the stinger barrier at security post no. 103 by virtue of his previous assignments to the Post. The Applicant was also well aware of the DSS operating procedures relating to the operation of the stinger barrier. These procedures provide that the driver of a vehicle must be given permission to proceed, and that the stinger barrier must be lowered when the driver is given the signal to proceed (DSS Standard Operating Procedures, section 46.03.06);

h. The Applicant's allegations that the traffic arm at the entrance was out of order are irrelevant. The function of the traffic arm is to regulate traffic flow, not to act as a barrier to stop vehicles before reaching the stinger barrier. The traffic arm may be kept in the raised position to expedite the flow traffic of traffic through the entrance at security post no. 103. The Applicant is

familiar with the functions and operation of the traffic arm and the stinger barrier as a result of his duties as a Security Officer;

i. The Applicant's assertions that SIU was not the appropriate entity to investigate the incident are also without merit. The SIU has competence to conduct fact-finding investigations of traffic incidents that occur within the United Nations Headquarters complex under the DSS and SSS Standard Operating Procedures. The SIU's findings were reviewed by the UNCB and accepted;

j. As such, the UNCB properly concluded that no compensation was payable for the damage to the Applicant's vehicle under sec. 4(a) of ST/AI/149/Rev.4. The ASG/Controller's decision to accept the UNCB's recommendation to deny the Applicant's claim was therefore fair and reasonable. The decision to reject the Applicant's claim is also lawful as the Applicant failed to comply with his obligation under sec. 12 of ST/AI/149/Rev.4 to take reasonable steps to receive suitable compensation for the damage to his vehicle;

k. The Applicant admits that he has motor vehicle insurance under which he can make a claim for the cost of the repairs to the vehicle. He states that he has decided not to make a claim under that insurance. As such, the Applicant has failed to take the reasonable step of claiming the cost of the repairs to his vehicle under his insurance, and has not met the conditions for presenting a claim for compensation established by secs. 5 and 12 of ST/AI/149/Rev.4.

Considerations

Applicable law

41. Staff rules 6.4 and 6.5 from the current Staff Rules (ST/SGB/2014/1) provide as follows:

Rule 6.4

Compensation for death, injury or illness attributable to service

Staff members shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations, in accordance with the rules set forth in appendix D to the present Rules.

Rule 6.5

Compensation for loss or damage to personal effects attributable to service

Staff members shall be entitled, within the limits and under terms and conditions established by the Secretary-General, to reasonable compensation in the event of loss or damage to their personal effects determined to be directly attributable to the performance of official duties on behalf of the United Nations.

42. ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service) issued on 14 April 1993, arts.1–5 , 12–16 and 18 provide that:

Purpose

1. Staff rules 106.5, 206.6 and 306.4 [today replaced by staff rule 6.5] provide that staff members shall be entitled, within the limits and under the terms and conditions established by the Secretary-General, to reasonable compensation in the event of the loss of or damage to their personal effects, determined to be directly attributable to the performance of official duties on behalf of the United Nations. The purpose of the present instruction is to define the terms, conditions and limits governing such compensation and to set forth the procedure for the submission and examination of claims in connection with such loss or damage.

2. The present instruction shall apply to incidents occurring on or after 1 January 1993. It cancels and supersedes administrative instruction ST/AI/149/Rev.3 of 17 November 1988.

Conditions for the entitlement

3. Without restricting the generality of the provisions of staff rules 106.5, 206.6 and 306.4 [today replaced by staff rule 6.5], loss of or damage to the personal effects of a staff member shall be considered to be directly attributable to the performance of official duties when such loss or damage:

(a) Was caused by an incident which occurred while the staff member was performing official duties on behalf of the United Nations; or

(b) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area designated by the United Nations Security Coordinator as hazardous, and occurred as a result of the hazards in that area; or

(c) Was caused by an incident which occurred during any travel, by means of transportation furnished by or at the expense or direction of the United Nations, undertaken in connection with the performance of official duties.

4. No compensation shall be paid for any loss or damage which was:

(a) Caused by the negligence or misconduct of the claimant; or

(b) Sustained by a private vehicle which was being used for official business, including travel in connection with home leave, when such use of a private vehicle was solely at the request of and for the convenience of the staff member.

5. Staff members should note that no compensation shall be paid for the loss of or damage to personal effects, except as provided under the Staff Rules and paragraph 3 of the present instruction. Otherwise, such loss or damage shall be the sole responsibility of the staff member. For this reason, it is recommended that staff members obtain, at their own expense, adequate personal property insurance coverage.

Notification of loss and presentation of a claim for compensation

12. In the event of any loss of or damage to a staff member's personal effects, he or she shall, as soon as possible, notify the appropriate United Nations authorities and other authorities, including the local police, and submit any pertinent evidence. Where articles have been lost or damaged, the staff member shall take all reasonable steps to recover said articles or to receive suitable compensation from the party responsible, or from his or her insurance company, for such

loss or damage. Compensation shall be reduced by the amount of any such recovery.

13. In order to be receivable by the Claims Board (see paras. 16 to 18 below), claims for compensation shall be made within two months of the discovery of the loss or damage, shall include copies of reports of investigations into the loss or damage and shall be submitted by the claimant to his or her executive officer/chief administrative officer for examination and submission to the Claims Board. Both the submissions by the claimant and by the executive officer/chief administrative officer shall be in the form of signed statements as described below.

14. The claimant shall set out in detail:

(a) Information pertinent to the amount of compensation claimed, including:

- (i) A description of the article;
- (ii) The age and the condition of the article;
- (iii) The original cost of the article and the date of purchase or acquisition;
- (iv) The replacement cost of the article and supporting documentation on both price and comparability of the proposed replacement article;

(b) All the circumstances pertinent to the loss or damage and the action taken by the claimant in respect thereof (see para. 12 above), including:

- (i) Statements signed by any other person or persons in a position to furnish information relating to the loss or damage, including copies of reports of investigations into the loss or damage;
- (ii) Personal insurance coverage, if any, the action taken to claim under that coverage and the results thereof;
- (iii) In the case of travel by common carrier (air, rail, etc.), a copy of the lost property report and information on any reimbursement claimed from the carrier;
- (iv) In the case of damage, the cost of repair supported by a copy of the invoice and receipt.

15. On receipt of a claim, the executive officer/chief administrative officer shall:

- (a) Examine the claim and ascertain whether all required information and material as set forth in the present instruction have been provided and, if necessary, request such further information or material as may be required or as he or she considers desirable;
- (b) Provide any additional information on the causes and circumstances of the loss or damage including copies of any investigation reports on the incident which may be available;
- (c) As appropriate, certify and provide supporting documentation:
 - (i) With regard to paragraph 11, as to the dependency status of the staff member;
 - (ii) With regard to subparagraph 3 (c), that the staff member was in official travel status;
- (d) Supply a copy of the inventory filed by the staff member in accordance with the applicable security plan, as appropriate;
- (e) Provide other pertinent observations including information regarding the replacement cost claimed as appropriate;
- (f) Forward the claim, other relevant documents, and his or her comments thereon to the Secretary of the Claims Board.

Consideration of claims

16. All claims shall be examined by the Claims Board in accordance with its terms of reference, set out in annex I/Amend. 2 to the Secretary-General's Bulletin ST/SGB/Organization. The composition of the Board and its administrative arrangements are announced periodically in information circulars. At locations away from Headquarters, local claims review panels may be established, as authorized by the ASG/Controller.

18. The Claims Board shall act in an advisory capacity to the ASG/Controller and shall transmit its recommendation regarding the settlement of each claim to the ASG/Controller.

Receivability

43. The Applicant, a former staff member, is contesting the decision of the ASG/Controller to approve the recommendation of the UNCB, to deny his claim for compensation of USD2,277.53 for damage to his vehicle following an accident that

occurred on 27 July 2013 at the United Nations Secretariat building's security post no. 103 in New York. The contested decision, which is alleged not to be in non-compliance with the Staff Regulations and Rules, as well as relevant administrative issuances then applicable to the Applicant's contract, is an appealable administrative decision under art. 2.1(a) of the Statute of the Dispute Tribunal. The Applicant was notified of the contested administrative decision on 12 May 2014 and filed a request for management evaluation on 8 July 2014, i.e., within 60 days from the date of notification. On 5 September 2014, he received a management evaluation response upholding the decision and, on 10 October 2014, within 90 days from the date of receiving the management evaluation response, the Applicant filed the present application. Therefore, the application is receivable *ratione materiae*, *ratione personae* and *ratione temporis*.

Findings

44. Sections 12, 13, 14(b)(ii), 14(b)(iv) and 15(a) of ST/AI/149/Rev.4 state:

12. In the event of any loss of or damage to a staff member's personal effects, he or she shall, as soon as possible, notify the appropriate United Nations authorities and other authorities, including the local police, and submit any pertinent evidence. Where articles have been lost or damaged, the staff member shall take all reasonable steps to recover said articles or to receive suitable compensation from the party responsible, or from his or her insurance company, for such loss or damage. Compensation shall be reduced by the amount of any such recovery.

13. In order to be receivable by the Claims Board (see paras. 16 to 18 below), claims for compensation shall be made within two months of the discovery of the loss or damage, shall include copies of reports of investigations into the loss or damage and shall be submitted by the claimant to his or her executive officer/chief administrative officer for examination and submission to the Claims Board. Both the submissions by the claimant and by the executive officer/chief administrative officer shall be in the form of signed statements as described below.

14. The claimant shall set out in detail:

...

(b) All the circumstances pertinent to the loss or damage and the action taken by the claimant in respect thereof (see para. 12 above), including:

...

(ii) Personal insurance coverage, if any, the action taken to claim under that coverage and the results thereof;

...

(iv) In the case of damage, the cost of repair supported by a copy of the invoice and receipt.

15. On receipt of a claim, the executive officer/chief administrative officer shall:

(a) Examine the claim and ascertain whether all required information and material as set forth in the present instruction have been provided and, if necessary, request such further information or material as may be required or as he or she considers desirable;

45. After reviewing the content of the recommendation made by the UNCB, the Tribunal finds that, instead of first analyzing the receivability of the claim in the light of the mandatory procedural steps set out in secs. 13 and 14 of ST/AI/149/Rev.4, read together with secs. 14(b)(ii), 14(b)(iv) and 15(a) of the same issuance, the UNCB incorrectly made a conclusion directly on the merits of the Applicant's claim, recommending the "denial" of his claim.

46. Section 18 of ST/AI/149/Rev.4/1993 states that "The [UNCB] shall act in an advisory capacity to the [ASG/Controller] and shall transmit its recommendation regarding the settlement of each claim to the [ASG/Controller]". According to this mandatory provision, the UNCB's recommendation does not constitute the final decision regarding whether compensation for damage to personal effects attributable to service may be awarded as such a decision is only to be made by the ASG/Controller based on the UNCB's recommendation. The Tribunal considers that compliance with this provision is mandatory and that the ASG/Controller is required to take his/her own decision, which must be a completely separate decision from the UNCB's recommendation.

47. As results from the evidence and from the Respondent's submissions, the contested decision consists in the UNCB's recommendation against awarding the Applicant any compensation, which was included in the minutes of UNCB's 343rd meeting of 20 February 2014 submitted for the ASG/Controller's consideration on 4 April 2014.

48. The Tribunal, after reviewing the content of the contested decision, finds that instead of making her own final and reasoned decision on the Applicant's claim, the ASG/Controller appears to have only signed off on the recommendation made by UNCB to deny the claim on 23 April 2014, as admitted by the Respondent. The Tribunal observes that the signature with the date of 23 April 2014 does not indicate the name and/or the position of the decision-maker.

49. Taking into account the above mentioned procedural irregularities of the contested decision, the Tribunal concludes that the mandatory procedure prescribed by ST/AI/149/Rev.4 was not followed and will not further analyze the grounds of appeal related to the merits of the present case.

50. In *Karseboom* 2015-UNAT-601, the Appeals Tribunal, *inter alia*, stated:

41. The Secretary-General submits that the UNDT, upon determining that the proper procedure had not been followed, should have remanded the case back to the ABCC to convene a medical board to re-examine Mr. Karseboom's case. Instead, the UNDT erred in effectively placing itself in the place of the medical expert and the decision-maker.

42. The Appeals Tribunal agrees with this submission.

43. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

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.

...

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

46. Clearly then, once the UNDT had decided that the procedure for presenting a medical opinion to the Secretary-General was flawed, the only proper course for it to take, since the issue was a medical one, was to remand the case to the ABCC to convene a medical board so that the Secretary-General could be properly advised on Mr. Karseboom's request for reconsideration.

48. Lastly, we turn to Mr. Karseboom's argument that, in view of Article 10(4) of its Statute, the UNDT did not have the power to remand the case to the ABCC to convene a medical board, since an order under that provision requires the concurrence of the Secretary-General.

49. The relevant part of Article 10(4) of the UNDT Statute 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.

50. Mr. Karseboom's argument has no merit. Firstly, Article 10(4) has no application to the present case. An order under Article 10(4) can only be made prior to the determination of the merits of a case. In the present case, the UNDT had already determined on the merits that the Secretary-General's decision was unlawful and void. There was thus nothing to prevent it from ordering a remand. Secondly, under Article 9(1) of its Statute, the UNDT "may order production of documents or such other evidence as it deems necessary".

51. Therefore, in the light of the Appeals Tribunal's binding jurisprudence, according to which the Tribunal cannot place itself in the position of the decision-maker, which in the present case is the ASG/Controller, the Tribunal will grant the application and will rescind the contested decision of 23 April 2014 together with the UNCB's recommendation of 4 April 2014.

52. The Tribunal notes that the Respondent submitted that:

... the Applicant has failed to take the reasonable step of claiming the cost of the repairs to his vehicle under his insurance, and has not met the conditions for presenting a claim for compensation established by [secs. 5 and 12 of ST/AI/149/Rev.4].

53. The Tribunal underlines that, according to secs. 14 and 16 of ST/AI/149/Rev.4, the UNCB is competent in the first instance to evaluate the receivability of a compensation claim in accordance with its Rules of Procedure, sec. 17. Consequently, the Applicant's compensation claim for property damage for his car is to be remanded for a new examination by UNCB, including on receivability.

54. Based on the UNCB's recommendation, the ASG/Controller is then to make the final decision on the Applicant's claim.

Conclusion

55. In the light of the foregoing, the Tribunal DECIDES:

- a. The application is granted;
- b. The contested decision of 23 April 2014 together with the UNCB's recommendation of 4 April 2014 are rescinded. The Applicant's claim is remanded for a new examination by the UNCB, including on receivability.

(Signed)

Judge Alessandra Greceanu

Dated this 25th day of April 2016

Entered in the Register on this 25th day of April 2016

(Signed)

Hafida Lahiouel, Registrar, New York