



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BARACUNGANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Karen Madeleine Farkas, UNHCR

Introduction

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (UNHCR).
2. He joined the Organization in May 2005 as a Senior Programme Clerk at the GL-5 level. On 1 January 2010, he was separated from service.
3. A few days after separating from service, the Applicant began suffering from an illness that paralyzed his limbs and left him entirely unable to move without the aid of others. He was subsequently diagnosed with polyradioculopathy/polyneuritis, a disorder of the peripheral nervous system.
4. On 9 June 2011, the Applicant filed a claim for compensation under Appendix D to the Staff Rules and Regulations in relation to his diagnosis of polyradioculopathy/polyneuritis after being granted a waiver of the time limit within which he had to file his claim pursuant to art. 12 of Appendix D.
5. On 20 June 2013, the Advisory Board on Compensation Claims (ABCC) made a recommendation that the claim be denied and the recommendation was approved on behalf of the Secretary-General on 16 July 2013.
6. The decision was however communicated to the Applicant in June 2014.
7. On 22 September 2014, the Applicant filed an Application before the Tribunal challenging the decision made on behalf of the Secretary-General with regard to his claim for compensation.
8. The Applicant was not represented by Counsel at the time that he filed his Application.
9. In March 2015, the Office of Staff Legal Assistance (OSLA) informed the Registry that it would represent the Applicant in the case and, on 9 April 2015, the Applicant filed a Motion to amend his original application.
10. The Respondent had no objection to the motion provided the scope of the motion was to allow the Applicant to clarify the issues in the case.

11. On 20 November 2015, the Tribunal issued Order No. 373 (NBI/2015) granting the Applicant's motion. The Tribunal directed the Applicant to file his amended Application by 14 December 2015 and the Respondent to file his amended Reply by 28 December 2015.

12. The Applicant filed the amended Application on 14 December 2015.

13. On 22 December 2015 the Respondent filed a motion requesting for an extension of time to file his amended Reply on the ground that the amended Application raised some new issues.

14. By Order No. 397 (NBI/2915) the Tribunal granted the Respondent's motion and directed him to file his amended Reply by 15 January 2016. The Respondent complied.

Facts

15. Following his separation from service, the Applicant started having the symptoms of polyneuritis and filed a claim for compensation pursuant to Appendix D of the Staff Rules and Regulations on 9 June 2011.

16. On 27 June 2011, the Applicant's claim was forwarded to the Officer Responsible for Compensation Claims at the United Nations Office at Geneva (UNOG), who is authorized to settle claims under Appendix D for amounts less than USD15,000 per annum or illness.

17. On 26 July 2011, the Officer Responsible for Compensation Claims at UNOG issued a memorandum recommending that the Applicant's Appendix D claim be rejected on the basis that his illness was not deemed to be attributable to the performance of his official duties on behalf of the Organization. No reasoning for this determination was provided.

18. The decision was forwarded to the Applicant by email dated 10 August 2011. In the email the Applicant was informed that according to art. 17 of Appendix D, he had 30 days to appeal the denial of his claim. That email also contains no reasons for the rejection of the claim.

19. On 7 September 2011, the Applicant contested the rejection of his Appendix D claim that was rendered by the Officer Responsible for Compensation Claims at UNOG.

20. In an email dated 29 September 2011, Mr. Christophe Duverger requested the Applicant to furnish detailed reasons as to why his ailment was service related.

21. In a letter dated 15 October 2011, the Applicant provided the Administration with additional information as to why his diagnosis of polyneuritis was attributable to the performance of his duties for the Organization.

22. The ABCC examined the Applicant's claim at its 463rd meeting on 11 June 2013. It granted him a waiver of the time limit. However, it recommended a denial of the claim on the basis that his illness was not attributable to his service. The operative part of the email reads,

Having also considered the claimant's statement, medical reports, and the advice of the Medical Director, in particular that there is no indication that the claimant's illness is directly related to his service, including the non-performance of an exit medical examination;

Recommends to the Secretary General that [...] claimant's claim for compensation under Appendix D to the Staff Rules for illness in connection with his work be denied.

23. The Medical Services Division doctor was of the view that the Applicant's condition was not service related. He opined "It is most likely the claimant's illness is due to two other significant illnesses which are unrelated to his service". No more is said on the "two other significant medical illnesses".

Parties' Submissions

Were the reasons in support of the ABCC's decision inadequate?

Applicant's submissions

24. The reasons given in support of the recommendation to deny the Applicant's claim were inadequate.

25. The ABCC failed to address in any way the evidence filed by the Applicant and provided absolutely no reasons as to why it found that the Applicant's illness was not attributable to his work with the Organization. In fact, there is no evidence whatsoever that the ABCC considered the evidence provided to it by the Applicant.

Respondent's submissions

26. There is no basis upon which it can be said that the ABCC did not consider the evidence provided to it by the Applicant. The submissions of the Applicant were transmitted to the relevant entities for consideration, including the ABCC and this is also reflected in the text of the recommendation of the ABCC to the Secretary-General.

27. It was the duty of the Applicant to submit evidence to establish the causal link between his illness and the performance of his duties. This he failed to do and it was lawful for the ABCC on evidence available to conclude that there was no causal link between the illness and the duties performed by the Applicant.

Did the decision-maker fetter her discretion or judgment by rubber-stamping the recommendation of the ABCC?

Applicant's submissions

28. The decision-maker in this case fettered her discretion by simply rubber stamping the recommendation of the Advisory Board.

29. The decision-maker had a duty to provide some reasons for her decision so that the person adversely affected by it is satisfied that the decision-maker herself considered the evidence and made an enlightened decision.

30. The decision contains the unsubstantiated recommendation of the ABCC and only a signature of the official to whom the Secretary-General appears to have delegated his authority.

31. There is no evidence whatsoever to suggest that the decision-maker reviewed any of the documents submitted by the Applicant or that she exercised her own judgment by endorsing the recommendation.

32. Since the recommendation of the ABCC is entirely devoid of any reasons in support of the recommendation, no reasonable person exercising independent judgment could have possibly endorsed it.

Respondent's submissions

33. The decision-maker, in this case the United Nations Controller, did not merely rubber stamp the decision of the ABCC but reviewed the documents submitted by the Applicant. The ABCC Secretariat prepares a presentation to the ABCC in each case for its consideration. All documents material to the case are included in the presentation. The Secretary of the ABCC provides the Controller with a copy of the ABCC minutes together with a copy of the presentation and the recommendation of the ABCC. The Secretary of the ABCC also has discussions with the Controller. The Applicant's assertion that the Controller rubber stamped a pre-prepared decision is without foundation.

Did the ABCC rely on extrinsic evidence?

Applicant's submissions

34. It is a breach of the *audi alteram partem* principle for a decision-maker to base a decision on information that has not been disclosed to the party adversely affected¹. Even when the information is disclosed, the decision-maker has an obligation to give the relevant party a fair opportunity to respond.

35. When performing essentially adjudicative functions as is the case with the ABCC, administrative decision-makers are generally precluded from *ex parte* fact-finding because they are supposed to exercise their adjudicative functions fairly and independently.

¹ Donald J.M. Brown and Honourable Justice John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto, Ontario: Canvasback Publishing, 2011) (loose leaf updated 2014) Vol. 2, Chapter 12:2100.

36. In the present case, the ABCC relied on information and documents to which the Applicant neither had access nor had been given an opportunity to respond to, namely the advice of the Medical Director.

37. The ABCC's approach and procedure point to bias and lack of independence from the Administration of the United Nations Secretariat, calling the ABCC's entire recommendation into question.

Respondent's submissions

38. In accordance with art. 16 of Appendix D, the ABCC "may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under the provisions of the article".

39. In order to discharge its responsibilities, the ABCC seeks advice from the Medical Director, who also attends meetings as an *ex officio* member. The relevant issue for consideration in this case was whether the Applicant's illness was attributable to the performance of his duties. The Applicant failed to adduce evidence on that issue despite several requests.

40. The advice of the Medical Director confirmed that the illness was unrelated to his duties and his advice was on the line of the advice given by the Applicant's treating physician.

41. In the light of the many opportunities given to the Applicant to provide additional evidence and given the fact that there was no conflict in the medical evidence given by the Medical Director and the Applicant's treating doctor the non-communication of the advice of the Medical Director to the Applicant did cause him any prejudice.

Was the Administration required to convene a Medical Board?

Applicant's submissions

42. No medical board was ever convened to review the Applicant's case, as required by art. 17 of Appendix D to the Staff Rules and Regulations.

43. The facts indicate that the ABCC simply chose to seek advice from one of the three parties referenced in art. 17 to render a decision as to the medical aspects of the Applicant's appeal, namely the Medical Director of the United Nations. The ABCC did not similarly seek advice from the Applicant's treating physician or from a medical practitioner outside of the United Nations.

44. The above-referenced actions by the Organization constitute a gross procedural flaw in the review and assessment of the Applicant's Appendix D claim and further calls into question the impartiality of the ABCC in the present case.

Respondent's submissions

45. The Applicant never sought reconsideration of the determination of the Secretary-General and therefore art. 17 of Appendix D on the convening of a medical board is not applicable.

46. A medical board is convened where there is conflicting evidence on a medical issue. As the Applicant failed to provide evidence to explain why his illness was attributable to the performance of his official duties, there was no conflicting evidence to justify the convening of a medical board.

Was the ABCC properly constituted?

Applicant's submissions

47. The ABCC was not properly constituted in that the four *ex officio* members were all from the Administration and there was no one to represent the interests of the Applicant.

48. The composition of the ABCC in the present case was not in compliance with the statutory requirements and in fact was constituted in such a manner that would favor decisions against staff members.

Respondent's submissions

49. The ABCC is entitled to decide on the procedures it considers necessary for discharging its responsibilities. In this regard it requires technical advice from time to time from experts. There is no evidence that the four *ex officio* persons represented the Organization and not the staff member. These persons attend the meetings of the ABCC to provide technical advice and this is a long standing practice of the ABCC.

Remedies

Applicant's submissions

50. Applicant requests that the decision to deny his claim be set aside and that the matter be remanded to the Secretary-General for a fresh determination.

51. The Applicant further requests six months' net base salary for the procedural irregularities associated with the initial review of his Appendix D claim.

Respondent's submissions

52. No compensation is due as there were no procedural irregularities. The claim should be rejected.

Considerations

53. The issue in this case is whether in the consideration and determination of his claim the Applicant was afforded due process.

Procedural requirements under Appendix D to the Staff Rules

54. The procedural rules governing claims for compensation for death, illness or injury are embodied in Appendix D of the Staff Rules.

55. Claims for compensation must be submitted within four months of the death of the staff member or the injury or onset of the illness according to art. 12 of Appendix D.

56. In exceptional circumstances the Secretary-General may accept a claim for consideration a claim submitted at a later date².

57. The determination of the injury or illness and of the type and degree of disability shall be made on the basis of reports obtained from a qualified medical practitioner or practitioners³.

58. The Secretary-General may require the medical examination of any person claiming or in receipt of compensation for injury or illness⁴.

59. In case of refusal or failure of a claimant or beneficiary to undergo such examination at such time or times as, in the opinion of the Secretary-General, may be reasonably necessary, the Secretary-General may bar the claimant or beneficiary from receiving compensation in full or in part⁵.

60. Every person claiming under the Appendix D rules or in receipt of compensation under those rules shall furnish such documentary evidence as may be required by the Secretary-General for the purpose of determination of entitlements under these rules.⁶

61. The ABCC may be consulted by the Secretary-General on any matter connected with the implementation and administration of the rules embodied in Appendix D⁷. The ABCC itself is composed of three representatives of the Administration appointed by the Secretary-General as well as three representatives of the staff appointed by the Secretary-General on the recommendation of the Staff Committee.⁸

62. The representatives should have the necessary expertise in administrative and personnel matters⁹.

² Article 12 of Appendix D.

³ Article 13 of Appendix D.

⁴ Ibid,

⁵ Ibid.

⁶ Article 15 of Appendix D.

⁷ Article 16(a) of Appendix D.

⁸ Article 16(d) (i) and (ii) of Appendix D.

⁹ Article 16(d) (ii) of Appendix D.

63. An individual aggrieved by a determination may ask the Secretary-General to reconsider his claim within thirty days of the notification. The Secretary-General has discretion to accept a late submission for reconsideration of the claim¹⁰.

64. Once the reconsideration is received and accepted a medical board shall be convened to consider and to report to the ABCC on the medical aspects of the appeal¹¹.

65. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations¹².

66. The request for reconsideration should be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board.

67. Article 16(c) of Appendix D empowers the ABCC to decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under Appendix D.

The Appeal to the Secretary General

68. The Applicant's claim was processed on 26 July 2011 by the Officer Responsible for Compensation Claims at UNOG, who is authorized to settle claims under Appendix D for amounts less than \$15,000 per annum or illness. His claim was rejected on the basis that there was no causal link between his illness and the performance of his official duties. No reasons were provided for the rejection of the claim or as to why there was no causal link between the illness and the performance of official duties. The decision was forwarded to the Applicant by email dated 10 August 2011.

¹⁰ Article 17(a) of Appendix D.

¹¹ Article 17(b) of Appendix D.

¹² Ibid.

69. In the email the Applicant was informed that according to art. 17 of Appendix D, he had 30 days to appeal the denial of his claim. No reasons were given.

70. On 7 September 2011, the Applicant contested the rejection of his claim and the matter was referred to the ABCC.

71. On 15 October 2011, the Applicant provided the Administration with additional information as to why his diagnosis of polyneuritis was attributable to the performance of his duties for the Organization.

The determination of the ABCC

72. The ABCC examined the Applicant's claim at its 463rd meeting on 11 June 2013. It granted him a waiver of the time limit. However, it recommended a denial of the claim on the basis that his illness was not attributable to his service.

Findings

73. The determination of a claim under Appendix D is an administrative process and therefore the rules applicable in decision-making are applicable. In addition to strict compliance with existing rules there is a further requirement that the process leading to the determination must be fair and comply with the rules of natural justice.

74. In the case of *Ansa-Emmim*¹³, the United Nations Appeals Tribunal (UNAT) held that all proceedings which culminate in appealable decisions must be conducted in a reviewable manner, by observing the principles of natural justice. The affected party must get a proper hearing, and the order detailing a decision must contain sound reasons which can be judicially scrutinized upon appeal¹⁴. In *Hepworth*¹⁵, UNAT held that due process requires that a staff member must know the reasons for a decision so that he or she can act on it.

¹³ 2011-UNAT-155, para. 31.

¹⁴ Paragraph 31.

¹⁵ 2011-UNAT-178, para. 32.

75. The decision of the UNOG officer to reject the claim contained no reasons as to why the injury or illness of the Applicant was not work related. Though the Applicant appealed that determination he certainly would have been hampered in the filing of the reconsideration of the claim in the absence of reasons.

76. The ABCC also did not provide any reasons and it is not surprising that in the communication sent to the Applicant that his claim had been rejected by the ABCC mentioned no reasons. An individual who is not satisfied with the decision of the ABCC may within 30 days of the notice of the decision request the Secretary-General to reconsider the determination of the ABCC¹⁶. That individual also has the legitimate right to challenge that decision before the Dispute Tribunal. In the absence of reasons it becomes difficult if not problematic for that individual to exercise his/her right of access to justice¹⁷.

77. In *Obdeijn*¹⁸, UNAT held,

The obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly Resolution A/RES/63/253 and the principle of accountability of managers that the Resolution advocates for.

The Tribunal concludes on that issue that the failure to provide reasons to the Applicant on the rejection of his claim by the ABCC and even by the Claims Compensation Officer in Geneva did not meet the standard required of due process in the determination of a claim of an individual.

Was the ABCC properly constituted?

78. Pursuant to Article 16 (d) (i) and (ii) of Appendix D to the Staff Rules, the ABCC shall consist of three representatives of the Administration appointed by the Secretary-General and three representatives of the staff appointed by the Secretary-General on the recommendation of the Staff Committee. There were

¹⁶ Article 17(a) Appendix D.

¹⁷ 2012-UNAT-201, para. 36.

¹⁸ Ibid.

twelve participants at the meeting of the ABCC that determined the Applicant's case on 11 June 2013. There is no indication at all who the members were and who they were representing. It is not at all possible to gather from the minutes of the 11 June meeting whether there were any representatives of the staff.

79. Admittedly there is a presumption of regularity that administrative matters are taken legally¹⁹ but that presumption can only be gathered if there is a substratum of facts or evidence that permit such an inference. No such inference can be gathered from the 11 June meeting as to the proper composition of the ABCC. It is highly recommended that in future the ABCC complies strictly with the provisions of Article 16 (d) of Appendix D and indicate clearly in their minutes of deliberations who the members of the ABCC present are.

80. The Respondent submitted that the ABCC has the power to decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities" as provided by Article 16 (c) of Appendix D. This is so indeed but even in deciding on its own procedures, which the Tribunal considers are unwritten ones, the ABCC is not allowed to flout the clear provisions of Appendix D on its composition.

81. The ABCC failed to follow its own rules and that has resulted in a denial of due process to the Applicant. Where there is a failure of the Administration to follow its own Regulations and Rules and that impacts and infringes the rights of a staff member, then as a general principle of law and the jurisprudence of this Tribunal the staff member is entitled to an effective remedy²⁰. The Tribunal considers that the lack of clarity on the composition of the ABCC is amounted to a denial of due process in the determination of the Applicant's claim.

82. No medical board was convened in the present matter. A medical board can only be convened if there is a request by the aggrieved individual within 30 days of the notification of the ABCC decision pursuant to Article 17 (a) of Appendix D. The Applicant did not make such a request and therefore he cannot be heard to complain on that issue.

¹⁹ *Rolland* 2011-UNAT-122, para. 26.

²⁰ *Nogueira* 2014-UNAT-409, para. 16.

Conclusion

83. Article 10.4 of the Statute of the Tribunal reads:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the **concurrence** of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary (emphasis added).

84. Article 10.4 of the Statute of the Tribunal is replica of art. 10.2 of the Statute of the former United Nations Administrative Tribunal that read,

Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the **request** of the Secretary-General and prior to the determination of the merits of the case, order the case remanded for institution or correction of the required procedure. Where a case is remanded, the Tribunal may order the payment of compensation, which is not to exceed the equivalent of three months' net base salary, to the applicant for such loss as may have been caused by the procedural delay (emphasis added).

85. The substantive difference between the two provisions is the replacement of the word "request" in the former Statute with the words "the concurrence" in the Statute of the UNDT.

86. The question arises whether the Tribunal should seek and obtain the concurrence of the Secretary-General before correcting a procedural error in the decision making process of the ABCC or the Secretary-General himself. Most of the cases filed before the Tribunal contain averments of procedural flaws.

87. These flaws would invariably be detected prior to the determination of the merits of the case as they may be gathered from the pleadings. If art. 10.4 is to be understood as meaning that in such circumstances the Tribunal should refer the matter back to the Secretary-General for correction and institution of the required

procedure, this would mean that the powers of the Tribunal on judicial review would be subservient to the willingness of the Secretary-General to agree to a correction of the procedural flaw. It would appear from that reasoning that the case can only proceed on its merits depending on the agreement of the Secretary-General to correct the procedural error.

88. The practical issue that would arise is how the Tribunal should proceed to obtain that concurrence from the Secretary-General. Nothing is provided in the Statute on this. Should the acceptance or rejection of that concurrence be gathered from the pleadings? In the present matter the Secretary-General's stand is that the Applicant's claim is not receivable. Should that be an indication that he has not concurred in a correction of the procedural errors highlighted above?

89. The former United Nations Administrative Tribunal had to decide a claim under Appendix D of the Staff Rules in Judgment No. 1426 (2009). The former United Nations Administrative Tribunal found that the ABCC had not complied with relevant rules. It referred to art. 10.2 of its Statute as the Respondent had agreed to convene a medical board to review the applicant's claim. The former United Nations Administrative Tribunal then referred the matter back to the ABCC for "correction of procedure". There is no indication whether the former United Nations Administrative Tribunal considered the willingness of the ABCC to convene a medical board as amounting to a request of the Secretary-General to proceed to a correction of procedure.

90. The Tribunal in the circumstances of the present case is not prepared to allow its power of judicial review to be circumscribed by art. 10.4. It is not deemed that the concurrence of the Secretary-General is necessary to take the appropriate remedial measure if this is found to be necessary. The Secretary-General as Respondent is entitled to have his due process rights respected and this has been done here as he has filed a reply to the claim and is legally represented.

91. The Tribunal will therefore utilize its power of judicial review and refer the case back, on its own volition, to the ABCC with a direction that it follows its own procedure on its composition and, whatever decision it reaches, to communicate that decision to the Applicant with reasons.

92. The Applicant's claim dates back to 2011 and the delay in the determination of his claim will further be compounded by a reconsideration of his claim by the ABCC. In the circumstances the Tribunal awards the Applicant one month's net base salary, as permitted by art. 10.4 of the Statute of the Dispute Tribunal and following the precedent of the former United Nations Administrative Tribunal Judgment No. 1426.

(Signed)

Vinod Boolell

Dated this 27th day of June 2016

Entered in the Register on this 27th day of June 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi