



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Daniel Trup, OSLA

**Counsel for the Respondent:**

Louis-Philippe Lapicerella, UNHCR

## **Introduction**

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (UNHCR) who is challenging the decision of the Secretary-General to refuse his claim for compensation submitted in accordance with Appendix D of the United Nations Staff Regulations and Rules.

## **Procedural history**

2. On 22 September 2014, the Applicant filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi relating to the Secretary-General's refusal of his Appendix D claim.

3. The Dispute Tribunal, in its Judgment No. UNDT/2016/092, rendered on 27 June 2016, concluded that the Applicant's due process rights had been contravened because: (i) the Administration failed to provide him with reasons for the denial of his claim; and (ii) the Advisory Board on Compensation Claims (ABCC) failed to follow its own rules regarding its membership. The Tribunal further concluded that the concurrence of the Secretary-General was not necessary to take the appropriate remedial measure in this case and utilized its power of judicial review to refer the case back, on its own volition, to the ABCC to follow its own procedure on its composition and to communicate a reasoned decision to the Applicant.

4. On appeal by the Secretary-General, the United Nations Appeals Tribunal (UNAT/the Appeals Tribunal), in its Judgment No. 2017-UNAT-725 dated 26 May 2017, concluded that the Dispute Tribunal exceeded its competence by making an order to remand the case to the Administration without the concurrence of the Secretary-General. Accordingly, the Appeals Tribunal partially set aside Judgment No. UNDT/2016/092 and remanded the case for a hearing *de novo* before a different UNDT Judge.

5. In compliance with Order No. 129 (NBI/2017), the Applicant filed an amended application on 27 July 2017.

6. On 27 September 2017 and 10 January 2017, the parties filed joint motions praying for suspension of proceedings to enable them to pursue informal resolution of the Applicant's claim. The Tribunal granted the motions and suspended proceedings until 28 February 2018.<sup>1</sup>

7. The Respondent filed his amended reply on 1 March 2018 after the informal settlement discussion failed.

8. The Tribunal held a case management discussion with the parties on 17 April 2018 at which time it was decided that a hearing would not be necessary and that the matter would be adjudicated based on the documentary evidence submitted by the parties.

### **Background facts**

9. The Applicant entered service with UNHCR on 16 May 2005 as a Senior Programme Clerk (GL5) in Muyinga, Burundi. He was separated from service on 1 January 2007 due to the discontinuation of his position.

10. On 8 August 2007, he was appointed as a secretary at the G-4 level in Bujumbura, Burundi. He was separated from service with effect from 1 January 2010.

11. According to the Applicant, on or about 7 January 2010, he started suffering from an illness that paralyzed his limbs and left him immobile. The Applicant later explained that in 2011, a neurologist diagnosed him with polyradioculopathy/polyneuritis.

12. The Applicant underwent a standardized UNHCR medical examination on 25 May 2011. The medical report confirmed the Applicant's existing illness and found him to be "unfit" for duty but did not make a finding as to whether his illness was work-related. This report was received by the Compensation Claims, Compensation Claims Service (ORCC/CCS) at the United Nations Office at Geneva (UNOG) on 22 October 2012

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<sup>1</sup> See Order Nos. 163 (NBI/2017) and 005 (NBI/2018).

13. On 9 June 2011, the Applicant filed a claim for compensation under Appendix D in relation to the diagnosis of polyradioculopathy/polyneuritis. The Applicant requested a waiver of the time-limit set out in art. 12 of Appendix D.

14. By a memorandum dated 27 June 2011, a UNHCR Senior Human Resources Associate forwarded the Applicant's claim to the Officer Responsible, ORCC/CCS.

15. Dr. Michel Baduraux, Medical Director, UNHCR Medical Service, prepared a medical abstract dated 12 July 2011, which was submitted to ORCC/CCS on 13 July 2011. Based on the standardized UNHCR medical examination of 25 May 2011, Dr. Baduraux concluded that: (i) there were no previous medical conditions that could be related to the cause of the report; (ii) the discovery of hepatitis B + serology/polyneuropathy of the lower limbs were circumstances related to the Applicant's illness; (iii) there was progressive deterioration of the Applicant's general condition; (iv) the clinical features were not considered to be completely or partially related to the circumstances related to the illness; and (v) the illness had resulted in an incapacity to work.

16. Also on 13 July 2011, the ORCC/CCS received a medical statement, dated 22 June 2011, from the Applicant's attending physician, which described the Applicant's condition as a "paralysis of the upper and lower limbs and pelvic girdle"<sup>2</sup>. The physician also indicated that the Applicant's condition was "probably linked to HIV"<sup>3</sup>.

17. By a memorandum dated 26 July 2011, the ORCC/CCS informed UNHCR that the Applicant's claim for compensation and payment of medical bills could not be accepted under Appendix D as his illness was not deemed to be attributable to the performance of his official duties.

18. The UNHCR Senior Human Resources Associate forwarded the decision of the ORCC/CCS to the Applicant on 10 August 2011. He also informed the

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<sup>2</sup> Translated from French by the Translation and Editorial Section, Division of Conference Services, United Nations Office at Nairobi (TES/DCS/UNON).

<sup>3</sup> Ibid.

Applicant that, pursuant to art. 17 of Appendix D, he had 30 days within which to appeal the denial of his claim.

19. The Applicant submitted an appeal to UNHCR on 7 September 2011, which was forwarded to the ORCC/CCS on 9 September 2011.

20. By memorandum dated 26 September 2011, ORCC/CCS informed the UNHCR Senior Human Resources Associate that the Applicant's appeal would only be received and considered if he could enunciate arguments clearly linking his illness to the performance of his official duties. The UNHCR Senior Human Resources Associate communicated this information to the Applicant by email dated 29 September 2011.

21. On 24 October 2011, ORCC/CCS received the Applicant's explanation, dated 15 October 2011, and entitled "relationship between [the Applicant's] illness and his official functions at UNHCR". The Applicant submitted in this document that he was healthy upon his recruitment in 2007 but was unwell when he was separated from service in late 2009. However, his illness was not timeously discovered because UNHCR failed to give him an end-of-service medical examination.

22. By memorandum dated 2 November 2011, the ORCC/CCS forwarded the Applicant's Appendix D claim to the ABCC.

23. The ABCC examined the Applicant's claim on 11 June 2013 and recommended that the Applicant be granted a waiver of the time limit under art. 12 of Appendix D but that his claim for compensation for a service-incurred illness be denied.

24. Although the ABCC's recommendation was approved on behalf of the Secretary-General on 16 July 2013, the Applicant was not notified of the decision until 25 June 2014.

## **Submissions**

### *Applicant*

25. The Applicant's case is that:

a. The Administration did not provide any reasons with regards to its determination that his illness was unrelated to his work at UNHCR. The absence of reasons in the memorandum from the ORCC/CCS disadvantaged him because he was unsure as to what evidence or additional information was required for his appeal to the ABCC.

b. The ABCC failed to follow its own rules to his detriment. Under art. 16(d)(i) and (ii) of Appendix D, the ABCC is supposed to 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. In the Applicant's case, there appear to have been 12 participants at the ABCC meeting on 11 June 2013. There is no indication in the ABCC minutes who these additional participants were or why they attended the meeting.

c. Additionally, the ABCC failed to adhere to art. 17(b) of former Appendix D in that it did not establish a medical board to consider and report on the medical aspects of the Applicant's claim.

26. At the case management discussion of 17 April 2018, counsel for the Applicant clarified that the Applicant no longer seeks resubmission of his claim to the ABCC as indicated in his amended Application of 27 July 2017. The Applicant seeks damages consistent with the failure of the Administration to apply its own rules and regulations with respect to former Appendix D. The calculation of damages should consider his injuries that he maintains are work-related.

***Respondent***

27. The Respondent's case is that the application should be dismissed because:

a. UNHCR met its obligation to ensure that the Applicant understood the documentation he was required to provide as proof in support of his claim but the Applicant did not meet the burden of proof as required by art. 15 of Appendix D. The Applicant failed to establish a causal link between his work with UNHCR and his diagnosis of polyradioculopathy/polyneuritis as is required by art. 2(a) of Appendix D. He merely provided a chronology of his illness without any material evidence (e.g. a medical opinion, documents, etc.) and requested that the Administration infer that the timing of his illness is indicative that his service with UNHCR was the cause of his illness.

b. At every step of the process, the Applicant was provided a reason for the rejection of his claim, that is the absence of a link between his condition and his service with UNHCR.

c. The Applicant's medical condition was assessed on various occasions by medical doctors and given proper consideration. The final advice provided by a United Nations medical officer confirmed that the Applicant's illness was likely due to two other significant medical conditions which were unrelated to his UNHCR service.

d. With respect to the Applicant's allegation that the Administration failed to adhere to the provisions of art. 16(d)(i) and (ii) of Appendix D on the composition of the ABCC, the Respondent submits that the additional attendees were subject matter experts (from the pension fund, the medical director, legal advisors, etc.) who attended on an ex officio basis to provide advice to the ABCC members pursuant to art. 16.

e. Lastly, the Applicant neither requested the establishment of a medical board nor nominated a medical practitioner to represent him on a medical board under art. 17 of the ABCC rules.

## Considerations

28. The parties have raised the following as issues in their amended pleadings:

- a. Whether the Administration failed to provide reasons when it communicated the impugned decision.
- b. Whether the Administration failed to adhere to the provisions of art. 16(d)(i) and (ii) of Appendix D on the composition of the ABCC.
- c. The establishment of a medical board under art. 17 of the ABCC rules.

29. In Judgment No. UNDT/2016/092, this Tribunal discussed, at length, the issues of the Administration's failure to provide reasons and to adhere to art. 16(d)(i) and (ii) of Appendix D on the composition of the ABCC and concluded that the Administration's actions resulted in a denial of the Applicant's right to due process. On appeal, the Appeals Tribunal concurred with the Dispute Tribunal's conclusion on these procedural irregularities. It stated in its Judgment No. 2017-UNAT-725 that:

The UNDT was faced with a case in which the contested administrative decision to deny [the Applicant] compensation under Appendix D was undisputedly procedurally unlawful due to the failure of the ABCC and the ORCC/CCS to provide reasons to him for the rejection of his claim, and the violation by the ABCC of its own rules regarding its composition. These failures hampered [the Applicant's] efforts in his filing for reconsideration of his claim as well as in exercising his right of access to justice.

Under Article 10 of its Statute, the only proper course for the UNDT to take was either to remand the case, provided that the Secretary-General concurred thereupon, to the ABCC to follow the prescribed procedure, or to consider whether the procedural flaws warranted the rescission of the impugned administrative decision. Therefore, the Appeals Tribunal holds that the UNDT, by making an order to remand the case to the Administration without the concurrence of the Secretary-General, which it was not competent to do, exceeded its competence and committed errors of law and procedure.

30. In light of the Appeals Tribunal's pronouncement on the unlawfulness of the procedural irregularities, this Tribunal will limit itself to determining issues



relating to the medical board under art. 17 of the ABCC rules, procedural delay and the appropriate remedy, that is, whether the procedural flaws warrant the rescission of the impugned administrative decision or whether the case should be remanded to the ABCC in accordance with art. 10.4 of the UNDT Statute.

Medical boards under art. 17 of Appendix D

31. The parties are at odds as to the procedure for establishing a medical board under art. 17 of Appendix D. The Applicant's case is that the ABCC failed to adhere to art. 17(b) of former Appendix D because it failed to establish a medical board to consider and report on the medical aspects of his claim. The Respondent submits however that the onus was on the Applicant to request the establishment of a medical board and to nominate a medical practitioner to represent him on the medical board.

32. Article 17 of Appendix D entitled "Appeals in case of injury or illness" states:

- (a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date. The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b);
- (b) A medical board shall be convened to consider and to report to the Advisory Board on Compensation Claims on the medical aspects of the appeal. 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 Nations;
- (c) The Advisory Board on Compensation Claims shall transmit its recommendations together with the report of the medical board to the Secretary-General who shall make the final determination;
- (d) If after reviewing the report of the medical board and the recommendations of the Advisory Board on Compensation

Claims, the Secretary-General alters his original decision in favour of the claimant, the United Nations will bear the medical fees and the incidental expenses; if the original decision is sustained, the claimant shall bear the medical fees and the incidental expenses of the medical practitioner whom he selected and half of the medical fees and expenses of the third medical practitioner on the medical board. The balance of the fees and expenses shall be borne by the United Nations;

33. It is clear from Judgment No. 2017-UNAT-725 that the Applicant was not required to submit a request for reconsideration under art. 17 prior to the filing of his application to the Dispute Tribunal for judicial review of the Secretary-General's decision. The Appeals Tribunal held that the request for reconsideration under art. 17 is an option afforded to a staff member who wishes to bring his/her case before a medical board.

34. The Tribunal cannot accept the Respondent's submission that the Applicant was obliged to request a medical board when art. 17 does not include such a requirement.<sup>4</sup> Article 17(a) only mandates a staff member seeking reconsideration of a claim that has been denied on medical grounds to include, in his/her request, the name of a medical practitioner to represent him/her on the medical board. Once the staff member complies with art. 17(a), the burden shifts to the Administration to convene a medical board that is competent to determine the nature of the staff member's injuries, illness or disability and its correlation to his/her official duties.

35. While the onus of establishing a medical board lies on the Respondent once a staff member submits a request for reconsideration, the Tribunal cannot find in the current case that the Respondent failed to live up to his responsibility when the Applicant opted to file an application with the Tribunal instead of returning to the ABCC with a request for reconsideration. In other words, the Respondent could not establish a medical board under art. 17(b), to consider and report on the medical aspects of the Applicant's claim, when the Applicant decided not to trigger said process by following the directives in art. 17(a). Instead, he chose to exercise his right to come before the Tribunal for a determination.

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<sup>4</sup> *Wamalala* UNDT-2014-133, paragraph 33.

36. The issue now is whether a medical board should have been established in this case.

37. The general principles governing the payment of compensation for service incurred injury are to be found in ST/SGB/Staff Rules/Appendix D/Rev.1 (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations), which in art. 2(a) and (b) states that.

The following principles and definitions shall govern the operation of these rules:

(a) Compensation shall be awarded in the event of death, injury or illness of a staff member which is attributable to the performance of official duties on behalf of the United Nations, except that no compensation shall be awarded when such death, injury or illness has been occasioned by:

(i) The wilful misconduct of any such staff member; or

(ii) Any such staff member's wilful intent to bring about the death, injury or illness of himself or another;

(b) Without restricting the generality of paragraph (a), death injury or illness of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations in the absence of any wilful misconduct or wilful intent when:

(i) The death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations; or

(ii) The death, injury or illness was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards to the staff member's health or security, and occurred as the result of such hazards; or

(iii) The death, injury or illness occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connexion with the performance of official duties; provided that the provisions of this sub-paragraph shall not extend to private motor vehicle transportation sanctioned or authorized by the United Nations solely on the request and for the convenience of the staff member.

38. In *Wamalala* UNDT-2014-133, the Tribunal held that the scope of its judicial review in compensation claims cases is limited to determining whether

“the ABCC correctly followed the procedure applicable to medical claims, whether it properly directed its mind to the relevant issues, whether the evidence on which it based its determination was adequate or flawed.”

39. The Tribunal has held in the past that its judicial review does not include interfering with an expert decision based on well-founded evidence or substitution of the views of the medical service with its own.<sup>5</sup>

40. In the current case, in making its recommendation of 11 June 2013, the ABCC, while taking into consideration the Applicant’s statement and his medical reports, relied particularly on the advice of Dr. Mike Rowell, then Medical Director, United Nations Medical Services Division (MSD), and his conclusion that there was no indication that the Applicant’s illness was directly related to his service with UNHCR. The Tribunal is reproducing below the advice provided to the ABCC by Dr. Rowell in his memorandum dated 4 April 2013.

1. Your memo requesting advice as detailed above refers.

*Whether the claimant’s illness/injuries polyradiculopathy/polyneuritis can be considered to be directly related to his service, including the decision to not undertake an exit medical examination?*

2. No. There is no clear indication of the condition from a medical practitioner. If the claimant’s description of polyradiculopathy/polyneuritis is accepted as is, there is no indication it is directly related to his service, including the non-performance of an exit medical. It is most likely the claimant’s illness is due to two other significant medical illnesses which are unrelated to his service.

3. As the condition is not assessed as service incurred, medical expenses etc are not further considered.

41. Dr. Rowell’s advice is bewildering because on one hand he states that there is no clear indication of the Applicant’s condition from a medical practitioner and then in the same breath indicates it is “most likely” that the Applicant’s illness was caused by “two other significant medical illnesses”. If there was no specific diagnosis from a medical practitioner regarding the Applicant’s condition, then how could a conclusion be drawn as to its root cause?

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<sup>5</sup> See *Gabaldon* UNDT/2011/132; *Wamalala* UNDT/2014/133, paragraph 27.

Additionally, although Dr. Rowell concluded that the Applicant's condition was not related to his service, he did not specify the "two other significant medical illnesses" that were unrelated to the Applicant's UNHCR service but presumably caused his condition.

42. Tribunal finds that the evidence on which the ABCC based its determination of 11 June 2013 was inadequate because Dr. Rowell's advice was vague and not based on well-founded evidence.

43. It is not the function of the Tribunal to put itself in the position of a medical practitioner by diagnosing medical conditions and making pronouncements on the cause of said conditions. Such assessments are properly left to medical professionals.

#### Procedural delay

44. The record shows that the recommendation of the ABCC was approved on behalf of the Secretary-General on 16 July 2013. However, the Applicant was not informed of the outcome until 25 June 2014 when he wrote to the UNHCR Human Resources Associate to inquire about his case. The Respondent has not provided a reason for this delay.

#### **Conclusions**

45. The Tribunal concludes that there are medical aspects to this case that should be dealt with by medical professionals. It is understandable that the Applicant is weary of waiting for resolution of a claim that he filed in 2011. However, with all the ambiguities raised by Dr. Rowell and the Applicant's physician, the Tribunal considers it will be a miscarriage of justice for it to merely award damages consistent with the failure of the Administration to apply its own rules and regulations with respect to former Appendix D as requested by the Applicant. Since there are lingering medical issues that the Tribunal is not competent to make pronouncements on, the best remedy is for this matter to be remanded to the ABCC.

## **Judgment**

46. The case is remanded to the ABCC, with the concurrence of the Secretary-General of the United Nations, for establishment of a medical board in accordance with art. 17(b) of Appendix D and for correction of the procedures relating to art. 16 of Appendix D.

47. In accordance with art. 10.4 of the UNDT Statute, which allows payment of compensation for procedural delay, the Applicant is awarded three months' net base salary for the unexplained delay between 16 July 2013, the date the Secretary-General decided on his claim, and 25 June 2014, the day the Applicant was informed of the Secretary-General's decision. The payment is to be based on his salary as of the date of his separation from service.

48. The compensation awarded to the Applicant shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 22<sup>nd</sup> day of November 2018

Entered in the Register on this 22<sup>nd</sup> day of November 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi