Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Security Officer with the Security and Safety Services ("SSS") in the Department of Safety and Security ("DSS"), in essence, contests the following decisions:

a. "The decision of the Secretary-General of 6 May 2015, communicated to the Applicant by email from the Secretary [of the Advisory Board on Compensation Claims ("ABCC")] dated 8 May 2015, which denied the Applicant compensation for claims the Applicant made under Appendix D to the Staff Rules ("Appendix D") following his work place accident and resultant injuries and illnesses" as well as a range of alleged failures and other shortcomings in relation therewith; and

b. Failure to convene a medical board in a timely manner to reconsider the initial ABCC decision of 6 May 2015 under art. 17 of Appendix D, as requested by the Applicant on 29 May 2015.

2. As remedies, the Applicant seeks the following:

a. The rescission of the Secretary-General's decision of 6 May 2015 and the ABCC recommendation on the grounds of procedural irregularities and violations of the Applicant's due process rights;

b. The payment of compensation for service related injuries resulting from the incident of 27 July 2013 under Appendix D, including:

i. The payment for total disability under art. 11.1(c);

ii. The payment for partial disability under art. 11.2(d); and

iii. The payment for permanent loss of function of the whole person under art. 11.3(c);

c. The authorization of the special sick leave credit in accordance with art. 18(a) of Appendix D;

d. The payment of two-year net base salary as compensation for due process violations; and

e. The payment of two-year net-base salary as compensation for emotional and moral distress and anxiety and for material harm suffered.

3. The Respondent submits that the application is not receivable *ratione materiae* as only a final administrative decision has direct legal consequences for a staff member's terms of appointment and no final administrative decision has yet been taken on the Applicant's request for reconsideration. The Respondent further submits that the current application is *res judicata* as the Dispute Tribunal in *Kisia* UNDT/2016/023 has already held that no application challenging the contested decision is receivable until a final administrative decision has been taken. In any event, the Respondent submits that the application is without merit.

4. The Applicant responds that the application is receivable since the decision of 6 May 2015 was taken on the advice of the ABCC, a technical advisory body, and the Applicant withdrew his request for reconsideration before filing the current application. On the merits, the Applicant submits that the decision to deny his claim under Appendix D was irregular, unlawful, improper, and tainted with improper considerations, factual errors, and due process violations.

Factual and procedural background

5. On 27 July 2013, the Applicant drove his car through the main entrance of the United Nations Headquarters in New York, at security post number 103, and stopped in front of a security barrier to be cleared for entry. After his car was inspected, the Applicant proceeded forward and collided with the barrier. According to the incident report prepared on the same day, the barrier sustained no damage, but the Applicant's car had some minor scratches on the front bumper. The Applicant also reported the

incident on the same day, stating that the half-risen barrier was not visible from his driver's seat and his car suffered a dent and scratch on the front.

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

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

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

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

10. On 14 April 2015, the ABCC considered the Applicant's claim at its 482nd meeting. According to the ABCC meeting worksheet, the ABCC considered:

a. The Applicant's claim form and attached statements dated 25 November 2013;

b. Documentation relating to his claim before the United Nations Claims Board ("UNCB"), consisting of the UNCB presentation, memorandum to DSS of the UNCB decision, and the Management Evaluation Unit ("MEU") decision;

c. DSS' confirmation that the Applicant was scheduled to work on the date of the incident;

d. The memorandum from the MSD of 20 January 2015;

e. The medical reports submitted by the Applicant.

11. The ABCC noted that the Applicant had been on sick leave from 1 September 2013 until his separation. The ABCC also noted that his UNCB claim for compensation for damage to his vehicle was denied, but wrote that while the UNCB may deny claims on the grounds of negligence of a claimant, Appendix D does not discount claims on that basis, adding however that no compensation may be awarded when an injury or illness is caused by wilful misconduct or wilful intent.

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

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

> Having considered at its 482nd meeting on 14 April 2015, the claim submitted by the above-referenced claimant for compensation under Appendix D to the Staff Rules for multiple injuries and illnesses (*inter alia*, back and neck pain, lateral hearing loss, lateral tinnitus, carpal tunnel right wrist, branchial neuritis, reduced speech discrimination, vestibular deficit, vision abnormality, and [post-traumatic stress disorder ("PTSD")]) in connection with an incident with his vehicle at the security stinger barrier located at the main entrance gate (post 103) of the UNHQ compound on 27 July 2013 when he was reporting to work;

> Having also considered the documentation submitted by the claimant; the circumstances surrounding the incident; the DSS investigation report; the impact and damage to the claimant's vehicle; the security video footage of the incident; the medical reports submitted by the claimant; and the advice of the Medical Director;

14. The ABCC concluded that "there is no credibility whatsoever to the incident as related by the claimant or to the injuries alleged to have been sustained as a result thereof" and recommended to deny the Applicant's compensation claim on the following grounds:

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

15. On 6 May 2015, on behalf of the Secretary-General, the Controller countersigned the ABCC's recommendation.

16. On 29 May 2015, the former counsel for the Applicant emailed the MEU, copying the ABCC, a letter by which he requested the Secretary-General to reconsider the Applicant's case pursuant to art. 17 of Appendix D.

17. By an email of 3 June 2015, the Secretary of the ABCC responded to the former counsel for the Applicant's 29 May 2015 email, stating, *inter alia*, that:

> Please be advised if a medical board is sought under Article 17 of Appendix D to the Staff Rules, [the Applicant] is required to (i) identify one medical practitioner to participate in the board (I note your letter appoints one, and an alternate), (ii) articulate the specific medical issue(s) he wishes the board to review and (iii) sign and deliver an undertaking accepting liability for half the expenses of the medical board if he does not prevail. In addition, the medical

> practitioner identified by [the Applicant] must also sign and deliver an undertaking accepting that the claimant, and not the Organization, will pay their fees and expenses in the event the claimant does not prevail. A form of such undertaking is attached below.
>
> I note that the medical issue which may be addressed by a medical board is whether the injuries claimed are consistent with the incident with his vehicle at the security barrier.
>
> [The Applicant] may wish to consider, however, that even if he prevails on the medical aspect of his claim, the Secretary-General[’s] decision on his case found that there was “no credibility whatsoever to the incident as related by the claimant.” […].
>
> Alternatively, if your client wishes to pursue further recourse, he may also wish to consider a review by the MEU pursuant to Staff Rule 11.2 or he may wish to submit further relevant medical information to the ABCC for reconsideration.
>
> With respect to the latter, what is required is new medical reports establishing his medical conditions claimed *(inter alia,* back and neck pain, lateral hearing loss, lateral tinnitus, carpal tunnel right wrist, branchial neuritis, reduced speech discrimination, vestibular deficit, vision abnormality, and PTSD) are a direct result of the incident which has been accepted as service-incurred pursuant to the Secretary-General’s decision.

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

19. On 15 July 2015, the MEU notified the Applicant that his request was considered not receivable, stating, *inter alia*, that (emphasis in original):

> The MEU considered that article 17 of Appendix D prescribes a specific procedure in the event that a staff member wished to seek reconsideration of a determination of the existence of a service-related injury or illness or of the type and degree of disability. The MEU noted that, in *James*, UNDT/2014/135 (under appeal), the [Dispute Tribunal] held that a staff member was required to exhaust the

> reconsideration procedure in article 17 of Appendix D before appealing to the [Dispute Tribunal]. But *see Baron*, UNDT/2011/174 (finding receivable an appeal of a decision based on the recommendation of the ABCC, when submitted to the [Dispute Tribunal] without first requesting reconsideration under article 17 of Appendix D, but then ordering a medical evaluation to be performed by a medical board).
>
> The MEU noted that your counsel's correspondence dated 29 May 2015 specifically requested reconsideration under article 17 with respect to the existence of your injuries and/or illnesses and the type and degree of disability. Your counsel's further correspondence dated 19 June 2015 concerned matters related to your alleged illnesses, injuries and disability and the review of your case by MSD. While your counsel stated that certain elements of the board's recommendations raised matters of law, the MEU noted that your counsel did not raise any matters other than those related to the determination of the existence and extent of an alleged service-related injury or illness and the type of disability.
>
> The MEU considered that the proper recourse in your case would be to proceed with an appeal under article 17 of Appendix D. The MEU noted, however, that the ABCC Secretary had also offered to present new medical reports to the ABCC for reconsideration. In any event, the MEU considered that your request was not receivable with the MEU.

20. On 22 July 2015, the Applicant filed an application with the Dispute Tribunal contesting, among other things, the correctness, reasonableness, lawfulness and fairness of the administrative decision of 6 May 2015 based on the ABCC recommendation, and of the MSD's advisory opinion to the ABCC. It was assigned case number UNDT/NY/2015/046.

21. On 16 March 2016, the Dispute Tribunal, following submissions in a case management discussion, rejected the instantly above-mentioned application as premature in *Kisia* UNDT/2016/023, considering that the Applicant had requested reconsideration under art. 17 of Appendix D and the final decision had not been taken by the Secretary-General. The Dispute Tribunal stated that the judgment was "without prejudice to any further proceedings before the Tribunal".

22. By a letter dated 29 March 2016, the Applicant submitted a new medical report and full contact details of his physician under art. 17 of Appendix D and reiterated medical issues to be considered by a medical board.

23. By letters dated 10 June 2016, the Secretary of the ABCC requested the Applicant and the physician nominated by the Applicant to sign undertakings in accordance with art. 17 of Appendix D.

24. On 21 June 2016, the Applicant provided full contact details of the physician and a signed undertaking from that physician to the Secretary of the ABCC.

25. On 16 August 2016, the Secretary of the ABCC provided the MSD with the contact details of the Applicant's physician and the Applicant's letter dated 29 March 2016.

26. On 3 October 2016, via email to the MEU, the Applicant withdrew his request for reconsideration under art. 17 of Appendix D.

27. The following day, on 4 October 2016, the Applicant filed the current application.

28. On 5 October 2016, the Registry of the Dispute Tribunal acknowledged receipt of the application and transmitted it to the Respondent, instructing him to file his reply by 4 November 2016.

29. On 4 November 2016, the Respondent filed his reply.

30. On 22 November 2016, the former counsel for the Applicant filed a motion for leave to file a response to the Respondent's reply and, with the motion, counsel also filed the said response.

31. On 14 May 2018, by Order No. 97 (NY/2018), the Tribunal granted the Applicant's motion for leave to file a response to the Respondent's reply and directed the parties to file separate submissions by 1 June 2018 in which they state their views

on whether the receivability issues raised in the Respondent's reply may be dealt with as a preliminary issue on the papers before the Tribunal.

32. On 1 June 2018, both parties filed their respective submissions in which they stated that they have no objections to the receivability issues raised in the Respondent's reply being dealt with as a preliminary matter.

33. On 15 August 2018, by Order No. 158 (NY/2018), the Tribunal directed the Respondent to file a submission by 14 September 2018, *inter alia*, clarifying whether the medical board has been convened and, if so, what steps, if any, have been taken to date for the Secretary-General to render a final administrative decision on this matter.

34. On 9 September 2018, via email, the Applicant submitted a signed statement stating, *inter alia*, that the Applicant had been unable to make payment to his counsel on record and did not have any funds to retain a doctor for purposes of the medical board.

35. On 14 September 2018, the Respondent filed a submission stating:

> … A medical board has not been convened. [The MSD] prepared terms of reference and were ready to send them to the Applicant's counsel on record. However, in correspondence dated 9 September 2018, copied to the Dispute Tribunal, the Applicant informed the Respondent that he no longer wishes to proceed with a medical board. In addition, he is no longer represented by counsel.
>
> … The Respondent maintains that the [a]pplication is not receivable. Additionally, the Applicant no longer wis[h]es to proceed with a medical board. Accordingly, it would not be appropriate to refer the matter for reconsideration. The Respondent respectfully invites the Dispute Tribunal to issue a judgment based on the material currently on the record.

Consideration

36. The Tribunal meant to deal with the receivability issues raised in the Respondent's reply as a preliminary matter, as agreed by the parties. However, considering that the Applicant is no longer represented by Counsel due to lack of

financial resources and that the Respondent also requested that the Tribunal issue a judgment based on the material currently on record, the Tribunal will deal with both receivability and the merits of the present application in this judgment, in the absence of any discernable prejudice to either party.

Receivability

37. Article 2.1(a) of the Dispute Tribunal's Statute states that the Tribunal is competent to "hear and pass judgment on an application … against the Secretary-General as the Chief Administrative Officer of the United Nations … [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

38. In this case, the Respondent submits that the present application is not receivable because only a final administrative decision has direct legal consequences for a staff member's terms of appointment and yet no final administrative decision has been taken on the Applicant's request for reconsideration under art. 17 of Appendix D. The Applicant responds that he withdrew his request for reconsideration and thus there is no pending matter before the Secretary-General.

39. Staff rule 11.2(b) provides that "[a] staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General … is not required to request a management evaluation", and it is well established that the ABCC is a technical body and hence, pursuant to staff rule 11.2(b), a staff member can appeal the ABCC's recommendation directly with the Dispute Tribunal, without requesting management evaluation (see *Dahan* 2018-UNAT-861, para. 21, citing *Baron* 2012-UNAT-257, para. 6). Although staff rule 11.2(b) allows a staff member to appeal the ABCC's recommendation directly with the Dispute Tribunal, the Respondent submits that the application is not receivable until the Secretary-General renders a final administrative decision on the Applicant's request for reconsideration under art. 17 of Appendix D.

40. Article 17 of Appendix D (Appeals in case of injury or illness) provides as follows:

> (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 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;
>
> (e) Whenever an appeal under this article involves also an appeal against a decision of the Joint Staff Pension Board, the medical board established under the Regulations and Rules of the Joint Staff Pension Board and such medical board's report shall be utilized to the extent possible for the purposes of this article.

41. In *Baracungana* 2017-UNAT-725, the Appeals Tribunal held that art. 17 of Appendix D does not require a staff member to request that a medical board be convened, but merely provides an option to bring his or her case before a medical

board and instituting such a request is not a condition of receivability of the application for judicial review:

> 27. In our view, Article 17 of Appendix D does not make it obligatory for the staff-member to request that a medical board be convened to review the Secretary-General's determination, nor does it institute such a request as a condition of receivability of the application for judicial review of the relevant (negative) administrative decision taken on behalf of the Secretary-General. This is just an option afforded to the staff member, if the latter wishes to bring his/her case before a medical board. In other words, the law does not specifically condition the right of the staff member to file an application for judicial review on his/her having prior sought reconsideration of the relevant determination by the Secretary-General. Consequently, as for all conditions of receivability of an application for judicial review, these provisions of Article 17 of Appendix D may not be interpreted so broadly as to hamper a staff member's access to justice, absent clear language to that effect.

42. In the present case, the Tribunal notes that the Applicant withdrew his request for reconsideration under art. 17 of Appendix D before the filing of the present application. Further, in a recent email communication dated 9 September 2018, the Applicant indicated that he did not have any funds to retain a doctor for purposes of the medical board. The Respondent, having previously insisted that the medical board was still seized of the Applicant's reconsideration claim, in a subsequent submission dated 14 September 2018, stated that considering that the Applicant no longer wished to proceed with a medical board, he decided that it would not be appropriate to refer the matter for reconsideration and thus did not convene a medical board.

43. As the Appeals Tribunal held in *Baracungana*, requesting a reconsideration under art. 17 of Appendix D is not a condition of receivability of the application for judicial review. Considering that a reconsideration request under art. 17 of Appendix D is merely an option for a staff member and art. 17 of Appendix D does not prohibit the withdrawal of a reconsideration request, the Tribunal finds that once the Applicant withdrew his reconsideration request under art. 17 of Appendix D, the case was no longer pending the Secretary-General's decision and thus is receivable with the Dispute Tribunal.

44. While the Respondent did not raise this issue, there may be a question whether the Applicant's challenge to the original administrative decision based on the ABCC's recommendation, which was notified to the Applicant on 8 May 2015, is receivable *ratione temporis* as the current application was filed on 4 October 2016, more than a year after the notification of the original administrative decision.

45. The Tribunal recalls that shortly after the original administrative decision was notified to the Applicant, he filed a reconsideration request, and subsequently, as advised by the Secretary of the ABCC, also filed a request for management evaluation within 30 days. Thereafter, he was advised by the MEU that the matter was not receivable with the MEU as the Applicant had, *inter alia*, failed to comply with the procedures under art. 17 of Appendix D, that being a precondition to filing a claim. Within 30 days after receipt of the MEU response, the Applicant filed the first application with the Tribunal under Case No. UNDT/2015/046 challenging the original administrative decision, whereupon the Respondent countered that the Applicant had failed to pursue his internal remedy for reconsideration and was thus not receivable. That application, following a case management discussion and submissions, was later rejected under Judgment No. UNDT/2016/023 as premature "without prejudice to any further proceedings before the Tribunal". The Tribunal notes that the first application was filed within 90 days from the date on which the Applicant was notified of the original administrative decision, as required by staff rule 11.4(b). The Tribunal notes also from that judgment that the Applicant had filed a motion following the case management discussion in that case wherein the Applicant's former counsel stated that in light of the Respondent's confirmation that there was a pending reconsideration, that he had raised no objection to the *ex officio* invocation of art. 17 of Appendix D. Further that he requested to withdraw that application "without prejudice to his rights to initiate new proceedings concerning the same substantive questions at stake" in the present case. Former counsel for the Applicant subsequently retracted the request to withdraw the application and it is clear from the tenor and contents of the judgment that the Applicant's rights in this regard were preserved.

46. Considering the particular circumstances of this case, the Tribunal finds that the current application is receivable *ratione temporis* as the Applicant timeously filed the initial application, which was only rejected as premature to allow the completion of the reconsideration process, "without prejudice to any further proceedings before the Tribunal", the Applicant having furnished the required documentation during those proceedings. The Applicant having withdrawn his reconsideration request, his case was then ready for judicial review when he filed the current application.

47. The Tribunal finds that it is regrettable that there were various uncertainties surrounding the requisite procedure under art. 17 of Appendix D. In particular, it was not clear whether a reconsideration process was a mandatory step before the filing of a case with the Tribunal, as in the management evaluation process. There were conflicting judgments at the Dispute Tribunal level and this issue was resolved by the Appeals Tribunal only in 2017 in *Baracungana*. Further, art. 17 does not set a time limit as to when a final decision on a reconsideration request should be made and yet does not expressly allow a claimant to file an application with the Tribunal in the absence of a decision after the expiry of a certain time period. This silence left a claimant like the Applicant at the mercy of the ABCC and having received no response for three months, the Applicant was apparently frustrated by the Administration's inaction and decided to pursue the matter directly with the Dispute Tribunal by withdrawing the reconsideration request. The Tribunal further notes that the Applicant was advised by the Secretary of the ABCC to challenge a non-medical finding with the MEU and yet the MEU told him that his case was not receivable with the MEU. Due to all these uncertainties, the Applicant pursued several internal procedures, during which he met various obstacles. The Tribunal notes with regret that even the current Appendix D does not set a deadline to take a decision on a reconsideration request, still leaving uncertainty for claimants. Even during these proceedings, following the Tribunal's Order of 15 August 2018 enquiring whether a medical board had been convened and what steps if any had been taken for the Secretary-General to render a final administrative decision, the Respondent advised that even by 14 September 2018, a medical board had not yet been convened but that

the MSD had prepared terms of reference and were ready to send them to the Applicant's Counsel on record. It is no surprise that the Applicant, who is no longer represented by counsel, on 9 September 2018 informed that he no longer wished to proceed with a medical board.

48. Additionally, the Respondent submits that the subject matter of this application is *res judicata* since the Dispute Tribunal issued *Kisia* UNDT/2016/023, dismissing the first application as premature, which the Applicant did not appeal. The Applicant responds that the Respondent's claim in this regard is a wrong interpretation of the doctrine, stating that *Kisia* UNDT/2016/023 was entered without prejudice to the Applicant, and on the grounds that the Tribunal lacked competency, since the Applicant had not withdrawn his reconsideration request and the Respondent had not taken a final decision. The Applicant submits that the Applicant's reconsideration request stands withdrawn, and nothing is pending before the Secretary-General.

49. The Tribunal notes that the principle of *res judicata* has been affirmed by the Appeals Tribunal in several judgments (see, for instance, *Costa* 2010-UNAT-063, *El-Khatib* 2010-UNAT-066, *Meron* 2012-UNAT-198, *Gakumba* 2014-UNAT-492 and *Chaaban* 2015-UNAT-554). A valid defense of *res judicata* provides that a matter between the same persons, involving the same cause of action, may not be adjudicated twice. Essentially, *res judicata* operates to bar a subsequent proceeding if the issue submitted for decision has already been the subject of a final and binding decision as to the rights and liabilities of the parties on the merits in that same regard. Where the application is dismissed as not receivable, there is no judgment on the merits, and thus the subsequent application is not barred by *res judicata* (see Administrative Tribunal of the International Labour Organization Judgment No. 3106 (2012)). As this Tribunal stated previously, it is questionable whether a matter adjudicated as non-receivable can be said to be *res judicata* if the merits have not been canvassed, considered and determined, and if there is still an actual unresolved controversy between the parties (*Nadeau* UNDT/2018/052, para. 48).

50. In the present case, the question is therefore whether these proceedings have already been the subject of a final and binding decision on the merits. The Tribunal notes that in *Kisia* UNDT/2016/023, the application was rejected as non-receivable and the judgment was rendered without prejudice to any further proceedings before the Tribunal. Since there was no judgment on the merits and there is still an actual unresolved controversy between the parties, the Tribunal finds that the present application is not barred by *res judicata*.

51. The Tribunal notes that the Applicant also contested the alleged failure to convene a medical board in a timely manner to reconsider the initial decision and the Respondent has not contested the receivability of this claim. However, the Tribunal is competent to review its own jurisdiction whether or not it has been raised by the parties (see, for example, *O'Neill* 2011-UNAT-182, para. 31, *Christensen* 2013-UNAT-335, para. 21, *Chahrour* 2014-UNAT-406, para. 25). Therefore, the Tribunal will consider this claim's receivability as below.

52. The Tribunal notes that the Applicant submitted a reconsideration request pursuant to art. 17 of Appendix D on 29 May 2015, and on 3 June 2015, the Secretary of the ABCC informed the Applicant of additional steps that he needed to undertake to complete his reconsideration request. The Tribunal further notes that the Applicant fulfilled all the requirements to properly request a reconsideration on 21 June 2016. About three months thereafter, on 3 October 2016, the Applicant withdrew his request for reconsideration.

53. The Tribunal further notes that art. 17 of Appendix D does not prescribe any time limit as to when a medical board should be convened after receipt of a reconsideration request.

54. While the absence of a response to a staff member's request may constitute an implied administrative decision that is subject to judicial review (see, for example, *Tabari* 2011-UNAT-177, para. 21), by withdrawing his request for reconsideration, there is no longer a live issue for the Tribunal to consider as the Administration could

not convene a medical board to consider a reconsideration request when the Applicant withdrew his request.

55. It is unfortunate that the Respondent maintained that the medical board was seized of the Applicant's reconsideration request despite the Applicant's withdrawal of such request and yet, at the same time, did not take any step to convene a medical board. Nevertheless, the fact remains that the Applicant, prior to filing these proceedings, withdrew his reconsideration request about three months after he fulfilled all the requirements for a reconsideration request, and also withdrew his current reconsideration request before the Tribunal due to his lack of financial resources to pursue a medical board option. Therefore, there is no longer a live issue for the Tribunal to consider regarding his reconsideration request. Accordingly, the Tribunal finds his claim with respect to a reconsideration request not receivable.

The merits

Applicable law

56. Appendix D governs compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. Appendix D has been revised by ST/SGB/2018/1 effective from 1 January 2018, in which art. 6.1(b) (transitional measures) provides that "[f]or claims filed for incidents that occurred prior to the entry into force of the present revised rules, the previously applicable rules will be applied". Therefore, the Tribunal will refer to the relevant provisions of the previous Appendix D that was applicable at the time of the incident.

57. Section II of Appendix D provides principles of award and general provisions, and particularly art. 2(a)-(b) provides:

> (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;

58. Section IV of Appendix D covers administration and procedures, and arts. 13-16 provide:

Article 13. Type and degree of disability

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 practitioners.

Article 14. Medical examination

The Secretary-General may require the medical examination of any person claiming or in receipt of a compensation for injury or illness under these rules. …

Article 15. Documentary evidence

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

Article 16. Advisory Board on Compensation Claims

> (a) An Advisory Board on Compensation Claims shall be established to make recommendations to the Secretary-General concerning claims for compensation under these rules;
>
> (b) The Advisory Board may be consulted by the Secretary-General on any matter connected with the implementation and administration of these rules;
>
> (c) The Advisory Board may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under the provisions of this article;
>
> …

59. There are two elements that must be established for a claim under Appendix D: "[o]ne is the medical assessment of whether the claimant suffered from the injury or illness as alleged. The other is the non-medical factual determination whether the illness or injury was attributable to the performance of official duties on behalf of the Organization (causation)" (*Peglan* UNDT/2016/059, para. 71).

60. The medical assessment of the injury or illness is conducted according to arts. 13 and 14, and whether the illness or injury was attributable to the performance of official duties on behalf of the Organization is decided in accordance with art. 2(b). To make these determinations, the ABCC may decide on procedures as it may consider necessary in discharging its responsibilities (art. 16(c)).

61. The Appeals Tribunal has provided the following well-established jurisprudence in reviewing the Secretary-General's exercise of discretion in *Sanwidi* 2010-UNAT-084, para. 40, which was also cited in the Appendix D matters in *Karseboom* 2015-UNAT-601:

> … 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.

62. In *Karseboom*, the Appeals Tribunal held that the Dispute Tribunal is not competent to make medical findings and thus upon finding any procedural flaw in relation to medical issue, the Dispute Tribunal should remand the case to the ABCC (paras. 46-47).

Alleged procedural violations

63. In the present case, the Applicant claims that the Secretary-General's decision to deny his claim under Appendix D based on the ABCC recommendation was irregular, unlawful, improper, and tainted with improper considerations, factual errors, and due process violations, raising various alleged failures and shortcomings.

64. In response, the Respondent submits that the ABCC's conclusion that the Applicant's illness and injuries were not caused by the incident in question was fair and reasonable, emphasizing that the ABCC relied on the MSD's medical advice that the claimed injuries were neither physiologically plausible nor consistent with the incident and on the MSD's conclusion that the vehicle was travelling at less than 4 km/h and the front bumper would have reduced the impact of the incident even further. The Respondent also submits that the ABCC reviewed the CCTV footage twice and noted that the car's contact with the barrier was minor and that the Applicant was seen walking around his vehicle and bending immediately after the incident.

65. Regarding the Applicant's claim that the contested decision was based on violations of due process and rights of the Applicant, the Respondent submits, without specifically addressing the applicable law or each of the Applicant's various claims, that the Applicant's rights were fully respected and that he did not identify any prejudice that arose from any of the alleged procedural violations.

66. The Tribunal will review various alleged procedural violations in turn.

CCTV video footage

67. The Tribunal recalls that the ABCC concluded that "there is no credibility whatsoever to the incident as related by the claimant or to the injuries alleged to have been sustained as a result thereof" and recommended to deny the Applicant's compensation claim on the following grounds:

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

68. The Applicant claims that the retrieval, review, analysis and dissemination of CCTV video footage of the incident violated his due process rights as he was not invited to be present at the retrieval and was never accorded any chance to review the CCTV video footage. Further, the Applicant claims that the retrieval, review, analysis and dissemination of the video by DSS was in clear breach of ST/SGB/2004/15 (use of information and communication technology resources and data) as only the Office of Internal Oversight Services ("OIOS") or the Office of Information Communication Technology ("OICT") could conduct investigations involving ICT data and resources with the prior approval of the Under-Secretary-General for Management ("USG/DM").

69. While the Respondent did not address the applicable law nor rebut the Applicant's contentions in this case, the Tribunal notes that the Applicant previously raised similar issues relating to his UNCB claim, as evident from Judgment No. UNDT/2017/044, and in which the Respondent submitted that the SIU has competence to conduct fact-finding investigations procedures, and the retrieval,

review and dissemination of the CCTV footage of the incident was lawful and conducted in accordance with the DSS/SSS's standard operating procedures.

70. The Tribunal notes that according to the definitions of ICT resource and ICT data in ST/SGB/2004/15, "security equipment (e.g., sensors, cameras, alarms, electronic access doors)" and thus the CCTV video footage fall under the purview of ST/SGB/2004/15. The question is then whether the retrieval, review and analysis of the CCTV video footage and investigation conducted by DSS violated any provisions of ST/SGB/2004/15. However, provisions on investigation refer to an investigation conducted under former ST/AI/371 (revised disciplinary measures and procedures) and given that it is not claimed that an investigation was conducted for possible disciplinary measures against the Applicant, it is questionable whether ST/SGB/2004/15 was applicable in this case.

71. Nevertheless, it must be that in every case the obtaining, handling, review, analysis and dissemination of any form of material to be used in a matter as evidence must be done in compliance with some basic rules to ensure that basic principles of fairness and due process are upheld, particularly where it is alleged that the material was tampered with as in the Applicant's case. The Tribunal notes that neither in the previous case Judgment No UNDT/2017/044, nor in the instant case, does the Respondent deny the applicability of the general principles regarding retrieval, review, access to and analysis and dissemination of CCTV video footage espoused in ST/SGB/2004/15. While the Respondent previously claimed that these actions were conducted in accordance with the DSS/SSS's standard operating procedures, the Tribunal stated in *Korotina* UNDT/2012/178 that "[i]nformation circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances" and in *Younis* UNDT/2019/004 that standard operating procedures also fall at the very bottom of "instruments". Therefore, even if DSS followed their internal standard operating procedures, it still begs the question whether that would have made the process lawful without more.

72. With respect to the dissemination of the CCTV video footage to the ABCC, the Tribunal notes that under art. 15 of Appendix D, documentary evidence needs to be furnished to the ABCC for the purpose of determination of entitlements under Appendix D. Further, art. 16 provides that the ABCC may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities. In light of these provisions and considering that the CCTV video footage was relevant and crucial for the Applicant's Appendix D claim, the Tribunal finds that the dissemination of the CCTV video footage in and of itself to the ABCC was appropriate. However, whether it was lawful is indeed questionable, as the video footage formed an essential element in the ABCC's causation findings on the non-medical factual determination whether the illness or injury was attributable to the incident, whilst at the same time not having been shown to the Applicant for his comments or without the other due process rights having been ensured or confirmed.

73. Another question raised by the Applicant is whether he should have been allowed to view the CCTV video footage provided to the ABCC. The Tribunal recalls that the Applicant alleges that the video was tampered with. The Tribunal recalls that under art. 15 of Appendix D, the ABCC may consider documentary evidence "for the purpose of determination of entitlements under these rules" and yet it is silent as to whether a claimant is entitled to review documentary evidence considered by the ABCC.

74. However, in *Peglan*, relying on the principle of *audi alteram partem* that it is a breach of such principle for a decision-maker to base a decision on information that has not been disclosed to the party adversely affected, the Dispute Tribunal held that the applicant should be given an opportunity to see and comment on adverse material and that the ABCC violated the principle of natural justice when it failed to afford the applicant such basic right (paras. 83, 90). Also, the Dispute Tribunal found, noting that the applicant in *Simmons* UNDT/2013/059 was given a chance to provide information or comment to an adverse finding, that not affording the applicant such opportunity in *Peglan* raised the presumption that the ABCC's discretion has been

arbitrarily exercised due to the inconsistent treatment of claimants before the ABCC (paras. 91-97).

75. In the present case, the ABCC's conclusion that "there is no credibility whatsoever to the incident as related by the claimant or to the injuries alleged to have been sustained as a result thereof" was mainly based on its review of the video footage and the MSD's opinion, which was also based on review of the same video footage, yet without allowing the Applicant access to it. In his reply to the Applicant's previous application, which the Respondent attached to his reply, the Respondent argued that the medical reports submitted by the Applicant did not establish that his injuries and illness were directly attributable to the incident because his physicians formed their opinions based on the circumstances of the incident as "self-reported by the Applicant", not on their review of the video footage of the incident. This argument proffered by the Respondent precisely illustrates that the Respondent's failure to provide this critical evidence to the Applicant prejudiced his right to a fair and reasonable consideration of his claim and thus it was unlawful to not provide the CCTV video footage to the Applicant for him to see and comment.

The Applicant's prior medical history

76. The Applicant also claims that the ABCC did not fully consider the fact that the MSD conducted a complete physical medical examination and medically cleared the Applicant as fit for duty in April 2013 and he had not suffered any injury or illness before the incident, except a previously fractured toe in 2012.

77. There is no dispute that the Applicant was involved in a car accident in July 2013 upon reporting for work. Also, it is not disputed that the Applicant was on sick leave from September 2013 until his separation in December 2014 as he was found to be incapacitated and entitled to a disability benefit. There is no information on record on what basis he was found to be incapacitated, although the Applicant submits that he was found to be incapacitated based on the same medical reports that he submitted to support his Appendix D claim. This has not been denied or rebutted in the

pleadings. The Tribunal notes that under the Regulations and Rules of the United Nations Joint Staff Pension Fund, specifically art. 33, a disability benefit shall be payable to a participant who is found to be incapacitated for further service due to injury or illness. The Tribunal notes that receiving a disability benefit does not necessarily mean that a claimant's injury or illness is service-related. The question then is whether such injury or illness was attributable to the performance of official duties on behalf of the Organization.

78. Article 2(b) of Appendix D provides that "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 willful misconduct or willful intent when: (i) the death, injury or illness resulted as a natural incident of performing official duties on behalf of the United Nations". The ABCC did not find that the Applicant's injury or illness resulted from any willful misconduct or willful intent. Given that there is no dispute that the Applicant suffered from injury or illness which resulted in a disability benefit, it appears that the ABCC relied on art. 2(b)(i) finding that the injury or illness did not result as 'a natural incident' of performing official duties on behalf of the United Nations as it found that "the injuries are neither "physiologically plausible" nor consistent with the incident".

79. The Applicant claims that he was medically examined by the MSD and declared as fit for duty just a few months prior to the incident and yet about a month after the incident, he was placed on sick leave until his separation due to disability. This prior medical history was not considered for its relevancy and further explored, assessed or specifically excluded by the ABCC. Instead, without explaining how each of the various injuries claimed by the Applicant are not attributable to the performance of official duties on behalf of the United Nations, the ABCC simply wrote that "the injuries are neither 'physiologically plausible' nor consistent with the incident". The Tribunal finds that the ABCC failed to consider relevant matters by not further exploring the connection or lack thereof between the incident and the injuries, especially considering that the Applicant was found to be fit for duty prior to the incident and yet placed on sick leave a month after the incident until his

separation due to disability. The Appeals Tribunal held in *Sanwidi* that "[t]he Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered". The Tribunal finds that in this case relevant matters were not properly considered by the ABCC.

The records relating to the Applicant's UNCB claim

80. The Applicant further claims that the ABCC's reliance on the UNCB's recommendation was improper as the ABCC had to carry out its own fair and independent review of his claim and the UNCB's recommendation was rescinded by the Dispute Tribunal in *Kisia* UNDT/2016/040.

81. As stated earlier, the ABCC may consider relevant documentary evidence "for the purpose of determination of entitlements". However, this authority is not unfettered and "[t]he Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered". The Tribunal notes that the ABCC is the only body established to make recommendations to the Secretary-General concerning claims under Appendix D whereas the UNCB is established to review loss or damage to personal effects (staff rule 6.5 and ST/AI/149/Rev. 4). The Tribunal further notes that the standard of liability is different as the ABCC acknowledged: while the UNCB may deny claims for negligence of a claimant, Appendix D does not discount claims on that basis, unless an injury or illness is caused by wilful misconduct or wilful intent. Considering that they are different bodies reviewing different types of claims on different standards of liability, the Tribunal finds that it was improper for the ABCC to review the UNCB's recommendation and related documentation as the UNCB's recommendation is not relevant to the ABCC's work and yet could improperly influence its decision.

82. Regarding the Applicant's claim that the ABCC's reliance on the UNCB's recommendation was improper as UNCB's recommendation was rescinded by the Dispute Tribunal, the Tribunal notes that *Kisia* UNDT/2016/040 was issued almost a year after the issuance of the ABCC's recommendation and that the basis for

rescinding the UNCB's recommendation related to non-compliance with specific procedures of the UNCB, not the substances of any documentary evidence presented to the UNCB. Thus, the Applicant's claim on this basis is rejected.

83. In light of the above, the Tribunal finds that the ABCC improperly considered the UNCB's recommendation and related documentation in reviewing the Applicant's Appendix D claim.

Controller's decision based on the ABCC recommendation

84. The Applicant also challenges the contested decision on the grounds that the Controller failed to take a reasoned and independent decision separate from the ABCC's recommendation. This claim was rejected by the Appeals Tribunal in *Kisia* 2018-UNAT-817, the case in which the Applicant raised a similar claim relating to his UNCB claim. The Appeals Tribunal held that "in the absence of an express provision to this effect, no law requires the decision-maker to make a distinct pronouncement, instead of simply referring to and approving a preceding reasoned recommendation, which also ensures the necessary transparency of the decision".

85. In this case, there is no express provision requiring the Controller to make a distinct pronouncement and thus simply referring to and approving a reasoned recommendation by the ABCC was sufficient. Accordingly, the Applicant's claim in this regard has no merit and is rejected.

Conclusion

86. In light of the foregoing, the Tribunal finds that the ABCC failed to act in a proper, reasonable, and lawful manner in relation to the Applicant's claim as (a) it failed to provide adverse material (CCTV video footage) to the Applicant to view and comment; (b) it did not consider his prior medical history relevant in reviewing his Appendix D claim; and (c) it considered the UNCB's recommendation and related documentation without demur.

Relief

87. As the Appeals Tribunal held in *Karseboom*, the Dispute Tribunal is not competent to make medical findings. Thus, the decision of the Secretary-General to deny the Applicant's claim for compensation for injury and illness is rescinded and the case is remanded to the ABCC for a full and proper reconsideration of the Applicant's claim. This includes giving the Applicant the opportunity to access and comment on any adverse material to be considered by the ABCC, including the CCTV video footage of the incident, and considering the Applicant's prior medical history and removing any documentation related to the UNCB recommendation.

88. The Applicant's claims for other remedies, specifically the award of compensation for total disability, partial disability, or permanent loss of function and the authorization of the special sick leave credit, will not be entertained as that will require the Tribunal's making medical findings, which this Tribunal is not competent to do.

89. Regarding the Applicant's claim for compensation for emotional and moral distress and anxiety because of due process violations, the Tribunal notes that the Dispute Tribunal's Rules of Procedure, art. 10.5(b), makes it clear that any compensation for harm must be "supported by evidence". However, the Tribunal notes that while the Applicant has provided some medical reports regarding stress and depression following the incident, his medical documentation does not substantiate any harm in connection with procedural violations relating to his Appendix D claim. Thus, the Applicant's claim in this regard is denied.

The Tribunal would like to highlight, as the Appeals Tribunal emphasized in *Dahan* 2018-UNAT-861 at para. 26, that "[i]t is of paramount importance that the Administration addresses staff concerns with promptitude and adheres to the highest standards of care and due diligence". Considering that the incident in question occurred in 2013 and the Secretary-General's decision to deny the Applicant's claim was rendered in 2015, the Tribunal orders that the ABCC promptly reconsider his case and the Controller's decision must be communicated to the Applicant no later

than three months from the release of this Judgment, failing which the Applicant may file for execution of judgment with the Tribunal.

Conclusion

90. In view of the foregoing,

a. The contested decision is rescinded and remanded to the ABCC;

b. The ABCC shall promptly reconsider the Applicant's case and the Controller's decision must be communicated to the Applicant no later than three months from the release of this Judgment; and

c. The Tribunal makes no order for all the Applicant's claims for other remedies.

(Signed)

Judge Ebrahim-Carstens

Dated this 7th day of February 2019

Entered in the Register on this 7th day of February 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York