



**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KOLLIE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

A. Ndubuisi Nwabudike

**Counsel for the Respondent:**

Steven Dietrich, AAS/ALD/OHR

## **Background**

1. At the time of the contested decision, the Applicant was an Information Technology Assistant at the United Nations Mission in Liberia (UNMIL).
2. On 22 February 2018, he filed an application contesting the decision of the Advisory Board on Compensation Claims (ABCC) not to award him any damages for his “claims of negligence”.
3. The application was served on the Respondent on 28 February 2018 with a deadline to file a reply by 30 March 2018.
4. The reply was filed on 3 April 2018 after the Respondent had obtained permission from the Tribunal because 30 March was a United Nations official holiday.
5. The Respondent argued that the application was not receivable *ratione materiae* on two grounds, namely: (a) the Applicant did not make a timely request for management evaluation; and (b) the Applicant does not contest an administrative decision for the purposes of art. 2.1(a) of the UNDT Statute because a claim of negligence cannot be included in a claim made under Appendix D to the Staff Rules.
6. On 10 October 2019, the parties were informed that the case has been assigned to the present Judge.
7. The Tribunal has decided to adjudicate the issue of receivability as a preliminary matter for a fair and expeditious disposal of this matter.

## **Summary of the relevant facts**

8. The Applicant commenced service with UNMIL on 15 November 2005 as a Radio Technician.<sup>1</sup>

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<sup>1</sup> Reply, para. 4.

9. On 9 May 2007, the Applicant was involved in a motor vehicle accident where he suffered injury while performing official United Nations duties.

10. On 8 July 2007, he submitted a claim for compensation under Appendix D to the Staff Rules to the ABCC.<sup>2</sup>

11. The ABCC considered the Applicant's claims and, on 20 April 2017, recommended to the Secretary-General that he be awarded compensation in the amount of USD30,412.29 which is equivalent to a 28% permanent loss of function to the whole person under art. 11.3(c) of Appendix D to the Staff Rules.<sup>3</sup> The ABCC decision was communicated to the Applicant on 19 May 2017.

12. On 7 June 2017, the Applicant wrote to the ABCC requesting them to review their recommendation so that the following could be fully addressed:

- a. Substantial upward review of the Board's award of lump sum compensation for the 28% percent Whole Person Impairment (WPI);
- b. Costs for future medical treatment including air ticket, logging, specialist consultations, laboratory tests, including computed tomography scan, X-rays, Magnetic resonance imaging and possible follow-up surgeries and medications;
- c. Costs for recruiting assistance for personal and home care activities for the present and as he progressively becomes less able to provide for himself in an amount not less than USD2,500 per month for as long as his condition remains justified;
- d. An award of not less than USD3,000 per month indexed to the cost of living until he attains the United Nations retirement age of 65 years, or a one-off lump sum award as compensation for loss of future earnings;

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<sup>2</sup> Reply, para. 5 and annex 1; application, annex 2, page 2.

<sup>3</sup> Application, annex 1, page 2.

- e. Compensation for the continuing and unending pain and anguish that he perpetually endures;
- f. Retroactive payment of all his out of pocket expenses;
- g. Compensation for UNMIL's negligence in its failure to provide him prompt, qualified surgical invention until eight years after his spinal injuries, which negligence substantially contributed in complicating his spinal injuries and prognosis; and
- h. That the ABCC consider recommending that he be reinstated in a United Nations mission or agency in a country with the appropriate facilities and expertise to attend spinal injuries.<sup>4</sup>

13. The ABCC reviewed the Applicant's request and, on 25 July 2017, concluded as follows in respect to his claim for compensation for negligence:

[Applicant] raises the issue of gross negligence, pain and suffering, and other compensation. **Liability for gross negligence and other compensation is not provided for under Appendix D to the Staff Rules** (or generally by workers' compensation schemes). Appendix D provides for medical expenses and PLF compensation (emphasis added).<sup>5</sup>

14. The Applicant was informed of this decision by email from Chief Human Resources Officer, UNMIL, on 27 July 2017.<sup>6</sup>

15. On 22 August 2017, the Applicant requested ABCC to reconsider its decision of 25 July 2017.<sup>7</sup>

16. On 25 August 2017, the Applicant received the ABCC's response refusing to reconsider his claim. The response was:

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<sup>4</sup> Application, annex 2, page 5.

<sup>5</sup> Ibid., page 7.

<sup>6</sup> Ibid., page 9.

<sup>7</sup> Ibid., page 11.

... there is nothing more ABCC can provide or reply to [Applicant]. He may wish to appeal to the MEU or UNDT if he wishes any further review. ABCC has awarded him all compensation he is currently eligible for and will continue to accept and review future claims (e.g. medical expenses and, if his condition worsens, Permanent Loss of Function).

17. On 22 October 2017, the Applicant requested management evaluation of the ABCC decision regarding his claims of damages against UNMIL for gross negligence.<sup>8</sup>

18. On 7 December 2017, the Management Evaluation Unit (MEU) informed the Applicant that his request was not receivable as it was time-barred. The pertinent parts of MEU's decision are reproduced below.

The MEU noted from your submission that, on 8 January 2013, the ABCC determined that your injuries were service-incurred and recommended that you be reimbursed the medical expenses incurred. The MEU also noted that the ABCC, *sua sponte* in May 2017, notified you of its determination that, based on the current medical information, you had sustained a 28% permanent loss of function (PLF) of whole person for your injuries, and accordingly recommended that you be compensated in the amount of US\$30,412.29.

If you wished to challenge this decision, pursuant to Staff Rule 11.2(c) you had sixty calendar days to submit your request for management evaluation. As you submitted your request only on 22 October 2017, more than 60 days from the notification date, your request is time-barred and, therefore, not receivable. In making this determination, the MEU noted that you indicated in your submission that the ABCC final decision was dated 24 August 2017. However, the MEU noted that no new decision was made by the ABCC in your respect beyond 22 May 2017, nor is there any evidence that the Administration agreed to reconsider the May 2017 decision.<sup>9</sup>

***Respondent's submissions on receivability***

19. The Applicant did not request management evaluation within the prescribed time limit.

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<sup>8</sup> Application, annex 3, page 2.

<sup>9</sup> Ibid., page 4.

- a. The Applicant was notified in writing of the alleged decision to reject his claim for gross negligence by email dated 27 July 2017 from the Chief Human Resources Officer, UNMIL. The 60-day time limit to request management evaluation expired on Monday, 25 September 2017. The Applicant made his management evaluation request on 22 October 2017, nearly one month late.
  - b. The Applicant's petition for reconsideration of his claim by the ABCC dated 22 August 2017 did not re-set or stop the time limit running under staff rule 11.2(c).
  - c. Notwithstanding his petition, the Applicant was required to submit his management evaluation request to MEU by 25 September 2017. He failed to do so.
  - d. The Dispute Tribunal does not have competence to waive the time limits for management evaluation under art. 8.3 of its Statute.
20. The Applicant does not challenge an administrative decision.
- a. A claim of gross negligence that has not been the subject of an administrative decision and, thereafter, management evaluation is not receivable before the Dispute Tribunal.
  - b. A claim of negligence is a separate claim for compensation that falls outside the framework of Appendix D, which is a worker's compensation system. A claim of negligence cannot be included in a claim made by a staff member under Appendix D.
  - c. The Applicant's claim of gross negligence was first made in his request for reconsideration under art. 17 of Appendix D, dated 7 June 2017. In response, the Organization informed the Applicant that a claim for gross negligence cannot be made under Appendix D. The Organization confirmed this in its

response to the Applicant's subsequent petition for reconsideration by the ABCC. The Applicant's claim of gross negligence under Appendix D does not give rise to an administrative decision for the purposes of art. 2.1(a) of the UNDT Statute.

***Applicant's submissions on receivability***

21. As a first step to the appeal process, on 7 June 2017 he requested for reconsideration of the 19 May 2017 ABCC recommendation, pursuant to art. 17 of Appendix D.

22. Predicated upon his request for reconsideration, the ABCC reviewed its recommendation on 25 July 2017 and issued its final decision on 24 August 2017.

23. Having received the final ABCC decision, he filed a management evaluation request. His management evaluation request was timely since it was made immediately following the final and definitive advice of the ABCC to the Applicant to either file a petition before the MEU or the UNDT.

24. Contrary to the Respondent's assertion, his management evaluation request of 22 October 2017 is within the statutory time limit as provided for under staff rule 11.2.

**Considerations**

Is the application receivable *ratione materiae*?

25. This application is based on ABCC's decision on the question of gross negligence as a claim under Appendix D of staff rules.

26. The United Nations Appeals Tribunal (UNAT) held in *Farzin*<sup>10</sup> that when an application is alleged to be irreceivable *ratione materiae* for untimely submission of management evaluation and also for the absence of an administrative decision capable of being contested, the UNDT should dismiss the application as irreceivable based on

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<sup>10</sup> 2019-UNAT-917.

the latter.

27. On the question of whether the UNDT has the competence to hear and pass judgment in a claim for gross negligence, *Wamalala* provides as follows:

Under the UNDT Statute, the Dispute Tribunal is not competent to hear and pass judgment on a claim for gross negligence against the Secretary-General that has not been the subject of an administrative decision and thereafter, management evaluation. Under Article 8(1)(c) of the UNDT Statute, an application shall be receivable if “[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required” [...] Mr. *Wamalala* did not submit his claim of gross negligence to the Secretary-General for consideration and decision and subsequently for management evaluation.<sup>11</sup>

28. The Applicant has not adduced any documentary evidence to show that the Secretary-General considered and made an administrative decision in relation to his claim for gross negligence. The only evidence that he has produced is to the effect that he asked the ABCC to consider compensating him for gross negligence over and above the award for compensation for injuries sustained in the course of duty.

29. The ABCC responded that the claim for gross negligence was misplaced and that it could not be considered under Appendix D of the Staff Rules.

30. UNAT jurisprudence confirms the reasoning given by ABCC in the following terms:

Appendix D, [...] is a workers’ compensation system. A workers’ compensation system is a no fault insurance or scheme whereby employers must cover occupational injury or illness. Employees do not have to prove employers negligence in order to obtain benefits” [...] Accordingly, a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.<sup>12</sup>

31. Two years later, UNAT restated this position in *James* by reiterating that:

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<sup>11</sup> 2013-UNAT-300, paras. 30-31.

<sup>12</sup> *Ibid.*, paras. 25 and 27.

[...] the Appeals Tribunal has previously established that a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.<sup>13</sup>

32. In the most recent case on the point, UNAT again reaffirmed the above position in *Dahan* by holding that:

The Appeals Tribunal notes that Ms. Dahan filed her case under Appendix D to the Staff Rules. Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. Appendix D, which is a workers' compensation system, is a no fault insurance or scheme whereby employers must cover occupational injury or illness. Employees do not have to prove employers' negligence in order to obtain benefits [...] The Appeals Tribunal has previously established that a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D.<sup>14</sup>

33. The Applicant in the instant case has brought his claim for compensation for gross negligence under a procedure that has been adjudicated irregular for not being supported by any Staff Regulation, Staff Rule or administrative issuance at all as it produces no reviewable administrative decision.

34. It is the duty of the Applicant to show the Tribunal the administrative decision that forms the basis of his claim.

... a statutory burden is placed upon an applicant to establish that the administrative decision in issue was in non-compliance with the terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant's contractual rights.<sup>15</sup>

35. The Applicant has failed to discharge the legal burden placed upon him to show the Tribunal that an administrative decision was made against him and that it has direct

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<sup>13</sup> 2015-UNAT-600, para. 25 citing to *Wamalala* 2013-UNAT-300, para. 27.

<sup>14</sup> 2018-UNAT-861, paras. 20 and 22 citing to *James* 2015-UNAT-600, para. 25, citing to *Wamalala* No. 2013-UNAT-300, para. 27.

<sup>15</sup> *Farzin* 2019-UNAT-917, para. 36.

legal consequences on his contractual rights.

36. In this Judgment, based on careful analysis of the jurisprudence, the notification that the ABCC gave to the Applicant was more of an advisory nature, that is, that he had brought his claim for gross negligence in the wrong forum and under the wrong Staff Rules.

37. The notification does not qualify as an administrative decision because, firstly, ABCC has no mandate to make any decision in relation to claims for gross negligence, secondly, the notification was not made within a regular or acceptable or designated legal framework, and thirdly, the notification bears no direct legal consequences on the rights of the Applicant.

38. The above three elements are prerequisites in determining whether an administrative act or omission falls within the meaning of “administrative decision” for purposes of receivability as stipulated in *Lloret Alcaniz et al*:

Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.<sup>16</sup>

39. In conclusion, the Tribunal agrees with the Secretary-General that this claim of gross negligence which was not the subject of an administrative decision and, thereafter, management evaluation, is not receivable before the Dispute Tribunal.

40. This application is hereby dismissed in its entirety as irreceivable *ratione materiae*.

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<sup>16</sup> 2018-UNAT-840, para. 62 citing to *Lee* 2014-UNAT-481, para. 50, citing to *Bauzá Mercére* 2014-UNAT-404, para. 18 and citations therein.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 30<sup>th</sup> day October 2019

Entered in the Register on this 30<sup>th</sup> day October 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi