



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Eric Muli, Officer-in-Charge

MP¹

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

¹ The Applicant's name has been anonymized because this Judgment contains personal data about his medical condition.

Introduction

1. On 22 December 2022, the Applicant filed an application appealing the decision of the Advisory Board on Compensation Claims (“ABCC”), dated 7 October 2022, denying his claim for compensation for illness incurred during performance of official duties on behalf of the United Nations Mission in South Sudan (“UNMISS”).

2. The Respondent filed a reply on 27 January 2023 urging the Tribunal to find that the application was not receivable.

3. On 11 August 2023, the Tribunal issued Order No. 131 (NBI/2023) in which it determined that the application was filed on the basis that the ABCC denied the Applicant compensation for an illness that occurred during the performance of official duties on behalf of UNMISS and that, therefore, the application was receivable in part.

4. On 18 December 2023, the Applicant filed a motion titled “Additional information and supporting documents”. In said motion, the Applicant submitted that UNMISS had “locked” his salary from November 2023 and had not told him why.

5. The Tribunal convened a Case Management Discussion (“CMD”) on 9 January 2024. At the CMD, the parties, *inter alia*, informed the Tribunal that they neither wished to have an oral hearing nor file closing submissions and that the Tribunal could issue a judgment based on the documents on record.

Facts

6. In April 2016, the Applicant was assigned to the Temporary Operation Base established in Mundri West County, in the Western Equatoria region of South Sudan.

7. During his 14 days in Mundri West County in April 2016, the Applicant developed jaundice-like symptoms.

8. He was examined by a Medical Officer at the UNMISS Level One Clinic on 13 September 2016 and was diagnosed with almost 10 years of alcohol abuse. UNMISS Medical Service recommended further medical assessment related to liver malfunction and referred the Applicant to a Level III hospital, Case Medical Center, in Uganda. Case Medical Center diagnosed the Applicant with “jaundice” due to a stone inside his gallbladder that blocked bile flow into his intestines.

9. In October 2016, the Applicant had two surgeries at Case Medical Center.

10. On 22 November 2016, the Chief Medical Officer, UNMISS, lodged a complaint on behalf of the Applicant regarding the diagnosis and treatment he received at the Case Medical Center.

11. On 24 November 2016, the Applicant was flown back to Juba and thereafter was medically evacuated to Aga Khan Hospital, Nairobi, Kenya, for further medical care.

12. On 11 December 2018, the Applicant was medically evacuated to India where he underwent treatment at the Apollo Hospital, New Delhi. He remained on regular out-patient care in New Delhi until 28 January 2019.

13. On 2 May 2019, the Applicant submitted a management evaluation request seeking compensation for the referral by the UNMISS Level I doctor to Case Medical Center and the resulting damages from the alleged malpractice by Case Medical Center.

14. On 13 June 2019, the Management Evaluation Unit (“MEU”) advised the Applicant that his 2 May 2019 request for management evaluation was not receivable for the following reasons:

- a. The alleged medical malpractice by a third-party entity, Case Medical Center, was not an administrative decision insofar as it did not relate to his contract of employment or terms of appointment, nor was it an action taken by the Administration;

b. The issue of medical malpractice was outside the scope of administrative review;

c. Regarding the referral decision by the UNMISS Level I clinic to Case Medical Center, the MEU noted that this was a medical assessment, which was similarly not subject to management evaluation. The MEU observed that such a decision could not be said to be the proximate cause of the Applicant's injuries; and

d. Finally, the MEU noted that as the Applicant's underlying illness was not service incurred, this was not a matter that could be brought before the ABCC.

15. On 17 May 2022, the Applicant submitted his claim for compensation under Appendix D to the ABCC for injuries (bile duct, gall bladder removal, cutting of small intestine and hernia) which he attributed to his work in Mundri in April 2016 and wrong referral to the Case Hospital in Uganda by UNMISS. The Applicant requested, *inter alia*, United Nations support to prosecute Case Medical Center for their medical negligence.

16. On 7 October 2022, during its 528th meeting, the ABCC, based on advice received from the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH"), considered the Applicant's claim. The ABCC determined that the Applicant's injuries and referral were not "directly causatively related to the performance of official duties and, therefore, the Board unanimously recommended to deny the claim on the merits" for the following reasons:

a. The Applicant's underlying illness (jaundice) was not service incurred because it was a form of hepatitis due to gall stones, a common condition that causes jaundice and abdominal pain, and which often comes and goes for a period with complete recovery between episodes. However, occasionally it leads to sudden obstruction of the stone in the common bile duct, which requires surgery to resolve;

b. On the wrong referral aspect of the claim, surgery carries some risk that cannot be eliminated and there will always be a small number of cases where a complication will arise due to complex anatomical features. The referral itself was made in good faith to a private hospital with appropriate facilities for care under the guidance of a qualified surgeon; and

c. Referral of the Applicant to a private hospital did not mean that the United Nations took on the risk from the hospital under Appendix D unless the referral was done knowing the care for his condition would be substandard.

Parties' submissions

17. The Applicant's principal contentions are:

a. The ABCC erred in its recommendation to deny his claim for compensation because on 21 April 2016 when he went on duty to Mundri West he was healthy and fit. He only became ill on 30 April 2016 whilst in the field performing official duties and he had never experienced jaundice before that time; and

b. The ABCC erred in determining that the care provided to him at the Case Medical Center on the wrongful referral by the UNMISS Medical Officer was appropriate, that he was referred to a qualified surgeon and that the referral was made in good faith.

18. The Applicant requests the Tribunal to award him compensation for the service incurred illness during performance of official duties on behalf of UNMISS and the wrong referral/resulting in injuries to his person.

19. The Respondent's principal contentions are:

a. The contested decision is lawful. The ABCC assessed the Applicant's claim in accordance with the rules set forth in Appendix D;

b. As the documentation concerned the technical field of medicine, ABCC requested the advice of DHMOSH per art. 2.2(c) of Appendix D. Based on DHMOSH's advice, ABCC concluded that the Applicant's underlying illness and the referral resulting injuries were not attributed to performance of official duty on behalf of the Organization;

c. The Applicant's assessment that his illness was service incurred is irrelevant. The assessment of whether an illness is service incurred is the responsibility of the Secretary-General and not the Applicant's;

d. The Applicant's allegations of wrong referral and professional incompetence against a United Nations doctor are baseless. The Applicant presents no evidence that the United Nations doctor who referred him to Case Medical Center deviated from accepted norms of medical practice, or that the Organization referred him to a physician who was not properly qualified to practice medicine;

e. The Applicant's views as to the quality of his treatment and the referral to the physicians are not evidence. On the contrary, the evidence establishes that the Organization referred the Applicant to a properly qualified physician employed at an appropriate medical facility. DHMOSH determined that the referral was a "medical assessment" made in good faith to a private hospital with appropriate facilities. DHMOSH has noted that Case Medical Center provided the Applicant with appropriate care under a qualified surgeon;

f. In accordance with art. 1.8 of Appendix D, the ABCC considered whether the Applicant's evidence fully supported his claim for compensation. The ABCC concluded that the Applicant's evidence did not fully support his claim that his illness is directly attributable to the performance of duty on behalf of the United Nations, and therefore recommended denial of the claim; and

g. Under the presumption of regularity, the Applicant has the burden of proving that the contested decision is unlawful. The Applicant has not met this burden.

20. The Respondent submits that the Applicant is not entitled to any remedy and that the relief he requests does not fall within the relief that the Dispute Tribunal may grant under art. 10(5) of the Statute. In view of the foregoing, the Respondent requests the Tribunal to dismiss the application.

Consideration

21. As has been described earlier, the decision which the Applicant seeks to challenge as the “denial of a compensation claim by the [ABCC] for illness incurred during performance of the official duties of the United Nations in South Sudan.”

22. The most important words used are “compensation for illness incurred” and “during performance of official duties of the United Nations in South Sudan.”

23. The aforesaid language implies that the Administration is willing to compensate for the loss suffered by the staff member due to illness incurred during the performance of official duties. Hence the test to determine eligibility to compensation is that the illness must be incurred during the performance of official duties.

24. The language “official duties” implies that a so-called duty that was not officially part of the Applicant’s official remit would not be covered by way of compensation. This language covers the eventuality of staff members going on frolics of their own which are outside the scope of official duties and in the course of these activities encounter circumstances which cause illness. Such illness would not be compensated.

25. But this language also calls into question illnesses that may be apparent when individuals seek medical attention but which are not necessarily connected to the work being done. To determine whether the factual circumstances

surrounding the Applicant's illness fall into the category of being "incurred during performance of official duties" it is necessary to look at the detailed facts surrounding his case for compensation.

26. The Applicant describes the backdrop to the onset of his illness in the following terms.

On 21st April 2016 a team of peacekeepers from [UNMISS] based in [the] Capital Juba, visited Mundri West in the country's Western Equatoria State area, and established a Temporary Operation Base there.

By then the pressure was high there. Civilians were displaced. Many of them were seeking sanctuaries in the bushes and displaced camps. Basic Services were unavailable. Violence between the Sudan People's Liberation Army and that holdout group the Sudan's People's Liberation Army in opposition continued in and around the vicinity of Mundri West.²

27. The Applicant described his duties as that of an interpreter for military Liaison Officers and Force Protection Element from the Nepalese contingent which was carrying out an assessment and providing force protection and equipment from Juba to Mundri West and from Mundri West Mvolo/Maridi to ensure safe passage and freedom of movement of humanitarian convoys including force protection elements along the route.

28. He further described his duties as providing translation services from English to local languages and vice versa and facilitating negotiations at checkpoints along the patrol route liaising with local authorities regarding their needs and advising the team on the local cultural diversity need.

29. The Applicant then described the beginning of the onset of his illness in the following terms:

On 30 April 2016, during our morning briefing to visit Maridi town that day, Patrol leader [...] a Military Liaison Officer (MLO) brought to the team members' attention concerning my illness as I had already shared with him in the night of April 29th, 2016, in our tent. I became unwell - I had lost appetite with feelings of tiredness

² Application, section VII, paras 1 and 2.

and weakness as well as developed skin rashes plus had dip [deep] brown colored urine and yellowish eyes.³

30. It is from this point that medical personnel began to intervene.

31. It is important to note that the circumstances of the pressure being high and civilians seeking sanctuary in the bushes and displaced camps could be described as “traumatic” and “stressful”. However, while such language may be appropriate to describe the surrounding circumstances it would be up to the medical experts or medically trained persons to diagnose and treat any illness which occurred.

32. If the illness were to be associated with the surrounding circumstances it could be the medical personnel’s job to identify any correlation between the symptoms identified and those circumstances complained of such as displaced civilians and violence between different groups.

33. The details of the sickness and the action taken/treatment applied by various doctors who treated the Applicant, did not identify stress or trauma as the cause of the illness suffered by the Applicant. What the Applicant described thereafter was a series of diagnoses and treatments which could only be described as erroneous and possibly negligent. But, that aspect of the application which is receivable had nothing to do with professional negligence nor misdiagnosis.

34. The Applicant was diagnosed with jaundice with a stone in the gallbladder that blocked the bile flow into the intestine.

35. He was operated upon but no gallstone was found and the operating doctor cut his bile duct while performing the procedure. This resulted in bile leaking through the cut part of the bile duct into his stomach resulting in him becoming jaundiced again.

36. Later, the Applicant complained of another doctor unnecessarily removing his gallbladder and very serious illness that followed this procedure. The Applicant also described enduring two further surgeries.

³ *Ibid.*, at para. 5.

37. The Applicant then concludes that the onset of his illness was service incurred and followed by a wrongful referral, which caused him to sustain injuries through the incorrect referral to a hospital in Uganda, instead of the referral to the Level 1 Health Center in Juba, where he incurred the injuries. The Applicant submits that he is entitled to compensation for the harm he suffered as a result of the wrongful referral.

38. But the conclusions the Applicant arrives at require medical expert concurrence to establish cause. The other question which arises is whether injuries incurred through incorrect referral are part of the application before the Tribunal at this time. Indeed, it has already been determined that those injuries cannot form part of the application to be considered for a remedy.

39. The Respondent's reply shed light on something which the Applicant never mentioned in his application. The Respondent asserted that on 13 September 2016 UNMISS Medical Service examined the Applicant at the level 1 clinic within Mission premises initially diagnosing the Applicant with almost 10 years of alcohol abuse. A referral to Annex R/1 of the reply supports this assertion. This was never denied by the Applicant.

40. The Respondent's position stated further that UNMISS Medical Service recommended further medical assessment related to liver malfunction for hyperfermentemia and hyperbilirubinemia and an ultrasound for "acute hepatitis/splenomegaly". Based on the initial assessment and diagnosis, UNMISS Medical Service referred the Applicant to a Level II hospital, Case Medical Center, in Uganda. Case Medical Center diagnosed the Applicant with jaundice due to a stone inside his gallbladder that blocked bile flow into his intestine.

41. The receivability decision made earlier (Order No. 131 (NBI/2023)) has traversed the legal consequences of the Applicant's failure to seek management evaluation in respect of the claim against ABCC and the failure to approach the negligence or medical malpractice claims in a timely manner through the correct process. This left only the claim against the decision of the ABCC to be decided, since it was held that an appeal against the ABCC's decision did not require

management evaluation. Indeed, the Tribunal determined that since the ABCC was advised by a technical body its decision did not require management evaluation.⁴ However, what stands to be determined is whether the decision was subject to review, which was requested by the Applicant, and was therefore not a final administrative decision.

42. In support of his assertion that the Applicant did not appeal against an administrative decision, the Respondent argues that the Dispute Tribunal lacks jurisdiction to accept the application because the Applicant does not contest a final administrative decision.

43. The Respondent notes that on 12 December 2022, the Applicant sought reconsideration of the contested decision pursuant to art. 5.1 of Appendix D and on 15 December 2022, the Acting Secretary, ABCC, transmitted the Applicant's request to DHMOSH for further consideration for the claim made. The Respondent argues that since the reconsideration is pending, no final administrative decision has been made.

44. By extension, the Respondent must be asserting that the decision which was referred to DHMOSH on 15 December 2022 is still pending even in January 2024 as this matter stands to be determined. This raises the question whether any genuine review was embarked upon in this case.

45. While the Tribunal finds no basis for questioning or finding that the initial decision of ABCC was unlawful, the Tribunal cannot accept that it has taken more than a year to review the ABCC's decision on the Applicant's request. In the circumstances, the Tribunal treats the 2022 decision as a final decision and considers the Applicant's right to challenge it by way of this application to be valid. The alternative position renders the Tribunal impotent to consider the matter even after the alleged review has taken an inordinate period to be resolved. That situation flies in the face of fairness and is unacceptable.

⁴ UNDT and UNAT jurisprudence has held that the ABCC is a technical body when its decision is based on a medical determination. See *Raschdorf* 2023-UNAT-1343; *Massi* 2020-UNAT-1002; *Dahan* 2018-UNAT-861, para. 21; *Kisia* UNDT-2019-128 (not appealed).

46. The Tribunal therefore determines that the application is properly made but it is denied because the Tribunal can find no fault with the ABCC decision to deny his claim for an entitlement to compensation for injury and illness incurred during and resulting from employment on the behalf of the United Nations. The Applicant is therefore entitled to take whatever next step is appropriate in the circumstances.

47. There is therefore no award of compensation made to the Applicant for harm done as a result of service incurred illness during performance of official duties on behalf of UNMISS and the referral resulting in the injuries the Applicant suffered.

Applicant's motion

48. The Applicant filed a motion on 18 December 2023 seeking additional information and supporting documents against the Administration's decision to block his salary. However, when the Tribunal scheduled a CMD on 9 January 2024, the Applicant withdrew the motion and stated that he would not be pursuing the matter because it had been resolved. Consequently, no further action was taken on this motion.

Conclusion

49. In view of the foregoing, the application is therefore denied in its entirety.

(Signed)

Judge Francis Belle

Dated this 15th day of February 2024

Entered in the Register on this 15th day of February 2024

(Signed)

Eric Muli, Officer-in-Charge, Nairobi