



Judgment No. 2017-UNAT-725



Counsel for Mr. Baracungana:

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Submissions

The Secretary-General's Appeal

15. The UNDT erred in finding that the present case was receivable, as Mr. Baracungana had failed to appeal the decision to reject his Appendix D claim as prescribed in Article 17 of Appendix D. Mr. Baracungana had failed to exhaust the required administrative remedies available under Appendix D before he appealed to the Dispute Tribunal. The Dispute Tribunal should not have received Mr. Baracungana's application unless and until the Appendix D remedies had been exhausted.

16. The UNDT neither sought nor obtained the concurrence of the Secretary-General, as required by Article 10(4) of its Statute, before deciding to remand Mr. Baracungana's Appendix D claim to the ABCC for reconsideration.

17. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment in its entirety. He also states:

In order to facilitate resolution of the present case, [the Secretary-General] will receive a request from [Mr. Baracungana] in accordance with Article 17 of Appendix D for reconsideration of the determination by the Secretary-General [of 16 July 2013] of [Mr. Baracungana's] Appendix D claim, notwithstanding the thirty-day deadline set forth in Article 17 of Appendix D, provided that, in accordance with Article 17 (a) of Appendix D, [Mr. Baracungana] accompanies such request for reconsideration with the name of his medical practitioner for the medical board to be convened in this matter.

Mr. Baracungana's Answer

18. The Dispute Tribunal properly exercised its jurisdiction and acted within its competence by remanding Mr. Baracungana's claim to the ABCC. Its decision is supported by a case decided by the former Administrative Tribunal in Judgment No. 1426 (2009). The UNDT's power of judicial review and the need to take the appropriate remedial measure cannot be circumscribed by Article 10(4) of the UNDT Statute.

19. In the event that the Appeals Tribunal finds that the Dispute Tribunal exceeded its competence, Mr. Baracungana submits, alternatively, that the doctrine of estoppel precludes the Administration from arguing that the failure to convene a medical board renders the case non-receivable. Mr. Baracungana contested the decision by ORCC/CCS within the 30-day

time limit, though he did not provide the name of a medical practitioner of his choosing. The ABCC decided not to convene a medical board. Instead, it took upon itself to reconsider whether Mr. Baracungana's claims were due to his service with UNHCR. The Secretary-General cannot now be heard to complain that no medical board was convened.

20. The appeal should be dismissed in its entirety. As the Secretary-General did not appeal the UNDT's award of one month's net base salary to Mr. Baracungana, that award should not be overturned.

Considerations

21. The UNDT found that the contested administrative decision to deny Mr. Baracungana compensation under Appendix D to Staff Rules on the grounds that his medical condition was not service-related was unlawful as it breached Mr. Baracungana's due process rights. Specifically, the UNDT held that: a) the Administration (the ABCC and the ORCC/CCS) failed to provide reasons to Mr. Baracungana for the rejection of his Appendix D claim, and b) the ABCC failed to follow its own rules regarding its composition.

22. The UNDT consequently remanded the case to the Administration for correction of procedure, and awarded Mr. Baracungana one month's net base salary for procedural delay, pursuant to Article 10(4) of its Statute.

23. Appendix D to Staff Rules applicable at the time governed the payment of compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.⁵ Article 17 of Appendix D entitled "Appeals in case of injury or illness" states:

(a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date. The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b);

⁵ ST/SGB/Staff Rules/Appendix D/Rev.1, 1993.

(b) A medical board shall be convened to consider and to report to the Advisory Board on Compensation Claims on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the claimant; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations;

(c) The Advisory Board on Compensation Claims shall transmit its recommendations together with the report of the medical board to the Secretary-General who shall make the final determination;

(d) If after reviewing the report of the medical board and the recommendations of the Advisory Board on Compensation Claims, the Secretary-General alters his original decision in favour of the claimant, the United Nations will bear the medical fees and the incidental expenses; if the original decision is sustained, the claimant shall bear the medical fees and the incidental expenses of the medical practitioner whom he selected and half of the medical fees and expenses of the third medical practitioner on the medical board. The balance of the fees and expenses shall be borne by the

26. The Appeals Tribunal does not find merit in this submission. We note that the former Administrative Tribunal in Judgment No. 1427 held that: ⁶

V. Instead of requesting that a medical board be convened to review the Secretary-General's determination, however, in accordance with article 17, the Applicant sought administrative review of the Secretary-General's decision by letter dated 10 October 2005. Having received no answer, she submitted a Statement of Appeal, dated 16 January 2006, to the [Joint Appeals Board (JAB)]. The JAB, however, on 28 November 2006 properly rejected the Applicant's appeal, noting that "the appeal is not receivable by the JAB for lack of competence in the matter", as the contested decision "[fell] under Appendix D, rather than Chapter XI of the Staff Rules". The JAB informed the Applicant that in the event she chose to pursue her claim, she would be well advised to "focus future action within the framework of Appendix D of the Staff Rules and the Statute of [the] Tribunal". The Applicant now comes before the Tribunal asking the Tribunal to set aside the decision of the ABCC that her tick typhus was not service-incurred.

VI. At the outset, the Tribunal must first consider whether the Applicant's claim regarding the ABCC is receivable, *ratione materiae*. Unfortunately for the Applicant, the Tribunal finds that it is not. Article 17 of Appendix D sets forth with considerable specificity the procedure to be followed by a staff member seeking to obtain a review of the Secretary-General's determination that his or her illness or injury is attributable to the performance of services on behalf of the Organization, such that the staff member would be entitled to compensation under Appendix D. That process requires that the Applicant request that a medical board be convened to review the decision of the Secretary-General within thirty days of notice of the Secretary-General's decision. In exceptional circumstances, the Secretary-General "may accept for consideration a claim made at a later date".

VII. In the instant case, the Applicant has failed to request reconsideration of the Secretary-General's decision in accordance with article 17, even though she was directed by the JAB to pursuing her claims under Appendix D. As the matter was never properly before the JAB and as the Applicant has never sought the appropriate review of the matter, the claim is not properly before the Tribunal.

27. However, the jurisprudence of the former Administrative Tribunal, though of persuasive value, cannot be binding precedent for the new Tribunals to follow.⁷ 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

⁶ Former Administrative Tribunal Judgment No. 1427 (2008), V –VII.

⁷ *Leal v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-337, para. 18, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

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

no matter how surprising and regrettable it is for the United Nations internal justice system to allow for the Judge's power of judicial review to be so circumscribed.

32. The UNDT was faced with a case in which the contested administrative decision to deny Mr. Baracungana compensation under Appendix D was undisputedly procedurally unlawful due to the failure of the ABCC and the ORCC/CCS to provide reasons to him for the rejection of his claim, and the violation by the ABCC of its own rules regarding its composition. These failures hampered Mr. Baracungana's efforts in his filing for reconsideration of his claim as well as in exercising his right of access to justice⁹

33. Under Article 10 of its Statute, the only proper course for the UNDT to take was either to remand the case, provided that the Secretary-General concurred thereupon, to the

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Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar