



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/060

Judgment No.: UNDT/2016/059

Date: 13 May 2016

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PEGLAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Introduction

1. The Applicant has challenged a decision of the Advisory Board on Compensation Claims (ABCC) dated 12 November 2013 to reject his request for compensation for an injury which he alleges he suffered in the course of his duties.

Procedural history

2. The Applicant filed the current Application with the Tribunal on 2 June 2015. The Respondent filed his Reply on 2 July 2015.

3. Pursuant to Orders No. 351 (NBI/2015) and 374 (NBI/2015) the parties submitted a joint statement of facts and points in issue on 20 November 2015.

4. On 13 and 14 April 2016, the parties made submissions on the issue of receivability, which had been raised by the Tribunal in its Order No. 188 (NBI/2016).

5. The Respondent submitted additional information on the composition of the ABCC and the identity of those present at the Board meeting on 14 October 2014. Following this, the Tribunal decided that there was sufficient evidence on file to determine the merits of the case without an oral hearing.

6. The Tribunal obtained official translations into English of annexes to the Application¹ and the Respondent's Reply² which were in French.

the translated documents.

Receivability

the ABCC. This is because the contested decision in this case is not based on a medical determination by the ABCC.

Decision

18. The Application is receivable.

Merits

Facts

19. The following is taken from the parties' joint statement of facts supplemented with facts taken from the pleadings and documents submitted by the parties.

20. The Applicant is a former staff member of the Opération des Nations Unies en Côte d'Ivoire (ONUCI)⁴. He was a locally recruited staff member who served as a Broadcast Technician.

21. In 2011, Côte d'Ivoire was in the midst of a political crisis which resulted in a general breakdown of law and order characterized by general acts of violence. The Applicant considers that the breakdown in law and order included incidents targeting United Nations staff such as a rocket attack on a United Nations armoured personnel carrier on 2 April 2011 injuring four soldiers and a sustained attack on the Seboko Abidjan Headquarters resulting in the evacuation of essential staff from Abidjan on 3 April 2011.

22. On 6 April 2011, the Applicant was attacked and sustained injury. The ONUCI Security Operations Centre (SOC) daily log dated 6 April 2011 recorded a message timed at 1555 hours that the Applicant "sustained injuries to his head after being hit with rifle butts when armed individuals entered to loot his home at Adjame 220 Logements...POC, Watchkeeper and MOC notified".

23. The Tribunal notes further documentary evidence from the same source which was not referred to in the statement of facts. The SOC daily log included a

⁴ United Nations Operation in Côte d'Ivoire (UNOCI).

people of FROI members (Force Republicaine de Côte d'Ivoire) who beat him using blunt objects (the stock of Kalashnikov) over his head, and the left side of his abdomen. There was no loss of consciousness. He was complaining of left neck pain and headache. The physical examination shows a superficial cut (3 cm) at the scalp.

He is fully conscious; there is no neurological sign of head injury.

No active bleeding, no sign of internal bleeding.

As past history, [the Applicant] sustained neck injury due to an aggression during the crisis of November 2004 in Abidjan.

He received: dressing of the wound, he continues using the neck collar he came with.

The general condition of the patient is stable. He is put in observation in the Level 1 plus.

28. The Applicant states that on 9 April, fearing for his life and having been refused a salary advance, he submitted a Movement of Personnel request which was denied. This is when he first attempted to commit suicide.

29. On 10 April 2011, the Applicant emailed an incident report to the ONUCI Chief Security Adviser, copied to six others at ONUCI including KB. The document contained a list of the personal belongings stolen or damaged during these events. To this was added a letter entitled "Attack and Attempted execution report which described the attacked in detail". He stated: "In conclusion I would like to emphasise that since the start of the hostilities, I have been threatened (sic) a number of times by the Groupement patriotique pour la paix (GPP) militia wing to my affiliation with UNOCI".

30. On 13 of April 2011, KB approved the Applicant's Movement of Personnel request for "Liberty Travel". He travelled by United Nations plane to Accra, Ghana. He later moved to Togo where he claimed asylum.

31. On 14 July 2011,

ABCC, a person from the Office of Legal Affairs (OLA) and the Senior Legal Officer of the United Nations Joint Staff Pension Fund (UNJSPF).

43. The substantive minutes of the 14 October 2014 meeting commenced by stating that that [the ABCC] had “considered the materials and issues attached” in

[The Applicant] (6691): deferral of case for consideration to seek clarification from ONUCI on whether other staff members were targeted threatened or similarly assaulted due to the

The board considered the claimants statements, the brief prepared on behalf of the claimant by his OSLA legal officer, the ONUCI Security operation Centre Daily log recording of the claimed incident, the ONUCI Security Section incident report which states that “this alleged incident happened during the Ivorian Political Crisis period when there was a breakdown of Law and Order and when all staff members were informed/advised by SOC through Radio Communication to remain at their respective residences due to the then prevailing Ivorian Crisis, especially in the Abidjan Sector”, the lack of corroborating investigation into the circumstances surrounding the incident, and MSD’s advice that there is no clear evidence that this occurred as described, or that it was directly related to the performance of his official duties.

The board had sought additional information from the Department of Safety and Security in ONUCI which advised that there were no similar complaints or incidents reported by other staff members in the mission at the time of the Ivory Coast political crisis and that “[t]he incident was reported to SOC (Security Operations center)...However no investigation has established circumstances surrounding this incident and the allegations made by the claimant.

49. These minutes were approved by the Chair of the ABCC on 9 December 2014.

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d. The advice from MSD that “there is no clear evidence that the incident occurred as described, or that it was directly related to the

the ABCC made a material mistake of fact or considered extraneous factors in its

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reports obtained from a qualified medical practitioner or practitioners and art. 14 may require the medical examination of any person claiming or in receipt of a compensation for injury or illness under these rules.

73.

76. Article 15 provides that every person claiming under these rules or in receipt of 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.

Was the ABCC properly constituted at the time of its deliberations and recommendations?

77. Article 16(d) of Appendix D specifies the constituent members of the ABCC but does not specify a quorum for the Board meetings.

78. In *Rouche* UNDT/2015/044 the Tribunal held:

A quorum is generally the minimum number of members of an entity authorised to cast a vote, and who must be present at a meeting to lawfully conduct business in the name of the entity. In the absence of a specific provision in this regard, the minimum quorum is 50% of its members. Voting members may vote in favour, against or abstain. Entities may alter the definition of a quorum to suit their particular purposes by specifying the nature and number of a quorum in any particular case.

79. The evidence of the ABCC Secretary is that ABCC conducts its business on the basis of a quorum consisting of at least a majority of its members, that is, four out of six of its voting members. The full complement of six members of ABCC was present at its 14 October 2014 meeting and five of the six were present at the 11 November 2014 meeting when the final recommendation was made. The Tribunal finds that there were sufficient ABCC members present at both meetings to meet the quorum requirements. The others who attended the meetings were either secretariat or *ex-officio* in a non-voting, advisory capacity. The Tribunal holds that the ABCC was properly constituted at each of the relevant meetings.

Did the ABCC process the Applicant's claim for compensation in a proper, reasonable, and lawful manner?

84. The principle ensures that a party adversely affected has the right to know, the opportunity to comment on and the ability to answer the case against him or her.

85. In the present case, ABCC had information before it that was adverse to the Applicant's claim

92. The failure of the ABCC to advise the Applicant of the adverse material may be contrasted with the exercise of its discretion in another case.

93. ~~Simmons~~ UNDT/2013/059 concerned a claim for compensation for

Did the ABCC properly determine the nexus between the Applicant's employment with the United Nations and his injuries and illness?

98. Article 2 of Appendix D states that, "...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" (emphasis added).

99. As submitted by the Respondent, the contested decision was not based on a medical determination by the ABCC but on its conclusion that there was no nexus between the Applicants employment with the United Nations and the alleged injuries and illness.

100. However, in its formal recommendation, approved as the decision on 16 December 2014, the ABCC referred to the advice of the MSD medical advisor (referred to by the Respondent as a non-voting expert consulted to provide advice on medical matters) that "...There is no clear evidence that the incident occurred as described, or that it was **directly related to the performance of his official duties**" (emphasis added).

101. It is clear that it was not within the competence of the MSD medical advisor to provide advice on whether the incident alleged by the Applicant occurred as described because that is patently not a medical matter.

102. In addition, the questions posed by the Secretary of the ABCC to MSD were neither framed nor answered in terms of the principles in Appendix D relating to compensation for injury. The question is not whether the incident was "directly related to the performance of official duties" but whether the injury or illness is "attributable to the performance of official duties".

103. The first formulation applies a stricter test than the one in Appendix D.

104. The Tribunal concludes that the ABCC relied on the advice of MSD which it was not competent to give and which was not in accordance with the correct test

109. Finally, the ABCC relied on information provided to it that the Applicant did not report that the attack on him was because of his performance of his official duties or affiliation with the United Nations. It did not refer to or take into account the incident report emailed by the Applicant to the ONUCI Chief Security Adviser, copied to six others at ONUCI on 10 April 2011 in which he expressly links the attack with his affiliation with ONUCI.

110. The Tribunal concludes that the ABCC did not properly determine the nexus between the Applicant's employment with the United Nations and his injuries and illness. Some of the material it relied on was derived from the opinion of a non-expert who did not apply the correct principle in art. 2 of Appendix D for determining the nexus between the Applicant's employment with the United Nations and his injuries and illness. In addition, it considered irrelevant evidence and did not take into account relevant evidence that was available to it.

111. The Tribunal holds that the recommendation of the ABCC to deny the Applicant's claim for compensation was unlawful.

Was the decision to deny the Applicant's claim for compensation well founded?

112. There is no evidence that the official who endorsed the recommendation of the ABCC on behalf of the Secretary-General exercised any independent judgment in the matter but relied on the flawed and unlawful recommendation of the ABCC

113. The decision of the Secretary-General is therefore similarly unlawful.

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relevant to the claim; and applying the correct principle in art.15 of Appendix D to determine if there was a nexus between the Applicant's employment with the United Nations and his injuries and illness.

(Signed)

Judge Coral Shaw

Dated this 13th day of May 2016

Entered in the Register on this 13th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi