
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/061

Judgment No.: UNDT/2016/040

Date: 25 April 2016

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

6. By “Claim for Loss of or Damage to Personal Effects Attributable to the Performance of Official Duties” dated 3 September 2013, the Applicant requested USD2,277.53 in compensation for the alleged damages to his car from the 27 July 2013 accident.
7. By an investigation report dated 28 October 2013, a Senior Security Officer of SIU provided the SSS Chief with SIU’s findings regarding the 27 July 2013 accident.
8. By interoffice memorandum dated 7 November 2013 to the UNCB Secretary, the SSS Chief forwarded the investigation report for the UNCB Secretary’s review and possible action.
9. In a case summary dated 20 February 2014, the UNCB Secretary set out his views on the circumstances surrounding, and the process leading up to, UNCB’s consideration of the Applicant’s claim. On the same date, UNCB held its 343rd meeting at which it considered the Applicant’s claim regarding his car.
10. By interoffice memorandum dated 4 April 2014 to the ASG/Controller, the UNCB Secretary forwarded the undated minutes of the 343rd UNCB meeting on 20 February 2014 for the ASG/Controller’s consideration in accordance with ST/AI/149/Rev.4, requesting that, if she approved of UNCB’s recommendation, she indicate this on the interoffice memorandum.
11. On 23 April 2014, the 4 April 2014 interoffice memorandum was countersigned. However, the actual name of the signer is not written on the document and illegible from the signature.
12. By interoffice memorandum dated 25 April 2014 to the Executive Officer of DSS, the UNCB Secretary informed that the UNCB had recommended that the Applicant’s claim be denied and instructed that the Applicant be advised accordingly.
13. By interoffice memorandum dated 12 May 2014, the acting Executive Officer of DSS forwarded the 25 April 2014 interoffice memorandum to the Applicant.

22. By legal representative authorization form signed by the Applicant on 29 May 2015 and his current Counsel on 31 May 2015, the Applicant notified the Tribunal and the Respondent that Mr. Gonzalez would represent the Applicant in the present case.

23. By motion of 1 July 2015, the Applicant requested leave to amend his application and appended the proposed revised application.

24. The case was assigned to the undersigned Judge on 22 July 2015.

25. By Order No. 202 (NY/2015) dated 28 August 2015, as corrected by Order No. 202/Corr.1 (NY/2015) dated 1 September 2015, the Tribunal ordered: (a) the Respondent to file a response to the Applicant's motions filed on 12 October 2014, 28 November 2014 and 1 July 2015, and (b) the parties to attend a CMD on 16 September 2015 to discuss further proceedings in the present case.

26. On 4 September 2015, the Respondent duly filed his response to Order No. 202 (NY/2015). He raised no objections to the Applicant's request for leave to introduce causes of action and amend the application on the basis that the Respondent would be granted leave to file an amended reply to the revised application within 30 days. As for the Applicant's motion for production of documents, the Respondent stated that this motion should be rejected as a number of the requested documents had already been produced by the Respondent and that the remainder of the documents were not relevant.

27. By motion dated 7 September 2015, the Applicant requested leave to file an observation to the Respondent's response to Order No. 202 (NY/2015).

28. At the CMD on 16 September 2015, Counsel for the Applicant confirmed that his motion for filing an amended application of 1 July 2015 superseded his client's previous motions of 12 October and 28 November 2014 to introduce causes of action and amend the application. Counsel for the Applicant further requested that the present case be joined with his other two cases before the Tribunal, namely

UNDT/NY/2015/046 and UNDT/NY/2015/055. The Tribunal informed the parties that the Applicant's other cases were yet to be assigned to a Judge.

29. By Order No. 234 (NY/2015) dated 17 September 2015, considering that the Respondent had no objections to the Applicant's request for filing an amended application, the Tribunal granted leave to the Applicant to file an amended application. The Tribunal further granted leave to the Respondent's correlated request for leave to file an amended reply within 30 days, and instructed the Applicant to file a response to this reply within two weeks after its filing. In connection with these pending submissions, the Tribunal ordered the parties to comment on the applicability of secs. 3, 4 and 5 of ST/AI/149/Rev.4. The Tribunal also informed the parties that it would only consider the Applicant's motion for production of documents after the filing of the other submissions ordered by the Tribunal.

30. The Respondent filed his amended reply on 16 October 2015 and the Applicant filed his response to the Respondent's reply on 30 October 2015.

31. By Order No. 290 (NY/2015) dated 12 November 2015, the Tribunal instructed the parties to attend a CMD on 7 December 2015 which, at the request of the Applicant, was subsequently rescheduled to 8 December 2015.

32. By motion dated 7 December 2015, the Applicant requested leave to file an addendum to his response filed in accordance with Order No. 234 (NY/2015) on the amended reply, arguing that he had not been able to access the amended reply before 7 December 2015.

33. At the CMD on 8 December 2015, the Applicant was present personally and assisted by his Counsel, Mr. Gonzalez, while the Respondent was represented by Mr. Gutman. The Tribunal instructed the parties to indicate if any further documents would be relevant to decide the present case. In accordance with his motion dated 12 October 2014, the Applicant further requested the Respondent to be ordered to produce the Standing Operating Procedures and the logbook for security post no. 103 in force on 27 July 2013. The Respondent objected to the request, submitting that it

was irrelevant because of the Tribunal's limited scope of judicial review. The Tribunal rejected the Applicant's request for these additional documents to be produced by the Respondent, remarking that the requested documentation was related to the merits of the Applicant's claim before UNCB and therefore not necessary for determining the present case. The Tribunal found

38. The Applicant further requests the Tribunal to “find” on “law, fact or equity”, as well as in most instances also on “procedure”, that:

- a. “the case presented by the Applicant is exceptional in nature”;
- b. “[the] Applicant was entitled to compensation and that the Respondent is liable for the Applicant’s damages”;
- c. “[the SSS Chief] acted with conflict of interest”;
- d. “the alterations of post log book entry, and the extraction of CCTV video from the original recording sources without [the Applicant’s] presence in a witnessed manner, was incorrect, unlawful and in violation of [the] Applicant’s rights”;
- e. “the investigation, was inadequate, unreliable, unfair and lacked credibility and integrity”;
- f. “CCTV data were inappropriately and incorrectly extracted, edited, and disseminated and/or that the potential for same was available as procedure was not followed”;
- g. “[a Sergeant] acted incorrectly by declining the Applicant’s request for the Investigation Report”;
- h. “the words ‘before being told to go’, which was reported but never investigated, formed the core of the findings of the investigators, of the decision, and UNCB recommendations to the A1 331.25 484.99 9 283.37 foundations

Agenda item as presented before UNCB by [the UNCB Secretary], and the Administration's decision and [the Management Evaluation Unit's] response was improper”;

k. “the [A]dministration, acted with willful misconduct, wanton misconduct and/or gross misconduct”;

l. “the UNCB Secretary erred in exposing the Applicant's medical records to UNCB”;

m. “the UNCB did not conduct an independent and fair review of the Applicant's claims but simply took the position of [the SSS Chief] and the investigation”;

n. “the Applicant[’s] rights and entitlements have been violated by the decision and the actions or lack thereof of the [A]dministration”;

o. “the language used by drafters of General Assembly Resolution A/Res/41/121 of 11 December 1986 ‘ ... arising out of any act or omission, whether accidental or otherwise in the Headquarters district ...’ As appropriate, and find on law that “for all accidental incidents happening at the h

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of two years net base salary for violations of the Applicant's due process rights"; "[o]rder compensation in the amount \$7,000.00 for the repair cost of the Applicant's vehicle damages and wear brought about by such damages"; "[o]rder an award for costs including reasonable attorney's fees"; and "[g]rant any other reliefs and order any other direction as the Tribunal may seem appropriate and in the interest of justice".

Respondent's submissions

40. The Respondent's contentions may be summarized as follows:

a. At the case management discussion held on 27 October 2014, the Applicant confirmed that the administrative decision in issue in this case is the decision to reject his claim for compensation under ST/AI/149/Rev.4, and the only relief he seeks is the payment of \$2,277.53 for the damage to his vehicle;

b. In his application, the Applicant contends that the Respondent is liable to pay compensation to him under various causes of actions, for example

familiar with the functions and operation of the traffic arm and the stinger barrier as a result of his duties as a Security Officer;

i. The Applicant's assertions that SIU was not the appropriate entity to investigate the incident are also without merit. The SIU has competence to conduct fact-finding investigations of traffic incidents that occur within the United Nations Headquarters complex under the DSS and SSS Standard Operating Procedures. The SIU's findings were reviewed by the UNCB and accepted;

j. As such, the UNCB properly concluded that no compensation was payable for the damage to the Applicant's vehicle under sec. 4(a) of ST/AI/149/Rev.4. The ASG/Controller's decision to accept the UNCB's recommendation to deny the Applicant's claim was therefore fair and reasonable. The decision to reject the Applicant's claim is also lawful as the Applicant failed to comply with his obligation under sec. 12 of ST/AI/149/Rev.4 to take reasonable steps to receive suitable compensation for the damage to his vehicle;

k. The Applicant admits that he has motor vehicle insurance under which he can make a claim for the cost of the repairs to the vehicle. He states that he has decided not to make a claim under that insurance. As such, the Applicant has failed to take the reasonable step of claiming the cost of the repairs to his vehicle under his insurance, and has not met the conditions for presenting a claim for compensation established by secs. 5 and 12 of ST/AI/149/Rev.4.

Considerations

Applicable law

41. Staff rules 6.4 and 6.5 from the current Staff Rules (ST/SGB/2014/1) provide as follows:

Rule 6.4

Compensation for death, injury or illness attributable to service

Staff members shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations, in accordance with the rules set forth in appendix D to the present Rules.

Rule 6.5

Compensation for loss or damage to personal effects attributable to service

Staff members shall be entitled, within the limits and under terms and conditions established by the Secretary-General, to reasonable compensation in the event of loss or damage to their personal effects determined to be directly attributable to the performance of official duties on behalf of the United Nations.

42. ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service) issued on 14 April 1993, arts.1–5 , 12–16 and 18 provide that:

Purpose

1. Staff rules 106.5, 206.6 and 306.4 [today replaced by staff rule 6.5] provide that staff members shall be entitled, within the limits and under the terms and conditions established by the Secretary-General, to reasonable compensation in the event of the loss of or damage to their personal effects, determined to be directly attributable to the performance of official duties on behalf of the United Nations. The purpose of the present instruction is to define the terms, conditions and limits governing such compensation and to set forth the procedure for the submission and examination of claims in connection with such loss or damage.

2. The present instruction shall apply to incidents occurring on or after 1 January 1993. It cancels and supersedes administrative instruction ST/AI/149/Rev.3 of 17 November 1988.

Conditions for the entitlement

3. Without restricting the generality of the provisions of staff rules 106.5, 206.6 and 306.4 [today replaced by staff rule 6.5], loss of or damage to the personal effects of a staff member shall be considered to be directly attributable to the performance of official duties when such loss or damage:

(a) Was caused by an incident which occurred while the staff member was performing official duties on behalf of the United Nations; or

(b) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area designated by the United Nations Security Coordinator as hazardous, and occurred as a result of the hazards in that area; or

(c) Was caused by an incident which occurred during any travel, by means of transportation furnished by or at the expense or direction of the United Nations, undertaken in connection with the performance of official duties.

4. No compensation shall be paid for any loss or damage which was:

(a) Caused by the negligence or misconduct of the claimant; or

(b) Sustained by a private vehicle which was being used for official business, including travel in connection with home leave, when such use of a private vehicle was solely at the request of and for the convenience of the staff member.

5. Staff members should note that no compensation shall be paid for the loss of or damage to personal effects, except as provided under the Staff Rules and paragraph 3 of the present instruction. Otherwise,

occurred on 27 July 2013 at the United Nations Secretariat building's security post no. 103 in New York. The contested decision,

47. As results from the evidence and from the Respondent's submissions, the contested decision consists in the UNCB's recommendation against awarding the Applicant any compensation, which was included in the minutes of UNCB's 343rd meeting of 20 February 2014 submitted for the ASG/Controller's consideration on 4 April 2014.

48. The Tribunal, after reviewing the content of the contested decision, finds that instead of making her own final and reasoned decision on the Applicant's claim, the ASG/Controller appears to have only signed off on the recommendation made by UNCB to deny the claim on 23 April 2014, as admitted by the Respondent. The Tribunal observes that the signature with the date of 23 April 2014 does not indicate the name and/or the position of the decision-maker.

49. Taking into account the above mentioned procedural irregularities of the contested decision, the Tribunal concludes that the mandatory procedure prescribed by ST/AI/149/Rev.4 was not followed and will not further analyze the grounds of appeal related to the merits of the present case.

50. In *Karseboom* 2015-UNAT-601, the Appeals Tribunal, *inter alia*, stated:

41. The Secretary-General submits that the UNDT, upon determining that the proper procedure had not been followed, should have remanded the case back to the ABCC to convene a medical board to re-examine Mr. Karseboom's case. Instead, the UNDT erred in effectively placing itself in the place of the medical expert and the decision-maker.

42. The Appeals Tribunal agrees with this submission.

43. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal,

