
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/016
/UNAT/1619
Judgment No.: UNDT/2012/076

22 February 2005. All the certificates were from the Applicant's physician placing the Applicant on medical leave due to his illness. In the medical certificate dated 22 February 2005, the Applicant's physician recommended that he return to work on 29 March 2005. This meant that his Canadian personal physician had placed him on sick leave for a cumulative period of about nine months.

6. On 2 March 2005, the Applicant wrote to ONUCI seeking to know whether he was to report to ONUCI in Côte d'Ivoire or his parent mission UNTSO in Jerusalem at the end of his sick leave. On the same date ONUCI forwarded to the Applicant an email dated 28 February 2005 from the MSD in which it was stated that on 27 October 2004 ("the October email") MSD had contacted the Applicant through his official email ("Lotus Notes account"). In that email, MSD claimed to have requested the Applicant to provide additional medical information regarding his illness so as to decide on the certification of his sick leave and had not received a response. MSD therefore had not approved any sick leave for him. The Applicant replied ONUCI and informed the mission that he had not received the email from MSD because since he left for his family visit

14. On 16 September 2005, the Applicant received an email from UNTSO Medical Officer in which he was informed that he had been medically cleared by MSD and advised to report for duty in Jerusalem. The Applicant reported for duty on 27 September 2005 in UNTSO.

15. On 5 October 2005, the Applicant received a fax message from the Chief Civilian Personnel Officer (“CCPO/UNTSO”) sent by the Human Resources Officer (“HRO/DPKO”). The fax message advised that since the MSD had only certified the Applicant’s sick leave for the period 6 July 2004 to 6 August 2004, the outstanding period, less the duration deducted from his annual leave would be converted to SLWOP. This meant that the Applicant would be placed retrospectively on SLWOP as from 2 September 2004 to 26 September 2005.

16. In another memorandum dated 19 October 2005, the CCPO/UNTSO advised the Applicant that USD58,015.78 was being recovered from his emoluments. Attached to the memorandum was a fax message from HRO/DPKO to the Chief Administrative Officer (“CAO/UNTSO”) dated 18 October 2005 on the subject of recovery of overpayment. On 20 October 2005, the Chief Personnel Management and Support Service (“PMSS”) wrote to the Chief Payroll Section, Accounts Division requesting the recovery of the sum owed and also notified it that PMSS had withheld the Applicant’s salary from 1 July 2005.

17. Following receipt of this information, the Applicant who already was a diabetic patient and had no money for accommodation and feeding in Jerusalem, was affected psychologically. He sought counseling with the organization’s counselor to whom he had written a letter explaining both the financial and emotional hardship he was experiencing.

18. Sometime in October or November 2005, the Applicant wrote a request for partial monthly recovery of overpayment as from the end of November 2005. He noted that the payroll section recovered 100% of his earnings in October 2005 therefore leaving him with no income whatsoever. In addition, the CAO/UNTSO wrote to the HRO/DPKO in

respect of the Applicant's situation and requested a reconsideration of the prolonged leave of absence as sick leave.

19. Having received no reply, the Applicant on 28 November 2005 sought the intervention of the Ombudsman. On 2 December 2005 the MSD New York wrote to the Medical Officer in UNTSO denying the request for additional sick leave approval for the Applicant. The MSD stated that its review of the documents submitted did not indicate any additional illness or worsening of the Applicant's condition and consequently there was no need for him to have remained in Canada for medication adjustment since he worked for UNTSO in Jerusalem where there were excellent medical facilities. On 12 December 2005 the Applicant sent comments on the denial of his request to MSD.

20. On 19 December 2005, the Applicant sought administrative review of the decision dated 18 and 19 October 2005 in which it was decided that USD58,015.78 was to be recovered from his emoluments.

21. On 31 January 2006 a fax message emanating from HRO/DPKO to CAO/UNTSO stated that MSD had, in a memorandum of 30 January 2006 reviewed the Applicant's case and in particular the circumstances surrounding the delay in clearing him to return to duty and had approved and certified sick leave for him for the period 1 April 2005 to 26 September 2005. In other words the Applicant's indebtedness was reduced to salary earned for the period 2 September 2004 to 31 March 2005, a period of 7 months.

The Former United Nations Administrative Tribunal

24. On 25 August 2008, the Applicant appealed the decision of the Secretary-General dated 3 June 2008 to the former UN Administrative Tribunal. On 2 March 2009, the Respondent filed his Reply to the Application and on 8 September 2009, the Applicant filed written Observations to the Respondent's Reply.

UNDT Proceedings

25. On 1 January 2010, the case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal ("The Tribunal") in accordance with the provisions of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of Administration of Justice).

26. Upon review of the case, the Tribunal held a case management hearing on 6 October 2010. Thereafter the hearing on the substantive Application was held on 10 January 2011 and 31 May 2011 and closing submissions received on 10 June 2011.

The Applicant's case

27. The Applicant's case is as follows:

- a. The decision not to approve his sick leave retroactively was unfair and amounted to penalising him since it took almost nine months to obtain a clear indication that the MSD was limiting the approval to one month of certified sick leave;
- b. His emoluments were improperly withheld;

- c. It was unfair on the part of the Respondent that while the Applicant had returned to his duty post, he was forced to work without pay for an unreasonable period of time thereby causing him additional stress;
 - d. The Respondent was negligent in not handling his sick leave request in a timely manner and
 - e. The Applicant's due process rights were violated.
28. The Applicant prayed the Tribunal for the following remedies:
- a. Payment of USD22,449.78 in lost salary plus the value of applicable education grant, pension contributions and annual leave entitlements over 14 months he was without remuneration with applicable interest from 1 July 2005;
 - b. Compensation in the amount of three years net base pay in light of exceptional circumstances of mistreatment and in view of the stress, uncertainty and humiliation caused by the Respondent's actions in leaving the Applicant for an extended period with no means of support while he worked in Jerusalem;
 - c. Reimbursement of expenses and legal costs in the amount of USD5,000 due to the Respondent's abuse of process including refusal to consider his just claims without protracted litigation;

The Respondent's case

29. The Respondent argued and submitted that:
- a. The Applicant's due process rights were not violated;
 - b. The Applicant failed to comply with the relevant administrative rules relating to sick leave;

- c. The decision not to certify part of the Applicant's request for sick leave was not improperly motivated, nor was it vitiated by bias or any other extraneous factors;
 - d. The Applicant had not submitted any compelling evidence of exceptional circumstances that warrant additional special consideration;
 - e. The Applicant's pleas for monetary compensation are unwarranted and
 - f. There is no basis for the award of legal fees and expenses.
30. The Respondent therefore requested the Tribunal to dismiss the Application in its entirety for the reasons that the Applicant was not denied any due process rights and did not adduce any evidence to merit additional relief.

Issue

31. Both Parties agreed with the Tribunal that the main issue to be resolved in this matter is whether the Administration's decision not to certify the Applicant's sick leave for the period 7 August 2004 to 28 March 2005 was proper.

Consideration

Staff rule 106.2

Sick leave

- (a) Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by the Secretary-General.

Maximum entitlement

- (b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:
- (i) A staff member who holds a fixed-term appointment of less than one year shall be granted sick leave at the rate of two working days per month of contractual service;
- (ii) A staff member who holds a probationary appointment or a fixed-term appointment of one year or longer but less than three years shall be granted sick leave of up to three months on full salary and three months on half salary in any period of twelve consecutive months;
- (iii) A staff member who holds a permanent or indefinite appointment, a fixed-term appointment for three years or who has completed three years of continuous service **shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.** (Emphasis added)

Uncertified sick leave

- (c) A staff member may take uncertified sick leave of not more than three consecutive working days at a time, for up to seven working days in a calendar year, when incapacitated for the performance of his or her duties by illness or injury. Part or all of this entitlement may be used to attend to family-related emergencies, or for paternity leave in case of birth or adoption of a child, in which case the limitation of three consecutive working days shall not apply.

Certified sick leave

- (d) Sick leave taken by a staff member in excess of the limits set in paragraph (c) above requires approval in accordance with conditions established by the Secretary-General. When those conditions are not

Sick leave during annual leave

- (e) When sickness of more than five working days in any seven-day period occurs while a staff member is on annual leave, including home leave, sick leave may be approved subject to appropriate medical certification.

Obligations of staff members

- (f) Staff members shall inform their supervisors as soon as possible of absences due to illness or injury. They shall promptly submit any medical certificate or medical report required under conditions to be specified by the Secretary-General.

33. The Administrative Instruction on sick leave provided for certification of sick leave in its section 7 and the relevant provisions are hereunder reproduced:

Certification of Sick leave

- 7.1 Unless uncertified sick leave is allowed under section 6.2 above, a staff member who is unable to perform his or her duties by reason of illness or injury must submit a medical certificate or a medical report, as provided in sections 7.2 and 7.3 below, no later than the tenth working day following the initial absence from duty.
- 7.2 A total of up to 10 working days taken cumulatively or consecutively during a calendar year may be approved as certified sick leave by the executive or local personnel office upon submission by the staff member of a certificate from a licensed medical practitioner indicating the date or dates of absence from duty by reason of illness, injury or incapacitation, without identification of diagnosis, or upon submission by the staff member of form MS.40, duly completed and signed by the attending physician.
- 7.3 After 10 working days of sick leave have been certified in accordance with section 7.2, certification of further sick leave by the Medical Director or designated medical officer shall be required. For that purpose, the staff member shall submit to the **executive officer** or **other appropriate official**, in a sealed envelope, a detailed medical report from a licensed practitioner. (Emphasis added)
- 7.4 However, no medical report need be submitted under section 7.3 above in the following cases:
 - (a) The period of absence owing to illness or injury has already been certified by the Medical Director or designated medical officer on the basis of a “sent home” slip;

(b) The staff member claims sick leave for half a day on account of

script” indicating that he should remain on medical leave due to illness without specifying details and had made no effort to contact MSD directly.

36. The Administrative Instruction governing sick leave provides that the staff member shall submit to the executive officer or other appropriate official in a sealed envelope, a detailed medical report from a licensed practitioner so as to have a sick leave request certified. The Applicant had continued to submit his medical certificates to his personnel Unit at ONUCI all through the period his personal physician in Canada placed him on sick leave. It was only on 2 March 2005 when the Applicant wrote to ONUCI indicating his readiness to return to work by the end of that month that he was informed that the MSD Headquarters in New York had sent him an email through his Lotus Notes account in October 2004 seeking further information regarding his sickness. He further learnt that on 28 February 2005, MSD wrote to ONUCI informing the mission that it had not received a response to the October email.

37. The email of 28 February 2005 from MSD Headquarters in New York to CAO/ONUCCI and CAO/UNTSO which was also copied to the Applicant’s Lotus Notes account read in part:

“[...] We are informing you that on 27 October 2004 we send [sic] an email to Mr. Ouellet requesting additional medical information regarding his sick leave which, **at that time, he was claiming the period 6 July 2004 through 30 January 2005. From your latest correspondence,** you were informing us that Mr. Ouellet’s physician had further extended his sick leave through 1 March 2005....” (Emphasis added)

38. From the above email, it is evident that ONUCI had been forwarding the medical certificates sent to it from Canada by the Applicant to MSD Headquarters in New York regarding his placement on sick leave by his personal physician.

39. Can it be said that the Applicant’s communication with the Organization regarding these sick leave placements were improper? Section 7.3 of the applicable

46. From that point on, the Applicant established direct communication with MSD and provided the documents it required of him. He further sent the queries raised by MSD to his personal physician who communicated the responses to the Medical Division.

47. On 11 April 2005, MSD wrote to the Applicant conveying their certification of

contributed in no small measure to the predicament of the Applicant when his sick leave certification was refused.

Recovery of overpayment made to the Applicant

55. Following the non-certification by MSD of the sick leave upon which the Applicant had been placed from July 2004 until March 2005 by his physician in Canada, the Applicant's salary was withheld as from 1 July 2005. At the time that the withholding of his salary began, the Applicant had fully recovered and was merely waiting to be

Case No.: UNDT/NBI/2010/016/UNAT/1619

Judgment No.: UNDT/2012/076

65. It is in evidence that by July 2005, the Applicant's contract had been extended to 31 December 2006. The recoveries to be made could therefore be spread over the duration of his contract thus allowing him to receive part of his salary for subsistence. It was not until December 2005 after several requests for partial recovery and administrative review of the decision to recover overpayments that the Organization decided to recover in installments.

66. It is clear that the core of this Application hinges on the decision by MSD not to certify the eight-month period from 7 August 2004 to 28 March 2005 as sick leave for the Applicant. Evidence shows that the Applicant was placed on sick leave throughout that period by his physician in Canada. That notwithstanding, all sick leave for a staff member required approval by the Secretary-General and only under conditions established by him. Under the former staff rule 106.2(b) (ii), the Applicant's maximum entitlement to sick leave was three months on full salary and three months on half salary in any period of twelve consecutive months.

67. The Tribunal finds that considering the delay on the part of the Organization in advising the Applicant that his ailment would require a maximum of one month sick leave approval only and with regard also to the fact that the Applicant's Côte d'Ivoire posting was not taken into consideration in reaching that decision, it

- b. The Applicant was entitled to sick leave of three months on full salary and three months on half salary in any period of twelve consecutive months;
 - c. The Respondent did not violate the Applicant's due process rights;
 - d. The decision not to certify the Applicant's sick leave though not motivated
- ti012 Tc0 Tw(c.)Tj/TT6 1 he

of three months on half pay in any period of twelve consecutive months. The Tribunal also awards the Applicant an additional **three months on half salary**;

iii. There was no proof of education grant and the Tribunal cannot make any award on that score.

c. All other prayers are refused

70. All the above compensation shall be computed at the Applicant's category and level of employment at the time of the contested decision. If payment is not made within 60 days of the date that this Judgment becomes executable, an additional five per cent shall be added to the interest at US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of May 2012

Entered in the Register on this 30th day of May 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.