

INTRODUCTION

1. The Applicant is a former staff member of the United Nations Mission in South Sudan (UNMISS). At the time of his separation from service, he was employed as a Security Officer at the FS-4/XI level in Kapoeta, South Sudan.

18. On 4 January 2012, the Applicant emailed the MSD again to follow up on the status of his case.¹² un rebutted testimony was that he did not receive a response from the MSD.

19. As the , he consulted another physician, Dr. Darwish, in his home country, Jordan, on 15 January 2012. Dr.

recommended sick leave for six weeks.¹³ The Applicant un rebutted testimony at the hearing was that Dr. Darwish then referred him to one Dr. Anani, a pulmonologist on 16 January 2012.

20. Dr. Anani diagnosed the Applicant with a pulmonary respiratory condition and recommended sick leave for two months, i.e., until 16 March 2012.¹⁴ The Applicant testified that he did not send the medical reports of 15 and 16 January 2012 to Dr. Onebunne or the MSD at the time because he thought he had been placed on sick leave based on the medical reports he had submitted in October 2011.¹⁵

21. The Applicant testified, and it was not rebutted, that the end of January 2012 was the last time he received his salary¹⁶ and consequently, he lost his health insurance coverage.¹⁷

23. The UNMISS Deputy Security Adviser (DSA), Mr. Jamshed Kazi, on 13 February 2012 and on 16 February 2012, the Applicant responded that he was still sick. Mr. Kazi responded to the Applicant on the same day as follows:¹⁸

You have to submit an official medical certificate to Medical Unit, copied to HR within 10 days of your absence, which you have not

medical certificate, which will be handled by the Medical Section. Since, you have not submitted so far, I would advise you to officially submit your medical certificate otherwise you will be considered for ABANDONMENT OF POST as per staff rules.

The staff rules are very clear that in case of sickness, you have to submit Medical Certificate within 10 days.

24. The Applicant emailed Dr. Onebunne on 17 February 2012 informing him that the Medical Unit had not certified his sick leave and thus, HRS and Security were demanding his return to the Mission area.¹⁹ Dr. Onebunne responded on 18 February 2012

27. report to Doctors Onebunne and Aly on 27 and 29 February 2012, respectively.²³ Dr. Aly who was the Chief Medical Officer (CMO) at UNMISS responded on 1 March 2012 requesting that a detailed medical report be sent. The Applicant then re-sent the medical reports, including the ones from 15 and 16 January 2012, on 5 March 2012.²⁴

28. On 7 March 2012, the Applicant emailed Dr. Aly to seek confirmation that he had received the medical reports that he had submitted. Dr. Aly responded the same day stating that the Applicant had to submit a detailed medical report from the start of his medical leave to the end or a medical report covering each period, which would be forwarded to the MSD for approval.²⁵

29. On 9 March 2012, the Applicant emailed a comprehensive medical report prepared by Dr. Darwish, dated 8 March 2012, to Dr. Aly. Dr. Darwish again recommended sick leave for a period of three months, until 27 May 2012.²⁶

30. The Applicant then followed up with an email to the Secretary-General on 29 March 2012 informing him of his illness and asking for his assistance regarding his still-pending request for certified sick leave.²⁷ The Applicant testified that he took this course of action because he did not know whom else to contact about the conflicting information UNMISS had been giving him.

31. His complaint was that on the one hand, UNMISS had informed him that he had many unused sick leave days and yet on the other hand, his salary and health insurance coverage had been terminated as of 30 January 2012. He did not receive a response from the Secretary-General.

32. On 11 April 2012, the MSD emailed the Applicant with the following decision on his sick leave requests:

Please be informed that all the medical reports you submitted to the Medical Services Division have been reviewed. According to the

²³ Annexes R6 and R7, Reply.

²⁴ Annexes R8 and R9, Reply.

²⁵ Annex 11, pages 44-45, Application.

²⁶ Annexes 10 and 11, Application.

²⁷ Annex 12, page 47, Application.

diagnoses given by these reports, you were granted sick leave as of September 12th 2011 through October 17th 2011.

In accordance with the Medical Disability Advisory (MDA) and the reports submitted, no further sick leave can be approved.²⁸

33. UNMISS/HRS informed the Applicant the same day (11 April 2012) via email, that he had been placed on certified sick leave and Special Leave Without Pay (SLWOP) effective 28 October 2011. He was requested to advise of his return date to the mission to enable HRS to finalize his administrative and attendance issues.²⁹

34. On 16 April 2012, UNMISS Security emailed the Applicant regarding the date of his return to work. The Applicant wrote back to UNMISS/HRS on 24 April 2012 complaining about the time the MSD had taken to respond and to inform the Mission that he was still sick and would report to work as soon as his doctors gave him clearance.

35. In a memorandum on 2 May 2012 to the Field Personnel Division of the Department of Field Support (FPD/DFS), the UNMISS Director of Mission Support (DMS) stated that the Applicant had been placed on annual leave from 12 September to 17 October 2011, that he had been placed on annual leave from 18 to 27 October 2011 and then on SLWOP from 28 October 2011 to 11 April 2012. He also stated that UNMISS/HRS had then communicated with the Applicant about his return to work to no avail. The UNMISS DMS then requested authorization for the Applicant's separation from service for abandonment of post on grounds of unauthorized absence.³⁰

36. The Applicant's appointment to the Office of Human Resources Management (OHRM) was effective 30 June 2012 which was the expiry date of his appointment to the Office of Human Resources Management (OHRM) on 22 October 2012.³¹

²⁸ Annex R10, Reply and annex 13, page 50, Application.

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Administration was so focused on separating him for his alleged abandonment of post that it did not properly assess the request.

44. The Applicant seeks the following remedies:
- a. Rescission of the decision that he abandoned his post;
 - b. An Order that the Administration terminate his appointment on medical grounds so that the matter can be referred to the United Nations Staff Pension Committee for a determination that he is incapacitated for further service and entitled to disability benefits under art. 33 of the Regulations of the Pension Fund;
 - c. Compensation of 18 net base salary in lieu of the remaining sick days he would have been entitled to (at either 100% or 50% pay);
 - d. An award for his suffering and stress over a period of five years.

Respondent

45. the application should be dismissed because:
- a. under section 5 of ST/AI/400 and its amendment. The Applicant initiated his separation from service by failing to report to duty or provide an acceptable reason for his unauthorized absence.
 - b. While the Applicant claims that his prolonged absence was due to health reasons, the only absence certified by MSD as sick leave was his absence from 2 September 2011 to 17 October 2011. A private physician may not grant a staff member sick leave. The decision whether to certify medical leave is made by the MSD.

c. The Applicant never challenged the determination that he was entitled to 36 days of certified sick leave. He had exhausted all the sick leave and annual leave to which he was entitled.

d. UNMISS

unauthorized absence after 11 April 2012 that he had unilaterally repudiated his contract of employment.

e. The Applicant was not entitled to pay during any period for which he was not on paid leave. He had been placed on SLWOP from 28 October 2011 and yet continued to be paid erroneously until January 2012.

f. The Applicant adduced no evidence to support his claim that there was a decision to deny a special dependency allowance for his disabled

48. Staff members who fall ill or are injured and, thus, cannot attend to their duties are entitled to sick leave. All sick leave must however be approved on

2.2 A total of up to 20 working days taken cumulatively or consecutively during a twelve-month period 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.

2.3 After 20 working days of sick leave have been certified in accordance with section 2.2, certification of further sick leave by the Medical Directorification ial on ec upon of further sin certifieueueueue I

sent medical reports from the three doctors who had seen him Drs. Elyan, Abdoh and Scholle to the UNMISS/CMO, Dr. Aly, asking him to take necessary action. Dr. Aly took no action sick leaves for up to 20 days as he was authorized to do. He did not request certification from the MSD either.

55. When, on 19 October 2011, the Applicant wrote to inform UNMISS/HRS that he was still ill, he also inquired as to his rights during sickness and was, on the same day, merely informed that he was entitled to 195 days of paid sick leave and thereafter another 195 days on half pay in any 48-month period.

56. Again, on 23 October 2011, the Applicant emailed UNMISS/HRS to ask if he needed to submit any documents to claim the sick leave days that he had been told he was entitled to. He was told in a response the next day to submit his detailed medical reports to Mr. Lado and to one

66. On 1 March 2012, Dr. Aly upon receiving new medical reports from the Applicant told him that a detailed medical report was required. On 7 March 2012, Dr. Aly asked him to submit a detailed medical report which would cover the entire period of the ailment from when he was first placed on sick leave. Two days later, the Applicant sent a detailed and comprehensive medical report covering the entire period of his ailment prepared by Dr. Darwish to Dr. Aly.

67. No further information was received from the MSD or Dr. Aly and, on 29 March 2012, the Applicant wrote to the Secretary-General seeking his assistance regarding the difficulties he was going through due to the lack of a response to his emails to the MSD regarding

72. The suggestion that the Mission communicated with the Applicant after 11 April 2012 to no avail is also untrue as the Applicant had continued to plead in his many correspondences to UNMISS that he was still suffering from many health complications.

73. Although the Applicant continued to explain to UNMISS authorities that he could not return yet to the Mission because he was still very sick, the UNMISS

78. In response to one of his communications to UNMISS/HRS, the Applicant was informed on 19 October 2011 that he was entitled to 195 days of sick leave with pay and 195 days of sick leave with half pay in a 48-month period. Also in response to his query as to whether he was required to send any documents to claim the sick leave days, UNMISS/HRS advised him to send his medical reports to an HR 8BT/F1 12 Tf1 0 0 1 1uQed a

83. In *Ouellet* UNDT/2012/076, the Tribunal held that because of the delay on the part of the MSD in advising the Applicant that only one month of the nine months of sick leave granted him by his doctor could be certified, among other factors, it was only fair that the Applicant be allowed the maximum sick leave

further advised that there were other options open to him. Due regard must also be given to when leave.

92. It is the Tribunal that under the circumstances, a duty was owed both on the part of the MSD and UNMISS/HRS, to advise the Applicant of his right to request the referral of the non-certification of his sick leaves to an independent medical practitioner or a medical board as provided for under section 13 of ST/AI/400.

93. The MSD having failed to review request for certification of his sick leave many months after he began requesting it and, thus, having put him at risk of losing his career, owed him the duty of informing him of his rights to seek referral to an independent medical practitioner or a medical board. UNMISS/HRS from whom the Applicant had sought advice as to his sick leave entitlements owed him the same duty to give him such helpful information.

94. The oft-touted retort that ignorance of the law is no excuse will not serve to discharge the Organizati clear duty to also inform the Applicant of what options were available to him under section 13 especially considering that the decision to not certify his sick leave was not *immediately* conveyed to him, as required. regarding the way he frequently communicated with UNMISS and the MSD is clear indication that he would have speedily availed himself of the option provided for by section 13 of ST/AI/400 if he were adequately informed.

95. In the prevailing circumstances, the Tribunal is not persuaded by the submission that it was reasonable to conclude that because the sick leave requests of an evidently sickly Applicant were not certified by the MSD, the said Applicant had unilaterally repudiated his own contract of employment and had abandoned his post warranting separation from service. The Tribunal finds and holds that it was unlawful to separate the Applicant on the ground of abandonment of post.



periodically by the Assistant Secretary-General for Human Resources Management, as may be adjusted locally at duty stations outside New York.

101. Section 4 of ST/AI/2011/5 provides *inter alia*:

4.1 A child who is certified by the Medical Director or designated medical officer as physically or mentally incapacitated for substantial gainful employment, either permanently or for a period expected to be of long duration, shall be recognized as a dependent child, regardless of the conditions of school attendance otherwise required under section 3.1 (a), and may continue to be recognized as a dependent after reaching age 18 or 21, provided it is established in accordance with section 3.1 (b) that the staff member provides main and continuing support for the child.

4.4 Staff members in the General Service and related categories shall receive for a dependent child with a disability a dependency allowance at double the rate of the regular child allowance payable at the duty station where the staff member is serving.

102. It needs be underscored that the Respondent is not challenging the special disability allowance for his disabled son. The Applicant testified that he was told during a telephone call from UNMISS that the said allowance would not be paid retrospectively.

103. Section 4 of ST/AI/2011/5 provides for payment of special disability allowance to staff members with dependents who are medically certified to have mental or physical disability. The Tribunal finds that while the Applicant remained a staff member, he was entitled to the special disability allowance in respect of his disabled son as from the date he first sent the supporting documentation requesting the allowance.

CONCLUSIONS

104. The Tribunal finds and holds that the Applicant duly performed the obligation to inform the Administration within the stipulated timelines of his ill health and diligently initiated and maintained communication with his supervisor, UNMISS/HRS, UNMISS CMO and MSD. He sent all documentation requested of him in that regard.

(Signed)

Judge Nkemdilim Izuako
Dated this 28th day of June 2018

Entered in the Register on this 28th day of June 2018

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi