



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/016
/UNAT/1619
Judgment No.: UNDT/2012/076
Date: 30 May 2012
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

OUELLET

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George G. Irving, Esq

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant is a former staff member of United Nations Truce Supervision Organisation (“UNTSO”) who was on deployment to Opération des Nations Unites en Côte d’Ivoire (“ONUCI”). While on family visit in Canada in July 2004, he was diagnosed by his personal physician with adult onset (Type II) diabetes and hypertension.

2. Following the diagnosis and treatment in Canada, he was absent from duty from 6 July 2004 to 26 September 2005. Later the Medical Services Division of the United Nations Secretariat in New York (“MSD”) certified only one month of sick leave for the said period. Upon his return to duty, he was placed on Special Leave Without Pay (“SLWOP”) in retrospect, so as to recover the overpayment of monies made to him during the period he was away from work. The Applicant challenges the decision by MSD to refuse to certify more than a month of sick leave and the decision by the Human Resources Department of Peacekeeping Operations (“DPKO”) to recover the alleged overpayment of emoluments.

Facts

3. The Applicant first joined the United Nations in 1985. At the time of the contested decision, he was working as a Radio Operator in the Field Service category (“FS-4”) and deployed on temporary duty status to ONUCI in Côte d’Ivoire.

4. While in Côte d’Ivoire, the Applicant began experiencing health problems and shortly thereafter in July 2004 he went on family visit travel to his home country, Canada where he was diagnosed with adult onset (Type II) diabetes and hypertension.

5. The Applicant informed ONUCI of his illness and sent the mission his medical certificate dated 6 July 2004, in which his doctor had recommended sick leave through 12 September 2004. Subsequently, the Applicant submitted several other medical certificates to ONUCI dated 24 August 2004, 12 October 2004, 10 January 2005 and

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 travel in July 2004, he could not access his Lotus Notes account.

7. ONUCI requested the Applicant to contact MSD directly to find out the additional medical information required from him. The Applicant contacted MSD on 3 March 2005 which sent him a form to be filed by his physician and also resent the October email which the Applicant did not receive. The Applicant sent the form and the October email to his physician and on 18 March 2005 his physician responded to the questions in the October email and informed MSD that she would send the Applicant's complete medical file by postal services.

8. Although the Applicant's physician had cleared him and declared him fit for duty as from 29 March 2005, ONUCI advised the Applicant that he required medical clearance from MSD before reporting to work. On 29 March 2005 the Applicant received an email from MSD requesting that his physician include all laboratory results done during the nine month period he had spent in Canada on medical leave.

9. On 11 April 2005, the MSD wrote to the Applicant confirming the receipt of his medical documents from his physician and stating that based on the contents of the documents, they had approved one month of sick leave; 6 July 2004 to 6 August 2004. On the same date, the Applicant wrote to the MSD and the mission reminding them that he was awaiting medical clearance to travel.

10. UNTSO then contacted the Applicant advising that his sick leave entitlement with full pay was about to be exhausted and asked him if he would like to be put on full pay status by using half sick leave and half annual leave days. The Applicant advised UNTSO on 15 April 2005, that he chose to use his annual leave to supplement his half day sick leave. Thereafter there were numerous communications between the Applicant, UNTSO and ONUCI regarding his medical clearance and which office to report to once he was medically cleared by the MSD.

11. On 8 July 2005 UNTSO wrote to the Applicant informing him that his half sick leave and half home leave entitlement would soon be exhausted and suggesting that it approach MSD for a possible receipt of disability benefit by him. The Applicant responded stating that he was still awaiting medical clearance and sought further information regarding a disability benefit application made on his behalf. The said application, was rejected since the Applicant did not meet the requirements for the benefit.

12. UNTSO requested the Applicant to send it his medical release certificate from his doctor so that it could follow up with MSD on his behalf and the Applicant complied. The Applicant then called MSD and was asked to have a new medical examination and on 8 August 2005 he forwarded a new medical report while informing MSD that the blood test results would be sent later.

13. On 15 August 2005 the Applicant sent his latest test results to the MSD and UNTSO but due to technical reasons, MSD was unable to open the attachments and the Applicant had to resend the results on various other occasions.

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.

Joint Appeals Board Review

22. The Applicant on 12 May 2006 filed an appeal to the Joint Appeals Board ("JAB"). The Panel issued a report on 29 February 2008 in which it unanimously found that the Respondent's decision to recover overpayment emoluments from the Applicant was reasonable and that the Applicant's due process rights were not violated.

23. In a decision dated 3 June 2008, the Under-Secretary-General, Department of Management agreed with the findings of the JAB.

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

Sick leave

32. It was the Respondent's case that the Applicant had failed to comply with the relevant rules governing the grant of sick leave. The relevant and applicable law can be found in the former staff rules (ST/SGB/2002/1; Staff rules staff regulations of 1 January 2002) ("The staff rules") and the former Administrative Instruction (ST/AI/1999/12; Family leave, sick leave and maternity leave which entered into force on 1 December 1999) ("The Administrative Instruction"). The relevant provisions of the staff rule are hereunder reproduced;

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 met, the absence shall be treated as unauthorized in accordance with rule 105.1(b)(ii)

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 visit to a licensed medical practitioner, in which case certified sick leave may be approved by the executive officer or other appropriate official on production of a medical certificate indicating that the staff member attended the doctor or dentist.

7.5 If no certificate or report is submitted as required by sections 7.1 to 7.4 above or if the sick leave is not certified by the Medical Director or designated medical officer, absence shall be treated as follows for administrative purposes:

(a) For staff appointed under the 100 and 200 series of the Staff Rules, the absence shall be treated as unauthorized absence in accordance with staff rules 105.1(b) (ii) and 205.1 (d). However, if the staff member belatedly submits the required medical certificate or report and establishes to the Secretary-General's satisfaction that the late submission was attributable to circumstances beyond his or her control, the absence may be charged to sick leave upon certification by the Medical Director or designated medical officer;

(b) For staff appointed under the 300 series of the Staff Rules, the period of uncertified absence shall be treated as special leave without pay in accordance with staff rule 306.2 (iii).

34. The Applicant argued that the Personnel Assistants in the mission are the focal points for leave requests and related matters and that there is no duty on the part of a staff member to contact MSD headquarters in New York directly. Further, that having continuously informed ONUCI about his health situation and sent to the mission his medical certificates issued by his physician in Canada, he had fulfilled any requirements under section 7.3 of the Administrative Instruction.

35. The Respondent's Counsel on the other hand argued that the Applicant failed to comply with the relevant law regarding sick leave. He also argued that the MSD is the body charged with certifying sick leave and ST/SGB/2004/8 (Organization of the Office of Human Resources Management) in its section 7.5(f) provides *inter alia* that one of the core functions of the MSD is "to evaluate and certify sick leave for staff worldwide." Counsel further argued that the Applicant had submitted "handwritten notes on Doctor's

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

Administrative Instruction¹ provides that a sick staff member shall submit to the executive officer or other appropriate official, a detailed medical report from a licensed medical practitioner. Having given all the necessary information concerning his health condition to ONUCI, which was the mission to which he was then attached to; the Applicant had discharged the obligation placed on him by the provision of section 7.3 of the Administrative Instruction. In the unlikely event that the Applicant's communication to ONUCI was addressed to the wrong recipient, ONUCI had an obligation to advise him to contact the proper office or to redirect the Applicant's communication to the appropriate office.

40. In her testimony before the Tribunal, the Senior Medical Officer for the Peacekeeping section at the Medical Services Division testified that the practice at the time of the Applicant's illness, was that if a staff member in peacekeeping fell sick while at home and the duration was longer than 10 days, the staff member was required to submit a certificate to the MSD and a copy to the Chief Medical Officer of the particular peacekeeping mission.

41. This testimony is contrary to the wordings of the Administrative Instruction which provides that the staff member shall submit the medical certificates to the executive officer or other appropriate official. If the witness' testimony is that the executive officer or other appropriate official referred to in the Administrative Instruction should be construed to exclusively mean the MSD and Chief Medical Officer of the peacekeeping mission, then the Administrative Instruction should have so specified.

42. Under cross-examination, the Respondent's witness had testified that it was possible that each mission would handle certification of sick leave differently. She also stated in her testimony that despite the wording of the Administrative Instruction, most staff members submitted their medical certificates directly to MSD.

¹ ST/AI/1999/12; (Family leave, sick leave and maternity leave which entered into force on 1 December 1999)

43. If indeed some staff members as a matter of practice communicated directly with the MSD rather than through their mission, such practice does not detract from or modify the written provisions of section 7.3 of the Administrative Instruction which require the staff member to submit his medical report to his executive officer or other appropriate official. Whereas in this case, the staff member had submitted the relevant medical documentation to his mission's Personnel Unit, his obligations under section 7.3 of the Administrative Instruction were fully discharged. From that point on, it became the responsibility of ONUCI and MSD to take action as needed.

Was MSD's decision not to certify Applicant's sick leave for the period 7 August 2004 to 28 March 2005 warranted?

44. The Applicant sent his medical certificates to ONUCI using his private email address as from the time he was diagnosed in July 2004. Evidence before the Tribunal shows that by 27 October 2004 MSD had received all of the Applicant's sick leave documents for the period 6 July 2004 to January 2005. Following the receipt of the said documents, MSD then sent the October email to the Applicant's Lotus Notes account seeking further information and details regarding his ailment. In the said email, it was stated that MSD would wait for the further information they were seeking before dealing with the certification of previous sick leaves granted the Applicant by the physician in Canada.

45. It is in evidence that the Applicant did not receive the October email when it was sent to him by MSD since he did not have access to his Lotus Notes account, while outside his duty station. In March 2005 after he had been declared fit for duty by his personal physician and inquired from ONUCI Personnel Unit as to where he was to report to duty, he was then informed about the MSD October email and that of 28 February 2005. It was only then that the said emails were forwarded to the Applicant's private email address by ONUCI.

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 only one month of sick leave for him. The letter stated:

Dear Mr. Ouellet:

We are informing you that we have received the medical documents from your physician and, based on these documents, the Medical Services Division has approved one month of your sick leave (6 July to 6 August 2004). The written approval will be send to DPKO/NY.

48. Somehow, the letter of 11 April 2005 from MSD to the Applicant certifying one month of his sick leave did not deal with the matter of the Applicant's medical clearance in order to enable him resume duty. Between the time the Applicant was medically cleared by his personal physician and his medical clearance by the Organization to report to duty, he had sent numerous emails requesting the necessary medical clearance. The Applicant's medical clearance was finally done and conveyed to him in an email of 16 September 2005, nearly six months after his physician had declared him fit to return to work.

49. Thereafter, the Applicant returned to duty in UNTSO as instructed on 27 September 2005. An email dated 2 December 2005 from MSD New York to the UNTSO Medical Officer, suggests that the Medical Officer had written to MSD requesting a re-consideration of the decision not to certify additional sick leave for the Applicant. In refusing the request for a re-consideration, MSD sought to explain that the extended sick leave by the Applicant's physician in Canada had been given merely for the purpose of re-adjusting the Applicant's medication, which re-adjustment could have been done in his duty post in Jerusalem, where excellent medical facilities were available. In fact, it appeared that MSD had lost sight of the fact that at the time he was diagnosed

in Canada, the Applicant was serving a posting at ONUCI Côte d'Ivoire and was not based in Jerusalem.

50. The MSD's position that no additional sick leave could be approved for the Applicant since he chose to remain in Canada whereas Jerusalem had excellent medical facilities is not tenable. This is because the Applicant at the time of his diagnosis and treatment was effectively on posting to ONUCI in Côte d'Ivoire. Although the Respondent's witness had also testified that Côte d'Ivoire had the necessary medical facilities to deal with the Applicant's ailment, that position was not borne out by the facts.

51. In his Application, the Applicant had stated that his symptoms first arose while on mission in ONUCI. He continued that Côte d'Ivoire was a duty station regarded by the United Nations as lacking adequate medical facilities and therefore staff members with certain categories of ailments were subject to medical evacuation. According to him, the country was going through an extended period of political turmoil and violence that finally resulted in the complete evacuation of the UN mission there.

52. The Tribunal takes judicial notice of the fact that by 2002, Côte d'Ivoire was in the throes of a civil war and although in 2003 a fragile ceasefire was in force, the country's government was unstable. The political situation had worsened with outbreaks of violence by 2004 which factors contributed to the establishment of ONUCI by a United Nations Security Council Resolution S/RES/1528 (2004) adopted on 27 February 2004. ONUCI which began operations in April 2004 had as part of its mandate, the provision of humanitarian assistance by helping to establish the necessary security conditions. The reality is that Côte d'Ivoire in 2004 was battling with serious political, economic and security problems and was unlikely to be the place to seek adequate

medical treatment for an ailment such as diabetes, recognised by the Organization as a condition for medical evacuation.²

53. There is evidence before the Tribunal that by July 2004, when the Applicant was first diagnosed and commenced treatment in Canada while on family visit travel, he had sent to ONUCI information in relation to his illness and sick leave provided by his physician in Canada. In doing so, he had fulfilled his obligation under Section 7.3 of the Administrative Instruction. While ONUCI like other peace-keeping missions at the time, could grant him ten days of certified sick leave as per section 7.2 and later obtain additional sick leave if needed from MSD in New York, it remains curious why the mission's medical officer did not certify the initial ten days sick leave which the mission had authority to do for the Applicant. Instead it sent all the Applicant's medical papers for request of sick leave to MSD in New York.

54. MSD delayed in contacting the Applicant when they sought further details regarding his condition despite the medical certificates that were sent to ONUCI since July 2004 when the Applicant fell ill. Even when it sent the 27 October 2004 questionnaire email to the Applicant, it not only did so through his Lotus Notes account which he could not access but failed to copy ONUCI through which the medical correspondences had been received by it. The Respondent's witness had told the Tribunal in her testimony that MSD did not copy the mission because the email being on medical matters was confidential. This Tribunal finds that this explanation was at best an afterthought considering that what the MSD had sent the Applicant was merely a long list of questions as to his ailment to be answered by his physician. Further, ONUCI had been forwarding to MSD New York the medical certificates submitted on a regular basis by the Applicant. If the MSD had responded or made the queries at the earliest opportunity, the undue delay would have been avoided and certification or non-certification would have taken place earlier. In other words the delay on the part of the Organization

² See ST/AI/2000/10; (Administrative Instruction on Medical Evacuation) and ST/IC/2000/70; (Information Circular on Medical evacuation)

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 medically cleared by the Organization, as required, so as to resume his duties. Unfortunately for him, the said medical clearance was issued to him after nearly six months of sitting idly in Canada and sending numerous emails on the subject.

56. Upon return to work on 27 September 2005, the Applicant was retrospectively placed on SLWOP from 1 September 2004 to 26 September 2005. This led to the Applicant's salary being garnished by the Organization as from October 2005 so as to recover 'overpayments' for the period 1 September 2004 to 30 June 2005, a period of ten months.

57. On 19 October 2005, the CCPO/UNTSO sent the Applicant an inter-office memorandum regarding recovery of overpayment of USD58,015.78. The sum sought to be recovered represented the salary that the Applicant earned as from 1 September 2004 when he had had been deemed to have exhausted his sick leave and annual leave days. The Applicant was also informed that the Payroll section had been advised to recover the said sum from his emoluments.

58. Upon receiving the above communication, the Applicant became depressed and sought counseling services with UNTSO counselor. In an email to the counselor, the Applicant described his situation and the fact that he bought his own air ticket to return to work; that he had requested a salary advance upon his arrival but the request was denied; that he could not benefit from his claim for education grant that had been pending for two

years because the Organization was recovering the overpayment for the period he was away. Further, he stated that he could barely afford accommodation even at USD18 per day at a monastery in Jerusalem because he had no means and was being hosted by friends. Above all, the Applicant indicated that he could not take care of his family.

59. On 22 November 2005, the CAO/UNTSO wrote to the HRO/DPKO requesting reconsideration of the Applicant's prolonged leave of absence as sick leave. Around the same time, the Applicant through the CCPO/UNTSO wrote to the HRO/DPKO requesting for partial monthly recovery of the overpayment from November 2005. In his letter the Applicant stated:

(i) I have no money left on me to live in Jerusalem and my request for salary advance was denied.

(ii) My health requires medical consultations from time-to-time. Also, I am on medication which stock will run out in about a month's time. I will have no money to purchase the medication and this will be harmful to my medical condition with diabetes unless this partial monthly recovery is approved

(iii) To add to my stress, I have no money to send to my children in Canada. This means that on top of not supporting them, I will not be able to provide proof of support and will most likely be blamed for it later.

60. When in November 2005, the Applicant did not receive any income and was undergoing counseling for his depression; he contacted the office of the Ombudsman for assistance. In his email to the Ombudsman, the Applicant narrated his woes and lack of motivation to work:

Thanks to my chief who got the UNTSO doctor to give me a prescription and also paid for it I was able to get more medication for diabetes as I am running out and have no money to buy any.

61. In a fax message dated 31 January 2006, it was conveyed that MSD had decided to certify further 'sick leave' for the Applicant for the period 1 April to 26 September 2005. This represented the period following his treatment when the MSD had failed or

neglected to medically clear the Applicant to return to work. While this so-called certification was meant to alleviate the Applicant's situation by reducing the ten months for which his salaries would have remained unpaid, it was clearly un-called for to certify sick leave for a staff member with regard to a period in which he was not sick and had in fact informed the Organization that he was well and ready to resume duties. The Tribunal finds that this so-called further certification was improper and was only aimed at covering up the incompetence of MSD in this respect.

62. The Applicant upon resumption worked for the Organization for two months-October and November 2005 without any remuneration whatsoever. The former Administrative Instruction ST/AI/2000/11(Recovery of overpayments made to staff members) under section 1 (a) defines overpayments as:

... payments made by the Organization to a staff member in excess of his or her entitlements under the Staff regulations and rules and relevant administrative issuances. Overpayments may occur in conjunction with periodic payments (for example, salary, post adjustment, dependency allowance and rental subsidy), settlement of claims (for example, education grant, tax reimbursement and travel expenses) or prepayment of the mobility and hardship allowance;

63. Section 2.2 provides that overpayment creates on the part of the staff member an indebtedness which shall normally be recovered by means of deductions from salaries, wages and other emoluments. ST/AI/2009/1 (Recovery of Overpayments made to staff members) provides for deductions by way of installments rather than completely leaving a serving staff member without any pay at the end of each month.

64. The United Nations is a humanitarian Organization and in providing humanitarian assistance worldwide, it needs to be mindful of its own staff members, who work towards fulfilling the Organization's mandate for a better world. To expect a staff member, working in a mission area, far removed from his home country, to receive no pay at all at the end of a month for whatever reason, is unfair and unconscionable.

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 is only fair that the Applicant be allowed the maximum sick leave approval of three months that he could be allowed under his contract of employment. He is also entitled to three months on half salary.

Findings

68. The summary of the Tribunal's findings are as follows:

- a. That the Applicant had fulfilled the requirements for application of sick leave as stipulated in relevant legislation;

- 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 by improper motives, was marred by administrative delays;
- e. That the Respondent's decision to garnish the Applicant's entire earnings while working for the Organization was unconscionable.

Remedies

69. In light of the above findings, the Tribunal awards remedies as follows:
- a. The Applicant had prayed for compensation in the amount of three years' net base pay due to his mistreatment by the Organization, stress, uncertainty and humiliation caused him through working for an extended period in which he was totally denied any pay.
 - i. Compensation, of **three months net base salary** to be paid to the Applicant for, moral damages, stress and humiliation caused him upon resumption of work in Jerusalem when he was denied pay for an extended period.
 - b. The Applicant also prayed for payment of USD22,449.78 with interest, for lost salary, education grant, pension contributions and annual leave entitlements of over 14 months when he remained without remuneration.
 - ii. The Applicant was entitled to a maximum of three months sick leave on full salary but the Organization only certified one month. The Tribunal accordingly awards him an additional **two months full salary**. The Applicant was also entitled under his contract to a maximum

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.