



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PORTER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Monica Ona Bileris, Esq.

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Nicole Wynn, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant was, at the time of the filing of this Application, a Security Awareness Induction Training (SAIT) Liaison Officer at the P-3 level with the United Nations Mission for Iraq (UNAMI) based in Amman, Jordan. He filed the Application on 21 February 2012 challenging three issues that arose from the circumstances of a prolonged medical leave that spanned a period of more than two years. These issues are:

- a. A decision taken by UNAMI administration to keep him on medical leave for more than two years after his doctors had recommended that he was fit to return to work.
- b. During the period of his forced medical leave, the Administration ignored his pleas for information and misled him thereby causing him untold stress and hardship.
- c. Failure by the Administration to reimburse financial claims that accrued to him as a result of the forced medical leave.

2. The Respondent filed a Reply to the Application on 26 March 2012 contending that the Application was not receivable *rationae temporis* as the Applicant had not requested management evaluation of the contested decisions within the requisite time limit.

3. After considering the submissions on both sides with regard to the receivability of this Application, the Tribunal ruled on 4 December 2013 that it is indeed receivable¹.

4. Thereafter, the Respondent appealed unsuccessfully to the Appeals Tribunal².

¹ *Porter* UNDT/2013/156.

² *Porter* 2015-UNAT-507.

Facts

5. The Applicant joined the Organization and first worked as a Security Officer at the FS-5 level with the United Nations Mission in Kosovo from June 2001 until November 2003.

6. In January 2005 he rejoined the Organization as a Training Officer with UNAMI and later became a Security Officer at the P-3 level under a fixed term appointment, limited in service to UNAMI.

7. From 1 January 2009, the Applicant worked in the Security and Safety Unit (SSU) as a Security Officer. He rotated regularly between duty stations in Baghdad, Iraq and Amman, Jordan. In April 2009, the Applicant was transferred to Amman, Jordan to serve as a Security Awareness Induction Training (SAIT) Liaison Officer.

8. While working in Baghdad, Iraq, the Applicant took ill in February 2009 and was admitted at the infirmary suffering from back-problems, pain, anxiety, and sleep deprivation among other complications.

9. The UNAMI Chief Medical Officer (CMO/UNAMI), Dr. Bernhard Lennartz, diagnosed him as suffering from extreme stress. Dr. Lennartz recommended that the Applicant should take some time off work to see his doctor in Amman, Jordan.

10. Around the first week of March of 2009, the Applicant saw Dr. Adnan Takriti, a psychiatrist in Amman, Jordan. Dr. Takriti advised him to take some time off work to recuperate and cleared the Applicant to return to work after one month. Dr. Takriti's medical report was sent to Dr. Lennartz who then forwarded it on 11 May 2009 to the Medical Services Division (MSD) in New York.

11. Having been advised to take some time off work by Dr. Takriti, the Applicant then applied for two weeks certified sick leave on 11 May 2009 which his doctor agreed to. For the said certified sick leave, he was authorized by MSD and UNAMI to be away from the mission area and to travel back to his home country, Canada. He paid for his ticket and travelled to Canada on 21 May 2009.

12. The Applicant was advised by Dr. Lennartz, in an email dated 20 May 2009, to provide a medical report to Dr. Tiwathia Adarsh of MSD in New York and was also informed that he needed to obtain medical clearance from the MSD in order to return to work at the mission.

13. On 1 June 2009, the Applicant was directed in an automated message by Dr. Adarsh (who was out of office) to contact one Dr. Surachai also at MSD. On 3 June 2009, Dr. Surachai advised the Applicant to remain on leave until he received medical clearance and that he should obtain a psychiatrist's report for that purpose.

14. The doctors that the Applicant first saw in Canada had referred him to Dr. Maurice Boulay who was a psychologist. Therapy sessions were scheduled and conducted on a continuous basis starting 7 June 2009 and went on for a period of about four months.

15. Dr. Boulay sent his medical report to both Dr. Lennartz and Dr. Adarsh on 30 August 2009 advising that the Applicant was anxious to return to work as quickly as possible but recommended that he be posted to a "non-conflict" area.

16. On 15 September 2009, Dr. Lennartz sent an email to Dr. Boulay asking him to advise the Applicant to see a psychiatrist and to obtain a report because that was what was required to process his sick leave and return to work.

17. On 30 September 2009, Drs. Lennartz and Adarsh wrote to the Applicant stating that Dr. Boulay, being a psychologist, was not considered a medical practitioner or doctor with regard to United Nations standards and that MSD would require, other than Dr. Boulay's report, a medical report from a psychiatrist.

18. The Applicant then saw a psychiatrist, Dr. Adelman, on 19 October 2009 who advised him that he had a mild version of Post-Traumatic Stress Disorder (PTSD). He also cleared him to return to work in the non-conflict zones of Jordan and Kuwait but not Iraq.

19. Following the submission of the psychiatrist's report to the MSD on 20 November 2009, Dr. Adarsh wrote to the Chief of Mission Support (CMS) at UNAMI on 30 November 2009, informing him that the Applicant was medically cleared to return to the Mission but that he may only be assigned to Jordan and Kuwait but not Iraq.

20. The Applicant was not informed of this development by MSD or UNAMI at that time nor was he asked to return to work. On 13 January 2010, the CMO/UNAMI, Dr. Lennartz, wrote to the Applicant informing him that he had been medically cleared to return to the Mission as of 30 November 2009 and that he was surprised that the Applicant was not informed by headquarters about this.

21. Thereafter on 1 April 2010, Dr. Adarsh wrote to the UNAMI CMS, Mr. Sellers, informing him that all medical reports from the Applicant's attending doctors had been reviewed by MSD and that based on the medical information provided, the Applicant was "NOT medically fit to return to UNAMI". No reference was made to the earlier medical clearance sent to the Mission on 30 November 2009.

22. On 7 April 2010, Ms. Muhoho, Chief, Human Resources Section, UNAMI, informed the Applicant that as from 17 February 2010, he had exhausted his sick leave entitlements with full pay of 195 working days since he was declared medically unfit to return to duty. UNAMI, she said, would make a request to the United Nations Joint Staff Pension Fund (UNJSPF) to award him a disability benefit.

23. The Applicant wrote to Dr. Adarsh on 9 April 2010, expressing his disagreement over the fact that he was still not cleared to return to work against his doctors' recommendations. Dr. Adarsh responded by informing him to file a compensation claim with the Advisory Board on Compensation Claims (ABCC) and sending him the relevant forms for compensation claim.

24. Dr. Boulay then wrote again to Dr. Adarsh on 7 June 2010 stating that it was his professional opinion that the Applicant was cleared to return to work and that "even a short return to duty would have been therapeutic in itself".

25. UNAMI did not make the request for a disability benefit as earlier indicated. On 29 June 2010, the Applicant filed a compensation claim with the ABCC detailing his perspective of what had led to his ailment and contending that his ailments were service-incurred.

26. Mr. Masaki Sato, Chief, Asia and Middle East Section, Field Personnel Division, Department of Field Support (FPD/DFS) again told the Applicant by a letter dated 6 August 2010 that as of 14 February 2010 he had exhausted his sick leave at full pay and that starting 15 February 2010, he was on sick leave at half pay. He said the Applicant did not receive any salary in June 2010 because he had been paid his regular salary until May 2010 while it ought to have been at half pay rate from 15 February 2010.

27. In a letter dated 12 January 2011, the Medical Director of MSD in New York informed the Administrative Officer at UNAMI that the Applicant's sick leave certification had been approved through to 31 January 2011.

28. On 21 February 2011, the Applicant received a Letter of Appointment (LoA) signed by Mr. Sato on 21 January 2011. The LoA indicated the term of appointment as 1 October 2010 to 23 November 2010, a period of 1 month and 23 days. This meant that his appointment had ended on 23 November 2010.

29. On 23 February 2011, the Applicant wrote to Ms. Muhoho and Mr. Sato requesting an explanation regarding the LoA he had just received that indicated that his contract had ended on 23 November 2010. Among other things, he made inquiries as to why he was notified of his termination towards the end of February 2011 when the notice of termination showed that his contract had expired in November 2010. He also asked to know why the reason indicated for his termination was that he was "disabled" when his doctors had advised that he was healthy and fit for work.

30. On 29 March 2011 Mr. Sato told the Applicant by letter that they were unable to place him in any field mission but that in order to keep him on actual contractual status, he would be placed on Special Leave without Pay (SLWOP) as from 24 November 2010 until the ABCC issued a decision in his case.

31. On different dates between May and July 2011, the Applicant wrote to Mr. Sato essentially protesting that he was receiving conflicting information from the Administration regarding his contractual status with UNAMI. He arranged to meet with Mr. Sato on 16 July 2011 and travelled from Ontario to New York but the meeting did not hold..

32. On 21 July 2011, the Applicant was again medically cleared by the MSD to return to UNAMI in either Jordan or Kuwait. The Applicant was informed that he was being sent on mission to Kuwait.

33. He eventually returned to Kuwait on 1 August 2011. On arrival in Kuwait, he was told to return to and remain in Amman, Jordan where he continued to serve as the SAIT Liaison Officer at the P-3 level.

34. On 11 August 2011, the Applicant through his legal Counsel addressed a letter to the Secretary-General and the Special Representative of the Secretary-General for UNAMI (SRSG/UNAMI) titled “Request for Final Administrative decision”.

35. No response to the above mentioned letter was received by the Applicant who then filed a request for management evaluation on 28 November 2011. The Management Evaluation Unit (MEU) responded the next day, 29 November 2011 informing him that his claims were not receivable.

The Applicant’s case

36. The Applicant’s case is premised on the following grounds:

- a. that he was forced into sick leave without cause for over 26 months.
- b. That UNAMI’s decision in April 2011 not to return him to duty was improper and that the MSD abused its authority when it cleared him for return to duty and then changed that decision four months later in spite of the professional opinion of three doctors clearly stating otherwise.
- c. That the Administration failed to place him back into service for over two years and did not provide him with the reasons for its decisions.

d. That UNAMI's repeated failure to return him to service and to pay him the sums owed him showed bias and prejudice against him.

e. That in repeatedly giving him conflicting and inconsistent information as to his standing with the Organization, he was not treated with the requisite respect and dignity.

f. That his due process rights were violated when the Administration failed to give him reasons as to why he was considered unfit for service in 2009 and thereby forced him into involuntary and prolonged sick leave.

37. The Applicant seeks the following remedies:

a. Payment of all back pay, including benefits, MSA, hazard pay, pension and any other emoluments denied the Applicant when he was involuntarily forced into prolonged sick leave from May 2009 including 11% interest thereon.

b. Compensation in the sum of USD1,000,000 for moral damages resulting from the Respondent's errors that led to loss of his fiancée and inability to pay his mortgage.

c. Immediate removal from the Applicant's personnel files of any negative reports concerning his mental and physical health and access to view the said personnel files.

d. That the Applicant be placed in a post with UNAMI that is of interest to him and in line with his qualifications, skills and grade.

e. Reimbursement of the Applicant's legal fees.

The Respondent's case

38. The Respondent's case is summarized below.

a. The main administrative action complained of by the Applicant is the MSD's decision of 1 April 2010 that he was not medically fit to return to UNAMI. The Applicant has not identified any specific breaches of the

Staff Regulations and Rules or applicable administrative issuances in the making of that decision.

b. Having taken certified sick leave from 11 May 2009 outside his duty station, the Applicant was required to comply with the MSD's direction to submit a psychiatrist's report regarding his condition before he could be cleared to return to duty. After repeated reminders, the psychiatrist's report was only submitted to the MSD on 20 November 2009.

c. The MSD had conditionally cleared the Applicant on 30 November 2009 to return to UNAMI but only to Jordan and Kuwait which were non-conflict areas. At that time, UNAMI had a policy that required all of its staff to be medically cleared for the entire mission area which included Iraq. This meant that the Applicant was not fit to return to UNAMI as Iraq was a conflict area.

d. Consequently, on 1 April 2010 the MSD determined that the Applicant was not medically fit to return to UNAMI. The Administration followed the applicable procedures in determining the Applicant's medical fitness to return to the mission.

e. From 1 July 2011, UNAMI duty stations in Jordan and Kuwait were converted to family duty stations. Following these operational changes in the mission, the Applicant's fitness to return to a non-conflict duty station within UNAMI was reconsidered.

f. Since Jordan which was the duty station for the post encumbered by the Applicant remained unchanged after 1 July 2011, the Applicant was no longer required to be medically cleared for the entire mission area. He was then cleared on 21 July 2011 to return to Jordan.

g. The Applicant's claim that he was not provided any reasons by the MSD for determining that he was not medically fit to return to the mission

is incorrect because DFS informed him verbally on numerous occasions why he was not medically cleared.

h. UNAMI reimbursed the Applicant with travel expenses associated with his return to the mission.

i. There were no procedural irregularities or abuse of the due process rights of the Applicant at any time.

Issues

39. Having considered the case as set out by the parties, the Tribunal will hereunder formulate the issues for determination as follows:

a. Were there any improprieties, abuse or negligence on the part of the MSD when after issuing a medical clearance on 30 November 2009 for the Applicant to return to work at UNAMI, it turned around four months later to issue another decision withholding medical clearance without any changes in the circumstances of the said Applicant? Was the Applicant entitled to know why the MSD considered him unfit for service in UNAMI in April 2010? If he was so entitled, was that information made available to him?

b. Did UNAMI have any existing policy at any time requiring that all mission staff be cleared for the entire mission area in order to be assigned to duties in any of its three duty stations?

c. Did the Applicant's failure to comply timeously with the MSD's directive to have his psychiatric report submitted to it contribute to the undue prolongation of his sick leave?

d. To what extent did conflicting information on the part of the Administration affect the Applicant's rights?

Considerations

Were there any improprieties, abuse or negligence on the part of the MSD when after issuing a medical clearance on 30 November 2009 for the Applicant to return to work at UNAMI, it turned around four months later to issue another decision withholding medical clearance without any changes in the circumstances of the said Applicant?

Was the failure on the part of the MSD to give the Applicant reasons as to why he was considered unfit for service in April 2010 a breach of the Applicant's rights? Did UNAMI have any existing policy at any time requiring all mission staff to be cleared for the entire mission area in order to be assigned to any of its three duty stations?

40. In considering the above-raised questions, it is clear that there is unchallenged evidence before the Tribunal which shows that the MSD received the report of the Canadian psychiatrist Dr. Adelman with regards to the Applicant's psychiatric health on 20 November 2009. It is important here to retrace the events surrounding the granting and withholding of the medical clearance sought by Applicant to enable him return to his duties after treatment and the report of his doctors.

41. On 30 November 2009 and exactly ten days after receiving the required psychiatrist's report in respect of the Applicant, the MSD sent a medical clearance to the UNAMI Chief of Mission Support (CMS) stating that the Applicant was medically cleared to return to the mission but may only be assigned to Jordan and Kuwait.

42. While the 30 November 2009 communication which granted medical clearance in respect of the Applicant was copied to Dr. Lennartz of UNAMI and another officer at DPKO, the Applicant was ignorant of that state of affairs and was not informed by the MSD or UNAMI that he had been medically cleared. The mission did not ask him to return either.

43. In an email dated 13 January 2010, Dr. Lennartz informed the Applicant of the said medical clearance of 30 November 2009 and expressed surprise that he was not informed by MSD. He advised him to contact his supervisor and the CMS of UNAMI for more information.

44. On 1 April 2010, MSD addressed a letter to UNAMI's CMS and this time copied the Applicant. The letter advised that the Applicant was not medically fit to return to the mission. The said letter did not give any reasons for this later decision; neither did it refer to the medical clearance it had communicated to the mission in respect of the Applicant only four months prior.

45. On 21 July 2011, the MSD sent another letter to UNAMI stating that the Applicant was medically cleared to return to the mission but may be assigned to only Jordan or Kuwait. Following this medical clearance, the Applicant was then asked to return to his former duties.

46. In other words, from the time of the MSD's first medical clearance of the Applicant on 30 November 2009, through the withdrawal of that medical clearance and the reinstatement of the same medical clearance on 21 July 2011 which enabled the Applicant to return to UNAMI, a period of about 20 months had elapsed during which the Applicant was in some kind of limbo with regard to his job, career and finances. Why was this so?

47. The Respondent in his Reply gave some explanations for these conflicting decisions with respect to whether the Applicant had medical clearance, when he got the medical clearance and when he was asked to return to duty at UNAMI.

48. It is the Respondent's case that the medical clearance by the MSD made in November 2009 in respect of the Applicant was only a conditional clearance since it was recommended that the Applicant could be sent to only the non-conflict areas of Jordan and Kuwait but not to Iraq.

49. The Respondent claimed that there was a requirement at that time and up till the first half of 2011 that all UNAMI staff members were to be medically cleared

for the entire mission area which includes Iraq. Consequently, the MSD's medical assessment of the Applicant on 1 April 2010 was that he was not fit to return to UNAMI. The Applicant was then informed as such by the mission in its letter of 7 April 2010.

50. The Respondent also claimed that operational changes which took place in the mission saw two of the three UNAMI duty stations being converted to family duty stations. While the majority of the staff in the SSI unit was reassigned to Iraq, the duty station for the post encumbered by the Applicant which was Amman Jordan since 1 July 2009 remained unchanged.

51. He continued that because of the changes in the structure of UNAMI starting from 1 July 2011, it was no longer required that every staff member be medically cleared to work in Iraq. It was therefore only when these structural changes had taken place that the Applicant could be medically cleared to return to the mission and he was sent to his former duties at his former duty station in Amman Jordan.

52. The Tribunal has reviewed this explanation. It is significant that in spite of claiming that there was a requirement that all UNAMI staff members had to be cleared medically for the entire mission area including Iraq, the existence of such a policy was never proven as it was not placed before the Tribunal. Thus, apart from the Respondent's say-so, there is no documentation to prove this assertion.

53. Again, it is curious that the MSD did not know about this policy requirement when on 30 November 2009 it sent to UNAMI what the Respondent has described as a conditional clearance on behalf of the Applicant. It is even more perplexing that the UNAMI CMO Dr. Lennartz himself did not know about the said policy and its requirement that every UNAMI staff member be medically cleared for the entire mission area in order to work in any part of UNAMI.

54. Clearly if the Chief Medical Officer of UNAMI knew of such a policy, he would not have informed the Applicant as he did in his 13 January 2010 email that he had been medically cleared on 30 November 2009 to return to the mission and even express surprise that the said Applicant was not informed.

55. Further, the Tribunal was not told when and how the MSD came to know about the requirement that medical clearance for UNAMI staff members must cover the entire mission area including Iraq. If the MSD knew that such a policy or requirement existed at UNAMI, why did it send the medical clearance of 30 November 2009?

56. Did the MSD come into this knowledge before clearing the Applicant on 30 November 2009? Or did it come to know about the policy and requirement of the mission thereafter? Who informed the MSD of the said requirement and when was this information given? Was it in writing? Was the MSD shown the UNAMI policy?

57. The answers to these questions are important for determining why four months after medically clearing the Applicant the MSD would, when there was no change in circumstances, make a turn-around on the same issue without any explanations to the Applicant who had a right to know, why suddenly he was no longer medically cleared to return to his duties.

58. The explanation by the Respondent that because in July 2011 some UNAMI duty stations were converted to family duty stations and the Applicant's duties which were assigned to Amman Jordan in 2009 remained in the same location, it became possible to clear the Applicant to return to his duties rings hollow.

59. This is because at the time that the Applicant was advised to seek medical treatment outside the mission area for his ailment in May 2009, his duty station was already in Amman Jordan – a non-conflict zone. In other words, he was already serving outside Iraq which at the time was the only conflict zone in UNAMI. Since the Applicant's case was never that he wanted to be placed in a family duty station, this explanation about Amman being converted to a family duty station is wholly irrelevant to this case.

60. Also, the Tribunal's review here leaves it in no doubt that at the times material to this case, there was not in existence any policy at UNAMI requiring that all staff members of the mission be medically cleared for every part of the mission area including Iraq. It is a basic legal principle that he who asserts must

prove. The burden therefore to prove the existence of such a policy lies on the Respondent

61. The Respondent did not tender a copy of the policy he claimed to rely upon in order to refuse the Applicant medical clearance for 20 months nor has he offered any proof of his assertion regarding the existence of such a policy. In the circumstances therefore, the Tribunal makes no hesitation in finding that the said assertion was only an afterthought offered by the Respondent's agents to explain away inexcusable incompetence and negligence.

Did the Applicant's failure to comply timeously with the MSD's directive to have his psychiatric report submitted to it contribute to the undue prolongation of his sick leave?

62. Part of the Applicant's case is that whereas he left the mission area on sick leave in order to obtain proper medical treatment in his country Canada on 21 May 2009, he was only cleared to return to his former duty station in UNAMI in July 2011. He ended up spending a total of 26 months on sick leave during which at some point he began to earn half pay and later no pay at all, in accordance with staff rules, because of the undue prolongation of his sick leave by the Respondent.

63. Although this Tribunal had determined above that the Applicant's period in a sick leave 'limbo' was unduly prolonged by UNAMI administration and the MSD, it is obvious that some part of that delay was caused by the Applicant himself. On 20 May 2009 before the Applicant left the mission to proceed on sick leave, the UNAMI Chief Medical Officer Dr. Lennartz sent him an email in which he copied the Chief of MSD.

64. In that email titled 'sick leave outside the mission', the UNAMI doctor told the Applicant that he could go to his home country on sick leave. He also told him to send his medical report to the MSD Chief in New York and informed him that he would need medical clearance from her before he could return to the mission. On 1 June 2009, the Applicant wrote to Dr. Lennartz at UNAMI and copied Dr. Adarsh of MSD to say he was in Canada and also to give his contact details.

65. Another email sent to Dr. Lennartz by the Applicant two days later showed that MSD had advised the Applicant to see a psychiatrist and send his medical reports. He was told to remain on sick leave until he got medical clearance from the MSD.

66. On 30 August 2009, one Dr. Boulay, a psychologist, whom the Applicant was seeing in Canada sent a medical report to UNAMI and copied MSD on behalf of the Applicant. In the email accompanying the medical report, he stated that he was continuing to see the Applicant for therapy sessions. He stated also that the Applicant could return to work and recommended that he be sent to a non-conflict zone.

67. Again on 15 September 2009, Dr. Boulay wrote to Dr. Lennartz at UNAMI and copied MSD restating that the Applicant should not be sent to a non-conflict zone. On the same day, Dr. Lennartz replied Dr. Boulay asking him to send an updated medical report on behalf of the Applicant directly to the MSD which would have to give him medical clearance to return to the mission.

68. Dr. Lennartz sent another email on the same day asking Dr. Boulay to advise the Applicant to see a psychiatrist since a psychiatrist's report was needed to process his sick leave and return to work. He stated also that he had given the Applicant the same information a week before. He had also written to the Applicant on 30 September 2009 telling him to see a psychiatrist as he needed the medical report for his medical clearance by MSD and sick leave certification because a psychologist was not considered a medical doctor under the UN staff rules.

69. On 1 October 2009, the MSD wrote to both the Applicant and Dr. Lennartz stating that in addition to the psychologist Dr. Boulay's report, a psychiatric evaluation was required for the Applicant's medical clearance. It was advised that the Applicant see a psychiatrist.

70. The Applicant then saw a psychiatrist Dr. Adelman who made a psychiatric assessment of him. On 20 November 2009, Dr. Adelman sent his medical report on behalf of the Applicant also recommending that he was fit to return to work but

should be posted to a non-conflict zone. Thereafter, on 30 November 2009 the MSD sent their first medical clearance in respect of the Applicant to UNAMI.

71. The Tribunal has traced the foregoing events because it is important to also recognize that the Applicant's tardiness in seeing a psychiatrist and obtaining a psychiatric assessment while in Canada did in fact contribute to the delay in attending to his medical clearance by the MSD. Therefore the delay between May 2009 and 30 November 2009 cannot be laid at the doorstep of the MSD or the Organization.

Did conflicting information on the part of the Respondent regarding the status of the Applicant's employment and health affect the Applicant's rights?

72. Following the MSD's letter of 1 April 2010 stating that the Applicant was not medically fit to return to UNAMI, the Human Resources Section at the Mission wrote on 7 April 2010 to the Applicant informing him that it would forward a request to the United Nations Joint Staff Pensions Fund (UNJSPF) for the award of a disability benefit to him as provided for by Article 33 of the UNJSPF. He was also informed that he would receive communication with respect to his separation from service.

73. The Applicant then wrote to the MSD Director on 9 April 2010 complaining about the withholding of his medical clearance by the MSD in spite of his psychiatrist's assessment to the contrary. In a reply on the same, the MSD Director told him to file a compensation claim with the Advisory Board on Compensation Claims (ABCC).

74. On 29 June 2010, the Applicant filed a compensation claim as advised by MSD. He did not receive any response or acknowledgment and no action was taken on his claim. Meanwhile, no request for the award of a disability benefit for the Applicant was ever filed by UNAMI's Human Resources Section.

75. Then on 6 August 2010, the Applicant was informed by FPD/DFS that he had received full salary for 195 working days, that is, for the period of 11 May 2009 till 14 February 2010. He was also informed that from 15 February 2010, he was

placed on sick leave with half pay combined with half days of annual leave to keep him in full pay status until 27 April 2010. From 28 April 2010, he was placed on sick leave with half pay which would expire on 31 July 2010.

76. Following several letters from the Applicant still seeking clarification regarding his employment status, Mr. Sato of FPD/DFS informed him on 29 March 2011 that they were unable to find any vacancies in which to place him in other field missions and that as a result, he was being placed on Special Leave without Pay (SLWOP) until the ABCC finalized the review of his case and issued a decision.

77. The Applicant wrote to Mr. Sato and Dr. Adarsh of the MSD on 2 June 2011. He queried in that email why he was placed on SLWOP and refused medical clearance to return to his duties even when his three doctors had cleared him to return to work for several months. He pointed out in that communication that even though the doctors had recommended that he be not posted to Iraq, he had not foreseen any problems with his posting since his duty post had been relocated to Amman even before he went on sick leave in May 2009.

78. On 15 June 2011, Mr. Sato emailed the Applicant asking him to call him. On 18 June 2011 after a telephone conversation, the Applicant wrote to Mr. Sato and expressed surprise that after many months of silence, he had now told him that things looked promising and that he was searching for a job for him. He reminded him that he had told him in March 2011 that he had been released from the United Nations and later that he was placed on SLWOP. The Applicant asked him why he was not sent back to his duties in UNAMI since he was no longer on sick leave.

79. The Applicant received a memorandum from the Officer-in-Charge of Mission Support in UNAMI on 5 July 2011 informing all internationally recruited staff in the Mission that there had been a change in status for the two duty stations of Amman and Kuwait. The said two duty stations had been transformed from non-family to family duty stations.

80. On 15 July 2011, Mr. Sato told the Applicant by phone that he must be prepared to be posted quickly. On 19 July 2011, he also told the Applicant by email that he was making progress with trying to return him to work at UNAMI. The Applicant wrote back the same day complaining that his taking of sick leave as recommended by the Organization was responsible for his predicament at that time as he had been out of work for 26 months and had lost his house and family.

81. On 25 July 2011, the Applicant was advised by Mr. Sato that he was to return to duty in Kuwait. The Applicant travelled to Kuwait on 1 August 2011 and was told to return to his former duty station in Amman, Jordan.

82. From the foregoing account, it cannot be disputed that during the prolonged sick leave which the Applicant endured, he had continued to receive conflicting information from the Administration regarding the status of his employment and health which contributed to heighten his anxiety at that time. This state of affairs is aptly captured in some of the Applicant's letters to the Respondent's agents. An excerpt from one of the letters written by the Applicant to Mr. Sato and a number of Administration officials on 19 July 2011 is hereunder reproduced as follows:

It has now been 26 months of stress. I have lost my house! My life is in ruins! I have lost my immediate family! Who can live with this? You have tarnished my name; you have tried to bury me under the guise of taking care of me when in fact you want me to disappear...you do not just drop a person one week saying they are covered until 2011 and then in the next instance fire them in November 2010 only to be reinstated in March 2011 but placed on unrequested SLWOP.

I have come to realize that the upper echelon of the UN is without compassion and substance. Where is your professionalism? Where is the integrity? Where is the respect for diversity?

83. While the Applicant had a right to information regarding the reasons for not granting him medical clearance to return to work in spite of being cleared by his own doctors, nothing shows that any explanations were offered him. The letter of 1 April 2010 from the MSD conveying his non-clearance to return to his duties did not give any reasons for the decision. The claim by the Respondent that the DFS informed the Applicant verbally on several occasions as to why he was not medically cleared has no merit.

84. This is because while the Applicant had written many times asking why his medical clearance was refused, there is nothing in writing from the Respondent's agents giving him any answers. It is cannot be believed that DFS chose to give the Applicant verbal answers on several occasions and on dates that are not specified on that particular issue.

85. In his pleadings, the Applicant claims that due to the repeated failure of UNAMI to give him proper answers over a period of two years with regard to his standing within the Organization, he was not treated with the respect and dignity due to him. The Tribunal indeed finds that due to sheer incompetence and inefficiency, the Respondent's agents did not exhibit professionalism when they failed in their duty to give proper, timely and accurate information regarding his employment and health status to the Applicant. They failed also to exhibit the core competency of communication which is required of every staff member.

86. In *Meron*³ the United Nations Appeals Tribunal held that where the Secretary-General has a pattern of failing to resolve issues within a reasonable timeframe or effectively, payment of compensation for the excessive and inordinate delays and emotional harm is justified.

The contested actions form part of the same continuum

87. It was argued by the Respondent that the Applicant has no *locus standi* before the Tribunal because the main decision contested by the Applicant is the refusal by the MSD on 1 April 2010 to grant him medical clearance. The Applicant contended that he contests a series of decisions over the course of over two years.

88. Most of the 20 month period in which the Applicant was estranged from the Organization was gravely marred by contradicting decisions, counter-decisions, non-decisions, mis-communications and non-communications all perpetuating the Applicant's confusion as regards his standing in the Organization.

89. The said period which was characterized by uncertainty and unanswered questions brought about by the actions and inactions of the Respondent's agents

³ 2012-UNAT-198, paras. 27-29.

formed a continuum during which the Applicant was kept in limbo; unaware, unsure and in a lingering state of confusion regarding his employment.

90. It was not until the Applicant was brought back to service in August 2011 that he could determine the finality of the different administrative decisions that were taken with regard to his unduly prolonged sick leave. The incompetence of the impugned set of actions did not become immediately evident until the Applicant returned to duty.

91. On 11 August 2011, he wrote a detailed letter to the Secretary-General and the SRSG/UNAMI setting out the facts of his case, his complaints and the remedies he sought. The said letter to the Secretary-General and the SRSG titled "Request for a Final Administrative Action" was not answered. The Applicant then sent a similar request to the MEU on 28 November 2011.

92. The Tribunal held, in Judgment No. UNDT/2013/156, that the instant Application did not arise from a single, detachable, stand-alone decision by the Respondent's agents but rather from a series of actions and inactions spanning a period of nearly two years. The only issue that this entire Application addresses is the incompetence and lack of professionalism exhibited in the Organization's dealings with the Applicant giving rise to an unduly prolonged sick leave with its attendant consequences which he was made to endure.

The Applicant's motion to amend his Application to include additional damages.

93. On 11 April 2014, the Applicant filed a motion seeking to move the Tribunal to grant him leave to amend the instant Application by adding new claims based on new developments and seeking additional damages on the basis of the said new claims and new developments.

94. In that motion, the Applicant alleged that after returning to his duties in August 2011, he suffered and continued to suffer harassment and retaliation at the hands of the UNAMI Administration would not give him answers to his questions as to how to achieve full mobility within the Mission. Even though the Applicant

through his own efforts was able to secure medical clearance for the entire Mission area including Iraq, he has been informed that upper management wanted to fire him.

95. On 30 April 2014, the Respondent filed his opposition to the motion. He argued that since the subject matter of the amendment sought to be made constituted new claims, they could not be allowed to form part of the on-going case since they had not been the subject of management evaluation or the administrative procedure in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

96. The Tribunal having considered the submissions on both sides, hereby rules that the motion is refused. The new claims sought to be allowed as part of this case which was instituted in 2012 are separate and distinct issues which cannot form part of the instant case. Moreover, the new claims and developments ought to be first referred to management evaluation.

Summary of findings and conclusions.

97. From the time of the MSD's first medical clearance of the Applicant on 30 November 2009, through the withdrawal of that medical clearance and the reinstatement of the same medical clearance on 21 July 2011 which enabled the Applicant to return to UNAMI, a period of about 20 months had elapsed during which the Applicant was kept in some kind of limbo with regard to his job, career and finances.

98. In spite of claiming that there was a requirement that all UNAMI staff members had to be cleared medically for the entire mission area including Iraq, the existence of such a policy was never proven as it was not placed before the Tribunal. Thus, apart from the Respondent's say-so, there is no documentation to prove this assertion.

99. The Respondent did not tender a copy of the policy he claimed to rely upon in order to refuse the Applicant medical clearance for 20 months nor has he offered any proof of his assertion regarding the existence of such a policy.

100. Although the Applicant's period in a sick leave 'limbo' was unduly prolonged by UNAMI administration and the MSD, it is obvious that some part of that delay was caused by the Applicant himself.

101. The Applicant's tardiness in seeing a psychiatrist and obtaining a psychiatric assessment while in Canada did in fact contribute to the delay in attending to his medical clearance by the MSD. Therefore the delay between May 2009 and 30 November 2009 cannot be laid at the doorstep of the MSD or the Organization.

102. During the prolonged sick leave which the Applicant endured, he had continued to receive conflicting information from the Administration regarding the status of his employment and health which contributed to heighten his anxiety at that time.

103. Due to sheer incompetence and inefficiency, the Respondent's agents did not exhibit professionalism when they failed in their duty to give proper, timely and accurate information regarding his employment and health status to the Applicant. They failed also to exhibit the core competency of communication which is required of every staff member.

Conclusion

104. The facts of this case show that the Applicant should have returned to work upon receiving medical clearance on 30 November 2009. The Tribunal therefore orders the Respondent to pay the Applicant his full salary from 30 November 2009 to 1 August 2011 (less any payments that had been made to him such as full salary and half salary during the said period.) In calculating payments due to the Applicant, the hazard pay component of his salary is not to be included since he was in fact outside of the mission area during the period.

105. The Tribunal is also convinced by the submissions made by the Applicant⁴ that the prolonged sick leave caused him anxiety and had a devastating effect on his personal and financial affairs including his failure to meet his mortgage

⁴ See para. 82 above.

obligations. The Applicant is accordingly entitled to moral damages which the Tribunal awards at USD 5,000.

106. The Respondent is ordered to grant the Applicant access to his personnel files in accordance with the relevant administrative practice.

107. All other pleas are refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 1st day of July 2016

Entered in the Register on this 1st day of July 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi