



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

AWWAD

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**

Brandon Gardner, OSLA

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

## **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.

## **PROCEDURAL HISTORY**

2. The Applicant filed this application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 2 June 2015 to contest the decisions to terminate his appointment with UNMISS on (1) the alleged ground that he had abandoned his post and (2) to deny him a special dependency allowance for his disabled son.

3. The application was served on the Respondent on 3 June 2015.

4. On 30 June 2015, 31 August 2015, 29 October 2015 and 26 November 2015, the parties filed joint motions for suspension of proceedings because they were engaged in discussions with a view to resolving the dispute informally. The Tribunal granted the joint motions and extended the deadline for the Respondent to file his reply to 21 December 2015.<sup>1</sup>

5. The attempts at informal settlement were unsuccessful; and the Respondent filed his reply on 21 December 2015.

6. The Tribunal held a case management discussion with the parties on 30 August 2016 and an oral hearing on 7 February 2017. The Applicant was the sole witness in this case.

## **BACKGROUND FACTS - the Applicant's claim against his separation from service**

7. The Applicant initially entered service with the United Nations Mission in Sudan (UNMIS) on 28 May 2006. Following the end of the mandate of UNMIS

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<sup>1</sup> See Order Nos. 236 (NBI/2015), 259 (NBI/2015), 357 (NBI/2015) and 381 (NBI/2015).

on 9 July 2011, he was transferred to UNMISS on a fixed-term appointment with an expiry date of 30 June 2012.

8. On 1 September 2011, while the Applicant was on rest and recuperation (R&R) and annual leave, he visited the clinic of one Dr. Thiab Elyan in Germany for treatment of multiple health concerns. Dr. Elyan admitted him to the Evangelisches Krakenhaus Hospital on 5 September 2011 and subsequently referred him to a pneumonologist, Dr. Ziad Abdoh, for treatment of pneumonia.<sup>2</sup>

9. The Applicant's R&R and annual leave ended on 5 September 2011 while he was hospitalized.<sup>3</sup>

10. On 9 September 2011, a physician at the Evangelisches Krakenhaus Hospital, Dr. J. E. Scholle, recommended that the Applicant be placed on sick leave from 5 to 18 September 2011.<sup>4</sup>

11. On 12 September 2011, Dr. Abdoh examined the Applicant and diagnosed him with an airflow obstruction, dyspnea, wheezing and coughing. The doctor recommended that he not be exposed to environmental triggers (dust, fumes and sand) and that he avoid staying in hot, humid environments to improve the effect of the prescribed medication. Dr. Abdoh additionally gave the Applicant four months' sick leave.<sup>5</sup> This new sick leave would serve to keep him on sick leave until 1 January 2012.

12. The record contains a sick leave report for 5 to 18 September 2011 that is signed and dated 13 September 2011 by the Applicant and his supervisor, Mr. Vasily Vasilovsky.<sup>6</sup> The Applicant forwarded the sick leave report and the medical reports from Doctors Elyan, Abdoh and Scholle to the UNMISS Chief Medical Officer, Dr. Moustafa Aly, on 14 September 2011 for action.<sup>7</sup>

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<sup>2</sup> Annex 2, page 7, Application.

<sup>3</sup> Annex 8, page 29, Application.

<sup>4</sup> Annex R1, Reply.

<sup>5</sup> Annex 2, page 8, Application.

<sup>6</sup> Annex R1, Reply.

<sup>7</sup> Annex R2, Reply.

13. On 16 September 2011, Dr. Elyan placed the Applicant on bedrest and sick leave from 19 September to 7 October 2011 because he was not responding to the prescribed course of treatment.<sup>8</sup>

14. On 19 October 2011, the Applicant informed the UNMISS Human Resources Services (UNMISS/HRS) that he was still undergoing treatment for his ailment and sought advice on his “rights” during sickness. On the same day, UNMISS/HRS informed him that he was entitled to 195 days of sick leave with full pay and then 195 days of sick leave with half pay for any period of 48 months.<sup>9</sup>

15. The Applicant emailed UNMISS/HRS on 23 October 2011 to inquire whether he needed to submit any documents to use his sick leave. In a response dated 24 October 2011, UNMISS/HRS told him to forward his detailed sick leave reports to Mr. Jackson Louis Lado and Dr. Roberts Onebunne at UNMISS. The Applicant did so on 26 October 2011.<sup>10</sup>

16. Dr. Onebunne forwarded the Applicant’s medical reports from Doctors Elyan, Abdoh and Scholle to the Medical Services Division (MSD) at United Nations Headquarters in New York on 27 October 2011. He pointed out in his email that the Applicant’s treating doctor had recommended four months of sick leave for him.<sup>11</sup>

17. The Applicant gave un rebutted testimony at the hearing that at the beginning of December 2011, he wrote to the MSD requesting an update on his case. MSD responded on 8 December 2011 and asked him to send them laboratory results and investigations that had been done, including any pulmonary function tests and imaging reports. He complied with the MSD’s request immediately.

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<sup>8</sup> Annex 2, page 7, Application.

<sup>9</sup> Annex 3, page 12, Application.

<sup>10</sup> Ibid, pages 10-11, Application.

<sup>11</sup> Annex 3, Reply.

18. On 4 January 2012, the Applicant emailed the MSD again to follow up on the status of his case.<sup>12</sup> The Applicant's unrebutted testimony was that he did not receive a response from the MSD.

19. As the Applicant's health continued to deteriorate, he consulted another physician, Dr. Darwish, in his home country, Jordan, on 15 January 2012. Dr. Darwish diagnosed the Applicant with "acute exacerbation of [bronchial asthma]" and "bronchopneumonia" and recommended sick leave for six weeks.<sup>13</sup> The Applicant's unrebutted 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.<sup>14</sup> 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.<sup>15</sup>

21. The Applicant testified, and it was not rebutted, that the end of January 2012 was the last time he received his salary<sup>16</sup> and consequently, he lost his health insurance coverage. He had not been given any notice of these administrative actions.

22. On 13 February 2012, UNMISS/HRS informed the UNMISS Chief Security Adviser (CSA), Mr. Parakrama Siriwardana, by memorandum dated 10 February 2012 from the Chief Civilian Personnel Officer (CCPO), of the Applicant's "unauthorized absence" from UNMISS since his leave ended on 31 October 2011. The CCPO informed the CSA that a staff member could be charged with abandonment of post under these circumstances and separated from service. The CSA was directed to contact the Applicant and advise HRS on his status.<sup>17</sup>

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<sup>12</sup> Annex 5, pages 18-19, Application.

<sup>13</sup> Annex 6, page 21, Application.

<sup>14</sup> Annex 7, page 23; Annex 10, page 39, Application.

<sup>15</sup> Annex 11, page 45, Application.

<sup>16</sup> Annex 16, page 63, Application.

<sup>17</sup> Annex 8, page 25, Application.

23. The UNMISS Deputy Security Adviser (DSA), Mr. Jamshed Kazi, forwarded the CCPO's memorandum to the Applicant 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:<sup>18</sup>

You have to submit an official medical certificate to Medical Unit, copied to HR within 10 days of your absence, which you have not done. It is not "follow up" or "emails", but it means an official 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.<sup>19</sup> Dr. Onebunne responded on 18 February 2012 stating that he had written to the MSD on 27 October 2011 requesting sick leave certification for four months. He copied the MSD on this email to serve as a reminder for his request to be processed.<sup>20</sup>

25. The Applicant's testimony was that Dr. Onebunne's email allayed his fears and made him believe that since the matter was pending with the MSD, there was nothing further for him to do. However, on 22 February 2012, he followed up again with Dr. Onebunne.<sup>21</sup>

26. On 26 February 2012, the Applicant visited Dr. Darwish again complaining of chest pain and dyspnea. After several tests, Dr. Darwish concluded that the Applicant would be at risk of contracting cardiac arrhythmia should he be exposed to trigger factors (dust, fumes, sand, etc.) or work in hot and humid environment. He placed him on sick leave for a period of three months, until 27 May 2012.<sup>22</sup>

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<sup>18</sup> Annex R4, Reply.

<sup>19</sup> Annex R5, Reply.

<sup>20</sup> Annex R3, Reply.

<sup>21</sup> Annex R2, Reply.

<sup>22</sup> Annex 10, page 39, Application.

27. The Applicant emailed Dr. Darwish's medical report to Doctors Onebunne and Aly on 27 and 29 February 2012, respectively.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup> 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

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<sup>23</sup> Annexes R6 and R7, Reply.

<sup>24</sup> Annexes R8 and R9, Reply.

<sup>25</sup> Annex 11, pages 44-45, Application.

<sup>26</sup> Annexes 10 and 11, Application.

<sup>27</sup> Annex 12, page 47, Application.

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

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

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.<sup>29</sup>

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's certified sick leave had been approved 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.<sup>30</sup>

36. FPD/DFS referred UNMISS' request for the Applicant's separation effective 30 June 2012 which was the expiry date of his appointment to the Office of Human Resources Management (OHRM) on 22 October 2012.<sup>31</sup>

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<sup>28</sup> Annex R10, Reply and annex 13, page 50, Application.

<sup>29</sup> Annex 14, page 53, Application.

<sup>30</sup> Annex R14, Reply.

<sup>31</sup> Annex R13, Reply.



37. On 4 March 2013, the Applicant was informed by the UNMISS CCPO that the Administration would not certify any more of his sick leaves and that his case had been submitted to OHRM for abandonment of post.

38. The Assistant Secretary-General, OHRM, approved the Mission's request on 18 March 2013 and the Applicant was separated from service with effect from 30 June 2012.<sup>32</sup>

**BACKGROUND FACTS – the Applicant's claim against the denial of special dependency allowance for his disabled son**

39. The Applicant's son (AMA) was born on 15 August 2010. The Applicant had been collecting dependency allowance at the normal rate since AMA was born.

40. On 4 November 2012, the Ministry of Social Development of Jordan issued a case report certifying that AMA suffers from Autism Spectrum Disorder (ASD).<sup>33</sup>

41. The Applicant forwarded the Ministry's case report to UNMISS/HRS on 24 February 2013 for action. UNMISS/HRS responded on 25 February 2013 that he needed to channel his request through the Regional Service Center in Entebbe (RSCE).

42. On 28 February 2013, counsel for the Applicant wrote to RSCE and explained that the Applicant's son had been diagnosed with ASD. He submitted a copy of the case report and requested payment of a special dependency allowance.<sup>34</sup> The UNMISS CCPO responded to counsel as follows on 4 March 2013:

Our records indicate that [the Applicant] receives regular dependency allowance for his spouse and two dependent children. There is no record that he submitted documents for consideration for special dependency allowance. However, if he has record of

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<sup>32</sup> Annex R12, Reply.

<sup>33</sup> Annex 19, page 81, Application.

<sup>34</sup> Annex 16, page 66, Application.

documents previously submitted, he should send them to us for processing.<sup>35</sup>

If we are to request for retroactive special dependency allowance, we need proof that the allowance was not granted due to our error and not because the staff member failed to submit his documents.<sup>36</sup>

## SUBMISSIONS

### *Applicant*

43. The Applicant's case is that:

a. The Administration erred in not certifying his sick leave requests. Relying on *Ouellet* UNDT/2012/076, the Applicant submits that he fulfilled his obligations under section 2.2 of ST/AI/2005/3 (Sick leave) when he provided all the requested information to UNMISS/HRS and the UNMISS CMO in a timely manner.

b. Any delay in the approval of his sick leave is attributable to miscommunication between UNMISS and the MSD.

c. Section 2.3 of ST/AI/2005/3 requires staff members to provide Administration with a detailed medical report from a licensed medical practitioner, which he did several times. If the Administration was dissatisfied with the reports he provided, it should have immediately advised him that the sick leaves were refused. He never received a formal refusal of any of his sick leave certification requests.

d. The Administration failed to follow its own rules regarding the procedure to be followed in cases of abandonment of post. The Administration acted contrary to sections 9 to 13 of ST/AI/400 (Abandonment of post).

e. The Administration unlawfully denied his request for special dependency allowance for his autistic son. It appears that the

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<sup>35</sup> Ibid, page 67.

<sup>36</sup> Ibid, page 64.

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 months' 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 of six months' net base salary in lieu of moral damages for his suffering and stress over a period of five years.

***Respondent***

45. The Respondent's case is that the application should be dismissed because:
- a. The Applicant's prolonged absence was not authorized 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 reasonably concluded from the Applicant's continued 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 son.

## **CONSIDERATIONS**

*Did the Applicant fulfil the obligations on his part to provide all necessary information needed by the Organization to certify the sick leave certificates from his doctors and to authorize his absences based on his ill health?*

46. The general rule regarding leave is that a staff member may take leave only when so authorized. When it is determined that a staff member's absence was caused by reasons beyond his control, the said absence may be charged to his accrued annual leave.

47. In this regard, staff rule 5.1(e)(ii) provides thus:

Leave may be taken only when authorized. If a staff member is absent from work without authorization, payment of salary and allowances shall cease for the period of unauthorized absence. However, if, in the opinion of the Secretary-General, the absence was caused by reasons beyond the staff member's control and the staff member has accrued annual leave, the absence will be charged to that leave.

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 behalf of the Secretary-General and under conditions established by him.

49. With regard to sick leave, staff rule 6.2<sup>37</sup> provides in relevant part:

(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 leaves must be approved on behalf of, and under conditions established by, the Secretary-General.

(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 staff rule 5.1(e) (ii).

(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.

(j) Where further sick leave is refused or the unused portion of sick leave is withdrawn because the Secretary-General is satisfied that the staff member is able to return to duty and the staff member disputes the decision, the matter shall be referred, at the staff member's request, to an independent practitioner acceptable to both the United Nations Medical Director and the staff member or to a medical board.

50. Also relevant for our purposes here is section 1 of ST/AI/2005/3/Amend.1 (Sick leave) which amends sections 2.1, 2.2 and 2.3 of ST/AI/2005/3. In amending the sections cited above, it allows a sick or injured staff member to submit a medical certificate within 20 working days of his initial absence from duty rather than the former requirement to do so within 10 days.

2.1 Unless uncertified sick leave is allowed under section 1.2 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 2.2 and 2.3 below, no later than the twentieth working day following the initial absence from duty.

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<sup>37</sup> ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations).

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 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 medical practitioner.

51. It is imperative that the facts of this case be reviewed to properly determine the issues that arise. The first issue is whether the Applicant diligently provided relevant and sufficient information and documentation to the Respondent for consideration towards authorizing his absences from duty or for taking other required administrative action.

52. During the period of the Applicant's R&R and annual leave, and precisely on 1 September 2011, he had consulted one Dr. Elyan at a hospital in Germany over his ill health and was admitted to the hospital on the same day his leave was to end – 5 September 2011. He was also referred to a pneumonologist Dr. Abdoh. Before he saw Dr. Abdoh, a physician at the same hospital Dr. Scholle placed him on sick leave until 18 September.

53. The Respondent's Annex R1 is a signed acknowledgment of the Applicant's sick leave report from Dr. Scholle. The document which was dated 13 September 2011 was acknowledged by one Vasily Vasilovsky who was the Applicant's supervisor. This establishes that the Applicant had fulfilled his obligation to provide a medical report of his ailment within 20 working days as required under ST/AI/2005/3/Amend. 1.

54. When the Applicant saw Dr. Abdoh on 12 September 2011, the doctor made additional diagnoses and placed him on further sick leave of four months which was to last until 11 January 2012. On 14 September 2011, the Applicant

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 to certify the Applicant's 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 Dr. Onebunne, a medical officer at UNMISS. He complied with this advice on 26 October 2011.

57. On 27 October 2011, Dr. Onebunne forwarded the medical reports from Drs. Elyan, Abdoh and Scholle to the MSD in New York and pointed out that the Applicant had been placed on sick leave by his doctors for four months seeking the MSD's certification. Evidently, there was no response from the MSD.

58. Early in December 2011, the Applicant emailed the MSD to find out the status of the certification of his sick leave requests. The MSD responded on 8 December and asked him to send all his laboratory results and the investigations into his health including any pulmonary function tests and imaging reports. The Applicant sent all the documents immediately as requested. He received no response from the MSD.

59. Again, on 4 January 2012, the Applicant emailed the MSD to inquire as to the status of his case but received no response to that email.

60. Back in Jordan, the Applicant saw another physician Dr. Darwish on 15 January 2012 who made further diagnosis, gave him another six weeks of sick leave and referred him to a pulmonologist Dr. Anani whom he saw the next day,

16 January, and was placed on sick leave for two months, that is, until 16 March 2012.

61. The Respondent ceased all payment of salaries to the Applicant after January 2012, consequently terminating his medical insurance. Meanwhile, there had been no response from the MSD as to the certification of his sick leave.

62. On 13 February 2012, the CCPO sent a memorandum stating that the Applicant's absence from duty was unauthorized and that his leave ended on 31 October 2011. The UNMISS DSA then sought response from the Applicant and told him that he had not submitted an official medical certificate to the medical unit within 10 days of the start of his ailment and that if he did not do so at once, he would be considered to have abandoned his post.

63. At this stage, it is obvious that the DSA did not even know that under the amended staff rules, 20 working days were allowed for a staff member to submit his sick leave in cases of sickness or injury. Neither did he know that the Applicant who worked in his unit had sent the medical reports from his doctors to both his supervisor Mr. Vasilovsky and to the Chief Medical Officer at UNMISS since September 2011 and had done so within the 20 working days that a staff member was allowed.

64. When, on 17 February 2012, the Applicant wrote to Dr. Onebunne to complain about the non-certification of his sick leave request by the MSD, Dr. Onebunne responded the same day assuring the Applicant that he had requested the certification of his sick leave since 27 October 2011. He copied the same email to the MSD as a reminder, but again no response was received from the MSD.

65. It was the Applicant's testimony that although his fears of his sick leave not being certified were allayed by Dr. Onebunne's email, he again wrote to him on 22 February 2012 and outlined his visits to doctors over his ailment, the several medical reports he was given and the recommendations of doctors that he stay away from tropical areas because the dust and humidity made his health condition worse.



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 certification of his sick leave certificates.

68. Finally, on 11 April 2012, the MSD wrote to inform the Applicant that his sick leave certificates had all been reviewed but that sick leave was approved for him for the period 12 September until 17 October 2011 only. It was also stated that in accordance with the Medical Disability Advisory, and the medical reports he submitted, no further medical leave could be approved for him.

69. The process for separating the Applicant for abandonment of post was initiated on 2 May 2012 by UNMISS/DMS when he reported to FPD/DFS that the Applicant's CSL ended on 17 October 2011, that he was placed on annual leave from 18-27 October and on SLWOP from 28 October until 11 April 2012 and that thereafter UNMISS/HRS communicated with the Applicant to no avail.

70. The details of the said report to FPD/DFS were misleading. This is because the decisions - to i) certify sick leave for the Applicant only until 17 October 2011, ii) place him on annual leave for nine days and iii) place him on SLWOP from 28 October 2011 until 11 April 2012 - were all taken retrospectively on 10 April 2012.

71. The matter of a retrospective decision regarding the placement of the Applicant on sick leave, annual leave and SLWOP is made clear by the facts that the Applicant had continued to receive his salary until the end of January 2012 while supposedly on SLWOP and by the MSD's communication to the Applicant on 11 April 2012.

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 DMS on 12 May 2012 requested authorization to separate him for abandonment of post. The authorization was granted on 18 March 2012, and the Applicant was separated effective 30 June 2012.

74. In closing submissions, it was submitted on behalf of the Applicant that he had fulfilled his duties to the Organization by providing it numerous medical reports. The Respondent did not respond to this issue and did not challenge the Applicant's submission on this score.

75. The Tribunal finds that from the start of his ailment at the beginning of September 2011, which led to repeated hospitalization and months of sick leave being recommended for him by his doctors, the Applicant diligently and timeously communicated with his supervisor Mr. Vasilovsky, UNMISS/HRS, UNMISS doctors and the MSD in New York.

76. He fulfilled the first duty on his part to inform the Mission within twenty days of his health challenges. He had also fulfilled the duty to keep the Organization informed of the health situation that prevented him from returning to work by providing it with the medical reports issued to him by his doctors as he received them.

***Were the processes adopted by the Organization for certifying the Applicant's sick leaves and for authorizing his separation from service flawed in any way?***

77. Regarding the question as to whether the processes for certification of sick leave was flawed in this case, the Applicant's case is that despite his efforts to get the Respondent to take action regarding the numerous medical reports from his doctors, he either never responded, responded incoherently or responded extremely late.

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 officer and to an UNMISS medical officer which he promptly did.

79. The evidence before the Tribunal is that despite the Applicant complying with all the requests from UNMISS doctors and the MSD by promptly sending all the documents requested by them, Dr. Aly did not certify the 20 days of sick leave that he could authorize locally for the Applicant; neither did the MSD review the documents sent to it to certify or to deny certification if warranted, in a timely manner.

80. The result is that the Applicant's medical reports and test results from September 2011, which the MSD began to receive from 27 October 2011, sat in the MSD offices without being attended to until April 2012; even then, only after the Applicant had written to the Secretary-General directly. No explanations have been offered for this six-month delay.

81. The Tribunal finds it unfair, unacceptable and unlawful for the MSD on 11 April 2012, nearly six months after that office began to receive the medical reports from the Applicant's doctors, test results and comprehensive medical report as demanded, to decide that sick leave could not be certified for him beyond 17 October 2011. That delay meant that neither the MSD nor UNMISS/HRS had complied with the clear stipulation in section 13 ST/AI/400 that where sick leave certification is not granted, the staff member should *immediately* be advised of the refusal.

82. The Tribunal finds that the MSD failed to discharge its duty to attend promptly to the various requests for review of the Applicant's medical reports and certification of his sick leave. The Tribunal also finds it unacceptable that the Applicant had to write to the Secretary-General directly, to trigger the MSD to act.

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 approval that he could be allowed under his contract of employment.

84. While the MSD is undoubtedly the medical expert within the Organization for reviewing and certifying medical certificates granted by private doctors, where it fails in its duty to make crucial decisions in time to save the affected staff member from undue anxiety and stress and the risk of losing his career, the Tribunal will have no choice but to grant such relief that will serve to mitigate the anomalous situation created for the staff member by its undue delay.

85. In that regard, the Tribunal finds that it is only fair that the Applicant be allowed sick leave certification from 5 September 2011, when he was first hospitalized in Germany, up to 27 May 2012 which was the termination date of the last sick leave given by one of his doctors Dr. Darwish (who had also written a comprehensive medical report covering the entire period of the Applicant's illness) before the non-certification decision by the MSD was made.

***Did the Organization owe the Applicant a duty to advise him of his options under ST/AI/2005/3 when he was refused certification of his sick leave certificates?***

86. Regarding the issue of the separation from service of the Applicant on the ground of abandonment of post, it was argued on behalf of the Applicant that the Administration failed to follow the appropriate procedures for separating a staff member on the ground of abandonment of post.

87. For his part, the Respondent argued that the Applicant initiated his separation from service by failing to report to duty or to provide an acceptable reason for his unauthorized absence. He continued that while the Applicant claimed his absence was due to health reasons, his prolonged absence was not authorized as certified sick leave. He submitted that in the prevailing

circumstances, the Mission reasonably concluded that the Applicant had unilaterally repudiated his contract of employment.

88. Section 13 of ST/AI/400 provides:

13. Where a staff member claims that his or her absence is the result of incapacity for reasons of health, his or her attention should be called to the provisions of staff rule 106.2 (a) (vi), which require the production of a certificate from a duly qualified medical practitioner stating the nature and probable duration of the illness. If the staff member fails to produce such certification or if the certification produced is not acceptable to the Medical Director and sick leave is not certified, the executive or administrative officer shall immediately advise the staff member, with a copy to the personnel officer, that sick leave has been refused and that the staff member must report for duty immediately or be separated for abandonment of post. If the staff member disputes the decision, he or she may request that the matter be referred to an independent practitioner or to a medical board under the terms of staff rule 106.2 (a) (viii). Pending a final decision following the report of the medical board, the period following the date of notification that sick leave has been refused should be compensable. However, should it be decided not to consider the period in question as sick leave, the remuneration received by the staff member during this period shall be recovered by the organization.

89. Also, Paragraph 1 of ST/AI/2005/5 (Abandonment of post) amending paragraph 5 of ST/AI/400 provides:

The absence of a staff member from his or her work, unless properly authorized as leave under staff rule 105.1 (b) [currently sr 5.1], as special leave under staff rule 105.2 [currently sr 5.3], as sick leave under staff rule 106.2 [currently sr 6.2] or as maternity or paternity leave under staff rule 106.3 [currently sr 6.3], may create a reasonable presumption of intent to separate from the Secretariat unless the staff member is able to give satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control.

90. The Respondent argued in closing submissions that the Applicant never disputed the MSD's decision not to certify his medical leave as provided for in the staff rules and in section 13 of ST/AI/400.

91. The Tribunal is of the view that due regard must be given to the fact that when the Applicant was denied certification of his sick leave requests, he was not

further advised that there were other options open to him. Due regard must also be given to when the Applicant was informed of MSD's decision to deny him sick leave.

92. It is the Tribunal's finding 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 the Applicant's 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 Organization's 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. The Applicant's diligence 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.

***Was the Applicant entitled to special disability allowance for his disabled son?***

96. Part of the Applicant's case is that special dependency benefits were denied him in respect of his disabled son AMA. The Applicant testified that he informed UNMISS in February 2013 about his son's disability and that OSLA submitted a claim in that regard on his behalf. He testified that his claim was not paid.

97. On his part, the Respondent pled that the Applicant had not adduced any evidence to support his claim that he was denied special dependency allowance for his disabled son. Exhibit A-16 annexed to the Applicant's pleadings is an email chain which shows that the Applicant sent an email on 24 February 2013 to a HR officer at UNMISS giving the information that his son had ASD and that action in that regard be taken. He attached an official report about his son's condition from the Ministry of Social Development in Jordan written in Arabic.

98. On 25 February 2013, the HR officer responded and asked the Applicant to forward his request for any entitlement to RSCE in Entebbe. On the same day, the Applicant's Counsel emailed the HR officer asking for the name of the officer to be contacted at RSCE. On 28 February 2013, Counsel again emailed the same request to the RSCE client support desk.

99. On 4 March 2013, the Applicant received a response from CCPO/UNMISS stating that there were no records that the Applicant submitted documents for consideration for special dependency allowance and asked that he send any record of previously submitted documents for processing. Counsel responded pointing out that a certificate in Arabic confirming the disability of the Applicant's son was attached to his original email.

100. Section 1.8 of ST/AI/2011/5 (Dependency status and dependency benefits) provides:

Claims for dependency benefits shall be submitted in writing and supported by evidence satisfactory to the Secretary-General. Subsequently, a separate claim for dependency benefits shall be made in accordance with the procedures set out in the information circular entitled "Review of claims for dependency benefits" issued

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 Applicant's claim that he was entitled to a 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.



105. The Tribunal finds and holds that the review and non-certification of the Applicant's sick leave were unduly delayed by the MSD and that the said delay was prejudicial to the Applicant.

106. Both the MSD and UNMISS/HRS owed a duty to the Applicant to advise him of the option open to him following the non-certification of his sick leave under the provisions of section 13 of ST/AI/400.

107. The Tribunal cannot find that the Applicant is entitled to disability allowance for his disabled son because the necessary documentation in this regard was sent to the Respondent after the effective date of the Applicant's separation.

### **JUDGMENT**

108. The application succeeds in part.

109. The Tribunal hereby rescinds the administrative decision that the Applicant abandoned his post.

110. The Respondent is hereby ordered to refer this matter to the United Nations Staff Pension Committee to determine his incapacitation and entitlement for disability benefit under art. 33 of the Regulations of the United Nations Joint Staff Pension Fund.

111. The Applicant shall be deemed to have been on certified sick leave and paid his full salary for the period starting from February 2012 when the said salary was stopped until 12 May 2012, the last date of the sick leave granted by his doctors while he awaited the late decision of the MSD.

112. The Applicant is not entitled to a disability allowance for his disabled son.

*(Signed)*

Judge Nkemdilim Izuako  
Dated this 28<sup>th</sup> day of June 2018

Entered in the Register on this 28<sup>th</sup> day of June 2018

*(Signed)*

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