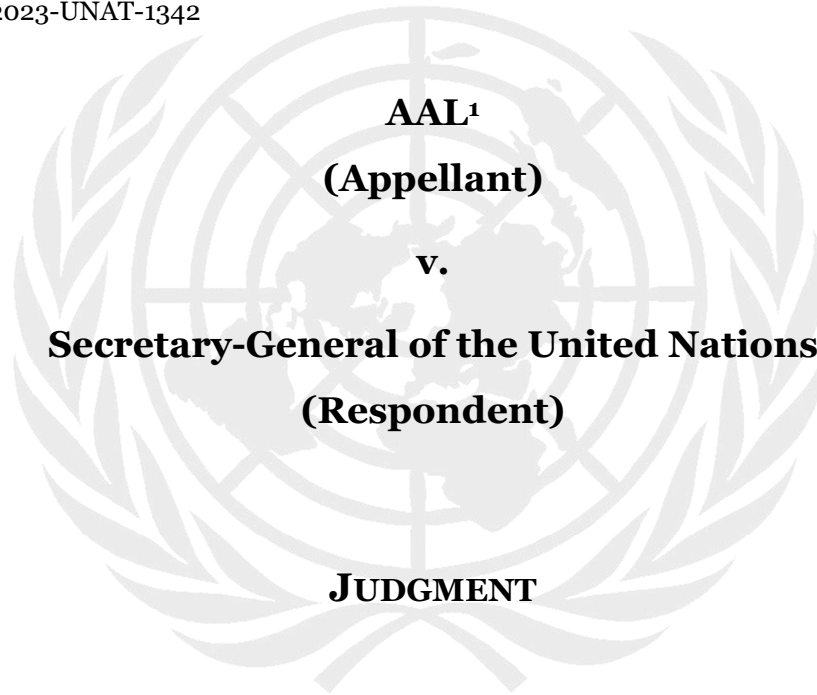




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1342



AAL¹

(Appellant)

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2022-1708
Date of Decision:	24 March 2023
Date of Publication:	9 May 2023
Registrar:	Juliet Johnson

Counsel for Appellant: Dorota Banaszewska, OSLA

Counsel for Respondent: Rupa Mitra

¹ This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE MARTHA HALFELD, PRESIDING.

1. AAL, a P-3 Child Protection Officer in a hardship mission (the Mission), contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the denial of sick leave entitlements of several periods of time, the denial of requests for telecommuting, her placement on Special Leave With Pay (SLWP) and Special Leave Without Pay (SLWOP), and discriminatory practices against her by her manager. By Judgment No. UNDT/2022/040, the UNDT dismissed the application on grounds that it was not receivable *ratione materiae*, had become moot, or had no merit.
2. AAL appeals.
3. For the reasons given below, we dismiss the appeal.

Facts and Procedure

4. AAL joined the Organization on 3 October 2017 at the P-3 level on a fixed-term appointment with the Child Protection Unit in a hardship mission.
5. On 17 October 2019, AAL left the Mission for her home country due to medical reasons and remained on certified sick leave until 15 April 2020.
6. On 16 April 2020, upon the conclusion of AAL's sick leave, AAL's supervisors allowed AAL to telecommute from her home country through the end of June 2020. In June, the Section Chief requested that AAL make arrangements to return to the duty station in line with the Mission's new rotation plan. AAL sought leave to continue telecommuting beyond 30 June 2020 but her supervisors denied the request as she was found medically fit to return to the duty station.
7. AAL did not, however, return to the duty station at that time. On 24 August 2020, the Mission's Medical Section confirmed receiving AAL's medical assessments (7 and 11 August 2020) and cleared her to travel to the Mission. On 8 September 2020, the Mission received clearance from the Ministry of Foreign Affairs to enable AAL to enter the country, and AAL was so informed that same day.

8. On 24 September 2020, AAL submitted another request to continue telecommuting from home after 1 October 2020. She attached a letter from the medical services in her home country, which she had received in April 2020, advising her on how to keep safe from COVID-19, considering her underlying medical conditions. On the same day, the Mission rejected her request, stating that “the position of child protection officer in the field requires the presence of the staff member on the ground”. The Mission Human Resources Office advised AAL to return to the duty station by 1 October 2020, failing which she would have to apply for sick leave or annual leave or SLWOP.

9. On 25 September 2020, AAL filed a request for management evaluation challenging the decision denying her request to telecommute and compelling her to return to the duty station by 1 October 2020.

10. AAL remained on sick leave from 1 October 2020 to 30 March 2021.

11. By letter dated 11 November 2020, the Under-Secretary-General for Management Strategy, Policy and Compliance informed AAL that she had decided to endorse the findings and recommendations of the Management Evaluation Unit and to uphold the decision requesting AAL to return to the Mission by 1 October 2020 and denying her request to continue to telecommute.

12. That same day, AAL again requested management evaluation *inter alia* of the decisions to place her on SLWOP and to engage in discriminatory practices against her. By letter dated 19 March 2021, AAL was informed that the decision to place her on SLWOP from 8 to 30 September 2020 would be upheld.

13. On 21 June 2021, AAL filed an application before the UNDT,

- a) Challenging the denial of her sick leave entitlement for the period 4 October 2019 to 12 December 2019; and placing her on SLWOP for that period;
- b) Challenging the denial of her sick leave entitlement for the periods 1 October 2020 to 1 December 2020; and 2 December 2020 to 30 March 2021;

- c) Claiming that the Administration had abused its discretion in placing her on SLWP from 1 July 2020 to 7 September 2020, and on SLWOP from 8 September 2020 to 30 September 2020, “instead of providing reasonable accommodation due to her medical vulnerability and enabling her to work”; and
- d) Claiming that the decisions taken by her manager and the Mission were also discriminatory in nature, further constituting an abuse of discretion. According to AAL there appeared to be a disparity of treatment in how her case was handled by the Administration.

14. On 3 May 2022, the UNDT issued Judgment No. UNDT/2022/040, dismissing the application.

15. The UNDT found the application not receivable *ratione materiae* with regard to AAL’s challenges of the denial of her sick leave entitlement and placing her on SLWOP instead for the period 4 October 2019 to 12 December 2019, on grounds that AAL had failed to seek management evaluation within the prescribed time limit. The UNDT further dismissed as moot that part of AAL’s application challenging the denial of her sick leave entitlement for the periods 1 October 2020 to 1 December 2020 and 2 December 2020 to 30 March 2021 on grounds that her sick leave requests for these periods had subsequently been certified by the Medical Service in February 2021.

16. As to AAL’s contention that the Administration had abused its discretion in placing her on SLWP and subsequently on SLWOP from 1 July 2020 to 30 September 2020, “instead of providing reasonable accommodation due to her medical vulnerability and enabling her to work”, the UNDT found that AAL had been placed on SLWP while she was waiting for her visa to be able to travel back to her duty station, and on SLWOP after getting her visa. The UNDT found no merit in AAL’s argument that she had been deprived of her right to work, as she was requested to work in her duty station and not medically required to telecommute. AAL was not entitled to payment for the period during which she was on SLWOP and did not perform work. For the same reasons, her request to have her “corresponding performance record” amended was unwarranted.

17. Finally, the UNDT dismissed AAL’s claim that the decisions taken by her manager and the Mission were also discriminatory in nature, further constituting an abuse of discretion. The UNDT noted that disclosure by the Secretary-General confirmed that a global rotation

policy had been implemented universally in the section, resulting in the return of different staff members to the duty station to replace and relieve others, as well as to ensure crucial presence on the ground. It was quite clear that AAL's role as a Child Protection Officer needed presence on the ground and that telecommuting was not appropriate for the functions of her role. The record clearly showed that the reason was true and that AAL was afforded the same discretion as other members of her team. The UNDT found that none of the decisions challenged were unlawful, and as such, AAL was not entitled to any of the remedies she requested.

18. On 1 July 2022, AAL filed an appeal, and on 6 September 2022, the Secretary-General filed his answer.

Submissions

AAL's Appeal

19. The UNDT erred in fact by finding that AAL was not medically required to telecommute for the periods she was placed on SLWP and SLWOP and that she did not have a medical exemption to telecommute for the relevant period. The UNDT clearly ignored the fact that AAL's request for a reasonable accommodation had been granted by the Department of Healthcare Management and Occupational Safety at the United Headquarters (DHMOS and HQ, respectively) in New York on 11 September 2020 and subsequently accepted by the Mission. It was only AAL's Second Reporting Officer (SRO) who – for improper and extraneous discriminatory reasons – rejected the recommendation for a reasonable accommodation and, hence, the Mission's Human Resources Management Section (HRMS) instructed AAL to claim sick leave "if she was not fit for duty". The UNDT's conclusion does not consider that the Administration's decision not to grant AAL a possibility to telecommute and placing her instead on SLWP and SLWOP was unlawful and in clear contradiction to DMOSH's guidelines during the COVID-19 pandemic as well as the criteria of disability set out in General Assembly Resolutions and ST/SGB/2014/3. Therefore, the UNDT's errors led to a manifestly unreasonable decision, in particular denying AAL the requested remedies.

20. The UNDT also erred in fact and law when concluding that AAL was not subject to discrimination as her SRO's decision to act against a medical recommendation of DMOSH was clearly deprived of any justification and, hence, taken for improper and extraneous reasons

that AAL cannot explain in any other way as an instance of discrimination. AAL provided the Dispute Tribunal with sufficient evidence to both grant the requested order for the Administration to have telecommuting status reflected in her attendance record for the period 1 July 2020 to 30 September 2020, and corresponding performance record, as well as award the compensation for economic loss and moral damages for the harm suffered.

21. AAL requests the Appeals Tribunal to reverse the UNDT Judgment, rescind the contested decisions and direct the Administration to have telecommuting status reflected in AAL's attendance record for the period 1 July 2020 to 30 September 2020, and corresponding performance record. AAL also requests that UNAT award her compensation for economic loss, in particular loss of her salary and benefits for the period of time when she was placed on SLWOP, and award her an adequate amount for compensation that UNAT deems appropriate for moral harm and damages.

The Secretary-General's Answer

22. The Secretary-General submits that the UNDT correctly held that the record corroborated that AAL was not medically required to telecommute and did not have a medical exemption to telecommute for the relevant period. While AAL asserts that the UNDT "clearly overlooked or ignored" "the evidence presented to it", she only cites paragraph 30 of her application in support of this claim which, in turn, cites no evidence that she was, in fact, medically required to telecommute and that she did have a medical exemption in this regard. E-mail correspondence from 4 August 2020 to 21 September 2020 sent by and to AAL, her supervisor, the Mission's human resources officers, and the Mission's and UNHQ's medical officers clearly shows that AAL's supervisor never made the decision to allow her to telecommute. AAL may specifically be referring on appeal to the e-mail dated 11 September 2020 from the Mission's medical unit indicating that, in view of her appeal of her return-to-work plan with DMOSH, as agreed upon with the Sick Leave Team, she could continue working at home until 30 September 2020 while the final return-to-work date to the Mission would be on 1 October 2020. However, even that e-mail contained no medically-based recommendation from either the Mission's medical unit or from DMOSH that AAL should telecommute. Moreover, while AAL asserts that her request for a reasonable accommodation had been granted by both UNHQ DMOSH and the Mission, any such grant of telecommuting was for AAL's supervisor to decide upon, not for the medical unit, which could only make recommendations in this context. In making his decision, AAL's supervisor reasonable considered that operational needs required AAL's presence at the duty station. In view

of the above, AAL's claim that this alleged "error in fact" by the UNDT "led unavoidably to an error in law by UNDT" is unsubstantiated.

23. The Secretary-General further contends that the UNDT correctly held that there was no evidence to support AAL's claim that she had been discriminated against. AAL asserted on appeal that the UNDT erred in fact and law in so finding. However, once again, her only argument is the conclusory statement that her manager's "decision to act against a medical recommendation of DMOSH" had no justification, absent proper reasons could only be as an instance of discrimination. First, AAL has not pointed to any medical recommendation of DMOSH, and as the UNDT correctly found, based on the evidence before it, AAL did not have a medical exemption to telecommute for the relevant period and was found medically fit to return to the duty station. Second, the UNDT provided a clear and detailed basis for its findings. The UNDT properly took into consideration that AAL had been allowed to telecommute from 16 April 2020 through the end of June 2020, that AAL's manager stressed the importance of AAL's and other staff members' return to the duty station under the rotation policy, and that the manager sought the return of not only AAL but also other staff members to allow for the relief of colleagues who had been on the ground for extended periods of time given the operational needs of the office. The UNDT reasonably found that AAL's role as a child protection officer needed presence on the ground. At the time, AAL herself wrote to a UNHQ medical officer, copying her supervisor and acknowledging, that as a critical staff, she was needed on the ground.

24. AAL has failed to demonstrate any error on the part of the UNDT in its Judgment. The Secretary-General requests that UNAT uphold the Judgment and dismiss the appeal.

Considerations

25. In her appeal, AAL does not challenge the UNDT finding of mootness regarding the sick leave claim for the period 1 October 2020 to 30 March 2021. Nor does she contest the UNDT's finding of non-receivability *ratione materiae* of her application concerning the rejection of certification of sick leave from 4 October to 12 December 2019, and consequently her placement on SLWOP during this period.

26. Rather, the appeal deals mainly with two other UNDT findings: i) that there was no abuse of discretion in the continued denial of telecommuting requests for the period during which she was placed on SLWP (from 1 July 2020 to 7 September 2020) and subsequently on

SLWOP (throughout September 2020), and that consequently, she was not entitled to payment for the period during which she was on SLWOP; ii) that there was no discriminatory practice against her in the decisions taken by the Administration.

27. Secretary-General's Bulletin ST/SGB/2019/3 (Flexible working arrangements) provides the legal framework applicable to telecommuting and provides in relevant parts as follows:²

Section 2

Guiding principles

2.1. Flexible working arrangements may be authorized subject to the following guiding principles:

(a) While there is no right to flexible working arrangements, such arrangements are in line with the efforts of the Organization to be responsive and inclusive and achieve gender parity, and therefore should be viewed favourably as a useful tool by staff and managers alike, where exigencies of service allow;

(b) Flexible working arrangements are voluntary arrangements agreed between staff and managers, such as first reporting officers;

(c) Managers should discuss the appropriate possibilities for staff members to avail themselves of flexible working arrangements. It is recognized that flexible working arrangement options may not be possible for some jobs and/or at certain periods of time;

(d) Staff members should seek written approval from their managers to avail themselves of the flexible working arrangements. When denying such requests, managers shall provide the basis for the non-approval in writing. Managers may suspend or cancel previously approved flexible working arrangements at any time due to exigencies of service or unsatisfactory performance. Staff members shall be informed of the basis for suspension or cancellation in writing. The Office of Human Resources shall monitor the implementation of the present bulletin and report on a regular basis to the Secretary-General on the Organization's usage of the different flexible working arrangements options;

(e) Approved flexible working arrangements shall be incorporated into an agreement between the staff member and manager. The agreement shall specify the duration and specifics related to the flexible working arrangement. A combination of one or more flexible working arrangements modalities may be authorized. One-time, ad hoc arrangements do not require the establishment of an agreement;

² Internal footnote omitted.

(f) It is the responsibility of all parties to the agreement to optimize the benefits of flexibility while minimizing potential problems. When staff members avail themselves of flexible working arrangements, their productivity and quality of output must be maintained at a satisfactory level, as assessed by their managers. First reporting officers should clearly communicate to staff their responsibilities and agreed deliverables. First reporting officers and staff are reminded of their performance management obligations, outlined in administrative instruction ST/AI/2010/5;

(g) No extra costs may be incurred by the Organization as a result of any of the flexible working arrangements;

(h) The use of flexible working arrangements requires careful planning and preparation on the part of all concerned. The relevant administrative office, with overall guidance from the Office of Human Resources, shall provide assistance to managers and staff, as required.

2.2. Certain components of the flexible working arrangements may be advised by the Medical Director or a duly authorized Medical Officer as being suitable to accommodate medical restrictions or limitations as part of a time-limited return-to-work programme. In line with the general principles of reasonable accommodations for short-term disability, if that advice is rejected, the manager would be required to establish that the requested accommodations represent a disproportionate or undue burden on the workplace.

...

Working away from the office (telecommuting)

3.5. Staff members may be authorized, upon written request, to work from an alternative work site at their official duty station when such an arrangement is consistent with the nature of the work involved. Care should be taken to ensure that telecommuting does not result in additional demands on other colleagues.

3.6. Authorization for staff members to work from an alternative work site at their official duty station may be given if the relevant staff members shall be reachable by telephone or email during the core working hours set for their duty station, and if they have, or obtain at their own expense, the necessary office equipment to discharge their official functions. Such equipment shall normally include a computer, access to the Internet and a telephone.

...

3.10. In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute from outside the staff member's official duty station for an appropriate duration not exceeding six months. Managers may, in exceptional circumstances, consider an extension of the authorization to remotely telecommute for an additional period not exceeding three months. Remote

telecommuting does not constitute a change of official duty station within the meaning of staff rule 4.8 (a).

28. The plain reading of these provisions reveals that while there is no right to flexible working arrangements, they should be viewed favourably “where exigences of service allow”. Staff members should seek written approval from their managers to avail themselves of flexible working arrangements.

29. The record shows that, having joined the Mission on 3 October 2017 as a Child Protection Officer with the Child Protection Unit on a fixed-term appointment at the P-3 level, AAL was firstly granted certified sick leave from 17 October 2019 to 15 April 2020, when she was allowed to work remotely through the end of June 2020 due to the COVID-19 pandemic.³ However, as early as 15 June 2020, AAL’s manager stressed the importance of AAL and *other staff members’* return to the duty station, in line with the Mission’s new rotation plan. On 19 June 2020, the Section Chief informed AAL that he “would not allow telecommuting by any staff in the Section, given the need to be present on the ground to deliver the mandate of the Section”.

30. A detailed timeline of events reveals that on 23 June 2020, AAL submitted to the Mission’s Medical Section a note from her doctor dated 19 June 2020, which indicated “*full recovery from some of her conditions and progress on the rest of the conditions*”, with reference to two further assessments that she would undergo. On 4 July 2020, the Mission’s Medical Section informed AAL that she had been *cleared to return*. It also stated that if she had any other condition that prevented her from returning to work, she would have to take sick leave or make an arrangement with her supervisor to work from home, which was outside of the telecommuting policy. On 17 July 2020, AAL wrote to HRMS indicating that she was waiting for a recommendation from her general doctor to make the final decision on when she could travel. On 24 July 2020, AAL provided a note from her doctor stating that while her symptoms were gradually improving, further assessments were required and that she would not be ready to travel until 12 August 2020 at the earliest after an assessment on 5 August 2020. On 28 July 2020, the Mission’s Medical Section informed AAL that it *did not recommend telecommuting for her, based on the medical report that she had provided*. Also on 28 July 2020, HRMS informed AAL that, based on the advice of the Medical Section, *she should proceed with her travel arrangements to the Mission*.

³ Impugned Judgment, para. 6.

31. On 24 August 2020, the Mission's Medical Section confirmed having received AAL's medical assessments (7 and 11 August 2020) and cleared her to travel to the Mission. On 8 September 2020, the Mission received clearance from the Ministry of Foreign Affairs to enable AAL to enter the country, and AAL was so informed the same day. On 11 September 2020, the Section Chief indicated that he would not approve telecommuting for AAL. Also on 11 September 2020, HRMS in response to the above e-mails informed AAL that if AAL was not fit to return to the duty station, she should request sick leave; and that were her sick leave not to be approved, she would be placed on annual leave followed by leave without pay.

32. This detailed timeline shows that AAL was given notice of the need for her to return to the duty station, as well as sufficient opportunity to apply for sick leave. An e-mail dated 21 September 2020, from HRMS to AAL noted that AAL's supervisor did not approve of telecommuting, and as such her continued absence on medical grounds should be covered by sick leave, which she should request. However, she did not request such sick leave, nor did she return to work, leaving no option for the Administration other than to place her on SLWOP. On 21 September 2020, AAL even acknowledged in her correspondence to HRMS that she had not been declared unfit or had a recommendation that she take sick leave. Although she submitted another medical report on 24 September 2020, from a different physician (dated 23 September 2020) indicating that her asthma was severe and expressing strong support for her to work remotely, the Section Chief reiterated on the same day his decision not to authorize her to telecommute given the need for the Child Protection Officer to be present on the ground.

33. Given these facts, AAL has failed to provide evidence that there were "compelling personal circumstances", as prescribed by Section 3.10 of ST/SGB/2019/3 so as to engender a decision to allow her to telecommute from outside her official duty station beyond 30 June 2020. She did not present any medical exemption to telecommute for the period of 1 July to 20 September 2020. Therefore, the UNDT did not err in finding that AAL was not medically required to telecommute, nor that AAL did not have a medical exemption.

34. Furthermore, in light of the applicable legal framework, the denial of the telecommuting request was appropriately accompanied by the basis for its non-approval in writing, which included the care to ensure that telecommuting did not result in additional demands on other colleagues who needed rest and recuperation, because they had not had the

opportunity to leave the duty station for a considerable period of time,⁴ as prescribed by Section 3.5 of ST/SGB/2019/3.

35. Moreover, the reasons given by AAL's manager were reasonable, as they related to the operational needs of the duty station and to the type of work performed by AAL. Apart from the "rotation policy" established by AAL's manager to ensure the presence on site of Child Protection Officers at all times, so as to maintain the engagement with the relevant parties as well as the conduct of verifications of information in a "purely field based operation", AAL was a Child Protection Officer whose work proved to have limited benefits when telecommuting.⁵

36. AAL claims that the fact that the SRO rejected the recommendation for reasonable accommodation, despite it having been previously granted by both UNHQ DMOSH and the Mission, is proof of improper and extraneous discrimination against her. This argument is without merit since, as correctly argued by the Respondent, the medical unit did not have competence to grant such permission, which was incumbent upon AAL's supervisor.

37. There is therefore no error in the UNDT finding that there was no abuse of discretion in the continued denial of telecommuting requests for the period between 1 July to 30 September 2020, during which she was placed on SLWP (from 1 July 2020 to 7 September 2020, while awaiting her visa to be issued) and subsequently on SLWOP (throughout September 2020, after the visa had been delivered),⁶ and that consequently, AAL was not entitled to payment for the period in which she was on SLWOP. For the same reasons, the UNDT did not err in finding that AAL's request to have her corresponding performance record corrected was unwarranted.

38. Regarding AAL's claim of alleged discriminatory practice against her, she did not establish any error in the UNDT's finding that she had not been treated differently from other staff members in her section. Although she had initially been granted permission to telecommute during the initial phase of COVID-19, the subsequent request that she present herself for work at the duty station was in keeping with the rotation policy, since her role as a Child Protection Officer required her presence on the ground, not to mention the fact that she

⁴ *Ibid.*, paras. 23 and 26.

⁵ *Ibid.*, para. 24.

⁶ *Ibid.*, para. 21.

had not been considered medically exempt. The UNDT found that, but for a justifiable exception of one staff member, all the other staff members telecommuted for roughly similar periods,⁷ a fact which corroborates the finding of non-discrimination.

39. The UNDT did not err by concluding that AAL was not subject to discrimination. There is no evidence that the SRO's decision was taken for improper or extraneous reasons. The Appeals Tribunal has reviewed the appeal and sees no error in the UNDT's finding that there is no evidence of discriminatory practice against AAL in the decisions taken by the Administration.

40. In light of the above, it follows that the UNDT did not err in rejecting the application on the merits and concluding that AAL was not entitled to any remedies that she had requested.

⁷ *Ibid.*, para. 26.

Judgment

41. AAL's appeal is dismissed, and Judgment No. UNDT/2022/040 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Judgment published and entered into the Register on this 9th day of May 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar