



**Before:** Judge Goolam Meeran

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

HARRIS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. On 11 August 2017, the Applicant filed a claim contesting the following two administrative decisions:

- a. Recovery in respect of salary paid while on sick leave and recovery of an Education Grant advance and Travel.
- b. Cancellation of health insurance while undergoing medical treatment.

2. The Respondent's reply, dated 15 September 2017, submitted that the application was without merit in that the Applicant was absent from work without authorisation. In the circumstances, the Respondent acted lawfully in recovering the salary paid to the Applicant whilst he was on unauthorised absence from work and that his health insurance cover ceased to be valid during this period. He asserts that the Applicant was advised to reactivate his insurance cover but that he failed to do so. Further the action to recover advance payments of Education Grant and its related Travel was lawful because the Applicant's son did not attend the educational establishment for which such funding was advanced and he failed to travel in accordance with the route approved in Umoja.

## **Findings of fact**

3. The Tribunal considered a substantial volume of documents provided by the Applicant who made several allegations against the decision-makers whom he regarded as having acted improperly in breach of the Organization's rules and procedures and without having regard to his health and welfare as a loyal staff member with approximately ten years of service.

4. The Tribunal did not consider that an oral hearing would assist in establishing the primary relevant facts.

5. The Tribunal finds the following facts proven on the basis of the documentary evidence and taking into account the submissions of the parties:

a. On 23rd September 2007, the Applicant commenced employment with the United Nations Interim Force in Lebanon (“UNIFIL”) on a fixed-term appointment as an Information Technology Assistant at the FS-4 level.

b. By notification dated 11 January 2016, received by the Applicant on 2 February, he was informed that due to staffing changes in the forthcoming budget his contract would be ending on 30 June 2016.

c. Since 17 March 2016, the Applicant did not report for work. He did not inform his supervisor of the reason for his absence and he could not be located. Accordingly, on 23 March 2016, the UNIFIL Human Resources Management Section (“HRMS/UNIFIL”) notified the Applicant that his failure to report to work without explanation was in breach of ST/AI/400 (abandonment of post).

d. The Applicant responded on 24 March 2016. It would appear that at the material time he was receiving urgent medical care. The Applicant stated that a medical report to this effect had been sent to UNIFIL. On 29 March 2016, he was asked to specify the e-mail address to which he had sent the report since it had not been received at UNIFIL.

e. On 30 March 2016, the Applicant sent a medical report to HRMS/UNIFIL informing them that he would be undergoing surgery on 6 April 2016.

f. On 20 April 2016, the Medical Services Division (MSD) formally approved sick leave from 21 March 2016 to 1 July 2016. This was subsequently extended by MSD for a second period, from 4 July 2016 to 7 October 2016.

g. On 23 June 2016, while the Applicant was still on MSD-approved sick leave, he was informed that he had been selected on promotion to an FS-5 post as Information Systems Assistant. Accordingly, the notice of non-extension of contract was rescinded and the Applicant’s services were to continue beyond 30 June 2016.

h. On 4 October 2016, the Applicant visited the HRMS/UNIFIL office without having obtained medical clearance that he was fit to resume duty. He was advised to obtain clearance, from MSD, that he was fit to return. The Applicant did not obtain MSD clearance but instead submitted a certificate of clearance dated 7 October 2016 from his treating physician.

i. It would appear that this was accepted by the Administration and the Applicant was instructed to resume duties in a different sector i.e. UNIFIL Sector East. However, he took exception to the conditions under which he had to work in Sector East and a number of meetings took place with his managers in order to resolve this matter. At a meeting on 15 November 2016, the Applicant informed the Chief of Regional Information and Communications Technology Services (Chief/RICTS) and the Chief/HRMS that he was not medically fit to carry out the duties in Sector East. In addition, he informed them that he was being unfairly treated. The Applicant's managers were insistent that he should report for duty as arranged in Sector East and he was asked to explain why he had not reported for duty upon his return from certified sick leave which ended on 7 October 2016.

j. Although the Applicant did not report for duty in Sector East, as required, he attended the UNIFIL HQ on various occasions and participated in training events in October and November 2016. Although UNIFIL placed the Applicant on Special Leave without Pay (“SLWOP”) from 8 October – 8 December 2016 for unauthorized leave<sup>1</sup>, the Respondent accepts that he was on approved certified internal auditor training from 24-28 October 2016 and from 31 October to 5 November 2016. Additionally, the record includes an interoffice memorandum (“IOM”) from the Chief/HRMS to the Applicant, dated 29 November 2016, which states that he had been absent from work in Sector East since 16 November and that if he did not show up for work or provide an explanation, his salary would be withheld for the period of his absence. A subsequent IOM from the Chief/HRMS, dated 16 January 2017, indicated

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<sup>1</sup> Respondent's reply, Annex R2.

that the Applicant's salary was being placed on hold with effect from January 2017 due to his unauthorised absence.<sup>2</sup> Accordingly, he was entitled to be paid for the period of authorized attendance and it would follow that these days should be credited as working days and should not be recorded as being on SLWOP.

k. The Respondent was concerned about what was considered to be a failure on the part of the Applicant to report to work as required in Sector East. On 28 November 2016, the Applicant was reminded of the meeting that took place on 15 November and was asked to explain his continuing failure to report for work in Sector East. Also on 28 November, the Applicant was advised that there was no record of authorised absence in the Umoja system and he was advised about the consequences that would flow from an unauthorised absence given that the UNIFIL Chief Medical Officer (CMO) had advised him that if he was not fit enough to perform his duties he needed to submit the appropriate certification to be approved by MSD at United Nations Headquarters. He was reminded that there was no record of certified sick leave after 7 October 2016.

l. From 9 December 2016 to 3 January 2017, the Applicant was on approved annual/home leave but he did not report for work at the end of this period.

m. On 3 February 2017, the Applicant was granted certified sick leave from 23 January to 17 February 2017 and subsequently extended to 31 of March 2017. Accordingly, he was covered for the period 23 January to 31 March 2017.

n. Given the periods of certified sick leave, home leave and training this left two periods of unauthorised leave from 16 November 2016 to 8 December 2016 and 4 January 2017 to 22 January 2017.

o. During this period, while issues relating to the Applicant's sick leave and failure to report for duty in Sector East were being dealt with,

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<sup>2</sup> Respondent's reply, Annex R6.

payment of the Applicant's salary was put on hold for January and February 2017<sup>3</sup>. There was a recovery of advance payments made in respect of an education grant advance of USD30,624.75 in respect of a dependent child who did not attend the approved school in the United States of America ("USA"). In addition, there was also an issue of recovery of a lump sum payment of USD1,629 in respect of education grant travel. The Applicant's salary was withheld and HRMS/UNIFIL placed the Applicant on Special Leave without Pay ("SLWOP") because of his unauthorised absence.

p. Given that the Applicant had been placed on SLWOP no contributions were being made towards its health insurance cover. In the circumstances his health insurance cover lapsed. The Respondent advised the Applicant on several occasions on how he could reactivate his health insurance cover through the self-service feature in Umoja. The Applicant failed to take appropriate steps to restore this important benefit. Instead of taking appropriate action in his own interests the Applicant took the view that the action taken to withhold his salary and its consequent effect of loss of health insurance cover was motivated by improper considerations for which he considered that there should be an investigation under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) for harassment and abuse of authority.

### **Applicable law**

6. Staff rule 5.1(e)(ii) provides:

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;

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<sup>3</sup> Ibid.

7. Staff rule 5.3 on special leave provides insofar as it is material:

(f) In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization.

(g) Continuity of service shall not be considered broken by periods of special leave with or without pay. However, staff members shall not accrue service credits towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay exceeding one month. Periods of special leave with partial pay or without pay exceeding one month shall not be counted towards accrued years of service for eligibility requirements for a continuing appointment.

8. Staff rule 6.2(f) and (g) concerning the submission of medical certificates provides:

(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.

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director. When, in the opinion of the United Nations Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule

9. Sections 9 - 11 of ST/AI/400 (Abandonment of post) provide:

9. Supervisors must report all unauthorized absences to the relevant executive or administrative officer, or the local personnel office in offices away from Headquarters, not later than the end of the fourth day of such absence. The executive or administrative officer should then endeavour to contact the staff member concerned by telephone or by any appropriate means, failing which a written communication should be addressed to the staff member at his or her last known address requesting him or her to report for duty or to provide a plausible explanation for his or her absence. In cases

of claimed illness, the executive or administrative officer should call the staff member's attention to the requirements of subparagraphs (v)-(vii) of staff rule 106.2 (a) (see para. 13 below.

10. Unless the executive or administrative officer receives a medical certificate or plausible explanation for the absence within 10 working days he or she shall refer the matter to the appropriate personnel officer, who should address a further written communication, by registered mail, personal delivery, or other appropriate means, calling the staff member's attention to the earlier attempts to contact him or her and the absence of an appropriate response. The communication should remind the staff member of the provisions of staff rule 105.1 (b) (ii), under which payment of salary and allowances shall cease for the period of unauthorized absence. It should allow a further period of up to 10 working days for reporting to duty or submission of a medical certification or plausible explanation, and should warn the staff member that failure to do so would be considered abandonment of post and would lead to separation on that ground.

11. It is the responsibility of staff members to inform their supervisors of absences, whether owing to illness or injury or any other cause. It is also the responsibility of staff members to keep the Organization informed of their current address and the person to be notified in case of accident or emergency. If, despite due diligence on the part of the Organization, the staff member cannot be reached or contacted, either in person, by registered letter or other reliable form of communication to the address most recently provided by the staff member, or through family or friends, receipt of such notice will be deemed to have occurred.

10. Paragraph 38 of ST/IC/2016/13 (Renewal of the United Nations Headquarters-administered health insurance programme), which came into effect on 1 July 2016, relates to health insurance cover for staff on SLWOP. It provides:

38. Staff members granted special leave without pay are reminded that they may retain coverage for medical and dental insurance during such periods or may elect to discontinue such coverage for the period of the special leave, under the following conditions:

(a) **Insurance coverage maintained during special leave without pay.** If the staff member decides to retain coverage during the period of special leave without pay, the Health and Life Insurance Section must be informed directly by the staff member in writing of his or her intention at least 31 days in advance of the commencement of the special leave. At that time, the Health and Life Insurance Section will require evidence of approval of the special leave, together with payment covering the full amount of the cost of the coverage(s) retained (i.e. both the staff member's



contribution and the Organization's share, since no subsidy is payable during such leave). ....

(d) **Re-enrolment upon return to duty following special leave without pay.** Regardless of whether a staff member has decided to retain or drop insurance coverage(s) during a period of special leave without pay, it is essential that he or she re-enroll in the plan(s) through the Umoja employee self-service portal, if a United Nations staff member, or by e-mail with a completed and signed application form, if a staff member of a United Nations agency, upon return to duty. This must be done within 31 days of return to duty. There is no automatic reinstatement of coverage following return from special leave without pay. Failure to re-enroll will result in the staff member being unable to resume participation in the insurance plan(s) until the next annual enrolment campaign. The staff member will be allowed to re-enroll only under the health insurance plan and coverage type in which he or she was insured prior to taking leave, in accordance with paragraph 35 (d) above.

11. Section 2 of ST/AI/2011/4 (Education grant and special education grant for children with a disability) provides:

Eligible staff members may claim the education grant when the following conditions are met:

(a) The child is in full-time attendance at an educational institution at the primary level or above while the staff member is in the service of the United Nations. Education shall be deemed 'primary' for the purposes of this instruction when the child is five years of age or older at the beginning of the school year, or when the child reaches age five within three months of the beginning of the school year. Exceptionally, a lower minimum eligibility age for receipt of the education grant could be accepted if laws at a specific location mandated an earlier start of formal education<sup>4</sup>;

(b) The entitlement shall terminate when the child ceases to be in full-time attendance at an educational institution or completes four years of post-secondary studies [...].

12. Section 6 of ST/AI/2011/4, which concerns advances against the education grant provides insofar as it is material:

6.2 Any paid advance shall be considered as due from the staff member until the education grant claim has been received and processed or is recovered from the staff member. Staff members are required to submit their claims for payment of the grant

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<sup>4</sup> ST/AI/2011/4/Amend.1 (Education grant and special education grant for children with a disability).

promptly, as required by section 7.1 of the present instruction. Recovery from the staff member's emoluments shall take place after the third and fourth month of the end of the academic year with regard to Headquarters and field staff, respectively, or on separation from service. Similar arrangements will be made for staff on other payrolls.

13. Section 8 of ST/AI/2011/4, which concerns education grant travel provides:

8.1 Staff members eligible for education grant travel under staff rule 3.9 (g) shall be entitled to travel expenses for the child for one round trip each scholastic year between the educational institution and the duty station, subject to conditions set out below:

(a) The child's attendance at the educational institution is at least two thirds of the school year;

(b) The travel is undertaken during, or immediately before and after the school year;

(c) The child spends at least seven days at the duty station;

(d) Travel expenses may not exceed the cost of travel between the staff member's home country and his or her duty station;

### **Considerations**

14. The issues that fall to be determined by the Tribunal are the two administrative decisions identified at the outset of this judgment namely:

a. Whether the Administration acted lawfully in taking steps to withhold the Applicant's salary and recover sums paid to him for education grant advances while he was on sick leave; and

b. Whether the Administration took the initiative to cancel the Applicants health-insurance while he was undergoing medical treatment or did the insurance cover lapse owing to the fact that the Applicant had been placed on SLWOP at the material time and ought to have taken appropriate steps to reinstate his policy.

15. The Tribunal will refrain from commenting on the criticisms made by the Applicant that are not directly relevant to a determination of the issues.

16. It is apparent from the foregoing factual findings that the Applicant did not act diligently in ensuring that any absenteeism due to sickness was promptly reported to his managers and supported by the appropriate medical certificates in accordance with staff rule 6.2(f) and section 11 of ST/AI/400. The record shows however that UNIFIL HRMS deemed the Applicant's unauthorized absence to be effective as of 16 November 2016 thus it was erroneous for his salary to be withheld from 8 October to 15 November 2016.

17. The record shows that the managers concerned acted appropriately and in accordance with the obligations placed on them by sections 9 and 10 of ST/AI/400 to ensure that the Organization's rules governing absenteeism due to ill health were properly followed. Given the fact that the Applicant absented himself from work in Sector East without proper authorization and failed to heed the advice and requests sent to him, it cannot be said that the Organization acted unlawfully in taking steps to place him on SLWOP. Moreover, it was lawful for the Organization to take steps to recover payments made in advance in respect of education grant and travel in circumstances where such advances were not utilised for the purpose for which they were granted.

18. Staff members will no doubt be aware of the fact that premiums in respect of health-insurance are paid by deductions from salary. The costs are borne by the Organization and staff members collectively through a cost-sharing arrangement approved by the General Assembly.<sup>5</sup>

19. Accordingly, in circumstances where the staff member is on SLWOP the onus is on the staff member who wishes to retain health insurance cover to pay the premiums required.<sup>6</sup> The consequence of failure to do so will result in the policy lapsing but may, in certain circumstances be reinstated upon payment of the outstanding premiums. It is clear from the documents that the Applicant was

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<sup>5</sup> ST/IC/2016/13 (Renewal of the United Nations Headquarters-administered health insurance programme, effective 1 July 2016).

<sup>6</sup> Ibid.

advised on 16 and 18 March 2017 by HRMS/UNIFIL that he should take appropriate steps to reinstate cover. Irrespective of the reason why the Applicant did not make the appropriate payments he allowed health cover to lapse because of his own default and not because of any unlawful action by the Organization.

20. Under article 10.5(b) of the UNDT Statute, this Tribunal may order compensation for harm but the claim must be supported by evidence. In *Kallon* 2017-UNAT-742, the United Nations Appeals Tribunal held:

The party alleging moral injury (or any harm for that matter) carries the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.

21. The Applicant, a self-represented staff member who does not necessarily understand the nuances of drafting pleadings, did not specifically refer to moral damages as one of his remedies in his application. However, taking into account the entirety of his application and the matters raised in Section VII of his application it is clear that he is raising the issue of moral damages for the harm suffered. Any other interpretation will not only be unjustified on the evidence before the Tribunal but it will be placing an unnecessary burden on self-represented staff members. The Tribunal has the duty to construe the application as a whole bearing in mind that it would be unusual for the majority of self-represented staff members to present an application that is a model of fine legal drafting.

22. At Section VII of his application the Applicant states:

- a. "The wrongful execution of the Special Leave without pay at such critical time when I was undergoing severe stress disorder treatment, endangered my life that of my family, pushing us into financial hardship, hence, further deteriorating my health.";
- b. "In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), my

rights were grossly violated, not to mention the impact of the physical and psychological impact me and my family will have to live with.”

23. The Applicant submitted a medical certificate, dated 9 February 2017, which diagnoses him with major depressive disorder that the psychotherapist, deems to have been exacerbated by “work related stress” and “post-surgical trauma”.

24. The Tribunal is satisfied that the Applicant has adduced sufficient evidence to prove beyond a balance of probabilities the existence of factors causing him psychological and financial harm. The Tribunal finds that the Respondent’s erroneous recovery of salary payments made to the Applicant for the period 8 October to 15 November 2016 did contribute to some degree to the extent and severity of the harm suffered.

### **Judgment**

25. The application succeeds in part in that the decision to withhold salary for the period 8 October 2016 to 15 November 2016 is unlawful.

26. The Respondent is ordered to reimburse the Applicant for salary withheld from 8 October 2016 to 15 November 2016.

27. The Respondent is also ordered to pay the Applicant USD3,000 as moral damages for the harm he suffered as a result of the erroneous recovery of salary.

28. The compensation awarded to the Applicant shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

29. All other claims are dismissed.

*(Signed)*

Judge Goolam Meeran

Dated this 15<sup>th</sup> day of December 2017

Entered in the Register on this 15<sup>th</sup> day of December 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi