



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HARRIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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 16 October 2017, the Applicant filed a claim challenging the decision to separate him from the Organization on the ground of abandonment of post. The application was presented as a challenge to the decision by the Management Evaluation Unit (“MEU”) to uphold the administrative decision to separate the Applicant from service. However, a closer examination of the application shows that the Applicant was in fact challenging the administrative decision on separation as being erroneous both procedurally and in substance and that MEU failed to address the inherent unfairness of the decision to separate him from service. By his reply the Respondent accepts that this is the case. In any event, it is settled law that “a recommendation by the MEU cannot have the status of an appealable administrative decision.”¹ Accordingly the Tribunal will not be examining the question whether the MEU was in error.

2. On 15 November 2017, the Respondent submitted his reply resisting the claim and asserting that the decision to separate the Applicant on the ground of abandonment of post was lawful in that it was made in accordance with the applicable procedures. The Respondent requested that the application be dismissed.

3. It is apparent from an examination of the file that this case may properly be determined on the basis of the documents submitted by both parties.

Findings of fact

4. The Tribunal finds the following facts based on the application and the reply together with the annexes filed by the parties:

- a. On 23 September 2007, the Applicant joined UNIFIL as an information technology assistant at the FS-4 level on a fixed-term appointment. By the time that he was separated from service on 12 July 2017 he had been promoted to the FS-5 level.

¹ *Nwuke* 2016-UNAT-697, paragraph 19.

b. It is not in dispute that the Applicant had a good work and attendance record until in or about 2016 when he suffered ill health for which he had been in receipt of medical treatment which resulted in him being absent from work since 17 March 2016. The Chief Information Technology reported to UNIFIL Human Resources Management Section (“HRMS/UNIFIL”) that the Applicant had not informed his supervisor of his absence and that his whereabouts could not be established. In response to a notification by the HRMS/UNIFIL that his failure to report to work without explanation was in breach of ST/AI/400 (abandonment of post) the Applicant sent an e-mail on 24 March 2016 explaining that he was under urgent medical care. He stated that a medical report had already been sent to that effect. However, the Applicant needed to obtain the appropriate clearance from the Medical Services Division (“MSD”).

c. On 20 April 2016, MSD approved the Applicant’s sick leave from 21 March 2016 to 1 July 2016 and subsequently extended it for a second term from 4 July 2016 to 7 October 2016.

d. While the Applicant was on certified sick leave he received an e-mail from the Chief of Regional Information and Communications Technology Services (“C/RICTS”) confirming the notification he was given in June 2016 that he was assigned to UNIFIL Sector East. It was said that this was in accordance with the RICTS rotation programme. The Applicant was not pleased with this posting. Following a meeting on 10 November 2016, the Applicant informed the Chief/RICTS that he objected to the conditions under which he would be expected to work. Also on 10 November 2016, the Chief/RICTS requested a meeting with the Applicant, the Chief Human Resources Management Section (Chief/HRMS) and the Chief International Staff Administration Unit (HRMS) to discuss the Applicant’s reassignment to Sector East and his absence from work. This meeting took place on 15 November 2016. The Applicant was asked to explain and clarify the reasons why he was not reporting to work since his return from certified sick leave. The Applicant gave two reasons. First, that he was not medically fit for duty in Sector East and second that he

considered that attempts were being made to destroy his career and he made various allegations to that effect. It would appear that this meeting did not result in any positive resolution.

e. By e-mail dated 28 November 2016, the Chief/RICTS asked the Applicant to explain his failure to report to work in Sector East following the meeting of 15 November 2016.

f. It would appear that the Applicant felt so strongly about the decision to reassign him to work in Sector East that although he was seen at UNIFIL HQ on several occasions and attended training events on certain dates between October 2016 and February 2017 he did not report for work in Sector East where he had been reassigned.

g. On 29 November 2016, the Chief/HRMS issued the Applicant with a warning that if he continued to absent himself from work in Sector East the process of separation for abandonment of post would be commenced. The Applicant responded on the same day stating that he was unable to work in Sector East and on 8 December 2016 he asked that the decision to reassign him be reconsidered.

h. The Applicant took home leave from 9 December 2016 to 3 January 2017.

i. On 16 January 2017, the Applicant received a final warning that he should report to work or else the Mission would initiate proceedings in respect of abandonment of post. The Applicant replied on 17 January expressing the view that he regarded this warning as part of the systematic threats that he was being subjected to.

j. The Applicant subsequently submitted a sick leave certificate and on 8 February 2017, the proceedings in respect of abandonment of post ceased upon receipt of an MSD medical leave certificate covering the period 28 January to 17 February 2017, subsequently extended through to 31 March 2017. On this date his entitlement to sick leave on full pay ended.

k. By e-mail dated 27 March 2017 to the C/HRMS, the Applicant sought guidance on the procedure for requesting Special Leave With Full Pay (“SLWFP”). On 31 March 2017, the C/HRMS advised the Applicant by email that since he had exhausted his allocation of sick leave with full pay, any additional sick leave certified by MSD would be charged against his allocation of sick leave with half pay and annual leave.

l. By memorandum dated 1 April 2017, the C/HRMS addressed the Applicant’s sick leave entitlements and his absence from work. She also explained to him that requests for SLWFP are to be directed to the Secretary-General.

m. The Applicant wrote to the Secretary-General on 20 April 2017 to request 18 months SLWFP. This email was copied to the UNIFIL Director of Mission Support (DMS).

n. By memorandum dated 21 April 2017, the C/HRMS directed the Applicant to provide a specialist report regarding his sick leave or report for duty by 25 April 2017. He was informed that since he was not on either approved annual leave or SLWOP, the period as of 1 April 2017 would be considered as unauthorized absence.

o. On 26 April and 11 May 2017, the Applicant received warnings that he had been absent from work in Sector East since 1 April 2017 and should report to work or provide a reason otherwise the Mission would initiate proceedings in respect of abandonment of post. The Applicant responded to the C/HRMS on 26 April and 19 May 2017 seeking information on the status of his pending request for SLWFP. He indicated that he was suffering from anxiety, depression and stress and needed to undergo treatment.

p. On 23 May 2017, the C/HRMS informed the Applicant that UNIFIL was following up with the Field Personnel Division (“FPD”) on his request for SLWFP since the Mission did not have delegated authority to decide on such requests.

q. On 26 May 2017, UNIFIL recommended to the Assistant Secretary-General for Human Resources Management that the Applicant be separated on the ground of abandonment of post. On 12 July 2017, the recommendation was approved.

r. By e-mail dated 25 July 2017, UNIFIL sent the Applicant a memorandum dated 24 July 2017 informing him that the Secretary-General had approved the decision to separate him from service with effect from 12 July 2017 on the ground of abandonment of post.

Applicable law

5. 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;

6. Staff rule 6.2 (f) concerning the submission of medical certificates provides:

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.

7. Section 5 of ST/AI/400 (abandonment of post) provides:

The absence of a staff member from his or her work, unless properly authorized as leave under staff rule 105.1 (b), as special leave under staff rule 105.2, as sick leave under staff rule 106.2 or as maternity leave under staff rule 106.3, 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.

8. Sections 9, 10,12 and 13 of ST/AI/400 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.

12. If by the end of the specified period the staff member has failed to comply with the warning to report for duty or to provide a plausible explanation or medical certificate, the Director, Staff Administration and Training Division, or the head of office at duty stations away from Headquarters, will submit a presentation to the Assistant Secretary-General for Human Resources Management, recommending separation for abandonment of post. The effective date of separation will be the date of the decision of the Assistant Secretary-General for Human Resources Management to treat the staff member's conduct as repudiation of the contract of employment, or the date of expiry of the fixed-term appointment, whichever comes sooner.

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 compensatable. 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.

Considerations

9. In essence, the issues appear to be:
 - a. Was the Applicant absent from work to perform the duties assigned to him in Sector East?
 - b. If yes, did the Applicant have a justifiable reason for absenting himself from work in circumstances where he failed to provide a duly authorised medical certificate?
 - c. Did the Applicant's managers follow the required procedures and did they provide the Applicant with sufficient opportunity to make good his defaults i.e. by providing a medical or other appropriate justification for not fulfilling his duties under the rotation system operated by the section chief?
 - d. Has the Applicant adduced sufficient evidence to support his claim that he was being threatened or otherwise dealt with in a hostile manner and or by impermissible considerations underpinning the decision to assign him to work in Sector East?
10. It would appear that the Applicant's objections to being assigned to duty in Sector East were not resolved in his favour and he was instructed to report for duty or, failing that, to provide a medical report or other justification for his

absence since 1 April 2017. The only medical certificates he provided with this application are dated 16 January and 9 February 2017 and have no bearing on his absence from 1 April to his separation on 12 July 2017. Additionally, he submitted several lab results all of which are dated July and August 2017, which are after his separation. In the circumstances the Tribunal finds that:

- a. It is not part of the Tribunal's functions to put itself in the position of the managers by making decisions on the deployment of staff or the assignment of their duties, including the place where they are to work. The Tribunal's duty is to judicially review the decisions to determine whether they are in accordance with the law and whether the decision maker/s acted procedurally correctly.² In circumstances where a staff member returns from sick leave the administration has to be satisfied that the staff member concerned is certified as fit to return to work. If the duties assigned are of such a nature that it will be difficult, or impossible, to perform because of a reason related to health then any representation to this effect must be supported by an appropriate medical report. Such judgments are left to medical professionals and are not to be determined on the basis of assessments or opinions of others including the staff member, the managers concerned and, it may properly be added, the Tribunal.
- b. He was absent from duty and hence failed to perform the work that had been assigned to him.
- c. He did not provide a duly authorized medical certificate or other justification for failure to report to work.
- d. The Administration followed the prescribed procedures and acted in accordance with the internal laws of the Organization.

² See *Auda* 2017-UNAT-787; *Sarrouh* 2017-UNAT-784; *Ljungdell* 2012-UNAT-265; *Ouriques* 2017-UNAT-745; and *Ogorodnikov* 2015-UNAT-549.

11. Insofar as the Applicant considers that the assignment to work in Sector East was motivated by improper considerations the onus is upon him to prove such procedural or substantive impropriety.³

12. In the current case, the Applicant failed to meet his burden of proving the impropriety that he alleged.

13. The Tribunal finds that the decision to separate the Applicant for abandonment of post was not unlawful.

Judgment

The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 15th day of December 2017

Entered in the Register on this 15th day of December 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

³ *He* 2016-UNAT-686; *Pérez-Soto* 2013-UNAT-329; *Obdeijn* 2012-UNAT-201.