



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DA SILVEIRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

William Woll

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant was an Administrative Assistant working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) in Goma. She contests a decision to separate her on the ground of abandonment of post.

2. The Respondent filed a reply on 3 December 2018 in which it is argued that the application is without merit.

3. Enquired by the Tribunal about her position vis-a-vis the reply and whether she wished to adduce evidence, on 8 September 2019, the Applicant filed a rejoinder, in which she reiterated the submissions contained in the application; she, however, declared that she did not wish to have a hearing.¹ A further filing was made by the Respondent upon which the parties accepted that the matter was ready for adjudication based on the documentary material.²

Facts

4. The Applicant joined MONUSCO on 14 June 2006 as an Administrative Assistant at the FS-4 level and on 1 July 2015, she was assigned to the Gender Advisory Section.³ She served on a continuing appointment.⁴

5. The Applicant maintains that since October 2015, she had problems with the Head of the Gender Advisory Section, Ms. Jamila Seftaoui.⁵ She documents that during the period from March to September 2016, she addressed the matter with the MONUSCO Conduct and Discipline Team (“CDT”),⁶ the MONUSCO Special Representative of the Secretary-General (“SRSG”)⁷ and the Head of the Gender

¹ Rejoinder, filed on 8 September 2019; Applicant’s Counsel email dated 8 September 2019.

² Respondent’s further response to Order No. 170 (NBI/2019); Order No. 060 (NBI/2020), para 3.

³ Application, annex 1.

⁴ Application, annex 55.

⁵ Application, section VII; Application annex 3.

⁶ Application, annexes 4, 7 and 8.

⁷ Application, annex 6.

Advisory Section.⁸ The problems apparently persisted even though Ms. Seftaoui was not based in the Applicant's duty station. As a result of the Applicant's complaints and interventions, the Applicant was offered a post in Lubambashi, but declined the offer because she preferred a non-family duty station.⁹

6. On 1 October 2016, the Applicant went on leave and on 18 October 2016, she submitted, through UMOJA, a request for certified sick leave ("CSL") for the period 18 October 2016 to 17 November 2016.¹⁰ The Medical Services Division ("MSD") at United Nations Headquarters in New York approved the request.¹¹

7. On 18 November 2016, the Applicant submitted a second sick leave request for the period 18 November 2016 to 18 January 2017.¹²

8. On 27 December 2016, the MSD approved the Applicant's sick leave up to 31 December 2016. The MSD informed the Applicant, however, that no further sick leave could be certified based on the documents submitted and that "any further [sick leave] need[ed] to be as per attached template information from a Psychiatrist or Psychologist".¹³ The attached template specified that a medical report must include, *inter alia*:

Impact of Diagnosis: description of how the current diagnosis is impacting the staff members in the following areas: overall daily functioning, work related duties, prognosis of the condition, justification why staff member is not able to resume duties during treatment [...].

Treatment Plan: duration, type, measurable goals of treatment. Follow-up plan on reporting progress needs to be clearly stated. If medication is prescribed, the plan of monitoring and adjusting the dosage and medication should be included.¹⁴

9. On 9 January 2017, the Applicant submitted a medical report covering the

⁸ Application, annex 10 and 12.

⁹ Application, annex 10.

¹⁰ Application, para 19, and annex 18.

¹¹ Reply, R/2.

¹² Application, annexes 19 and 20.

¹³ Application, annex 21.

¹⁴ Ibid.

period through 17 January to MSD. The medical report recommended further leave until 18 April 2017.¹⁵

10. Throughout the period January- June 2017, there were exchanges concerning the Applicant's inability to file sick leave requests through UMOJA due to the lack of approval of the pending ones.¹⁶ Because of this impediment, the MSD confirmed having received the medical report for 18 January – April 2017 only in March 2017.

11. Ultimately, considering the request on the merits, on 5 April 2017 the MSD responded that the medical report appeared the same as the one previously submitted in January and did not justify extension through mid-April. The MSD clarified that each extension request needed to be supported by a medical report consistent with the template.¹⁷ The same was reiterated upon a further filing by the Applicant, who on 25 May 2017, filed with the MSD a medical report for the period 10 April 2017 to 14 May 2017.¹⁸ Since the medical report was the same as the one previously provided and only dates had been changed, MSD advised her to submit a new one.¹⁹

12. On 15 June 2017, the Applicant requested further sick leave, for the period 15 May 2017 to 15 June 2017. On 29 June 2017, the MSD denied the request stating:

Based on the new certificate dated 15 June no further sick leave can be approved. The certificate does not explain your symptoms and why your condition is preventing you from working. Also, the report does not provide a treatment progress update. Indeed, your doctor explains that you could work if allowed to change post. Based on the provided diagnosis and the explanation above, your sick leave extension cannot be approved.²⁰

13. On 31 July 2017, the Applicant informed the MONUSCO Chief Medical Officer (“CMO”) that she had been diagnosed with sleep apnea, which required an electrically powered medical device to assist her breathing when sleeping. She attached a certificate from a pulmonologist stating that she required, on a regular basis, an

¹⁵ Rejoinder, annex 64.

¹⁶ Application, annex 27, annex 34.

¹⁷ Application, annex 28.

¹⁸ Reply, R/3, page 5.

¹⁹ *Ibid*, page.3.

²⁰ Application, annex 40, Reply annex 3, page.1.

electricity-powered device (“CPAP”) to use while sleeping. The Applicant sought advice as to whether she would not have problems due to power cuts in Goma. The advice from the CMO was that the issue was the same everywhere as in Goma and that she should contact Human Resources and her Section Chief, while he would provide technical advice when requested.²¹

14. On 12 August 2017, MSD informed the CMO that no further sick leave would be authorized for the Applicant beyond 17 January 2017 and that any absence after that date would need to be handled administratively.²²

15. On 28 August 2017, the Applicant informed the MONUSCO Human Resources Section (“HRS”) that she had a new medical report and that her health condition was “incompatible with living conditions in Goma.” On the same day, an HR Officer advised the Applicant to provide additional information.²³

16. On 8 September 2017, HRS notified the Applicant of her unauthorized absence from duty and informed that according to her attendance records in UMOJA, her certified sick leave was only until 17 January 2017 while there was no record for her prolonged absence beyond that date.²⁴ HRS further informed the Applicant that the office would proceed to withhold her salary and if she did not report on duty within a period of 10 days or provide a plausible reason or supplementary sick leave certification, MONUSCO would consider her as having abandoned her post.²⁵

17. On 20 September 2017, Counsel for the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) in New York requesting for:

- (a) The transfer of the Applicant to a country where the electricity supply is stable, or

²¹ Application, annex 42, 43.

²² Reply, R/2.

²³ Application, annex 44, page 2.

²⁴ Application, annex 45.

²⁵ Ibid.

(b) In the alternative, an agreed termination of her appointment.²⁶

18. On 21 September 2017, the Officer-in-Charge (OiC), HRS wrote to the Applicant noting that she had not reported for duty or replied to the 8 September 2017 letter. He again requested that she provide a plausible explanation or supplementary sick leave certification for her absence beyond 17 January 2017. The OiC/HRS also informed the Applicant that should she fail to do so, MONUSCO would initiate the procedure to separate her for abandonment of post.²⁷

19. On 28 September 2017, the Counsel for the Applicant wrote to the OiC/HRS explaining that the Applicant had not abandoned her post, but rather was on sick leave due to her medical condition caused by the harassment she suffered at work. He further explained that she was unable to return to Goma because she was suffering from sleep apnea, which required an uninterrupted electrical supply to operate her medical device.²⁸

20. On 24 October 2017, MONUSCO requested the Department of Field Support (“DFS”) to seek ASG/OHRM’s approval to separate the Applicant from service on the ground of abandonment of post.²⁹

21. On 24 April 2018, the OiC/HRS informed the Applicant of the procedure regarding her separation for abandonment of post.³⁰

22. On 25 June 2018, the ASG/OHRM approved the request to separate the Applicant from service on the ground of abandonment of post.³¹ The Applicant was separated on 26 June 2018.³² The decision to separate the Applicant for abandonment of post was upheld by management evaluation.³³

²⁶ Application, annex 48.

²⁷ Application annex 49.

²⁸ Application, annex 52.

²⁹ Reply, R/4.

³⁰ Application, annex 54.

³¹ Reply, annex 5.

³² *Ibid.* annex 1.

³³ Application, annex 63.

Submissions

Applicant's submissions

23. The Applicant submits that she did not abandon her post. Rather, she suffered sleep apnea as was confirmed by a well-known pulmonologist following a series of tests. However, the matter of refusal to return to the duty station on the basis of apnea is secondary to the question of unapproved sick leave for the preceding period.

24. Regarding the unapproved sick leave, the Applicant submits that the MSD acted arbitrarily and was probably influenced by Ms. Seftaoui, the supervisor who had harassed her.

25. The Applicant maintains that she had submitted genuine medical reports, issued by an authorized and practicing psychiatrist who operates from Pole Saint-Exupery, a recognized institution in France. The MSD personnel took their decision to reject her reports based on United States of America (“USA”) standards. In the USA, according to the Applicant, medical services are very costly, which motivates doctors to continuously vary the medical reports, even when the patient’s condition has not improved. By contrast, doctors in France are paid by the patients and the government. As such, the doctors do not commit much time to revise medical reports, if the conditions of their patients have not improved considerably.

26. The Applicant further takes issue with the MSD doctors, who are not psychiatrists, and challenges their capacity to reject the medical reports issued by a specialist. The Applicant opines that if the MSD doubted the medical reports that she had submitted, then it should have asked her to be examined by a different doctor based in any United Nations Office in Paris. The Applicant points out that whereas staff rule 6.2(j) envisions that the staff member may request examination by an independent practitioner or a medical board, it does not mean that she was obliged to request it.

27. Regarding the sleep apnea and the Respondent’s proposition that she could have availed herself of enhanced residential security measures, which included solar panels, in order to maintain her medical device, the Applicant submits that in January

2017, when the relevant memorandum was circulated, she was on a sick leave and, thus, was unaware of this facility.

28. As a remedy, the Applicant requests the Tribunal to: (a) find that the decision of separating her on the ground of abandonment of post was unjust and thus annul it; and (b) order the administration to pay her EUR2,000 being the expenses for legal fees.

Respondent's submissions

29. The Respondent contends that the contested decision was lawful under section 5 of ST/AI/400 (Abandonment of Post), according to which the absence of a staff member from his or her work, unless properly authorized, may create a reasonable presumption of intent to separate from service unless the staff member provides satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control. The Applicant's prolonged absence was not authorized. MSD had explained to the Applicant why her sick leave requests beyond 17 January 2017 were rejected. The Applicant initiated her separation from service by failing to report to duty or provide an acceptable reason for her unauthorized absence.

30. The Applicant's allegation that the MSD improperly rejected her sick leave requests and that Ms. Seftaoui inappropriately influenced the MSD is unsupported by any evidence. The Applicant has the burden of proving that bias or improper motivation prompted MSD's decision to reject her sick leave requests.

31. Contrary to the Applicant's allegation, her sleep apnea diagnosis did not prevent her from reporting for duty in Goma because she was entitled to a backup power supply if necessary. The Respondent documents that in January 2017, MONUSCO informed all international staff that the security measures had been revised to add a solar panel to the two other back-up power supplies that had been previously approved. The Applicant was aware of these benefits and had indeed received the residential security allowance.³⁴

³⁴ Reply, annexes 6, 7 and 9.

32. Accordingly, the Respondent requests the Tribunal to: (a) dismiss the Application; and (b) not award the legal fees requested.

Considerations

33. The Tribunal recalls that judgments on fitness of staff members for duty, as noted by the Appeals Tribunal, are principally 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.³⁵ The case in question, however, is not as much about a substantive judgment on fitness; rather, it is about whether the administration acted in accordance with the formal rules and reasonably in the face of information provided to it.

34. The Tribunal agrees with the Applicant that the primary question for the legality of the impugned decision lies in the refusal of the certification of her sick leave. In this regard, the regulatory framework applicable at the relevant time foresaw as follows.

35. Staff rule 6.2(a) concerning sick leave:

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 leave must be approved on behalf of, and *under conditions established by, the Secretary-General* [emphasis added].

36. Staff rule 6.2(f), obligations to submit medical certificates:

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* [emphasis added].

37. Section 2.3 of ST/AI/2005/3/Amend.1 (Sick leave):

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

³⁵ *Harris* 2019-UNAT-897, para 21.

appropriate official, in a sealed envelope, a detailed medical report from a licensed medical practitioner

38. ST/AI/400, which applies as *lex specialis*, notwithstanding the change of numbering in the staff rules, provides in relevant parts:

Section 5

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.

Section 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 [...]. 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.

Section 13

[...] If the staff member fails to produce [medical] 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 [...].

39. As can be seen from the above-cited provisions, there is a degree of formality required for the judgment on fitness to be soundly made. Neither the requirement of a detailed medical report as per ST/AI/2005/3/Amend.1 nor the requirement that the medical report adhere to a provided template are overly onerous or otherwise unreasonable, considering the need for the MSD to assess the validity of medical

reports remotely, on all kinds of ailments and across different national standards for medical reports. It is, likewise, not unreasonable that, in dealing with a protracted period of illness, with each further request for extension it is required to provide a detailed description of impact on the patient and the treatment plan. The latter is notably necessary where, as in this case, the medical condition is diagnosed solely upon symptoms reported by the patient, without laboratory tests, imaging exams or other objective method.

40. The Tribunal will not entertain the Applicant's averment that MSD had no psychiatric expertise. Obviously, MSD has access to medical specialists as necessary. In order to engage them where required, it must have available to it proper medical documentation.

41. There is no dispute that the Applicant submitted a full medical report for the period ending on 17 January 2017, which was along the lines of the template – *nota bene* one obviously drawn up by a specialist – and was approved by MSD. There is also no dispute that for the subsequent periods of her absence the Applicant failed to do so: she recycled the previous report with a changed date and further recommendation for sick leave, while the report failed to address the questions of treatment plan and prognosis. The Applicant's contentions regarding her unchanged condition, the difference in standards for medical reports between the USA and France and her opinion that a new medical report in the extended format was not necessary, are irrelevant. If, for whatever reason, the Applicant had problems obtaining a report in the required format from the treating physician, then, in accordance with section 13 of ST/AI/400, she had the option of requesting that the matter be referred to an independent practitioner. This she did not do. While the Applicant is correct that she had no legal obligation to pursue this avenue, her decision to not avail herself of the option causes her to bear the evidentiary consequences of it, i.e., that the refusal to certify extended sick leave remains un rebutted.

42. In this case, the refusal to certify sick leave was not only based on the formal lack of documentation and thus legitimate but also *prima facie* reasonable by common

sense standards. The MSD justifiably insisted on information as to how, notwithstanding the three and half months of sick leave and therapy, the alleged stress adaptation disorder would still have impeded the Applicant's overall daily functioning and performance of the generic duties of an administrative assistant while half a year earlier she had declined an offer of a transfer. Moreover, pharmacotherapy and psychotherapy are usually available in Missions, the latter, if not through sessions in person, then by audio-visual means, while rest and recuperation breaks provide an opportunity to see medical practitioners regularly. Given that it was maintained that the Applicant could not return to her post, explanation was due as to the treatment plan and the prognosis.

43. The Applicant's averment that the Organization's medical services were acting in concert with her supervisor to harass her is entirely unsubstantiated.

44. Regarding the sleep apnea invoked as a health condition barring return to the duty station, the Tribunal notes, primarily, that the Applicant did not request sick leave on this score. The Applicant had been appointed to perform a specific function at a specific Mission theatre. Should the Applicant lose the ability to so perform on health basis, the proper procedural avenue is a sick leave request, where medical reports become evaluated on the merits. The Applicant did not do so – her correspondence with the CMO is, at best, inconclusive - neither did she follow up on MONUSCO's request for further information, thus precluding *ab initio* a substantive response either on the part of the MSD or on the part of Human Resources.

45. Based on the information provided, however, the Tribunal concurs that it was not unreasonable to disqualify the reason invoked by the Applicant for not returning to work as implausible under the terms of section 13 of ST/AI/400. Even accepting as true that the Applicant was diagnosed with sleep apnea meriting the use of CPAP, using a CPAP device is a treatment of choice, to facilitate breathing during sleep, and the Applicant obviously had managed without any device until July 2017. As such, the need for uninterrupted power supply must be seen in proportion and not be confused with the need for a life-supporting system.

46. The Tribunal posits that a staff member who, by reasons of health, requires special logistics in order to effectively perform, may count on a reasonable effort by the Organization in arranging for amenable conditions. The Organization, however, cannot bear all the burden of accommodating a staff member's special needs and to the furthest extent, this responsibility rests mainly on the staff member. For example, whereas a staff member who cannot climb stairs may reasonably expect that his or her office be placed on a ground floor and a ramp built to access the ground floor, he or she cannot, however, demand the instalment of an elevator. The burden of logistics necessary for the staff member's comfortable functioning must be shared in cooperation, with the Organization's focus being on security and staff members having discretion in their choices.

47. In this regard, as demonstrated by the Respondent, throughout the relevant period, the Applicant was in receipt of residential security allowance. Residential security measures, including reimbursement for a generator or a battery with inverter, were in place at least since 2015; these were readily capable of providing backup power supply. The January 2017 provision for reimbursement for solar panels was just an additional facility. However, the Applicant, who, as the record shows, during her sick leave was occasionally using her work email, was using UMOJA and corresponded intensely with MONUSCO, had access to this, and opportunity to seek further information. All considered, the Applicant had no grounds to assume that the measures in place in Goma were insufficient to support her use of CPAP. Yet, the Applicant did not undertake any effort to putting the CPAP to trial in Goma neither did she act in the spirit of cooperation by engaging MONUSCO in addressing the problem.

48. Altogether, the Applicant's actions were consistent with a concluded intent to not return to Goma, no matter the lack of basis. The Respondent's decision to separate her on the ground of abandonment of post was lawful.

JUDGMENT

49. The application is dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 15th day of April 2020

Entered in the Register on this 15th day of April 2020

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi