



Before: Judge Francis Belle
Registry: Nairobi
Registrar: René M. Vargas M., Officer-in-Charge

BK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Elizabeth Brown, UNHCR
Sandra Lando, UNHCR

Introduction

1. The Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application on 2 January 2023 to contest the decision to reduce his Standard Assignment Length (“SAL”) on medical grounds. Due to the subject matter of his application, the Applicant requested anonymity.
2. The Respondent filed a reply on 2 February 2023. He seeks dismissal of the application on the basis that the contested decision was well-founded and properly executed. The Respondent did not object to the motion for anonymity.
3. The Tribunal held a case management discussion on 5 June 2023 where it was, *inter alia*, agreed that the Tribunal could proceed to judgment based on the record before it.
4. Vide Order No. 100 (NBI/2023), the Tribunal granted the Applicant’s motion for anonymity.

Facts

5. The Applicant joined UNHCR in September 2009 as Finance Associate (G-6) in Budapest. He was promoted to Senior Project Audit Associate (G-7) in 2015. In 2016, the Applicant was converted to the professional category and reassigned as Regional Project Control Officer (P-3) in Sarajevo. After an assignment to Port of Spain, the Applicant was reassigned to Addis Ababa on 21 December 2020 as Project Control Officer.
6. From 21 December to 29 December 2020 and 10 May to 11 July 2021, the Applicant was authorized to telecommute from outside his duty station.
7. In November 2021, the security situation in Ethiopia deteriorated such that the Federal Government declared a nationwide state of emergency. The United Nations Crisis Management Team (“CMT”) decided to allow non-essential staff and their dependents, as well as dependents of critical staff, to move voluntarily. An

email to this effect was sent to UNHCR staff on 8 November 2021. The pertinent part of the email stated:

Over the last few days we have discussed a range of precautionary measures to enable us to do just that. These measures include voluntary movement of specific categories of staff and their dependents from Addis Ababa and your respective duty stations to other parts of the country or out of Ethiopia. The CMT has, therefore, decided to allow non-essential staff and their dependents as well as dependents of critical staff to move voluntarily. Please note that this option is subject to your Head of Agency deciding on your role as essential or non-essential staff.

8. On 10 November 2021, the Applicant notified the UNHCR Representative that he was confirming his voluntary move as a non-essential staff member with his family effective that night.

9. A few hours later, the Senior Human Resources (“HR”) Officer responded informing the Applicant that he could not leave the country before a telecommuting request was duly approved by the Representative, or that approved annual leave covered the duration of his absence away from the duty station.

10. A series of email exchanges ensued, whereby the Applicant sought approval to telecommute, but the operation had not yet considered whether this was operationally possible for the Applicant’s job functions. The Applicant proceeded to take uncertified sick leave (“USL”) from 10 to 26 November 2021.

11. On 10 January 2022, UNHCR Ethiopia staff were notified that the restrictions had been lifted with respect to family members, and all staff were encouraged to contact HR for further guidance on the return to duty station.

12. The Applicant had no approved telecommuting request from 16 January to 27 February 2022. The Applicant took annual leave (“AL”) on 20 January 2022 and USL on 28 February 2022.

13. The Applicant was on certified sick leave (“CSL”) from 1 March 2022. He never returned to the duty station. The Medical Section indicated that CSL was expected to continue to at least February 2023, at which time he was to be re-evaluated. The Applicant exhausted his maximum entitlement of 195 days on full pay CSL on 16 September 2022. Since that time, he had been on half pay CSL, using half AL days.

14. Following several email and Microsoft Teams exchanges with Senior Medical Officers from the Division of Human Resources (“DHR”) in Nairobi and Geneva, the Applicant was sent an Independent Medical Examination (“IME”) consent form on 31 May 2022. On 16 August 2022, the Applicant responded citing issues with the consent form but also including a signed copy with comments.

15. The IME was conducted on 17 August 2022.

16. On 11 October 2022, the Applicant received a memorandum, dated 3 October 2022 and approved by the Director/DHR on 5 October 2022, that contained the conclusion and recommendation of the Medical Section with respect to the reduction of the Applicant’s SAL on medical grounds. It recommended the reduction with immediate effect and put into place a medical constraint that the Applicant not serve in C/D/E category duty stations with immediate effect until October 2023.

17. The Applicant filed a request for management evaluation on 3 December 2022.

18. On 16 January 2023, the Deputy High Commissioner replied to the Applicant’s request for management evaluation stating that it was not receivable and that he could proceed directly to the UNDT.

Parties' submissions

19. The Applicant's principal contentions are:
- a. The medical practitioner that UNHCR designated to conduct the IME (Dr. H.) is an employee of a Non-Governmental Organization ("NGO") mainly funded by UNHCR, which created a conflict of interest in violation of ST/AI/2019/1 (Resolution of disputes relating to medical determinations);
 - b. He was not provided with the terms of reference ("TORs") of the IME contrary to sec. 2.4 of ST/AI/2019/1;
 - c. He was not provided with the curriculum vitae ("CV") of the proposed IME contrary to sec. 3.2 of ST/AI/2019/1;
 - d. He was coerced to sign the IME consent form, contrary to secs. 3.5 and 2.6 of ST/AI/2019/1, within a 24-hour ultimatum; and
 - e. The failure of UNHCR to respond to his management evaluation request in a timely manner.
20. The Applicant seeks the following reliefs:
- a. Rescission of the SAL reduction decision since it was based on a medical determination by an IME who should have recused him/herself because of a conflict of interest;
 - b. Moral and financial compensation for the damages caused by the IME process violating ST/AI/2019/1;
 - c. A public apology and resignation by the Head of UNHCR Medical Service and by the Case Manager/Senior Medical Officer due to gross negligence and violation of UNHCR Rules;

d. An Office of Internal Oversight Services (“OIOS”) and UNHCR Ethics Office Investigation into the SAL reduction decision with immediate effect, because it is a scheme used and abused to terminate UNHCR staff on extended sick leave instead of proper management of extended sick leave; and

e. Financial compensation for his family members for the mental and financial damages caused by the gross negligence of UNHCR (ab)using the IME/SAL cut and management evaluation process.

21. The Respondent’s principal contentions are:

a. ST/AI/2019/1 is not applicable in this case because it has not been adopted by UNHCR;

b. There is no evidence of conflict of interest. UNHCR is indeed identified on the website of the NGO as a donor for a 2019 project and a future project. However, it is not the sole donor. The Applicant has not provided any evidence that Dr. H.’s work with the NGO intersects with any specific activities which UNHCR funds;

c. Dr. H. also works for a healthcare clinic and as a private practitioner. UNHCR periodically uses the healthcare clinic for examinations of its staff members. The health care clinic uses numerous doctors. UNHCR made a general request to the healthcare clinic to perform the IME. Dr. H. was not requested specifically. Also, as a licensed physician, Dr. H. has sworn a medical oath. The Applicant has provided no evidence to rebut that his/her examination was anything other than objective and professional. Therefore, the suggestion that Dr. H.’s work or opinions are unduly influenced by UNHCR’s funding is unfounded;

d. The Applicant was not pressured to consent to an IME. The UNHCR Medical Section followed a consultative and collaborative approach, and the proper procedure was followed; and

e. The Applicant's conduct illustrates that he has violated the doctrine of clean hands because the Applicant asserts that the process leading to the contested decision was flawed, but he has violated good faith in his failure to adhere to the proper rules, procedure and fair engagement.

22. The Respondent requests the Tribunal to refuse all the reliefs sought by the Applicant and to dismiss the application.

Consideration

23. The Applicant challenges the Administration's decision to order an immediate cut of SAL in his future work for UNHCR.

24. The decision that he challenges is based on an IME. The Applicant argues that the doctor who conducted the evaluation should have recused herself because she was not independent and had a conflict of interest. His critique of the IME process and her response thereto are collectively the focus of the entire application.

25. The Tribunal will carefully examine the issues arising from the Applicant's submissions.

The Issues

26. The Tribunal agrees with the Respondent that the primary issue in the case was whether the contested decision was procedurally correct.

27. The Respondent also argued that the United Nations Appeals Tribunal ("UNAT") has repeatedly held that, "[w]hen judging the validity of the Administration's exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct and appropriate".

28. The Applicant's specific allegation is that the medical practitioner UNHCR designated to conduct the IME, Dr. H., turned out to be an employee of an NGO that is mainly funded by UNHCR. He refers to this as a conflict of interest.

29. The Applicant submits that a conflict of interest arises pursuant to ST/AI/2019/1, which deals with resolution of disputes relating to medical determinations.

30. Sec. 1.3 of ST/AI/2019/1 states in its relevant part that:

[a] conflict of interest shall comprise any instance in which such medical practitioner's professional or personal relationship, activities or interests may impair or reasonably give the appearance of impairing the practitioner's impartiality and independence. Former employees of a United Nations organization, regular treating physicians and members of the same medical office as regular treating physicians of the staff member must not act as an independent medical practitioner or as the Chair of a medical board.

31. If the Applicant is correct about this, then the conflict of interest would affect the legality of the decision to reduce his SAL.

The Legality of the IME Procedure

32. The factual background to these arguments is very much connected to the position that the Applicant held and the circumstances that had arisen in his duty station (Addis Ababa).

33. The facts show that the Applicant had been in a discussion with his superiors in relation to his request to telecommute during the COVID pandemic and, later, as the security situation in Ethiopia deteriorated.

34. Such permission was granted for him to telecommute from Hungary from 21 December to 29 December 2020 and from 10 May to 11 July 2021.

35. The Respondent set out the important email and timelines in the case as follows:

A series of email ensued, whereby the Applicant sought approval to telecommute, but the operation had not yet considered whether this was operationally possible for the Applicant's job functions. The Applicant proceeded to take sick leave (SL) from 10 to 26 November 2021 (which does not require supervisor approval). On 26 November 2021 the applicant referenced a request for telecommuting for 29 November 2021 to 15 January 2022 in his email; however, no

such request was ever formally submitted in the correct channel, nor recorded in the internal administrative system, as noted by the Senior HR Officer in an email dated 7 February 2022. The Respondent notes that a request was signed on 2 December, but never submitted.

36. The Applicant has not refuted these email exchanges nor this timeline of events.

37. Other important facts are that the situation in Ethiopia deteriorated and the CMT decided to allow non-essential staff and their dependents to move voluntarily subject to a decision on each staff member's role. The Applicant took advantage of this situation. However, the circumstance was reversed and personnel were asked to return to their work bases unless their supervisors directed otherwise and granted permission to telecommute.

38. It appears that during the year 2021 and going into 2022, the Applicant resorted to taking USL and CSL, which continued for some months. It is during this period of sick leave that the issue of the Applicant's health took centre stage and after multiple exchanges, one of which was an objection by the Applicant, being taken to granting permission to submit to an IME, in Budapest. On 17 August 2022, the matter was referred to an IME.

39. On 5 October 2022, Dr. N., Senior Medical Officer, DHR, UNHCR, Geneva, sent the Applicant a copy of the 24 September 2022 IME report and summarized the recommendation of the Medical Board.

40. On 11 October 2022, the Applicant received a memorandum dated 3 October 2022 and approved by the Director/DHR on 5 October 2022, which contained the conclusion and recommendation of the Medical Section with respect to the reduction of the Applicant's SAL on medical grounds. The memorandum recommended the reduction with immediate effect and put into place a medical constraint that the Applicant not serve in C/D/E category duty stations with immediate effect until October 2023.

The UNDT's purview

41. It is important to understand the scope of review of the UNDT in circumstances involving medical evaluations such as the instant. The UNDT does not have medical competence and, therefore, cannot evaluate the substance of the IME. The UNDT, in line with its statutory role, can only determine whether the procedure taken to refer the Applicant to an IME for medical evaluation was fair and rational in the circumstances.

42. The UNDT can evaluate the fairness of the procedure by assessing the grounds for imposing the procedure. Thereafter, the notification to the Applicant of the steps to be taken to engage in the process and any right afforded to appeal or review the decision can be evaluated.

Evidence of Health Concerns/Context

43. There was clear evidence of health concerns emerging from the Applicant's records kept by the Organization and provided to the Tribunal by the Respondent. The Applicant has not challenged these records.

44. The Applicant had reported ill for some months before the decision to refer him to an IME was taken. In the circumstances, the best interests of the Organization and of the Applicant were considered and the decision taken to refer the matter for an IME was taken with his agreement by way of consent.

45. It is significant that the Applicant himself referred to his medical condition in his own correspondence, where he contests the imposition of the IME rather than allowing him to improve. The question is: improve from what? This is important since the UNDT is not in a position to evaluate the seriousness of this admitted fact, but only to determine that in light of the surrounding facts and the admission, the decision to refer the matter to an IME seemed fair. This also affects the legality of the decision to refer the Applicant to an IME.

Consent

46. It is also noted that fairness in the circumstances included seeking the Applicant's permission/consent to refer the issue of his medical condition to an IME. Such a request was the lawful way to proceed since decisions made about personal health conditions should always be voluntary, as long as the subject of the proposed evaluation is able to consent to any determined procedure required by the Organization. The Tribunal therefore finds that this approach was correct.

47. In this case, the Applicant was able to consent and did consent even though he originally questioned the need for such consent.

48. It is also noted that the Organization must be able to act in order to protect itself and its staff at any time. The decision to refer the matter to an IME is just a part of the larger concern for the protection of the Organization and the staff, including the subject of the IME. In this regard, it is imperative that the Organization be able to assess the fitness of staff members to perform their duties in light of the conditions that may prevail in any duty station, and taking into account the level of responsibility of the officer involved and the role played by the organization he represents.

49. In this regard, the importance of the role the Applicant played in the Organization was underscored by reluctance of his superior officers to permit him to undertake an extended period of telecommuting. But, in the alternative, there was concern about his ability to perform the properly assigned duties of his office. The role of the IME in this regard is therefore of pivotal importance because failure to impose an IME could result in serious repercussions for the Organization.

50. The Respondent has submitted that in *Kamanou* UNDT/2012/050, para. 37, the Tribunal stated that “it is clear that the Organization may conduct such medical examinations not only with a view to protecting staff members, but also in its own interests”.

51. The decision to have the Applicant consent to an IME was reasonably taken in the interest of the Organization.

The Applicable legal instruments/Administrative Instruction

52. It is also an essential element of the procedural propriety that the process of referral to an IME be supported by legal instruments.

53. After making reference to staff rule 4.19, which deals with medical examinations, the Respondent argues that the Administrative Instruction on Medical Clearances and Fitness to Work (UNHCR/AI/2022/03) “addresses different situations in which the Medical Section would need to determine a staff member’s fitness to work”:

10. In addition to the above and for health and safety reasons, the Medical Section may at any time request staff members to undergo medical examinations [citing Staff Rule 4.19]. Situations that may merit such a request include long term service in D and F duty stations for “D and E waiver”; inclusion in an emergency Response Team roster; end of Medical Evacuation and /or Other Medical Travel; end of extended sick leave, following workplace incurred injury and illness; during outbreak of communicable disease and /or during pregnancy. Medical examinations undertaken in these situations assist Medical Section in identifying specific needs of staff members and where required, recommended workplace accommodation.

The conduct of the IME

54. It is clear from the foregoing that the decision-making process involved in the evaluation of a staff member, in this case the Applicant, for the purpose of an IME should be guided by principles of fairness, which include impartiality and appearance of no external influence that would cause bias or a conflict of interest.

55. The Applicant argues that such principles are included in ST/AI/2019/1 but the Respondent advances that this administrative instruction is not applicable. The fact is that UNHCR would have had to subscribe to the said administrative instruction if it is to be determined to apply to the Applicant’s situation. The Tribunal is satisfied that UNHCR has not subscribed to ST/AI/2019/1.

56. While the Tribunal accepts the latter proposition, it is not dismissive of the need for guidelines in relation to bias and conflict of interest. However, these guidelines would have to be determined by those involved to the extent that the outcome would be in the interest of both the staff member and the Organization. The context in which bias and conflict of interest arise would influence the nature of the applicable rules. The question arises: why would UNHCR or the Applicant have had an interest in obtaining a biased IME on which neither the staff member nor the Organization could rely? The Applicant's health and professional future were at stake as was the ability to discharge his duties on behalf of UNHCR. It is therefore important to examine the conduct of the IME, if possible.

The Conduct of the Medical Examination

57. Since the Tribunal has determined that the decision to refer the Applicant to an IME was fair and reasonable, it would have to consider whether anything about the way the IME was conducted would interfere with its purpose.

58. In this case, the Applicant has not denied a medical condition requiring attention and he did consent to the IME. The objection to the doctor who performed the IME would have to be based on evidence that can be specifically proven. In this matter, ST/AI/2019/1 is used to refer to a connection to any organization that could have been connected to UNHCR. This legal assessment would then be two tiered since the Administration must be satisfied that the medical practitioner is competent to carry out the evaluation, and there must be some basis for UNHCR to assess the competence of the medical practitioner involved. Therefore, a record that includes evidence of work conducted for an organization which has the approval of UNHCR should be of some importance.

59. The fact that the selected medical practitioner has worked for an organization that was partly funded by UNHCR, which referred the Applicant to the IME, should not be problematic where evidence of competence and or expertise is essential since the interest of both the staff member and the Organization must be protected. If the IME had worked in the Applicant's favour, he could argue that it should be accepted

because the organization for which the medical practitioner once worked had the approval of UNHCR in the past.

60. Different considerations may have been applied if it were a situation in which the Applicant was making a medical claim against the organization/UNHCR or the organization was trying to resist such a claim. Although the procedure should not be biased against either side, the approach would certainly differ from one which was considered to be adversarial. In the case of an IME the situation is not adversarial.

61. Although there is always a possibility that a medical doctor would be influenced by past association, it is questionable whether in a situation such as that involving the Applicant, it would be of such a nature that the decision would warrant the consideration of some remote connection.

62. The Tribunal is of the view that this would not be the case unless the Applicant can clearly establish a bias in the assessment that has been done. But, in any event, the Tribunal has not seen the medical assessment and would not be qualified to evaluate its medical soundness in the circumstances. A review looking into such a bias would have to be done by a medical team and not by the UNDT. To establish such a bias, the Applicant would have to ask for the appropriate medical review, which would not be done by the UNDT.

ST/AI/2019/1 - Applicability

63. Even if ST/AI/2019/1 was applicable, it is interesting that it itemizes the instances of clear conflict being former employees of a United Nations organization and regular treating physicians or those who might be regular treating physicians or members of the same office as regular treating physicians of the staff member. It has not been argued nor established that any of these circumstances apply to Dr. H., the examining physician in this case.

64. The Applicant also submits that he was not provided with TORs for the IME, contrary to sec. 2.4 of ST/AI/2019/1. The Applicant also argues that said administrative instruction requires that where there is a request for a review, the Board shall provide a curriculum vitae of the selected Doctor and the fees to be paid to her. But these issues would be finally settled by the governing regulations, which the Respondent argues are not found in ST/AI/2019/1 that does not apply to UNHCR as earlier stated.

65. It is of some significance that the Respondent argues that the Organization pursues the IME as part of a collaborative process. This makes sense since the staff member would not want to endanger his own health, and the Organization would not want to endanger others or the Organization's interests. The invitation to the Applicant to consent to the procedure also indicates that it is collaborative.

Was the Applicant pressured to Consent to the IME?

66. The Applicant further argued that he was pressured to sign the consent form for the IME on the basis that its results would not be shared with him or other parties, and that failure to attend an appointment for the IME would result in administrative consequences. In other words, the confidentiality of the IME would be guaranteed.

67. This argument betrays the Applicant's concern only for his own cause, but not for the interests of the Respondent. The Applicant, however, cannot deny that the statutory basis for such an IME existed and, therefore, there should be no reason to pressure or persuade the Applicant to consent to an IME unless he rejects the factual basis conducting it, which he did not.

68. The Applicant also complains of the failure to respond to his request for management evaluation in a reasonable time in spite of the Applicant's request. The fact is that no management evaluation response was required in this case because it was not an administrative decision alone that provided the basis for the IME determination. A medical determination was also involved, and the Administration would properly act in accordance with the medical determination and not

otherwise. There is no evidence that the Administration did not follow the medical determination, and an evaluation of this would require a medical review.

Misusing the Process to Dismiss Staff

69. The Applicant submits that UNHCR is misusing the IME process to dismiss staff. But this allegation is particularly scurrilous when one considers that the Applicant appears to have been abusing the opportunities for, firstly, telecommuting and, secondly, taking CSL and USL for his own purposes. These features of the case gave rise to the Respondent's submission that the Applicant should come to equity with clean hands.

The Doctrine of clean hands

70. The Respondent argued that UNAT has recognized the doctrine of clean hands, defined by Black's Law Dictionary as "the principle that a party cannot seek equitable relief or assert an equitable defence if that party has violated an equitable principle, such as good faith".

71. As an example, the Respondent cites the principle that USL is not meant to be a means for covering absence outside the duty station, as explicitly set forth in staff rule 6.2(i). Therefore, the Applicant was in violation of this provision during the 14 days of USL that he took in November 2021. Additionally, he was in violation again when he took USL on 28 February 2022 and, subsequently, CSL from 1 March 2022.

72. Consequently, far from UNHCR being unjust, the Applicant himself was not being fair to the Organization when he acted in this way. The Tribunal agrees. The Applicant's allegation that the Administration is seeking to dismiss staff members through the application of the IME procedure is a hasty generalisation. The Applicant would have to produce evidence of this alleged fact and in the absence of such facts it would demonstrate the extent to which he was concerned only with his needs and not the needs of UNHCR.

The Orders Sought

73. It is on this basis that the Applicant asked in essence for remedies set out at para. 20 above.

74. The Tribunal is being asked to order an investigation into the IME and UNHCR. It is not possible for the Tribunal to make such an order. It has already been stated that in an application before it, the Tribunal will only consider the validity of the Administration's exercise of discretion in administrative matters and determine if the decision is legal, rational, procedurally correct and appropriate (see for example *Toure* 2016-UNAT-660, para. 30, and *Awe* 2016-UNAT-667, para. 26).

75. In some cases, the Tribunal, in its discretion, may refer the matter to the Secretary-General for accountability. However, this is not an appropriate case in which to make such a referral since the Tribunal has not found that anything irregular has taken place in the process pursued in this matter.

76. The earlier narrative also implies that it is not for the Tribunal to remove the IME but to determine whether it was lawfully imposed. If its imposition is unlawful, then such a declaration would be made. In this case the Tribunal does not consider that there was any unlawful behaviour by UNHCR in following and implementing the recommendations arising from the said procedure. The decision was rational, procedurally correct and appropriate.

77. The Tribunal also notes that there is no basis for an award of damages for negligence or otherwise. The Applicant refers to the failure to provide a timely management evaluation response, but no evaluation was necessary because of the nature of the application. The Tribunal has not held that there is any failure to act without due care in the manner of the appointment of the medical practitioner to carry out the IME; and there is no evidence of malpractice in the conduct of the IME.

Award of Damages

78. The Tribunal can find no basis for an award of damages in the circumstances. In any event, even if there was a basis for such a finding that the Applicant's rights were violated, no award of damages, moral or otherwise, could be made without evidence of the damage caused. No evidence of such damage has been provided.

Conclusion

79. In view of the foregoing, the Tribunal DECIDES to dismiss the application in its entirety save that the Applicant's identity is to be anonymised in accordance with his motion for anonymity.

(Signed)

Judge Francis Belle

Dated this 22nd day of March 2024

Entered in the Register on this 22nd day of March 2024

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi