



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

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Judgment No. 2019-UNAT-948/Corr.1

**Bezziccheri  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge Sabine Knierim Judge Jean-François Neven
Case No.:	2019-1244
Date:	25 October 2019
Registrar:	Weicheng Lin

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Counsel for Ms. Bezziccheri:	François Lorient
Counsel for Secretary-General:	Wambui Mwangi

*Reissued on 8 December 2020*

**JUDGE MARTHA HALFELD, PRESIDING.**

1. This case arose from Ms. Sonia Bezziccheri's challenge before the United Nations Dispute Tribunal (United Nations Dispute Tribunal or UNDT) of the Administration's decision not to recommend her for consideration for a disability benefit by the United Nations Staff Pension Committee (UNSPC). The UNDT rendered Judgment No. UNDT/2019/012 in Geneva on 29 January 2019, rescinding the decision on grounds it was illegal since the decision relied upon the report of an Independent Medical Examination (IME), which it found was a result of unlawful procedures. Noting that the UNDT was not vested with jurisdiction to determine the status of her sick leave and her alleged incapacity and that such determination must be determined by an IME or Medical Board, however, the parties' continued disagreement over the composition of the Medical Board resulted in the inability of Ms. Bezziccheri's case to be submitted to the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund) for consideration of her disability benefit. The UNDT noted there was a deficiency in the regulatory regime as there was no mechanism to address party disagreement over the Medical Board composition and awarded Ms. Bezziccheri USD 5,000 for the deficiency having resulted in a long and abusive proceeding. For reasons set forth below, the Appeals Tribunal dismisses Ms. Bezziccheri's appeal and upholds the impugned judgment. The Appeals Tribunal notes Administrative Instruction ST/AI/2019/1 (Resolution of disputes relating to medical determinations), which was issued after the impugned Judgment was rendered, as it may have applicability to Ms. Bezziccheri's situation.

**Facts and Procedure**

2. The following facts have been established by the UNDT:<sup>1</sup>

... In 2008, the Applicant was on four months' full time sick leave and on four months' part time sick leave. In 2009, 2010, 2011 and 2012, she was on sick leave for intermittent periods.

... In April-May 2013, during her annual leave in Italy, the Applicant was hospitalized and examined by medical specialists. She underwent additional tests and a Magnetic Resonance Imaging ("MRI") on 4, 11, and 14 May 2013, and informed her supervisors in Cambodia and in Austria (Vienna) accordingly.

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<sup>1</sup> Impugned Judgment, paras. 2-48.

... On 16 May 2013, the Applicant wrote to Dr. L., Joint Medical Service (“JMS”), United Nations Office at Vienna (“UNOV”), enclosing a certificate dated 9 May 2013 from Prof. M., a Neurosurgeon.

... On 24 May 2013, the Applicant wrote to JMS requesting three weeks to undertake physical therapy. Certificates from Dr. H., a Neurosurgeon, were translated from Italian to English by the Applicant and sent to JMS.

... On 27 May 2013, JMS replied to the Applicant requesting additional information to allow the Administration to decide about her sick leave status.

... On 28 May 2013, the Applicant replied to JMS. JMS responded on the same day requesting to be provided with a detailed therapy plan from her treating physician, and suggesting that they discuss the conversion of annual leave into sick leave based on the therapy plan.

... On 30 May 2013, the Applicant reverted to JMS and, on 31 May 2013, JMS answered, amongst other things, as follows:

Dear Ms. Bezziccheri, I am copying Ms. [L.] in [Human Resources] of UNODC on to this mail. Thank you for letting me know that you are in Rome, as this was not clear before. As soon as we receive your medical report we can then approve retroactively Sick Leave during Annual Leave after reviewing the documents provided.

... On 17 June 2013, the Applicant replied to JMS. She attached a diagnosis certificate from Prof. P., a receipt for nine sessions of physiotherapy, and a recommendation to stay to undertake rheumatologic exams. In this email she also included the translation of a certificate from Prof. M.

... On 18 June 2013, JMS replied to the Applicant that they would inform her about how much sick leave could be converted retroactively upon receipt of her final report.

... On 19 June 2013, the Applicant responded noting that she would report once all scheduled tests and exams were completed and analysed by her physician. On the same date, JMS informed the Applicant that it would grant her sick leave for her medical condition for a period equal to the one she would have had if she were at her duty station.

... On 25 June 2013, the Applicant was hospitalized at Santo Spirito Hospital, Rheumatology Department.

... On 2 July 2013, the Applicant replied to JMS' 19 June 2013 communication attaching proof of her admission at the above-referred hospital, and a certificate from Dr. Z., a Rheumatologist.

... On 3 July 2013, JMS replied to the Applicant; on 11 July 2013, the Applicant responded by email, attaching a typed certificate from Dr. Z., a Rheumatologist,

and a certificate from Dr. I., a Specialist in internal medicine and dietetics, dated 10 July 2013. She provided her own translation of the certificates in her email in question.

... On 16 July 2013, JMS replied to the Applicant requesting that she send a final report from her treating doctor, with as much details as possible, concerning investigations and therapies undertaken, to enable the Administration to certify her sick leave. JMS noted that the Administration would inform her about how much sick leave it would certify upon receipt of the report.

... On 3 August 2013, the Applicant sent a certificate from Dr. I., to the Human Resources Management Service (“HRMS”), UNOV/UNODC, together with its translation, and a prescription for pharmacotherapy from Dr. B.

... On 3 September 2013, the Applicant wrote to JMS informing that she was still under treatment. She attached a certificate from Dr. I. and provided a translation of it.

... On 4 September 2013, JMS replied that based on the certificate it was unable to make any further decision. In this email, JMS wrote:

Thank you for sending your certificate for extension of your sick leave. As your sick leave has now been above 3 months, I would ask you to provide us with a detailed medical report about diagnosis, examinations, therapy plan in English or with an official translation in order to be able to endorse any further sick leave. Based on the certificate supplied I am unable to make any further decisions.

... On 16 September 2013, the Applicant wrote to JMS. She attached diagnostic and pharmacotherapy treatment reports from Dr. F., a rheumatologist, and Dr. B., a psychiatrist, and indicated that the full clinical record was still to be released from the hospital.

... By email of 4 October 2013, HRMS, UNOV/UNODC, informed the Applicant that the Medical Service was not in a position to endorse her absences for health reasons, and that this might have an impact on the calculation of her October 2013 salary. She was requested to reply by 8 October 2013; the Applicant did not receive that email. It was, however, forwarded to the Applicant’s private email address on 16 October 2013, and the Applicant replied on 18 October 2013 noting that she had not received the previous email.

... Also on 18 October 2013, JMS wrote to the Applicant informing her that JMS was still unable to endorse the retroactive conversion from annual leave to sick leave based on the documentation provided so far; the Applicant was again requested to submit a detailed medical report.

... The Applicant responded by email of 21 October 2013, noting that the full clinical records were still to be released from the hospital, and that she would send them as soon as she received them.

... On 21 October 2013, JMS replied to the Applicant informing her about the need to have the reports written in a detailed manner, amongst other things, because it might be possible to undergo certain therapies at her duty station. JMS also informed the Applicant that it would be able to decide on the approval of retroactive conversion of annual leave into sick leave only upon receipt of the detailed report, and that it would await the Applicant's further reports from treating specialists.

... On 5 November 2013, JMS informed HRMS, UNOV/UNODC, that it had still not received any final report from the Applicant's specialist, and that an independent assessment might be necessary.

... JMS wrote to the Applicant on 11 November 2013, in the following terms:

We have received several short sick leave certificates by your doctor, furthermore some reports from specialists, two of them in Italian. As your diagnosis has varied over the course of your sick leave, we would need a summary and detailed report by your treating specialist regarding the various diagnostic tests you underwent, the therapy received at what point in time over the last months, possible admissions to hospital or other treatment facilities as well as an explanation regarding your fitness to travel and why you had to undergo diagnostic tests and therapy in Italy rather than in your duty station.

... By email of 5 December 2013, the Applicant submitted two additional medical certificates to HRMS, UNOV/UNODC, according to which she was unfit to work, without providing a date at which she would be able to resume work. In her email she further noted that she would "like to apply for disability benefit".

... By email of 19 December 2013 to the Applicant, a Medical Officer, JMS, stated:

I would suggest that you ask your treating doctor in Italy to write us a very comprehensive report in English, including diagnosis, all the treatments you underwent during your stay in Italy with exact dates.

Regarding your suggestion of expediting your request for disability benefit, allow me to just summarize the next steps. First we have to establish the retroactive conversion of Annual Leave into Sick Leave, based on the documentation provided. So far I do not have enough information suggestive of disability and am unable to make a judgment on your state of health and prognosis. Once we have a clearer picture, we might need to involve an independent specialist for an assessment. Only then we can eventually decide whether we can present your case in UN New York, who will then make a decision.

... The Applicant's post was abolished and her fixed-term appointment was allowed to expire on 31 December 2013, the date of her separation from service.

... On 16 January 2014, JMS informed HRMS, UNOV/UNODC, that the Applicant had to undergo an independent medical examination (“IME”) to be conducted by Dr. P., a doctor located in Rome, who performed independent medical evaluations for the Food and Agricultural Organization.

... On 12 January 2014, the Applicant sent professional translations of the clinical record of the hospitalization period, the personality tests, translated certificates of Dr. Bo. and Dr. Be., and a report from Santo Spirito Hospital. She resent the documents on 17 January 2014 and, subsequently, JMS acknowledged the Applicant’s submission.

... On 17 January 2014, JMS informed the Applicant that to assess her sick leave and disability claim, an independent assessment was required. The Applicant was not provided with any details as to Dr. P.’s qualifications. Furthermore, the Applicant’s request to have a “medical legale” present during the exam was denied as not normally being part of an independent medical exam.

... On 14 February 2014, the Applicant and Dr. P. were put in contact by JMS. The Applicant met alone with Dr. P. on 5 March 2014.

... By email of 14 March 2014, a Human Resources Assistant, HRMS, UNOV/UNODC, requested a Medical Officer, JMS, to inform them about the status of the Applicant’s case in light of the IME, both with respect to the question of whether her case could be submitted for disability review, and a confirmation of the certified sick leave periods. The Medical Officer, JMS, responded by email of the same day stating that the Applicant had been seen and examined by the independent specialist, who would send his report soon. She noted, further, that “only thereafter [would they] be able to confirm which Sick Leave periods [could] be certified”.

... On 19 May 2014, the Applicant wrote to JMS, requesting an update regarding her request for a disability benefit. The Medical Officer, JMS, replied on the same day, stating that she had never received Dr. P.’s report, but that she had talked to Dr. P., who would resend it to her.

... Dr. P.’s report, dated 25 April 2014, was sent to JMS, which forwarded it to the Medical Services Division (“MSD”), New York (“NY”), on 10 June 2014. The report concluded that the Applicant’s “functional ability” to work based on her physiology was “normal”. In his report, Dr. P. did not respond to the question of for what period of time, if any, the retroactive conversion of annual leave into sick leave would be justified from a medical point of view.

... On 9 December 2014, JMS asked MSD for an update on the Applicant’s case.

... The Deputy Director, MSD, NY, advised JMS, on 23 December 2014, that in light of the IME outcome, the Applicant’s case could not be recommended for

consideration for a disability benefit by the United Nations Staff Pension Committee (“UNSPC”) of the United Nations Joint Staff Pension Fund (“UNJSPF”).

... By email of 29 December 2014, a Human Resources Officer, Staff Administration Unit, HRMS, UNOV/UNODC, informed the Applicant of the decision of the Deputy Director, MSD, not to recommend her for disability consideration by the UNSPC. The Applicant expressed her intention to contest the decision.

... On 2 January 2015, the Applicant filed a “request for reconsideration of the decision issued by the UN Medical Services Division”, “under art. 17a of the Appendix D” to the Staff Rules.

... By email of 6 January 2015, the Chief, Staff Administration Unit, HRMS, UNOV/UNODC, informed the Applicant that MSD’s decision not to submit her case to the UNSPC was taken on the basis of an IME, and that any further questions with respect to that medical review had to be addressed to JMS. She further noted that UNODC had received no claim under Appendix D to the Staff Rules from the Applicant, and that MSD’s decision was “the refusal to recommend [her] case for disability review by the UN Pension Fund Committee, under the Regulations and Rules of the [UNJSPF]”. The Applicant was further invited to contact a Human Resources Policy Officer, HRMS, UNOV/UNODC, if she needed further information with respect to the internal appeals procedures at the United Nations.

... After several email exchanges with the Applicant, a Human Resources Policy Officer, HRMS, UNOV/UNODC, informed the Applicant, by email of 9 January 2015, that a staff member wishing to formally contest an administrative decision should file a request for management evaluation.

... The Applicant wrote to the Medical Director, JMS, on the same day, requesting to be provided with the “decision of the Disability Committee of [her] request of [disability benefit]” in writing.

... Equally by email of 9 January 2015, the Medical Director, JMS, informed the Applicant that the Deputy Medical Director, MSD, NY, had informed him that since the outcome of her IME suggested that her functional ability to work was “normal”, he had not recommended the Applicant for consideration for a disability benefit by the UNSPC.

... By email of 12 January 2015, a Legal Assistant, HRMS, UNOV/UNODC, also confirmed to the Applicant that she should file a request for management evaluation with the Management Evaluation Unit (“MEU”). She further noted that it was UNODC understanding that the Applicant had initiated a request before the UNJSPF for consideration for a disability benefit, as no such request had been filed by the Organization, and that the Applicant might seek clarification directly from the UNJSPF with respect to the Fund’s procedures.

... On 25 January 2015, the Applicant filed a request for management evaluation of the decision by the Deputy Medical Director, MSD, NY, to reject her request for disability benefit and not to recommend her for review by the UNSPC.

... On 13 February 2015, the Applicant was informed that prior to her separation, 42 days of certified sick leave had been used to cover her absence from 16 May to 12 July 2013, one day of annual leave balance and seven days of uncertified sick leave had been used to cover her absence from 15 to 24 July 2013, and that the remaining period from 25 July until 31 December 2013 had been recorded as special leave without pay for administrative purposes, since her absence for these days had been unauthorized.

... By letter dated 13 March 2015, the Officer-in-Charge, MEU, responded to the Applicant's request of 25 January 2015, stating that her request was not receivable in light of staff rule 11.2(b) and the fact that the contested decision was based on medical advice from an independent medical practitioner.

...

### **The Impugned Judgment**

3. Ms. Bezziccheri filed her application before the UNDT contesting the decision not to recommend her for consideration for a disability benefit by the UNSPC. The UNDT found that the Administration had secured an IME from Dr. P. for two purposes: to determine whether Ms. Bezziccheri's annual leave could be converted retroactively into sick leave, and whether her case could be considered for a disability benefit under the Regulations and Rules of the UNJSPF. It was thus utilized for the double purpose of assessing her sick leave status and her suitability for a disability benefit. As one's sick leave must first be exhausted before consideration of the disability benefit, her sick leave status was determinant to her suitability for a disability.

4. During the course of the proceedings, the UNDT issued Order No. 24 (GVA/2016) (remand order) and remanded the case for institution of the required procedure, namely, the constitution of a Medical Board. In its Order, the UNDT found that in taking the contested decision the Administration had failed to follow the correct procedures. It ordered that the procedures with respect to Ms. Bezziccheri's sick leave status and ultimately the decision not to submit her case to the UNSPC had to be repeated as the terms of reference for Dr. P., the doctor seized of conducting an IME, were procedurally unsound. It stated further that the Administration should not rely upon Dr. P.'s report to determine her sick leave status and in turn her suitability for a disability benefit. The Dispute Tribunal suspended the proceedings for three months for the duration of the remand before issuing the impugned Judgment.



5. In its Judgment, the UNDT held the decision was illegal and ordered it be rescinded as the decision relied upon the IME report from Dr. P., which the UNDT held was a result of unlawful procedures for the reasons set forth in its remand order, namely, that the terms of reference for the IME Doctor, Dr. P, were deficient, that the procedure followed by the Administration was illegal, and the Administration could not reply upon Mr. P.'s report to take the contested decision.

6. The UNDT noted that it did not have jurisdiction to decide on the status of Ms. Bezziccheri sick leave and medical status, including her alleged incapacity, at the time of her separation or on the date of the impugned Judgment. Such could only be determined by an IME or a Medical Board. As the parties did not agree on either of the two, the case could not be submitted or referred to the UNJSPF for consideration of a disability benefit, if applicable. The UNDT therefore found that Ms. Bezziccheri's request for remedies must fail. The UNDT noted that the main issue in this matter lied in the fact that the Administration's rules with respect to the composition of the Medical Board and the determination of a Chairperson, in case of disagreement between the parties' medical representatives, were glaringly deficient.

7. The UNDT did not award any damages to Ms. Bezziccheri but exceptionally granted her costs in the amount of USD 5,000 as the entirely deficient regulatory regime had resulted in a long and abusive proceeding, both in equity and law.

8. Subsequently, Ms. Bezziccheri filed her appeal on 3 April 2019, and the Secretary-General filed his answer on 3 June 2019. On 7 July 2019, Ms. Bezziccheri filed a motion for interim measures, to which the Secretary-General filed his response on 22 July 2019. On 8 July 2019, Ms. Bezziccheri also filed a motion to strike evidence to which the Secretary-General files his response on 22 July 2019. The Appeals Tribunal's rulings on these motions are set forth in this Judgment.

## **Submissions**

### **Ms. Bezziccheri's Appeal**

9. Ms. Bezziccheri requests the Appeals Tribunal to rescind the MSD's decision of 29 December 2014 which "rejected [her] disability claim" and wrongfully asserted she had not exhausted all of her sick leave entitlements. She requests the Appeals Tribunal order the following actions from the Administration: (i) to reimburse her for the balance of her sick leave;

(ii) to submit her claim for disability to the UNJSPF together with the medical reports of Dr. Turchi, her treating physician in Rome, Italy, and to follow all procedures required by the UNSPC and the UNJSPF; (iii) to pay her USD 50,000 for due process violations during the IME and for abuse of proceedings; (iv) to pay her two years' net base salary for the deficiencies in the IME and Medical Board resolution system, which have caused her harm and anxiety; (v) to order three years' net base salary as compensation in lieu to rescission; (vi) to order the Secretary-General to hold accountable the officials responsible for errors and maladministration of her disability case and to reform the IME and Medical Board appointment systems; and (vii) to award her costs for the Secretary-General's abuse of proceedings.

10. Ms. Bezziccheri requests an oral hearing before this Tribunal to hear two medical experts: Dr. Bongiovanni and Dr. Turchi, explaining that she has been 78 per cent disabled since 2013 and how the protracted five-year proceedings before the UNDT have aggravated her health and increased her anxiety harm and stress. She asks this Tribunal to hear from the Secretary of the UNSPC that her disability case has been received but remains pending until the Secretary-General performs all of his obligations and to hear from a senior official at the UNJSPF that the UNSPC can now review her case on the basis of the existing medical reports and the expertise from the Italian authorities.

11. Ms. Bezziccheri asserts that, as she is now left in a legal lacuna and vacuum with no efficient performance action having been ordered by the UNDT, the Secretary-General continues to obstruct the submission of her case to the UNJSPF hampering the UNSPC's final determination as to her claim of being 78 per cent disabled. Dr. Turchi's medical report provided to the UNDT on 30 May 2018 is the uncontested evidence that since 2013 she has been unable to perform her duties by reason of illness. The Italian courts have adjudicated her as 78 per cent disabled based on the reports of Dr. Turchi and the reports of the court-appointed medical examiner, Dr. Bongiovanni.

12. The Administration's calculation of 42 sick leave days in reliance upon the Medical Disability Advisory Guidelines (MDA Guidelines) on medical absences set forth by a private insurance company, Reed Group Ltd., is erroneous. The UNDT Judge agreed that the reliance upon same was questionable and thus ordered the IME to review the matter objectively. However, every time the terms of reference were drafted for the IME it included the MDA Guidelines. Ms. Bezziccheri objected because the MDA Guidelines considered fibromyalgia as only a "perceived" illness of temporary duration and not a long-term illness, whereas the

United Nations World Health Organization and the UNJSPF recognized that condition as a long-term disability. She originally submitted her disability claim for fibromyalgia in 2013 to the UNJSPF, and the Pension Fund was ready to review but postponed its consideration until the UNDT would rule on the contested decision taken by the MSD on 23 December 2014.

13. The UNDT erred in not ordering any in-lieu compensation to the rescission as the rescission was an ineffective remedy. As a result of the defective IME rendering the decision illegal, Ms. Bezziccheri is left without any remedy as a matter of justice and equity or any means to compel the UNSPC and UNJSPF to process her 2013 disability claim. Thus, the UNDT should have ordered specific performance. The UNDT ignored her affidavit of costs amounting to USD 50,000. Ms. Bezziccheri thus prays the Appeals Tribunal award compensation for costs more commensurate with her actual costs.

14. The UNDT failed to order payment of her sick leave balance. In November 2013, without any notice, the Organization stopped paying her monthly salary. As found by the UNDT, the purpose of her December 2013 request for disability benefits was to prompt a sick leave audit to assess her disability before its submission to the UNSPC. The Administration erroneously concluded that she had exhausted her sick leave and only revealed that its Medical Director was wrong in this conclusion in 2014. The new disclosure changed the nature of the UNDT's remand order. The Secretary-General's admission before the UNDT that she was entitled to exhaust all of her balance of sick leave before submitting her disability case to the UNSPC proves that she is still owed the balance.

### **The Secretary-General's Answer**

15. The Secretary-General requests the appeal be dismissed in its entirety. Ms. Bezziccheri has not demonstrated that the UNDT made any errors warranting the reversal of the impugned Judgment, as required of her under Article 2 of the Appeals Tribunal's Statute. The UNDT correctly found that the Administration did not have an accurate or complete account of her sick leave balance as it was not in possession of all the detailed medical certificates. At the time of her separation in 2013, the Administration did not have a complete record of her sick leave since 2008. It is inconceivable that the delays in providing the requisite medical reports for a period of five years (2008-2013) were reasonable and justified by her medical condition.

16. The Administration's calculation of Ms. Bezziccheri's leave status is accurate. The Administration was correct to categorize periods of her sick leave that had not been certified by the Medical Director, per Staff Rule 5.1(e)(ii), as unauthorized absence. The UNDT correctly found that she had not submitted all of her medical reports and certificates by 12 December 2014. Notably, the UNDT granted her leave to submit the outstanding reports on 8 March 2018, but she filed only medical bills and did not provide any detailed reports or certificates as required. Accordingly, the computation of her sick leave was based on what she had submitted and on a generous interpretation of the maximum internationally recognized absence time of 21 days per the MDA Guidelines. Based on her provided medical reports, the Administration retroactively applied 42 days of sick leave, which left 14 days of sick leave with full pay and 195 days of sick leave at half pay.

17. The UNDT correctly found it lacked jurisdiction to compute the sick leave or decide on Ms. Bezziccheri's alleged incapacity. It correctly found that until a Medical Board could be convened the matter of her suitability for disability benefits would remain unresolved. Ms. Bezziccheri claims in her appeal that the report of Dr. Turchi confirms that her disability had been "progressing since early 2013". However, to conclude on her disability status is not the role of Dr. Turchi but of the IME or the Medical Board. Even if the UNDT or Appeals Tribunal did rely on the report in making a merits conclusion, this report indicates she can be considered disabled for the purpose of the Italian authorities as of 25 March 2016, after her date of separation from the Organisation.

18. The UNDT correctly did not order specific performance to correct the Organization's procedure with regard to the appointment of an IME or Chairperson of the Medical Board as this is not the role of the Tribunals when conducting judicial review. The UNDT also correctly did not award compensation. Ms. Bezziccheri seeks compensation for the time and resources she spent on translation of documents, legal services, medical witnesses, travel and hearing costs. She also seeks USD 50,000 for alleged due process violations and an exceptional compensation for a failed remanded case. She fails however to identify how the UNDT committed an error in not awarding such compensations, but merely sets forth her disagreement on appeal. The delays for which she seeks compensation were largely due to her own failure to provide medical documentation of her sick leave absences. She requests this Tribunal to order specific performance so that the UNJSPF may process her request for consideration for disability benefits. She also claims that the UNDT should have ordered in-lieu compensation since it

ordered rescission. This assertion is erroneous as Article 10(5) of the UNDT Statute only requires in-lieu compensation when rescission involves “appointment, promotion or termination”, which is not the concern in this matter.

**Ms. Bezziccheri’s Motion for Interim Measures**

19. On 7 July 2019, Ms. Bezziccheri filed a motion for interim measures pursuant to Article 9(4) of the Appeals Tribunal’s Statute. She argues that the Secretary-General did not comply with the impugned Judgment and none of the parties appealed the rescission of the contested decision made on 29 December 2014, which means that the ordered rescission was executable. She requests the Appeals Tribunal to compel the Secretary-General to comply immediately with the rescission of the 29 December 2014 decision and to order the Secretary-General to reimburse her all of the salary balance and sick leave entitlements owed to her since 2013 and to pay her USD 5,000 as costs.

**Secretary-General’s Response to the Motion for Interim Measures**

20. As neither party has appealed the USD 5,000 award of costs, the Secretary-General accepts that the order for the payment thereof constitutes a final and binding decision and confirms that pending the provision of banking information from Ms. Bezziccheri, the award will be promptly paid to her.

21. Regarding the rescission of the decision, the Secretary-General notes that a new determination in the matter is unavoidably linked to the question of the exhaustion of her sick leave entitlement. According to the Section 3.2 of Administrative Instruction ST/AI/2005/3 (on Sick Leave), the Medical Director or a designated medical officer can only make a new determination on whether Ms. Bezziccheri’s case can be recommended for consideration for disability benefit by the UNSPC when she has used all of her entitlement to sick leave with full pay. In her appeal, she has challenged the Administration’s reliance on the MDA Guidelines to determine her sick leave status. She has also argued that the UNDT failed to order the payment of her sick leave entitlements which were owed to her and that the Appeals Tribunal should find that the Administration erred in determining her sick leave. Thus, the conclusions by this Tribunal on the issues raised by her in her appeal will ultimately impact how the Administration can implement the order. The rescission decision will involve a consideration of whether she should be considered for a disability benefit, and the question of whether Ms. Bezziccheri has

exhausted her sick leave entitlement will determine whether she is eligible to be considered for a disability benefit. Accordingly, the order for rescission cannot be executed in light of the appeal.

22. Regarding her request for reimbursement of salary or entitlement, the UNDT did not order the reimbursement of her salary balance for sick leave entitlement. Considering that this is also part of her appeal, this request per her interim measures motion should also be dismissed.

**Ms. Bezziccheri’s Motion to Strike Evidence**

23. On 8 July 2019, Ms. Bezziccheri filed a motion titled “Motion to Strike [Two] Medical Opinions issued by the United Nations Legal Counsel as well as other non-established evidence in the Respondent’s answer of 3 June 2019”. She requests this Tribunal to strike from evidence three assertions made by the Secretary-General in his Answer. First, she requests the Secretary-General’s assertion that Ms. Bezziccheri contested every step taken to convene a Medical Board be stricken from evidence. This assertion contradicts the UNDT’s finding that both counsels had agreed on convening the Medical Board, but its two doctors were unable to agree on its terms of reference or on a Chairperson.

24. Second, Ms. Bezziccheri requests the Appeals Tribunal to strike new evidence set forth in the answer regarding the MDA Guidelines’ 21-day maximum absence for fibromyalgia, as the record before the UNDT reflected that the MDA Guidelines had been applied without a clinician, health professional or licensed doctor’s examination. A prior medical examination, which is the basic requirement of the MDA Guidelines, never occurred. The Secretary-General has not proffered any evidence that the MDA Guidelines are “internationally” recognized and absent the prior medical exam, the Appeals Tribunal should strike the medical opinions given by the Secretary-General in his answer and consider as arbitrary the decision to limit her incurable disability to a maximum of 42 days’ absence.

25. Third, she requests the Appeals Tribunal strike the determination that 25 March 2016 was the date Dr. Turchi had indicated in his report that Ms. Bezziccheri became disabled. Dr. Turchi’s report pointed to the initial diagnosis made in 2013. The date of 25 March 2016 is when she had filed her application for disability before the Italian authorities, and Dr. Turchi’s report confirms her eligibility as of that date for purposes of social security coverage in Italy.

### **The Secretary-General's Response to Motion to Strike Evidence**

26. The Secretary-General requests this Tribunal to dismiss the motion to strike evidence, as it is merely an attempt to supplement her appeal with additional arguments without having established exceptional circumstances.

### **Considerations**

#### *Request for oral hearing*

27. As a preliminary matter, Ms. Bezziccheri has filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. The witnesses Ms. Bezziccheri would like to be heard before this Tribunal were either heard before the UNDT or should have been heard there. The Appeals Tribunal has consistently held that additional evidence may not be accepted on appeal if it could have been presented before the UNDT.<sup>2</sup> In the present case, there are no exceptional circumstances which justify the production of the additional evidence, as required by Article 2(5) of the Statute.<sup>3</sup> Moreover, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is refused.

#### *Motion for interim measures*

28. Ms. Bezziccheri requests that the Secretary-General comply with the UNDT Judgment insofar as it has not been appealed against. That would involve rescinding the 29 December 2014 decision not to refer her case to be considered for disability benefit at the UNJSPF, paying her the costs awarded by the UNDT Judgment, as well as paying the "salary balance and sick leave entitlements owed to (her) since 2013".<sup>4</sup>

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<sup>2</sup> *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, paras. 15-16.

<sup>3</sup> *Mbok v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-824, para. 37.

<sup>4</sup> Impugned Judgment, para. 57.

29. In other words, Ms. Bezziccheri requests partial execution of the UNDT Judgment, arguing that she is the only one to have appealed it. However, in light of Articles 11(3) and 12(4) of the UNDT Statute, this execution should have been requested before the UNDT. Indeed, the jurisdiction competent to order execution of a judgment is the one that has issued that judgment.

30. In any event, on the one hand, it is clear from the Secretary-General's response to the motion that the payment of costs are being prepared by the Administration. On the other hand, the other issues Ms. Bezziccheri has raised in her appeal, that is payment of sick leave entitlements and possible exhaustion of her sick leave entitlements, will still be the subject of consideration and determination by the Appeals Tribunal. This empties the argument of *res judicata* and leaves no space for execution of the judgment on these points at the moment. The motion is, thus, denied.

*Motion to strike assertions and evidence*

31. After the Secretary-General submitted his answer to her appeal, Ms. Bezziccheri filed a motion to strike out certain specific statements in the answer, which she claims are false. She also requests that the Appeals Tribunal strike out what she calls a medical opinion.

32. At the outset, we agree with the Secretary-General that what Ms. Bezziccheri did *via* this motion was to supplement her appeal with the arguments targeted to rebuke the ones in the answer. Apart from the fact that there is no provision in our Statute to justify the filing of additional pleadings, our jurisprudence has established that this could only occur in exceptional circumstances.<sup>5</sup>

33. Moreover, while Ms. Bezziccheri requests that this Tribunal strike out the medical opinion from the file, we note that the only medical opinion filed with the answer to the appeal, signed by Dr. Turchi, is in fact the same one that has already been filed by Ms. Bezziccheri with her own appeal.

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<sup>5</sup> *Chrichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035; *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044; *He v. Secretary-General of the United Nations*, Order No. 312 (2018); *Khisa v. Secretary-General of the United Nations*, Order No. 329 (2018); *Koumoin v. Secretary-General of the United Nations*, Order No. 305 (2017).



34. Further, it is indeed not up to a party to request that the Appeals Tribunal strike out each and every argument she or he does not agree with, since it is natural that the parties may dispute certain issues or matters at stake.<sup>6</sup> In view of the foregoing, the motion is denied.

*Merits*

35. There is no challenge against the UNDT's finding that the 29 December 2014 decision not to recommend Ms. Bezziccheri for disability consideration by the UNSPC was illegal, mainly for procedural reasons, and it had to be rescinded.<sup>7</sup> By Order No. 24 (GVA/2016), the UNDT adjourned the proceedings in this case so as to allow the Organisation to follow the required procedure before the parties engage in informal settlement negotiations. The parties, however, were unable to reach an agreement, not even on the choice of the Chairperson of the Medical Board to evaluate Ms. Bezziccheri's fitness for work. Instead, the parties engaged in discussions as to whether or not Ms. Bezziccheri had exhausted her sick leave entitlements, which is a precondition for a disability benefit, according to Section 3.2 of ST/AI/2005/3.

36. The matter was hence referred back to the UNDT to determine the issue. The UNDT found, on the one hand, that there was no regulation within the Organization's system that covered the situation in which parties did not reach an agreement regarding the designation of a Chair to a Medical Board,<sup>8</sup> and on the other hand, that it did not have jurisdiction to decide on Ms. Bezziccheri's sick leave and medical status, including her alleged incapacity, as these matters could only be determined by an independent medical examination or a Medical Board, pursuant to Staff Rule 6.2(j).<sup>9</sup> As a consequence, the UNDT found that the case could not be referred to the UNJSPF for consideration of a possible disability benefit.

37. In her appeal, Ms. Bezziccheri requests that the Secretary-General reimburse her the balance of sick leave owed from 2013 until the contested 29 December 2014 administrative decision, as well as submit the matter to the UNJSPF for examination of the disability benefit requirements. She also seeks USD 50,000 and an equivalent of two years' net base salary as compensation for "due process violations" during the medical examination in Italy, abuse of proceedings during the three years of remand procedures from 2016 to 2018 following UNDT

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<sup>6</sup> This is obviously the main reason why the parties in the present case have not reached an agreement, despite the efforts they had made under the UNDT's management.

<sup>7</sup> The reasons therefor have been detailed by Order No. 24 (GVA/2016), particularly paras. 64 and following.

<sup>8</sup> Impugned Judgment, para. 99.

<sup>9</sup> *Id.*, para. 100.

Order No. 24/2016, and the “Organization’s failure, inefficiency and deficiencies in its IME and Medical Board resolution system, and for the harm and anxiety” she suffered therefrom.

38. Ms. Bezziccheri further seeks in-lieu compensation, should the Secretary-General elect not to rescind the decision as ordered by the UNDT Judgment. She also requests that the officials responsible for the maladministration of her case be referred for accountability and the Appeals Tribunal order the Secretary-General to reform the Organization’s IME and Medical Board appointment system.

39. First of all, as detailed in the document entitled “Power of attorney”, the legal representation of Ms. Bezziccheri’s counsel is, insofar as it concerns the appeal to this Appeals Tribunal, limited to the request of “further compensation”. As a consequence, the claims of reinstatement of sick leave, submission to the UNJSPF for assessment of the disability benefit and referral for accountability, as well as the request for an order to reform the Medical Board appointment system are not receivable. Ms. Bezziccheri’s counsel did not have the legal authorization to make such requests.

40. Further, Ms. Bezziccheri alleges that, without specific performance being ordered by the UNDT, its Judgment has little practical effect and efficiency. She also states that the Judgment failed to set in-lieu compensation as an alternative to the rescission of the contested decision.

41. Regarding the setting of in-lieu compensation, as governed by Article 10(5)(a) of the UNDT Statute and Article 9(1)(a) of the Appeals Tribunal’s Statute, this is required only when the contested administrative decision that is rescinded concerns appointment, promotion or termination. In such cases, the Organization may elect to pay it as an alternative to the rescission of the contested decision or specific performance ordered. Otherwise, there is no mandatory requirement for the UNDT or the Appeals Tribunal to establish an amount that the Administration may elect to pay instead of rescinding the decision. In such situations, in keeping with the Statute, there is thus no error in not setting an amount as in-lieu compensation. On this point, the appeal must fail.

42. On the other hand, the specific performance requested appears to be the payment of sick leave entitlements from 2013 until the rescinded 29 December 2014 administrative decision. In her appeal, Ms. Bezziccheri claims that the Secretary-General admitted before the UNDT that her sick leave entitlements had not been exhausted and that she had a remaining positive balance

of 14 days in full pay and 195 days of sick leave at half pay as of 31 December 2013. This acknowledgment would be enough as a basis for ordering retroactive payment of her entitlements from when she stopped receiving monthly salary in November 2013 until 29 December 2014 when the contested decision was issued.

43. The first important point here is that the sole fact of having admitted that Ms. Bezziccheri's sick leave entitlements had not been exhausted did not mean that she is automatically entitled to their balance. She would still have to fulfill the requirements to receive the benefit, as established by the law. In this respect, the UNDT found that it was made clear to Ms. Bezziccheri that any conversion from annual leave to sick leave could only be made upon receipt of medical certificates and a detailed medical report, as stipulated by Section 2.3 of ST/AI/2005/3, which states that after 20 working days of sick leave have been certified, 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 appropriate official, in a sealed envelope, a detailed medical report from a licensed medical practitioner. The UNDT also found that Ms. Bezziccheri had failed to fully comply with the relevant medical documentation, particularly in face of her apparent changing diagnosis from different doctors.<sup>10</sup>

44. According to the UNDT, that failure on Ms. Bezziccheri's part led the Administration to submit the case to an independent medical assessment tasked with analysing not only the conversion of her annual leave into sick leave but also her possible incapacity to work for the purpose of a disability benefit.<sup>11</sup> Although it was the Administration's duty to determine Ms. Bezziccheri's sick leave status and whether she was fit for work at the time of her separation, the procedure undertaken by the Administration and the medical report that followed were found to be flawed and thus the decision based thereupon illegal.<sup>12</sup>

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<sup>10</sup> *Id.*, paras. 94 and 95.

<sup>11</sup> *Id.*, para. 95.

<sup>12</sup> *Id.*, paras. 96 and 97. In its Order No. 24 (GVA/2016), the UNDT set forth clear reasons as to why the decision was flawed: the Administration had turned the two-stage process governed by Staff Rules 6.2(g) and (j) into a one-step procedure, and the independent medical assessment Ms. Bezziccheri underwent under Staff Rule 6.2(j) in fact had been conducted under Staff Rule 6.2(g) as a first step to substitute for the medical report she had failed to present.

45. One of the main reasons for the UNDT's finding was that for Staff Rule 6.1(j) to apply, the independent practitioner or a medical board had to be acceptable to both parties. Indeed, Staff Rule 6.2(j) and (k) on review of decisions relating to sick leave reads: <sup>13</sup>

6.2 (j) Where further sick leave is refused or the unused portion of sick leave is withdrawn because the Secretary-General is satisfied that the staff member is able to return to duty and the staff member disputes the decision, the matter shall be referred, at the staff member's request, *to an independent practitioner acceptable to both the United Nations Medical Director and the staff member or to a medical board.*

(k) The medical board shall be composed of:

(i) A medical practitioner selected by the staff member;

(ii) The United Nations Medical Director or a medical practitioner designated by the United Nations Medical Director; and

(iii) A third medical practitioner, *who shall be selected by agreement between the other two members* and who shall not be a medical officer of the United Nations.

46. Contrary to Ms. Bezziccheri's claims, the rescission for procedural reasons ordered by the UNDT did not entail *per se an* automatic acknowledgment of her sick leave entitlements, since she had failed to provide sufficient documentation for the Administration to determine her sick leave status and ultimately her disability benefits, if any. Because of that, the case was adjourned so that Staff Rule 6.2(j) could be correctly applied, that is, a proper medical evaluation could take place with a possible new decision being issued.

47. The parties or their respective medical representatives, however, never reached an agreement with regard to the designation of the Chairperson of the Medical Board, as would have been necessary under Staff Rule 6.2(k)(iii). It is true that the parties were able to designate their respective medical representatives, but they in turn were not able to agree on the Chairperson of the Medical Board.<sup>14</sup> Despite having acknowledged the deficiency in the Organization's conflict resolution mechanism since it did not carry any solution to situations where parties do not settle on the designation of the Chair of a Medical Board, the UNDT concluded that only an independent medical examination or a medical board – and not the UNDT – could determine Ms. Bezziccheri's sick leave status or her alleged incapacity for work. The matter remained

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<sup>13</sup> Emphasis added.

<sup>14</sup> Impugned Judgment, paras. 61, 62 and 99.

unresolved then, as found by the UNDT, since the parties had not resolved the issue of the Chairperson's designation.<sup>15</sup>

48. We agree with the UNDT in its reasoning, as the UNDT may not substitute a possible and future Organization's decision issued in a proper application of Staff Rule 6.2(j) by its own determination. In line with the UNDT, although we are not aware of the reasons as to why the parties' medical representatives could not reach a conclusion concerning the Chair of the Medical Board, we also regret it.<sup>16</sup> Moreover, since there was no agreement on such a fundamental point to proceed in the process of evaluation of Ms. Bezziccheri's rights, both parties seemed to have maintained their positions, even though the UNDT recognized "a lot of good faith" on the part of the Secretary-General and his Counsel, prior to the termination and during the UNDT proceedings.<sup>17</sup> The fact remains that even after the issuance of the UNDT Order remanding the case for proper consideration by the Administration, Ms. Bezziccheri did not file "additional medical certificates or medical reports in support of additional periods",<sup>18</sup> which means that she did not produce the necessary evidence in support of her allegations.

49. At this stage and having had the opportunity afforded by the UNDT with the Secretary-General's agreement to have a proper evaluation in keeping with Staff Rule 6.2(j), Ms. Bezziccheri could have been more forthcoming in the arrangements to establish the Medical Board, as it was mainly in her interest as the complaining party here. Depending on the new decision taken by the Administration based on the Medical Board's report, she would have had the opportunity to contest it, had it not been in her favour. Nevertheless, she decided not to take any further action, other than to request relief from the Tribunals before any new decision was taken, as if she had fully complied with all the requirements, which was not the case. The appeal in this respect is bound to fail.

50. Despite the above, we take note of the recent issuance of Administrative Instruction ST/AI/2019/1 on resolution of disputes relating to medical determinations dated 15 February 2019, after the UNDT Judgment was issued. Section 4.3 of said instrument, relating to the review by a medical board, establishes the following:<sup>19</sup>

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<sup>15</sup> *Id.*, para. 100.

<sup>16</sup> *Id.*, para. 99.

<sup>17</sup> *Id.*, paras. 101 and 102.

<sup>18</sup> *Id.*, para. 60.

<sup>19</sup> Emphasis added.

The third independent medical practitioner selected by the other two members of the medical board shall be the Chair of the board. *If the other two members do not reach an agreement, the Medical Director must refer the decision to an appropriate external medical authority, who shall select the Chair* []

51. We consider that this provision might be applicable to situations such as the present one, where there has not been an administrative decision following the lack of agreement in the selection of the Chair of the Medical Board. While there was no conflict resolution mechanism for the present situation as highlighted by the UNDT,<sup>20</sup> now the legal framework does exist that provides this mechanism. We therefore recommend that the Administration review the applicability of this new issuance to Ms. Bezziccheri's situation, as the matter has remained unresolved.

52. As for the other claims in the appeal, including the request to increase the amount of costs awarded, the Appeals Tribunal finds that Ms. Bezziccheri had failed to establish any errors of law or of fact leading to a manifestly unreasonable decision by the UNDT. Apart from the fact that she claims to have incurred expenses amounting to USD 50,000 without any proof thereof, as determined, she has not fulfilled all the documentation requirements set forth by the relevant regulatory framework. Moreover, the extensive length of the proceedings before the UNDT was in part due to the time the parties spent trying to reach a consensual resolution, which eventually proved to be in vain. If there was or were failure(s) on the part of the Administration, particularly with regard to the deficiency of the system as acknowledged by the UNDT, there were also failures on Ms. Bezziccheri's part. We find that the UNDT wisely pondered on the totality of the situation before reaching its conclusion and accordingly we defer to its consideration on the amount of the costs awarded.

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<sup>20</sup> Impugned Judgment, para. 99.

**Judgment**

53. The appeal is dismissed and Judgment No. UNDT/2019/012 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25<sup>th</sup> day of October 2019 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Knierim

*(Signed)*

Judge Neven

Entered in the Register on this 20<sup>th</sup> day of December 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar