



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

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Judgment No. 2021-UNAT-1081

**Sonia Marie Léocadie Da Silveira  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge Martha Halfeld Judge Sabine Knierim
Case No.:	2020-1397
Date:	19 March 2021
Registrar:	Weicheng Lin

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Counsel for Appellant:	William Woll
Counsel for Respondent:	Maryam Kamali

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. Ms. Sonia Marie Léocadie Da Silveira (Ms. Da Silveira) contested the decision of the Administration to separate her from service on 26 June 2018 on the ground of abandonment of post. The United Nations Dispute Tribunal (Dispute Tribunal or UNDT) by Judgment No. UNDT/2020/055 rejected her application as without merit.<sup>1</sup> For reasons set out below, we dismiss the appeal and affirm the UNDT Judgment.

**Facts and Procedure**

2. Ms. Da Silveira joined the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) as an Administrative Assistant on 14 June 2006. She served in that capacity until October 2016, at which time she became absent from duty until 26 July 2018 – the time of separation from service for abandonment of post.

3. On 1 October 2016, Ms. Da Silveira went on leave, and on 18 October 2016, she submitted a request for certified sick leave (CSL) for the period of 18 October 2016 to 17 November 2016. The Medical Services Division (MSD) approved this first CSL request. Ms. Da Silveira followed up with a second CSL request on 18 November 2016 for the period 18 November 2016 to 18 January 2017, but the MSD only approved her request for up until 31 December 2016.

4. Ms. Da Silveira renewed her requests for CSL for up until 15 June 2017, in separate applications, submitting the same medical report as the ones previously provided to MSD with date changes only. The MSD denied the subsequent CSL requests on the basis that: “the [medical] 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.”

5. On 31 July 2017, Ms. Da Silveira informed the MONUSCO Chief Medical Officer (CMO) that she had been diagnosed with sleep apnea, which required an electrically powered medical device for Continuous Positive Airway Pressure (CPAP) to assist her with her breathing and sleeping ailments.

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<sup>1</sup> *Da Silveira v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/055 dated 15 April 2020 (Impugned Judgment).

6. Although Ms. Da Silveira told the MONUSCO Human Resources Section (HRS) that she obtained a new medical report and that her health condition was “incompatible with living conditions in Goma,” she did not actually provide HRS with any updated information or medical reports.

7. On 8 September 2017, HRS notified Ms. Da Silveira of her unauthorized absence from duty and informed her that if she did not report on duty within 10 days or provide a plausible reason or supplementary sick leave certification, MONUSCO would consider her as having abandoned her post.

8. On 20 September 2017, the counsel for Ms. Da Silveira wrote to the Assistant Secretary-General, Office of Human Resources Management, (ASG/OHRM) in New York requesting that Ms. Da Silveira be transferred to a country where electricity supply was stable, or in the alternative requested an agreement regarding termination of her appointment.

9. On 21 September 2017, HRS wrote to Ms. Da Silveira that she had not reported for duty or replied to the 8 September 2017 letter. HRS again requested that she provide a plausible explanation or supplementary sick leave certification for her absence beyond 17 January 2017, or otherwise MONUSCO would initiate the procedure to separate her for abandonment of post.<sup>2</sup>

10. On 28 September 2017, counsel for Ms. Da Silveira wrote to the HRS explaining that she had not abandoned her post, but she was rather on sick leave due to her medical condition caused by the harassment she suffered at work. The counsel further explained that his client was unable to return to Goma, her duty station in the Democratic Republic of the Congo, because she was suffering from sleep apnea, which required an uninterrupted electrical supply to operate her CPAP medical device.

11. On 24 October 2017, MONUSCO requested the Department of Field Support (DFS) to seek the ASG/OHRM’s approval to separate Ms. Da Silveira from service on the ground of abandonment of post. On 24 April 2018, the HRS informed Ms. Da Silveira of the procedure

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<sup>2</sup> Although MSD initially only approved Ms. Da Silveira CSL request for up until 31 December 2016, it later granted approval for CSL until 17 January 2017, pursuant to a request that was accompanied by a medical report covering the period of 1 January through 17 January 2017.

regarding her separation for abandonment of post. On 25 June 2018, the ASG/OHRM approved the request to separate Ms. Da Silveira for abandonment of post.

12. On 11 May 2018, Ms. Da Silveira sought management evaluation with the Management Evaluation Unit (MEU) concerning the decision to terminate her Continuing Appointment and to separate her from service for abandonment of post. The decision to separate her was upheld by the MEU, which concluded that Ms. Da Silveira was absent from duty and failed to perform the functions assigned to her.

13. The MEU, also in its conclusion, stated that Ms. Da Silveira did not provide a duly authorized medical certificate or provide support or any other justification for her unauthorized absence since 17 January 2017. The MEU concluded that the Administration was statutorily obliged to process her separation for abandonment of post and reasoned that it followed the prescribed procedures and acted in accordance with the terms of Ms. Da Silveira's appointment.

14. On 10 August 2018, the Secretary-General endorsed the findings and recommendations of the MEU and upheld the decision to separate Ms. Da Silveira on the grounds of abandonment of post.

15. Ms. Da Silveira applied to the Dispute Tribunal on 28 August 2018, requesting the annulment of the post abandonment procedure against her, initiated by the Administration on 24 April 2018.

16. On 15 April 2020, the Dispute Tribunal dismissed Ms. Da Silveira's application. In the view of the Dispute Tribunal, neither the requirement of a detailed medical report pursuant to Administrative Instruction ST/AI/2005/3/Amend.1 (Sick leave) nor the requirement that said medical report adhere to a provided template were overly onerous or otherwise unreasonable. The UNDT concluded for the period after the authorized sick leave ending 17 January 2017, Ms. Da Silveira had failed to furnish medical reports that met the criteria set by the Administration.

## **Submissions**

### **Ms. Da Silveira's Appeal**

17. Ms. Da Silveira argues that the UNDT committed an error of law in its interpretation of Section 13 of Administrative Instruction ST/AI/400 (Abandonment of post) by placing the onus on her to challenge the MSD decision for denying her CSL request. She argues that there is no requirement to dispute the MSD decision by seeking referral to an independent practitioner or to a medical board. It is her contention that she may choose to do so but is not obliged to undertake such course of action. As such, Ms. Da Silveira contends that not seeking review of the denial of the MSD decision did not imply that she had abandoned her position.

18. Further, Ms. Da Silveira submits that the Administration should have informed her of the possibility of having her request reviewed by an independent practitioner or a medical board. She contends she was already suffering from mental depression at that time, and she did not have counsel then who could have advised her on any possible recourse. It was therefore unreasonable of the Administration to demand that she defend herself to prove that she was actually sick.

19. Ms. Da Silveira also contends that the proper standard of proof should be “clear and convincing” when termination might be the result of an administrative action. Had the Dispute Tribunal applied the “clear and convincing” standard, it would have found that she had proffered sufficient proof to substantiate the veracity of her claims.

20. Ms. Da Silveira finally also submits that the Dispute Tribunal made a mistake of fact when it considered that the reimbursement for installation of generators or batteries were measures available to her since 2015 and that she could have benefited from those. These measures, arguably, would have addressed the issue of power interruption in Goma and as such would have permitted her to effectively use a CPAP medical device. However, Ms. Da Silveira argues that such reimbursement measures were actually not available to her.

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

21. The Secretary-General submits that the UNDT correctly upheld the contested decision since Ms. Da Silveira was absent from duty from 18 October 2016 until 26 July 2018, at which time she was separated from service. Ms. Da Silveira had provided a valid sick leave certificate only

from 18 October 2016 until 17 January 2017. From 18 January 2017 until 26 July 2018, she had not provided a valid medical certificate or other justification for her failure to report to work.

22. Further, beginning 8 September 2017, MONUSCO repeatedly advised Ms. Da Silveira that she should either: (a) report for duty; (b) provide a valid medical certificate, or (c) provide an otherwise valid explanation for not reporting to duty. MONUSCO also advised her that failure to act accordingly would result in the initiation of abandonment of post procedures. Instead, on 20 September 2017, Ms. Da Silveira's counsel wrote to OHRM requesting transfer to a country where electricity supply was stable. Having received no valid medical certificate or other justification within the prescribed time frame, MONUSCO proceeded with the separation.

23. Ms. Da Silveira did not provide a duly authorized medical certificate or other justification for being absent from duty. The Administration thus rightfully followed the procedures outlined in ST/AI/400 on abandonment of post to separate her from service, after having given her several notices and more than adequate time to respond.

24. Ms. Da Silveira also applies the incorrect standard of proof requiring "clear and convincing" evidence, which is applicable in cases of termination of appointment as a result misconduct. Here, she was being separated from service due to an abandonment of her post, which was initiated by her own actions.

25. The Secretary-General avers that the alleged error of fact regarding availability of reimbursement measures for generator or battery is inconsequential here. The details regarding such measures do not alter the UNDT's finding that the Administration was justified in separating Ms. Da Silveira for abandoning her post and for her having failed to submit valid medical certificates to the Administration when instructed to do so.

### **Considerations**

26. The issue on appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the administrative decision to separate Ms. Da Silveira from service for abandonment of post was lawful.

**Applicable legal framework**

27. To begin, Staff Rule 6.2(a) (Sick leave) lays the groundwork for a staff member's entitlement to sick leave. The rule states: “[s]taff 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.”

28. Further, Staff Rule 6.2(f) (Obligations of staff members) elaborates on the responsibility of the staff member to follow prescribed procedures. To wit, the rule states: “[s]taff 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.”

29. Of particular import to the discussion herein, one must also look to Section 2.3 of ST/AI/2005/3/Amend.1 for guidance. The relevant section states: “[a]fter 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 appropriate official, in a sealed envelope, a detailed medical report from a licensed medical practitioner.”

30. Additionally, the following sections of ST/AI/400 regarding abandonment of post are also of particular relevance here. Section 5 of ST/AI/400 provides:

The absence of a staff member from his or her work, unless properly authorized as leave under staff rule 105.1 (b), as special leave under staff rule 105.2, as sick leave under staff rule 106.2 or as maternity leave under staff rule 106.3, may create a reasonable presumption of intent to separate from the Secretariat unless the staff member is able to give satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control.

31. Section 10 of ST/AI/400 outlines the procedures and warnings that the Administration need to provide to the staff member. In relevant part, Section 10 provides:

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.

32. Finally, Section 13 of ST/AI/400 clearly lays out the possible consequences for failing to produce a medical certificate and the recourse that may be available to a staff member. In relevant part, Section 13 states:

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 (...).

33. In the present case, as per the evidence on file established by the UNDT, Ms. Da Silveira had been absent from duty from 18 October 2016 until 26 June 2018, at which time she was separated from service for abandonment of post. While she provided a valid sick leave certificate for the period of 18 October 2016 through 17 January 2017, she did not provide a duly authorized medical certificate or other justification for her failure to report to work for the period of 18 January 2017 until 26 June 2018. Following that, the Administration repeatedly (on 8 September 2017, 21 September 2017, and 24 April 2018) advised Ms. Da Silveira that she should either report for duty, provide a valid medical certificate explaining her absence from work, or provide an otherwise valid explanation as to why she could not report to duty. Ms. Da Silveira was also repeatedly advised that abandonment of post procedures would be initiated if she did not provide appropriate justification for her absence within a specified timeframe, which she failed to do.

34. Under these circumstances, the UNDT found that Ms. Da Silveira's absence during the relevant time period, spanning over one and a half years, was unauthorized. During that time, she had failed to show up and perform the work that had been assigned to her, and that "[a]ltogether, [Ms. Da Silveira'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."<sup>3</sup>

35. We find that the evidence on record supports the UNDT's finding. Indeed, the Dispute Tribunal very thoroughly conducted a judicial review of the administrative decision under challenge. It properly reviewed the legality of the contested administrative decision from every possible angle in accordance with the applicable law and established the critical facts of the case.

36. First, the UNDT examined the legality of the MSD's refusal to certify Ms. Da Silveira's sick leave request. The MSD's refusal was not only based on the formal lack of documentation, which in and of itself served as a legitimate reason to deny the CSL, but the MSD action was also *prima facie* reasonable by common sense standards. The UNDT reasoned that 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 Ms. Da Silveira'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".<sup>4</sup>

37. This finding of the UNDT is correct. It is premised on the thoroughness and reasonableness of the action of the MSD, which is the competent technical body to evaluate medical certifications. The UNDT thus properly credited the technical expertise of the MSD and did not attempt to substitute the medical findings of the latter with its own.<sup>5</sup>

38. We also agree with the UNDT's holding that, if Ms. Da Silveira had problems obtaining a medical certificate or the certification she produced was not acceptable to the Medical Director, as was the case here, 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 or to the medical board. Ms. Da Silveira, however, never undertook such course of action.

39. We must reject Ms. Da Silveira's assertion that the UNDT erred in law and that it misapplied Section 13 of ST/AI/400, upon placing the burden on her to pursue this dispute resolution mechanism, and we must also reject Ms. Da Silveira's argument that the

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<sup>3</sup> Impugned Judgment, para. 48.

<sup>4</sup> Impugned Judgment, para. 42.

<sup>5</sup> *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 41; *Karseboom v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-601, paras. 40-47.

Administration should have informed her of the possibility to refer her case to an independent practitioner or to request a medical review board.

40. As a threshold matter, we note that, as correctly interpreted by the UNDT, the wording of Section 13 of ST/AI/400 clearly establishes an option and not a legal obligation of Ms. Da Silveira to take recourse to this avenue. It was entirely up to her to avail herself of this possibility, and she opted not to. So, her separation from service came solely as a consequence of her absenting from her duties, from 18 January 2017 until 26 June 2018, without any proper justification, i.e. without a valid medical certificate explaining her absence from work, or providing an otherwise valid explanation. Then, while the Administration may have chosen to inform Ms. Da Silveira about her right to refer her case to an independent practitioner or to request a medical review board, there was no obligation at law upon it to do so. This conclusion is in line with our consistent case law that staff members have to ensure that they are aware of the provisions of the Regulations and Rules and ignorance of the law is no excuse.<sup>6</sup> Therefore, Ms. Da Silveira's argument to the contrary is without merit.

41. Second, even though Ms. Da Silveira had not requested sick leave on this score, the UNDT proceeded to examine whether her sleep apnea formed a reasonable basis for her not returning to work at her duty station. In this respect, the UNDT opined that:<sup>7</sup>

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.

42. The UNDT also highlighted, that:

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<sup>6</sup> *Abu Rabei v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1060, para. 27; *Schepens v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-830, para. 33; *Al-Dawoud v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-664, para. 21; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 26.

<sup>7</sup> Impugned Judgment, para. 45.

...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.

43. Ms. Da Silveira takes issue with the UNDT's factual findings that she should have tried using her CPAP device in Goma first, within the limitations of the electricity supply at the duty station, before reaching the conclusion that she could not at all make use of such device. She also questioned whether the Organization would have reimbursed her for a generator or a battery as part of her residential security allowance. However, apart from the fact that Ms. Da Silveira had not requested sick leave on that score, i.e. due to sleep apnea, the relevant issue is a technical one, belonging to the competence of MSD and not that of the UNDT, which nevertheless *ex abundanti* addressed it. Hence, in this regard, we accept the Administration's argument that the detailed interpretation of the facts about Ms. Da Silveira's CPAP machine or sleep apnea are not relevant to the UNDT's finding that the Administration was justified in separating her for abandoning her post and for having failed or refused to submit valid medical certificates to the Administration when instructed to do so.

44. Indeed, as already alluded earlier in this Judgment, Ms. Da Silveira could either have reported for service or provided valid medical certificates for her absence in order to satisfy the United Nations medical services that her condition and ongoing prognosis and treatment justified her absence from duty. Consequently, as she failed to do either, the Administration lawfully proceeded with separating her from service for abandonment of her post. This conclusion renders it unnecessary to examine the other grounds of appeal advanced by Ms. Da Silveira, as they are not decisive for the outcome of the present case.

45. As a final point, Ms. Da Silveira's claim that the UNDT erred in law by failing to apply the "clear and convincing evidence" standard of proof is without merit. The "clear and convincing" standard is to be applied for termination of appointment due to misconduct, not

separation from service due to abandonment of post. In any event, we hold that the facts underpinning the challenged administrative decision to separate Ms. Da Silveira from service for abandonment of her post, which also provided the factual basis of the UNDT's reasoning, satisfy more than the preponderance of evidence standard. Ms. Da Silveira's absence during that period of about one and a half years was unauthorized. She failed to show up and perform the work that had been assigned to her. Her actions show the very high likelihood that Ms. Da Silveira had indeed abandoned her post. Therefore, the Administration was justified in separating her from service on 26 June 2018 on the ground of abandonment of post.

46. In these circumstances, and given the presumption of regularity accorded to administrative acts, the Impugned Judgment could not be found erroneous in law, and much less manifestly unreasonable in terms of the established material facts and the conclusions drawn therefrom.

47. For all these reasons, the Appeals Tribunal finds that the UNDT did not make errors of law and fact when it concluded that the decision to separate Ms. Da Silveira for abandonment of post was lawful.

48. Our conclusion that the UNDT did not make any errors of law or fact in dismissing Ms. Da Silveira's challenge of the decision to separate her from service for the abovementioned reason precludes the Appeals Tribunal from awarding compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".<sup>8</sup>

49. Accordingly, the appeal fails.

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<sup>8</sup> *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 34; *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33.

**Judgment**

50. The appeal is dismissed, and Judgment No. UNDT/2020/055 is affirmed.

Original and Authoritative Version: English

Dated this 19<sup>th</sup> day of March 2021.

*(Signed)*

Judge Raikos, Presiding  
Athens, Greece

*(Signed)*

Judge Halfeld  
Juiz de Fora, Brazil

*(Signed)*

Judge Sandhu  
Vancouver, Canada

Entered in the Register on this 7<sup>th</sup> day of April 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar