UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1294

AAF

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case No.:	2021-1615
Date of Decision:	28 October 2022
Date of Publication:	20 December 2022
Registrar:	Juliet Johnson

Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Rupa Mitra/Sylvia Schaefer

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal by AAF, an Interpreter in the Department for General Assembly and Conference Management (DGACM) in New York, at the time of the events at issue. She appeals Judgment No. UNDT/2021/094 (impugned Judgment), issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), rejecting her application and upholding a contested decision to stop implementing a return to work (RTW) plan approved by the Medical Services Division (MSD).

2. For the reasons set out below, we dismiss the appeal.

Facts and Procedure

3. AAF was an Interpreter at the P-4 level, in DGACM in New York, at the time of the events at issue.

4. As explained in the agreed facts submitted by the parties and outlined in detail in the UNDT Judgment, the generic job descriptions for Interpreters indicate the need to be able to work under continuous stress and to remain calm in stressful situations. Functions of Interpreters at the P-4 level include routinely covering sensitive meetings. The demand for interpretation services varies during the year based on the schedule of regular programme meetings, other scheduled meetings, and ad hoc requests. May and June are among the busiest months for Interpreters due to the increase in meetings of intergovernmental bodies in anticipation of the General Assembly's session in September.

5. AAF had been working as an Interpreter at the P-4 level continuously since 2008. In August 2017, she became ill. She claimed that periods of stress or overwork weakened her immune response, making her susceptible to infections and other illnesses. She went on certified and uncertified sick leave and also took annual leave during the following periods:

3 to 29 October 2017;

1 to 3 November 2017;

13 to 27 November 2017;

6 to 22 December 2017;

24 January to 19 February 2018;

16 April 2018;

19 April to 7 November 2018;

12 to 16 November 2018;

26 to 30 November 2018;

10 to 14 December 2018;

24 to 28 December 2018;

5 February 2019;

25 to 26 March 2019;

20 to 22 May 2019;

3 June to 3 July 2019;

5 July to 31 July 2019;

9 August 2019; and

27 August 2019.

6. On 5 November 2018, the MSD, now called the Division of Healthcare Management and Occupational Safety and Health (DHMOSH), submitted to DGACM a RTW plan for AAF. The RTW plan recommended that she would work on a full-time basis only on alternate weeks from 7 November 2018 to 31 December 2018, using one week of sick leave between each week of work. Thereafter, she would begin to work full-time again. However, she was not to be assigned to "stressful meetings" or meetings lasting more than three hours and was not to be assigned any work beyond regular working hours or on weekends. The Interpretation Service (IS) duly implemented all medical accommodations of the RTW plan from 7 November to 31 December 2018. AAF had expressed her view as to how the RTW plan should be applied in practice, and the IS implemented all her suggestions.

7. From 1 January 2019, the RTW plan was modified upon the advice of the MSD (first modification). The restriction of only working on alternate weeks was lifted so that AAF could work full time, every week. The other restrictions, namely that she was not to be assigned to "stressful meetings" or meetings lasting more than three hours, and not to be assigned any work beyond regular working hours or on weekends, however, remained. This modified RTW plan was initially set to continue until the end of February 2019 but was extended three times on the advice of DHMOSH until the end of June 2019. The IS duly implemented all medical accommodations required under the modified RTW plan, as

repeatedly extended, except that the last extension was implemented only until the end of May 2019.

8. On 13 May 2019, the Chief, English Interpretation Service (EIS) and the Chief, IS, met with AAF and provided her with a notice that the RTW plan could no longer be implemented from 1 June 2019 (contested decision) because of the needs of the IS during the peak period of meetings which included May and June. The higher number of meetings resulted in an additional burden in terms of managing the process of assigning interpreters to cover all the meetings. Moreover, other interpreters received more assignments, including a higher number of sensitive meetings and assignments outside regular working hours. It was explained to AAF that the RTW plan had caused difficulty for the programmer and for the other staff who had been forced to cover more of the stressful meetings.

9. On 15 May 2019, the First Reporting Officer (FRO) of AAF sent an e-mail to DHMOSH explaining that, because of the needs of the IS as of 1 June 2019, they would no longer be able to abide by all the terms of the amended RTW plan. The DHMOSH responded the same day by taking note of the contested decision and by thanking the FRO for the support given to the staff member. On 16 May 2019, the DHMOSH wrote to AAF, indicating that they had spoken with her supervisor, who had justified the ending of the RTW plan as amended due to the needs of the office, which the DHMOSH considered was consistent with the requirements of the applicable legal framework set out in the Secretary-General's Bulletin ST/SGB/2019/3 (Flexible Working Arrangements).

10. From 20 to 22 May 2019, AAF was granted certified sick leave after she contracted infections. From 3 June to 31 July 2019, she was granted further certified sick leave, including days combining a half-day of certified sick leave and a half-day of annual leave.

11. On 3 July 2019, AAF submitted a request for management evaluation of the decision to cease implementation of the RTW plan and seeking compensation for the harm caused.

12. On 25 July 2019, AAF's physician proposed a further lifting of restrictions in the RTW plan. She indicated that if the plan could not be implemented it would be more deleterious to AAF's condition to be on sick leave than to work without restriction. It was pursuant to this latter recommendation that AAF returned to work on 1 August 2019. Previously the MSD had taken

the position that if the RTW plan was not implemented AAF would have to remain on sick leave.

13. On 29 July 2019, the DHMOSH sent an e-mail to AAF including their recommendation (second modification to the RTW plan), based on her physician's advice, to accept "medium level-stress/difficult meetings" on a full-time basis with immediate effect; to take "evening meetings (until 10:00PM)" as of September 2019; and to accept "the most stressful/difficult meetings" as of October 2019, and resume working on weekends once these phases had been introduced successfully, which AAF forwarded to the IS.

14. On 30 July 2019, the IS informed the DHMOSH that it would not be able to implement the recommendations outlined in DHMOSH's e-mail, indicating that the decision not to implement was subject to review by the Management Evaluation Unit (MEU).

15. From 1 August 2019, AAF returned to work full time. In August 2019, the number of meetings serviced by the IS was relatively low.

16. On 23 September 2019, AAF informed the Chief, IS, about DHMOSH's second modification of the RTW plan, which was then implemented accordingly.

17. On 24 September 2019, the MEU issued a letter to AAF indicating that, as the IS was resuming implementation of her RTW plan, her request for management evaluation of the decision not to implement her RTW plan was effectively moot.

18. On 21 October 2019, AAF was assigned to the Editing Section, English Translation Editorial Service, Documentation Division, DGACM, until January 2020, and the assignment was subsequently extended.

19. On 20 December 2019, AAF filed an application with the UNDT, challenging the contested decision. AAF requested 1) restoration of sick leave used during the period of the 13 May 2019 decision and re-implementation of the RTW plan, as well as restoration of annual leave used in conjunction with half-pay sick leave in order to stay in full-pay status while on sick leave; 2) compensation for the damage to her health claiming that the contested decision caused a potentially life-threatening condition (sepsis).

20. On 14 July 2020, as a gesture of good faith, the Administration restored to AAF 44 days of sick leave.

21. On 14 May 2021, AAF was reassigned to the Economic Commission for Africa as Chief, English Translation and Editing Unit.

22. On 4 August 2021, the UNDT issued the Judgment upholding the contested decision. The UNDT found that the reasons provided for rejecting further implementation of the RTW plan were reasonable and correct and that the contested decision was, thus, a lawful exercise of the Administration's discretion. Accordingly, the UNDT dismissed AAF's application.

Procedure before the Appeals Tribunal

23. On 1 October 2021, AAF filed an appeal with the UNAT, challenging the UNDT Judgment.

24. On 30 November 2021, the Secretary-General filed his answer.

Submissions

AAF's Appeal

25. In her appeal to the UNAT, AAF seeks moral damages for illness caused by the Administration's contested decision. She claims there was sufficient evidence before the UNAT for a finding that her infection treated in May 2019 resulted directly from the contested decision, and she requests an award of six months' salary. In addition, she submits there is sufficient evidence before the UNAT to make an order that her sick leave and annual leave days taken as a result of the contested decision be fully restored. The Administration had restored her a total of 44 days of absence/sick leave at full pay used as a result of the contested decision, but no annual leave was restored. AAF requests that 14 missing days of annual leave be restored to her, and that the totality of the leave days taken be reclassified as special leave with full pay.

26. First, AAF claims that the UNDT erred in fact and in law when considering the Administration's exercise of discretion in choosing to unilaterally cease implementation of the DHMOSH's RTW plan. She contends that the UNDT did not weigh in its assessment the Secretary-General's duty of care to provide staff with a safe working environment, as

reflected in Staff Regulation 1.2(c). The UNDT erred in fact and law in stating that the risk to the AAF's safety and security was alleviated by her placement on sick leave. This conclusion ignored that AAF's health was damaged by the decision with the weakening of her immune system causing infection, that the medically recommended gradual reintegration was interrupted, thus jeopardizing the RTW plan's success, and that AAF was forced to use sick and annual leave entitlements which might otherwise have been used for illness or absence not caused by the Administration's decision. In addition, AAF contends that the UNDT did not consider the evidence that, from 1 August 2019, she returned to work on the basis of medical advice that this was the least bad option but still deleterious to her health thus representing a risk when compared to continued implementation.

27. AAF accepts that the IS does have discretion not to implement a DHMOSH recommended RTW plan. However, the decision maker is "required to establish that the requested accommodations represent a disproportionate or undue burden on the workplace", in line with the general principles of reasonable accommodations for short-term disability, as reflected in ST/SGB/2019/3, Section 2.2. According to her, this procedural requirement was not achieved by the IS. AAF argues that use of the words "disproportionate" and "undue" indicated a requirement to weigh the operational impact of the RTW plan against the reasons for its recommendation or negative consequences of non-implementation. Therefore, the UNDT erred in law by failing to consider how this element of the rule modified the discretion afforded to the decision maker when refusing to implement.

28. AAF claims UNDT erred in law by applying an inappropriate standard. The Dispute Tribunal should have assessed whether her medical situation, prognosis, likely duration of the RTW plan, expectation of resumption of full duties with no restrictions and possibility to amend the RTW plan, were all relevant considerations to a decision not to implement. Rather than address this argument, the UNDT found no "duty to present her with an alternative scheme" and that instead AAF should have done so. This is manifestly unreasonable when AAF was presented with a unilateral decision without notice or consultation.

29. AAF also submits that the UNDT finding that placement on sick leave following the decision shows the decision was not contrary to the duty to maintain a safe and secure workplace, is similarly premised on errors of fact and law. The decision in fact created a workplace so unsafe that AAF was required to be placed on sick leave rather than work at

100 per cent. The RTW plan was aimed at her full rehabilitation and gradually resuming full duties, while the decision not to implement it made it likely for her to be separated following exhaustion of sick leave in a few months' time, potentially losing her income and insurance while seeking to recover from a serious medical condition. According to AAF, this is a breach of the duty of care.

30. Second, AAF argues that the UNDT erred in law in their application of the "no difference" principle. The UNDT had described the failure to provide her with reasons as a procedural error in the contested decision. However, they found that such an error had not prejudiced AAF as its correction would have made "no difference". According to her, oddly the UNDT had relied on judgments where the UNAT supported the non-application[1] of the principle or overturned its application.[2] These citations highlight the exceptional circumstances when this principle may be applied. The principle relates to issues of due process rather than procedural irregularity. Therefore, its application here is an error of law.

31. Third, AAF maintains that the UNDT erred in fact and law in finding the RTW plan was reimplemented from 1 August 2019, and that she was required to contest by management evaluation the refusal of 30 July 2019. The Secretary-General had claimed that the RTW plan was reimplemented from 1 August 2019 but had provided no evidence to support the assertion. AAF had showed that her return to work on 1 August 2019 resulted from the presentation of new medical evidence indicating that sick leave was more deleterious to her health than working without an RTW plan, and not from a change in workload. When addressing the argument that reimplementation did not take place from 1 August 2019, the UNDT had descended into a question of procedure rather than fact and evidence. The UNDT reasoned that AAF failed to contest by management evaluation the refusal to implement the RTW plan on 30 July 2019 and on that basis the UNDT decided they would not look at impact beyond 30 July 2019.

32. AAF also submits that the UNDT erred in law by finding that management evaluation was required of the 30 July 2019 refusal. From the outset it was clear that the RTW plan was to evolve with different phases, and that there had been one singular decision to cease all implementation of the RTW plan. The UNDT's finding otherwise runs contrary to the

[1] *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 54.
[2] *Allen v. Secretary-General of the United Nations*, Judgment No. 2019-UANT-951, para. 38.

evidence and represents an ambush, since pleadings were never requested on the issue, which breaches AAF's due process rights.

33. In addition, AAF states that relevant documents from September 2019 show reimplementation was a response to medical information received. In reply, the Administration took two contradictory positions, that there was a temporary increase in work that needed to be addressed and that they needed to achieve a long-term solution. In closing submissions, they raised a new justification which had been rejected by the UNDT. AAF contends that when a party provides multiple contradictory accounts as to why a decision was taken, an inference may be drawn that the decision was arbitrary.

34. Fourth, AAF argues that the UNDT erred in fact and law in their assessment of the implementation period of the RTW plan submitted by the Secretary-General. They had asserted that the period from 7 November 2018 to 30 May 2019 was "nearly eight months", which was inaccurate, since it was in fact less than seven months. This inaccurate assessment had been repeatedly relied on by UNDT to justify the Administration's action, and this error of fact had led to a manifestly unreasonable decision.

35. AAF further claims that the UNDT had erred by accepting the Secretary-General's assertion that the 13 May 2019 contested decision was a temporary suspension of the RTW plan to cover a busy period, without any consideration of the countervailing evidence. According to her the fact the Administration did not communicate reimplementation when the purported busy period of May and June 2019 ended, demonstrated that the cessation was complete. Also, the claim of a temporary suspension finds no support in the contemporaneous documents. When communicating reimplementation in September 2019 no mention was made of an alteration to the workload but instead the reason for the change of position was recorded as her explanation of the case and the medical notes which she submitted.

36. Finally, AAF submits that the UNDT considered the contested decision was required to alleviate the burden on the other interpreters. The UNDT ignored her evidenced submission that the decision resulted in her being placed on sick leave and freelance interpreters covering meetings. AAF had provided evidence that freelance interpreters only covered those meetings that she could cover on the RTW plan and had been covering up until

cessation of implementation. Thus, the decision did not create a benefit to the Organization or achieve its stated goal.

The Secretary-General's Answer

37. The Secretary-General argues that the UNDT had correctly found that the contested decision was a lawful exercise of the Administration's discretion under the relevant legal framework. The UNDT had properly taken into account that the legal framework set out in ST/SGB/2019/3, which defines a RTW plan as a time-limited programme that is not intended to be a long-term or permanent feature. Rather its Section 2.2 specifies that medical accommodations are to be considered "in line with the general principles of reasonable accommodations for short-term disability". The UNDT noted that AAF's medical problems long predated the contested decision of 13 May 2019, and that her medical accommodations had already been implemented from 7 November 2018. The UNDT had also properly recognized that, as an Interpreter at the P-4 level, AAF's work output was important to the successful delivery of her office's mandate and that, at the time that the contested decision was taken, her office was in a particularly busy period. In addition, the UNDT had rightly recognized that the medical accommodations that the Administration had been applying since November 2018, which included shielding AAF from stressful meetings, longer meetings, and overtime work, more generally had a negative impact on the work situation of her peers and supervisors.

38. As regards the lawful exercise of the Administration's discretion, the Secretary-General also submits that AAF endeavors to expand the legal requirements under ST/SGB/2019/3, by purporting to add burdens and responsibilities on the part of the Administration that simply do not exist and that, as such, the UNDT correctly declined to apply. In relation to this, the Secretary-General submits that the UNDT was not required to consider AAF's health status or medical advice given to her as those evolved subsequent to the contested decision.

39. As regards AAF's argument that in assessing the legality of the contested decision, the UNDT should have weighed the Administration's obligation to provide staff with a safe working environment, the Secretary-General submits that far from breaching its responsibilities under Staff Regulation 1.2(c) for the safety and welfare of all staff, the Administration had made extra efforts to accommodate AAF.

40. As regards AAF's submission that the fact that she went on sick leave following the date of the contested decision was in itself evidence that the Administration's so-called duty of care was breached and that the UNDT should have weighed in its judgment the fact of her subsequent sick leave, the Secretary-General argues that the role of the UNDT is to review the contested decision. The decision-maker could not reasonably be expected to know what would occur in the future, and the contested decision clearly could not have been based on information that occurred following the taking of the decision. Therefore, the UNDT had properly declined to consider factors which were not before the decision-maker as such information is not relevant for the determination of the lawfulness of the contested decision.

41. Similarly, to AAF's claim that the UNDT erred in not taking into consideration the medical advice given to her on 25 July 2019, the Secretary-General responds that the Administration was not required, nor would it have been able, to consider future medical advice to AAF in exercising its discretion under the ST/SGB/2019/3 to end the revised RTW plan during the peak work period, and the UNDT was not required to consider such advice either.

42. The Secretary-General argues that the UNDT correctly did not apply a requirement on the part of the Administration to consult DHMOSH in making the contested decision and present AAF with an "alternative" set of medical accommodations. There is no such requirement set out in ST/SGB/2019/3 and the UNDT correctly declined to apply additional requirements and responsibilities to the Administration beyond those set out in the applicable policy. It is not the manager's role to determine the appropriate work arrangement to accommodate a staff member's health conditions. Such a determination is a medical one. If a staff member is requesting accommodations, the manager may grant them in accordance with ST/SGB/2019/3, and the determination to be made was limited to whether the requested accommodations represent a disproportionate or undue burden on the workplace.

43. The Secretary-General submits that the UNDT properly considered the requirement that the manager establish that medical accommodations represent a disproportionate or undue burden on the workplace. The UNDT clearly and specifically did consider the requirements set out in Section 2.2 of ST/SGB/2019/3. Although the UNDT held that the delay in providing reasons for the contested decision amounted to procedural error, the UNDT found that the reasons for rejecting the second RTW plan were valid ones.

44. In addition, the Secretary-General submits that the UNDT correctly determined that AAF was required to contest the 30 July 2019 decision not to implement the second revised RTW plan from 29 July 2019 by way of management evaluation. In relation to this, the UNDT had correctly held that the contested decision and the decision of 30 July 2019 not to implement DHMOSH's 29 July 2019 advice on a different set of medical accommodations for AAF, were two different administrative decisions, each rejecting significantly distinct advice from DHMOSH, and they differed in consequence. The RTW plans, as advised by DHMOSH, submitted on 5 November 2018 (the first RTW plan) and on 29 July 2019 (the third RTW plan) were substantially different in terms of scope and content. Not once did DHMOSH refer to a continued RTW plan or the implementation of another phase of one plan as maintained by AAF.

45. In response to AAF's further claim that the UNDT erred in law by finding that management evaluation was required of the 30 July 2019 decision, the Secretary-General submits that the UNDT has the authority to define the administrative decision(s) challenged by a party and identify the subjects of judicial review of its own accord. It was well within the jurisdiction of the UNDT to define the administrative decision that was the subject of AAF's challenge. Therefore, the UNDT's consideration of the matter was not an "ambush," as AAF claimed, but a lawful exercise of its own jurisdiction.

46. The Secretary-General also submits that the minor mathematical error in the UNDT's computing of the length of time that AAF's medical accommodations were implemented, does not amount to reversible error. The UNDT had indeed erred in computing such length as being "nearly eight months", when the period of time during which the Administration had actually implemented medical accommodations was six months and twenty-three days, or nearly seven months. According to the Secretary-General, the error does not affect the reasoning in the UNDT judgment. The burden of satisfying the UNAT that the UNDT's Judgment is defective rests with AAF, and she has failed to carry that burden.

47. The Secretary-General argues that AAF merely disagrees with the Judgment and attempts to relitigate her claims before the UNAT. She devotes much of her appeal to re-arguing previous arguments before the UNDT, in particular that the contested decision was not required to alleviate the burden on her colleagues; the UNDT should not have accepted the Administration's evidence that May and June are particularly busy work periods for AAF's unit; and that the contested decision did not represent a temporary suspension of the

RTW during a busy period. According to the Secretary-General, AAF fails to demonstrate how the UNDT erred on these questions and instead, she literally attaches excerpts of her arguments before the UNDT as support for her claims on appeal. The UNAT has repeatedly held that an appeal is not an opportunity for the parties to reargue their case. It does not fall to the UNAT to conduct a new trial.

48. Finally, the Secretary-General submits that AAF has not made out a claim for compensation. Her related assertions are without merit, and she has failed to demonstrate any error on the part of the UNDT.

Considerations

Lawfulness of the contested decision

49. The UNDT held that the contested 13 May 2019 decision (to stop the implementation of the second RTW plan) was lawful. Examining ST/SGB/2019/3, Section 2.2, the UNDT found there was a procedural error because no reasons were provided to AAF at the time on why the RTW plan would no longer be implemented. However, relying on previous jurisprudence of the Appeals Tribunal, the UNDT found that this error was not of such significance that, by itself, it rendered the decision unlawful, and that the contested decision was within the discretion of the Administration. The Secretary-General offered a thorough reasoning in his reply to AAF's application which the UNDT found convincing. The UNDT elaborated:[3]

> … The Tribunal observes that in accordance with sec. 2.2 of ST/SGB/2019/3, a return-to-work plan is "a time-limited programme" in order "to accommodate medical restrictions or limitations". The plan is therefore by definition a transitional and temporary arrangement that, due to a medical condition of a staff member, is installed to eventually allow her/him to fully resume her/his functions. Whereas no maximum time limit is given on how long time this arrangement can be in place, it is clear that it is not intended to be a permanent feature.
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> … When the Applicant's return-to-work plan was rejected for the first time on 13 May (the decision under review in the present case), this transitional and temporary arrangement had already been in place for almost eight months (her first return-to-work plan started on 7 November 2018). The Applicant's medical problems, however, went further back in time, as according to the agreed facts, she also went on

[3] Paras. 33 to 37 of the impugned Judgment.

> extended sick leave from 24 January 2018 to 19 February 2018. At the time of the contested decision, the situation was therefore not new, and taking into account that the Applicant served as a P-4 level interpreter, her daily and regular contribution to the work output of the office would have been important to the successful delivery on her office's mandate.
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> … As the Applicant's inability to cover any strenuous or overtime meetings persisted as per the return-to-work plan, the Tribunal finds that it was only reasonable for her office to insist that a more sustainable solution had to be found. Obviously, the accommodations negatively impacted the work situation of her peers and supervisors as they had already—for almost eight months—had to replace her at these meetings and administer her return-to-work plan. Also, using freelancers, as submitted by the Applicant, was evidently not a long-term answer to the situation in terms of expenditure and work quality. The Tribunal is further convinced by the Respondent's submission that May and June 2019 were particularly busy periods for the Applicant's office.
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> … Consequently, after almost eight months of the Applicant having already served on a return-to-work plan that limited her work capacity and facing a particularly busy period, the Tribunal finds that it was not unreasonable for the office to require the Applicant to fully reassume her duties, at least until the workload had diminished, in order to avoid a disproportionate or undue burden on the workplace in accordance with sec. 2.2 of ST/SGB/2019/3.
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> … While the untimely provision of the reasons is regrettable, the Tribunal does not find that this impacted the contested decision or the Applicant's possibility of subsequently accessing justice before the Dispute Tribunal. Similarly, whereas under sec. 2.2 of ST/SGB/2019/3, it was for the Applicant's manager to establish that the requested accommodations represented a disproportionate or undue burden on the workplace and not Counsel for the Respondent, the Tribunal also finds that this error was not of such significance that, by itself, it rendered the decision unlawful. Rather, it would appear that for the preparation of the reply, Counsel for the Respondent had sought information from the Applicant's manager, who then provided the belated reasons. It is therefore telling that the Applicant has not made any submissions regarding the delay in providing reason(s) and therefore by herself has not claimed prejudice from any of the identified procedural irregularities.

50. AAF's submissions on appeal do not put the UNDT Judgment into doubt.

51. Firstly, we agree with the UNDT that the Secretary-General did not commit any procedural errors which render the contested decision unlawful. ST/SGB/2019/3 provides as follows:

> 2.2 Certain components of the flexible working arrangements may be advised by the Medical Director or a duly authorized Medical Officer as being suitable to accommodate medical restrictions or limitations as part of a time-limited return-to work programme. In line with the general principles of reasonable accommodations for short-term disability, if that advice is rejected, the manager would be required to establish that the requested accommodations represent a disproportionate or undue burden on the workplace.

52. The UNDT correctly relied on the Appeals Tribunal's consistent jurisprudence according to which only substantial procedural irregularities can render an administrative decision unlawful. Such substantial procedural irregularities were found by the Appeals Tribunal when a staff member was not sufficiently informed about charges of misconduct in disciplinary proceedings.[4] In other cases, the Appeals Tribunal held that the Administration's failure to offer a reasoning when issuing an administrative decision will not automatically render this decision unlawful.[5]

53. We agree with the UNDT that shortcomings under Section 2.2 of ST/SGB/2019/3 can only be regarded as substantial procedural irregularities (rendering the refusal to implement flexible working arrangements unlawful) if the lack of providing such reasoning impacted the staff member's due process rights, namely his or her possibility of challenging the administrative decision before the UNDT. As the Secretary-General had delivered the requested reasoning albeit not when issuing the contested decision on 13 May 2019 but in his reply to AAF's application to the UNDT, and AAF had an opportunity to address and challenge it, the UNDT correctly found that the procedural error was not of such significance that, by itself, it rendered the contested decision unlawful.

54. The UNDT did not commit any errors in holding that the Secretary-General established that the continuation of the RTW plan would result in a disproportionate or undue burden on AAF's workplace. Contrary to AAF's submissions on appeal, it is not necessary for the Administration to "weigh the operational impact of the RTW plan against the reasons for its recommendation or negative consequences of non-implementation". It

[4] *Muindi v. Secretary-General of the International Maritime Organization*, Judgment No. 2017-UNAT-782, paras. 48-53; *Rangel v. Registrar of the International Court of Justice*, Judgment No. 2015-UNAT-535, paras. 70-76.
[5] *Obdejin v. Secretary-General of the United Nations*, 2012-UNAT-201; *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 24.

suffices that the Administration can reasonably show that the (continued) implementation of a RTW plan will result in a disproportionate or undue burden on the workplace.

55. In the present case, we agree with the UNDT that the Administration has established that the continuation of the RTW plan would result in such a disproportionate or undue burden on the workplace. On 13 May 2019, when the contested decision was taken, AAF's workplace had already dealt with her medical condition for a substantial amount of time. Since the fall of 2017 AAF had been absent from work for considerable amounts of time (see above). An RTW plan had been established and implemented by the Administration since November 2018. The UNDT correctly found that, due to the substantial period of time the RTW plan had already been implemented, the consequences for AAF's colleagues, the uncertainty about the development of AAF's medical condition and the upcoming busy periods for AAF's workplace, it was reasonable and lawful for the Administration to stop the (further) implementation of the RTW plan.

56. The UNDT did not err in holding that by stopping the implementation of the RTW plan, AAF's safety and security were not put at risk because AAF did not work from 1 June to 31 July 2019 but was instead placed on a combination of sick leave and annual leave, which was eventually fully restored to her advantage. Contrary to AAF's submissions on appeal, we do not find that the Secretary-General violated his "duty of care to provide staff with a safe working environment, as reflected in Staff Regulation 1.2(c)". According to the 15 May 2019 e-mail to both DHMOSH and AAF, AAF's manager thought that the Interpretation Service, as of 1 June 2019, would "no longer be able to abide by all the terms of the RTW". To have AAF work without being able to respect the requirements of the RTW plan might have created a risk to AAF's health (as previously pointed out by her doctors). It was thus reasonable for the Administration to assume that it was better for AAF's health to be placed on sick leave than to work in a stressful environment and without being able to respect the RTW plan. Only in a statement dated 29 July 2019, more than two months after the contested administrative decision was issued, did AAF's doctor express her view that AAF "is medically well enough to work full time" and "if all the recommendations cannot be instilled, it is still recommended that she work, as it is highly stressful and not conductive for improvement of her condition to be on sick leave at present". As the UNDT referred to the time period between 1 June and 31 July 2019, this medical statement is without legal relevance. The UNDT's finding that all 44 days of sick and annual leave for this time period have been restored to AAF by the

Secretary-General, is also not put into doubt on appeal. AAF does not show that there were more than 44 working days in June and July 2019. Also, AAF does not state on appeal that it was erroneous for the UNDT to refer to the respected time period. We note that, according to the 13 May 2019 decision, the Administration was willing and able to implement the RTW plan until 31 May 2019, and AAF resumed her full-time work for the Interpretation Service on 1 August 2019. AAF's claim that the decision not to implement the RTW plan which "made it likely for her to be separated following exhaustion of sick leave in a few months' time, potentially losing her income and insurance while seeking to recover from a serious medical condition" is a breach of the duty of care, is without merit. Firstly, AAF was not separated from service due to her medical condition; instead, she resumed her full-time work on 1 August 2019 and is apparently still working for the Organisation. Secondly, should a staff member's medical condition not improve after substantial periods of sick leave and implementation of a return-to work programme under Section 2.2 ST/SGB/2019/3, the tribunals would not consider a separation from service due to medical incapacity as a breach of the duty of care but rather as a reasonable and lawful option of the Secretary-General.

57. Further, the UNDT did not err in finding the RTW plan was reimplemented from 1 August 2019, and that AAF was required to contest by management evaluation the Administration's refusal of 30 July 2019 to implement DHMOSH's 29 July 2019 recommendation (which was based on AAF's doctors 29 July 2019 advise as mentioned above). AAF does not present any evidence on appeal that the previous RTW plan was not (again) respected starting from 1 August 2019. It is undisputed that she resumed her full-time work for the IS on 1 August 2019. She has not stated on appeal in which way the Administration disrespected the previous RTW plan which provided she would not be assigned to stressful meetings or meetings that last for more than 3 hours and not work beyond the regular working hours or on weekends. There is no evidence that the Administration violated the provisions of the RTW plan by exposing AAF to stressful meetings, to meetings that last to more than 3 hours or to make her work beyond the regular working hours and/or on weekends. AAF herself conceded, in her 22 February 2021 comments on the Secretary-General's reply, that "August is very clearly not a peak period with only 96 meetings in total", thus enabling the Administration to again respect the RTW plan unlike during the busier months before. On appeal, AAF does not state at all that the Administration did not implement the previous, second RTW plan. Instead, she claims that the 29 July 2019 DHMOSH's recommendation that she could as of now "take assignments

that correspond to medium level-stress/difficult meeting, on full time basis", was not followed (which means, in fact, that she criticizes that the Administration did not expose her to more stressful working conditions at an earlier stage). We agree with the UNDT that the 30 July 2019 decision (to not apply the RTW plan as recommended on 29 July 2019) and the 13 May 2019 decision (to stop implementing the previous RTW plan) are two different administrative decisions due to the different provisions of the two RTW plans, and that management evaluation was required of the 30 July 2019 refusal if AAF wanted to challenge this decision.

58. Finally, the UNDT's assertion that the RTW plan had been implemented for "nearly eight months" constitutes an arithmetical mistake under Article 12(2) of the UNDT Statute but no error of law or fact under Article 2(1) of the UNAT Statute. The UNDT correctly referred to the period from 7 November 2018 to 30 May 2019 as the time the RTW plan had been implemented by the Administration. Also, we find it does not make a difference for the present case whether the RTW plan had been implemented for "nearly eight months" or for "nearly seven months".

Remedies

59. As there is no unlawful administrative decision, there can be no remedy under Article 9(1) of the UNAT Statute.

60. Further, AAF cannot claim compensation for the infection suffered in May 2019 because she has not shown that this illness was directly caused by the contested 13 May 2019 decision as required under the consistent jurisprudence of the Appeals Tribunal.[6] There is no direct causal link between the 13 May 2019 decision and AAF's urinary tract infection and subsequent sepsis. Even without medical knowledge the Appeals Tribunal feels competent to point out that illnesses like urinary tract infection and sepsis cannot be (directly) caused by an administrative decision. Accordingly, the 19-21 May 2019 documents by the doctors who treated these illnesses do not mention the 13 May 2019 decision as a direct cause. The 12 March and 5 May 2020 medical statements are given by doctors who did not treat the

[6] *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, paras. 20-21, citing *Mihai v. Secretary-General of the United Nations,* Judgment No. 2017-UNAT-724, para. 21, citing *Diatta v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-640; *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277.

urinary tract infection and sepsis at the time; they also render no evidence for a direct link between the administrative decision and those infections.

61. In consequence, AAF cannot claim to be compensated by restoration of more absence days. As found by the UNDT, 44 days were restored to AAF for the relevant time period between 1 June and 31 July 2019, when the RTW plan was not implemented. AAF has not shown why the Secretary-General would have to restore absence days in May 2019 (when the RTW plan was still implemented) and in August 2019 (when AAF had resumed her full-time service on the basis of the RTW plan).

Judgment

62. The appeal is dismissed, and Judgment No. UNDT/2021/094 is affirmed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Knierim, Presiding	Judge Sandhu	Judge Murphy

Judgment published and entered into the Register on this 20th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar