



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

GOUIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Human Rights Officer at the P-4 level in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), contests the refusal by Medical Services Division (“MSD”) in New York “to take a decision in regards to [his] sick leave for the past 11 months.” He submits, *inter alia*, that a number of actions of the Administration are unlawful, including the delay in taking a decision on his sick leave, being asked “over and over again” to provide additional documentation or forms already submitted in relation to his sick leave, and the discrepancies in the process between MSD in Geneva and New York.

2. The Respondent submits that the application is not receivable because the Applicant has not identified any administrative decision that is in non-compliance with his terms of appointment. No final administrative decision refusing to certify the Applicant’s absence from work as sick leave has been taken. The Respondent further submits that, in any event, the application is without merit. The Applicant has not provided the Administration with the documentation required to process his request for the certification of sick leave. Any delay in the process is attributable to the Applicant and not the Administration.

Procedural history

3. By Order No. 189 (NY/2016) dated 4 August 2016, the Tribunal invited the parties to consider resolving this dispute amicably, failing at which they were to file a jointly-signed statement addressing a number of issues.

4. On 18 August 2016, the parties filed a joint motion requesting the Tribunal to refer the case to mediation and suspend proceedings for a period of one month.

5. By Order No. 201 (NY/2016) dated 18 August 2016, the Tribunal referred this case to mediation and suspended the proceedings until 19 September 2016. Due to an administrative oversight, Order No. 201 (NY/2016) was not transmitted to the the Mediation Division of the Office of the United Nations Ombudsman and Mediation Services and no action was taken by the parties to resolve this case informally during the month that proceedings were suspended.

6. On 19 September 2016, the Applicant filed a response to Order No. 201 (NY/2016), stating that “although he embraced every single opportunity to resolve the issue through discussions and informal mediation” he had “lost any hopes that the issues submitted to the Tribunal could be solved through mediation.”

7. In light of the Applicant’s response, by Order No. 219 (NY/2016) dated 20 September 2016, the Tribunal stated that it would proceed with its consideration of this matter and ordered the parties to file a jointly-signed statement addressing the issues set out in Order No. 189 (NY/2016).

8. On 29 September 2016, the parties filed a jointly-signed statement, responding to a number of questions posed by the Tribunal in Order No. 189 (NY/2016).

9. By Order No. 229 (NY/2016) dated 30 September 2016, the Tribunal ordered the parties to attend a Case Management Discussion (“CMD”) on 4 October 2016 to discuss the issues arising in this case.

10. On 3 October 2016, the Applicant informed the Tribunal that he might not be able to participate in a CMD on 4 October 2016 due to the effects of Hurricane Matthew in Haiti, where the Applicant is stationed. He requested the postponement of the CMD until after the hurricane dissipated.

11. By Order No. 231 (NY/2016) dated 3 October 2016, the Tribunal found that, given that this case can be decided on the papers, it was sufficient to receive closing submissions from the parties by 10 October 2016.

12. On 5 October 2016, the Applicant filed a motion for leave to amend his application. He submitted that in the process of preparing the joint submission filed on 29 September 2016, he learned for the first time of the decision taken by MSD on 9 December 2015 to certify sick leave for the period 1 November 2015 to 12 December 2015. He submitted that the decision was never communicated to him and therefore he was never provided an opportunity to challenge it. The Applicant therefore requested leave to amend his application to include reference to the 9 December 2015 decision. The Applicant also requested the Tribunal to order the Administration “to fully disclose to the Applicant all decisions taken since 10 March 2015 and which concern the Applicant or, alternatively, to order the administration to certify that no such decisions exist.”

13. By Order No. 234 (NY/2016) dated 6 October 2016, the Tribunal granted the Applicant’s request to amend his application, but rejected his request to order disclosure of “all decisions taken since 10 March 2015.”

14. On 10 October 2016, the parties filed their closing submissions.

Background

15. The Applicant joined MINUSTAH in October 2012. Starting December 2014, he went on a temporary assignment with the Office of the High Commissioner for Human Rights (“OHCHR”).

16. On 10 or 11 March 2015, while on leave in his home country, the Applicant informed MINUSTAH and OHCHR that he was unable to return to his duty station and resume functions due to medical reasons.

17. In their joint submission dated 29 September 2016, the parties summarized the subsequent events and exchanges as follows:

... The Applicant submits that he has provided the following documentation and information to the Organization:

(a) On 10 March 2015, Applicant sent an email to MINUSTAH and OHCHR with an attached medical certificate stating he was unable to resume his duties. OHCHR and MINUSTAH never responded to this email.

(b) On 8 April 2015, Applicant sent an email to MINUSTAH and OHCHR with an attached medical certificate stating he was unable to resume his duties until 15 May [2015]. OHCHR and MINUSTAH never responded to this email.

(c) On 7 May 2015, Applicant informed OHCHR and MINUSTAH by email that he was cleared to resume his duties as of 16 May and asked for the procedure to follow. On 12 May 2015 MINUSTAH provided the Applicant a form to be filled [out] by the Applicant’s physician to obtain medical clearance. On 13 May 2015, Medical Service Division (NY) requested that the Applicant’s physician provides a “comprehensive medical report” and fill a MS.24 form. On 19 May 2015, documents requested were faxed by Applicant’s physician to Medical Service Division (NY)

(d) On 11 June 2015, Medical Service Division (Geneva) requested the Applicant to provide a MS.24 form.

On 12 June 2015, Applicant provided Medical Service Division (Geneva) the requested documents by email.

(e) On 24 June 2015, Medical Service Division (NY) informed the Applicant they hadn't received the documents faxed on 19 May. On 2 July 2015, after retrieving the original fax from his physician's office, the Applicant sent the requested document by email to Medical Service Division (NY).

(f) On 20 July, Medical Service Division (NY) requested that the Applicant's physician provides "a detailed report". On 27 July, Applicant informed Medical Service Division that he has been unable to reach his physician to verify whether he had faxed the requested document.

(g) On 21 July, Medical Service Division (NY) requested that the Applicant's physician provide a letter that clearly states that the Applicant is fit to resume his duties. This document had already been provided on 19 May, 12 June and 2 July.

(h) On 13 October, MINUSTAH Personnel Division requested the Applicant to submit a MS.6 form. On 14 October Medical Service Division (NY) requested the Applicant to provide a new MS.24 form. Applicant immediately made an appointment with his physician at the earliest date possible, which was on 18 November. Applicant asked for clarification whether he should provide the administration with the MS.6 or the MS.24 form. On 22 October, Applicant resent his request for clarification. On 26 October, Applicant received a reply to his request. On 18 November, Applicant sent by email to Medical Service Division the new MS.24 form and a letter confirming he was fit to resume his duties.

(i) On 23 November 2015, MINUSTAH Medical Section requested the applicant to provide a copy of documents already provided to Medical Service Division (NY). On 25 November, Applicant sent by email to MINUSTAH Medical Section the requested documents.

(j) On 9 December, Medical Service Division (NY) requested the Applicant's physician provide a "comprehensive psychiatric evaluation." The Applicant immediately forwarded by email this request to his physician. On 17 January 2016, Applicant informed Medical Service Division (NY) that he has been unable to reach his

physician to confirm whether he had faxed the requested documents and asked for guidance on how to proceed and suggested the form might be filled [out] by MINUSTAH Medical Service. On 27 January 2016, Medical Service Division (NY) responded that the form had to be filled [out] by the applicant's treating physician. On 17 February 2016, Applicant informed Medical Service Division (NY) that he has been unable to reach his physician to confirm whether he had faxed the requested documents.

... The Respondent submits the following:

(a) The Respondent did receive this email, dated 11 March 2015.

(b) The Respondent is unable to confirm that this email was received. However, the Respondent is in receipt of the medical certificate referred to, which was re-sent by the Applicant on 13 May 2015.

(c) The Respondent confirms receipt of the email dated 7 May 2015. However, the Respondent did not receive the fax that the Applicant refers to.

(d) The Respondent is unable to confirm receipt of the email dated 12 June 2015.

(e) The Respondent confirms receipt of an email dated 2 July 2015 from the Applicant to MSD. Attached to this document was a document entitled "medform.pdf."

(f) The Respondent confirms receipt of this email.

(g) The Respondent confirms that MSD sent the email referred to.

(h) The Respondent confirms that it has received the emails referred to.

(i) The Respondent confirms that the Applicant sent an email on 25 November 2015 to a medical officer within MINUSTAH, enclosing an earlier email sent to MSD. This earlier email was sent on 18 November 2015 and included form MS.24.

(j) The Respondent confirms receipt of the emails referred to, and confirms that it has not received the comprehensive psychiatric report referred to.

18. On 26 November 2015, the Applicant requested management evaluation. He identified the contested decision as “many decisions taken and not taken by MINUSTAH Personnel and Medical Services Division NY in [connection] with the certification of a sick leave.”

19. On 7 January 2016, the Applicant received a response to his management evaluation request, which stated that “MSD has advised the [Management Evaluation Unit] that no decision has been taken to deny [his] request for certified sick leave,” which “remains under consideration, pending the submission of documentation requested by MSD.” The response concluded that, “[i]n the absence of any administrative decision ... [his] request for a management evaluation ... is not receivable.”

Consideration

Receivability

20. The Respondent’s submits that this case is not receivable as no final administrative decision has been taken regarding the Applicant’s absence from work for the period from 11 April 2015 to 15 May 2015. Any delay in the process of certifying this absence as sick leave was not due to any administrative decision but was attributable to the Applicant.

21. The Applicant alleges that he has submitted all relevant information and that the continued delay in the processing of his request is in breach of his right to have his request properly considered, and that this delay might result in adverse consequences for him.

22. The Tribunal is persuaded that the ongoing uncertainty with regard to the Applicant’s sick leave request and the failure to process it may have adverse consequences on his rights and status as a staff member. The

Tribunal finds that, under art. 2.1(a) of the Tribunal's Statute, this case is receivable.

Merits

23. The Applicant submits that the Secretary-General, through MSD New York, has continuously refused to take a decision regarding his sick leave. This refusal is unreasonable and should be considered unlawful. The Applicant states that MSD New York has requested more than nine documents from his physician and documents faxed to MSD have been regularly lost. He submits that being asked to provide these documents over and over again is tantamount to harassment and should be considered unlawful.

24. The Respondent submits that since the Applicant's absence exceeded 20 working days, his request for sick leave must be certified in accordance with ST/AI/2005/3 (Sick leave) as amended by ST/AI/2005/3/Amend.1, which requires submission of a detailed medical report. Thus, until the Applicant provides a detailed medical report covering the period of 11 April 2015 to 31 October 2015, his request cannot be processed. The Respondent disagrees with the Applicant's assertion that, on 19 May 2015, a detailed medical report was sent to MSD. The Respondent submits that the document received by MSD on that date was a copy of test results, not a detailed medical report. The Respondent submits that the Applicant has failed to provide any evidence from his physician that a detailed medical report was sent to MSD, nor offered to provide a new copy. The Respondent also submits that the Applicant's absence has not been recorded as unauthorized or special leave, or charged against annual leave, as MINUSTAH is awaiting a final decision from MSD on the Applicant's sick leave. No final administrative decision has been taken

on the certification of the Applicant's sick leave as MSD remains willing to certify the sick leave upon receipt of satisfactory documentation.

25. The Tribunal does not have the medical expertise to decide on requests for sick leave or whether or not any given medical documentation is "satisfactory." The parties have obviously reached an impasse. The Applicant submits that, in the period of March to December 2016, he sent a multitude of copies of the same documents, including medical reports and forms, in response to requests from the MINUSTAH Medical Section, MSD Geneva, MSD New York, and OHCHR. In the joint submission dated 29 September 2016, the Respondent has confirmed receipt of most of the communications, stating, however, that it was "unable to confirm" that some of them have been received. It may well be that this is due to the fact that several medical offices have been involved in this matter (MINUSTAH Medical Section, MSD Geneva, MSD New York, and OHCHR).

26. Thus, the Applicant asserts that he has submitted the requested reports and forms over and over again to various offices, whereas the Respondent insists that the Applicant has not submitted "satisfactory documentation," although it is not entirely clear to the Tribunal how the documentation previously submitted by the Applicant, as set out in the joint submission dated 29 September 2016, differs from what supposedly remains outstanding.

27. In the circumstances, it is incumbent upon the Administration to reach a decision on the Applicant's request. The Applicant shall be provided with an opportunity to submit, within one month of the date of this judgment, any further documentation to the MSD New York that he wishes to file. Thereafter, the Respondent shall identify and collect all pertinent information in the possession of MINUSTAH Medical Section, MSD Geneva, MSD New York, and OHCHR, and render its decision on his

request within 90 days of the date of this judgment. Any resulting administrative decision(s) may be subject to appeal as per the standard procedures set out in the Statute of the Dispute Tribunal and the Staff Rules.

Orders

28. The application succeeds.

29. The Applicant's request for certification of his sick leave is remanded to the Secretary-General for consideration.

30. Within one month of the date of this judgment, the Applicant shall submit any further documentation to the MSD New York that he wishes to be taken into consideration.

31. Within 90 calendar days of the date of this Judgment, the Respondent, through a properly designated office, shall render a decision on the Applicant's request.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 12th day of October 2016

Entered in the Register on this 12th day of October 2016

(Signed)

Hafida Lahiouel, Registrar, New York