



Before: Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

BEZZICCHERI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

François Lorient

Counsel for Respondent:

Jérôme Blanchard, UNOG

Introduction

1. By application filed on 8 April 2015, the Applicant contests the “[r]econsideration by [the Secretary-General] of [her] disability benefit claim”, notified to her on 29 December 2014. The Respondent filed his reply on 14 May 2015.

Facts

2. The Applicant entered the service of the United Nations Office on Drugs and Crime (“UNODC”) in Bangkok, Thailand, in April 2002. She was laterally re-assigned to the UNODC Office in Phnom Penh, Cambodia, in 2010, where she worked as an Associate Advisor (HIV/AIDS).

3. 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.

4. 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.

5. 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.

6. 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.

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

8. 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.

9. 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.

10. 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..

11. 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.

12. 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.

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

14. 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.

15. 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.

16. 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.

17. 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..

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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”.

28. 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.

29. 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.

30. 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.

31. 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 resented the documents on 17 January 2014 and, subsequently, JMS acknowledged the Applicant's submission.

32. 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.

33. 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.

34. 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".

35. 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.

36. 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.

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

38. 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").

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

Procedure before the Tribunal

49. By Order No. 203 (GVA/2015) of 19 October 2015, the Tribunal convoked the parties to a case management discussion ("CMD"), which took place on 12 November 2015.

50. The hearing on the merits was held from 12 to 14 January 2016; the Tribunal heard several witnesses called by both parties, and called one witness at its own motion.

51. By Order No. 24 (GVA/2016) of 16 January 2016, the Tribunal remanded the case for institution of the required procedure.

52. By joint motion dated 20 May 2016, the parties informed the Tribunal that they had each appointed their own representative for a Medical Board, and that while the parties' representatives at the Medical Board had agreed on the specialist required, they were still discussing and deciding on the Chair of the Medical Board.

53. By joint motion dated 16 January 2017, the parties informed the Tribunal that their representatives at the Medical Board had still not been able to agree on the Chair of the Medical Board, and on some other issues. They therefore asked the Tribunal to call them for a CMD or, in the alternative, to receive guidance on how to proceed in this case and to be given the opportunity to submit in writing their respective argumentation on the medical disability advisor guidelines, the mandate of the Medical Board, and the basic requirements of the Chair.

54. By Order No. 11 (GVA/2017) of 16 January 2017, the Tribunal convoked the parties to a CMD, following which they engaged in informal settlement negotiations.

55. On 23 November 2017, the parties informed the Tribunal that settlement efforts had not been successful, and asked that the case be remanded back to the Tribunal for final adjudication. They also requested the Tribunal to give them until on or around 20 December 2017 to submit their closing submissions.

56. By Order No. 221 (GVA/2017) of 27 November 2017, the Tribunal ordered the parties to file their closing submissions by 22 December 2017. Counsel for the Applicant filed his closing submission on 20 December 2017, whereas Counsel for the Respondent did so on 22 December 2017.

57. In his closing submissions, the Respondent asserted, for the first time, that “even if all [of the Applicant’s] belated medical certificates [had] been endorsed by a Medical Board at the time, or at any later point in time, [she] would not have exhausted her sick leave entitlements, and her case could, therefore, not have been considered for a disability benefit”.

58. In view of the above assertion, the Tribunal, by Order No. 1 (GVA/2018) of 3 January 2018, invited the Applicant to provide comments on the issue of the exhaustion of her sick leave entitlements as raised by the Respondent. The Applicant’s Counsel filed his comments thereon on 18 January 2018, *inter alia*, contesting the Respondent’s evidence on the Applicant’s exhaustion of sick leave and stressing that any such argument should have been made earlier and not at this late stage of the proceedings.

59. In light of the parties’ filings, by Order No. 47 (GVA/2018) of 22 February 2018, they were called to a hearing, which took place on 7 March 2018. During the hearing, the Tribunal heard evidence from a Human Resources Assistant, Recruitment and Placement Unit, HRMS, UNOV, who gave evidence with respect to the computation of sick leave entitlements in general and the consolidation of the Applicant’s sick leave entitlements, together with her parent department.

60. By Order No. 56 (GVA/2018) of 8 March 2018, the Tribunal granted the Applicant's Counsel leave to file missing medical certificates to which he had referred to in his latest submission and at the hearing of 7 March 2018, and to ask the Respondent to provide it with the administrative issuance referred to by his witness with respect to the computation of sick leave entitlements. Pursuant to said Order, the Applicant filed additional medical documentation, namely medical bills, but no additional medical certificates or medical reports in support of additional periods at the relevant time for which she had been certified to be medically unfit to work prior to her separation in December 2013. The Respondent, pursuant to above-referenced Order, filed Personnel Directive PD/4/77 of 1 September 1977 (Administration of sick leave).

61. The parties were further ordered to file additional submissions, which they did, on 20 April 2018. Thereafter, the parties were convoked to another CMD, which was held on 22 May 2018. The undersigned Judge reiterated that the Tribunal could not grant most of the requested relief and that unless the parties agree on an IME or a Medical Board, the matter would remain unresolved. The Tribunal also expressed its view that the lack of a dispute resolution mechanism with respect to the constitution of the Medical Board, that is, the designation of the Chair, was highly regrettable and a main concern in this matter. After the CMD, the parties continued attempts to resolve the matter by appointing new medical representatives.

62. Unfortunately, and despite good faith on the part of both Counsel, the parties were again not able to resolve the matter and no agreement could be reached on a Chairperson for a Medical Board. The Applicant filed a motion for summary judgment on 1 October 2018. The Respondent filed his comments thereon on 8 October 2018.

63. The Tribunal called the parties to a CMD on 11 October 2018 and another one on 7 November 2018, to report to it about progress being made. During the CMD, the Tribunal reiterated the need for the parties' medical representatives to agree on a Chairperson for the Medical Board and the Terms of reference for the latter. By Order No. 190 (GVA/2018), the Tribunal made some additional orders to help the parties resolve the outstanding matters to set up a Medical Board.

64. By submission filed on 2 December 2018, the Applicant asked the Tribunal to render a judgment as per her application and closing submissions, with costs. The Applicant made an additional filing on 6 December 2018 indicating that she had appointed a new medical practitioner to represent her and asked the Tribunal to appoint a Chair for the Medical Board.

Parties' submissions

65. The Applicant's principal contentions are:

a. The Respondent misrepresented her sick leave entitlements and omitted certain periods of her sick leave in his computation, particularly sick leave from 9 April to 15 May 2013; had such been duly taken into account, she would definitely have exceeded her 195 days of sick leave entitlement in late 2013;

b. In the parties' agreed statement of fact of January 2016, it was admitted that during her annual leave in Italy in 2013, she was hospitalized and followed medical treatments in April-May 2013; para. 4 of Order No. 24 (GVA/2016) also quoted the joint agreement of facts covering the April-May 2013 period; in the latest submission filed by the Respondent on 28 February 2018 this period of sick leave is missing;

c. The Respondent was fully aware in December 2013 of the Applicant's sick leave exhaustion; emails from JMS/UNOV show that conversion of the April/May 2013 annual leave into sick leave was a priority at JMS; accordingly, Dr. P.'s terms of reference in January 2014 were to look into the retroactive conversion from annual leave into sick leave and the Applicant's prognosis;

d. In light of the medical notifications of 3 and 4 December 2013 from Dr. Be. and Dr. Bo., as well as the Applicant's own email of 5 December 2013 regarding her disability claim, the Respondent was well aware of the Applicant's incapacity; therefore, and in light of the severe medical diagnosis and medication prescribed by Dr. Be. and Dr. Bo., and of all the medical and

hospital certificates on record, the Applicant had to be maintained on sick leave status pending a final medical determination and until full exhaustion of all her remaining sick leave entitlements; the Respondent's submission that nothing in these certificates indicated that the Applicant was unable to perform her duties in November or December 2013 is unreasonable; also, at the hearing in January 2016, the Medical Doctor, JMS, did not refute the diagnosis of Dr. Be. and Dr. Bo.;

e. The Respondent abused the procedure and misled the Tribunal; the errors, omissions, delays and negligence by JMS in December 2013 were compounded by the irregular appointment of the Independent Medical Examiner and the inaction on the report of Dr. P.; the Applicant's sick leave entitlements on half-pay should have been activated in 2014, until the UN Medical Director and the UNSPC had issued a determination on her case, in accordance with sec. 3 of ST/AI/1999/16;

f. According to constant practice, and as reflected in OHRM Personnel Policy of 1 September 1977 (particularly in light of its sec. 8), the Applicant was entitled by contract to her balance on Special Leave With Half Pay ("SLWHP"), regardless of her balance of Special Leave With Full Pay ("SLWFP") in December 2013, until a determination on her disability claim was made by the UNSPC; not applying such policy to her was discriminatory; particularly, since in light of Annex A/1 submitted by the Respondent, he could already calculate that the Applicant was left with no more than a 14 day balance of SLWFP in December 2013;

g. The dispute resolution system related to appointing an Independent Medical Examiner and a Medical Board is ineffective and the Organization is responsible for this deficiency; under the current system, officials of the Medical Services Division expect to have the last word on appointments, as this case has demonstrated between 2016 and 2018; as a consequence, the Applicant's claims for the appointment of a highly qualified Chairperson were rejected arbitrarily;

h. The Tribunal should include in its final ruling its findings in Order No. 24 (GVA/2016) with respect to the appointment of Dr. P. as an Independent Medical Examiner;

i. The basic standards for IME reports were not respected by Dr. P. and his report, while it outlined her nails and shoes, omitted important workplace incidents that impacted on the Applicant's medical condition;

j. The Administration's use of the Medical Disability Advisory ("MDA") Guidelines of the private Reed Group for the management of sick leave absences was arbitrary and unauthorized; the mere discussion during an informal working group such as the purely technical, consultative working group of the United Nations Medical Directors Working Group ("UNMDWG") does not validate the choice of the guidelines; instead, the disability rules adopted by the United States Congress on 2008 (ADA amendments act) and jurisprudence on *fibromyalgia* using these rules should have been used;

k. The Organization's relations with the private Reed Group are questionable and lack transparency; and

l. The Applicant claims costs for abusive procedures, namely 248 hours of legal attorney services, USD22,000 for translators for the January 2016 hearing and for other specialized medical evidence filed at the UNDT; USD21,000 for travel/hotels three times from Canada to Geneva to ensure her Counsel's participation at the hearing, negotiations with OHRM and UNJSPF; USD3,200 for secretarial, telecoms, transport to Court hearings (taxis); she offered to provide receipts to the Tribunal if requested.

66. The Respondent's principal contentions are:

a. The issue for determination by the Tribunal is whether or not the Administration followed a proper and fair procedure in reaching the contested decision, and whether the latter was legal, rational and procedurally correct;

b. The decision was fair, reasonable and proportionate and the proper procedure was followed; under sec. 3.2 of ST/AI/2005/3/Amend.1 on sick leave, it is only once a staff member has used all of the entitlement to sick leave with full pay that the executive or local personnel office shall bring the situation to the Medical Director or designated medical officer, for determination whether the staff member should be considered for a disability benefit under art. 33(a) of the Regulations of the UNJSPF; similarly, under sec. H.3 of the Administrative Rules of the UNJSPF, a request for determination by the Staff Pension Committee under art. 33 (a) of the Regulations shall be made by the Organization if (a) during, or on the expiry of, the appointment of a participant, there is reason to believe that he or she may be incapacitated or (b) when a participant is placed, or is proposed to be placed, on leave without pay for reasons of health; or (c) whenever the appointment of a participant is terminated, or is proposed to be terminated, for health reasons. At the time of the Applicant's separation, none of these conditions were met. In fact, the Applicant did not provide justification or medical reports to the JMS for the purpose of certifying her sick leave in 2013, despite several reminders, and as per requirements of staff rule 6.2(f) and ST/AI/2005/3/Amend.1 on sick leave. As such, and since the file did not indicate that the Applicant had exhausted her sick leave entitlement with full pay, at the time of her separation the Administration was not in a position to determine whether the conditions to submit the Applicant's case for consideration for a disability benefit to the Medical Director were met. For the same reasons as above, the conditions set down in administrative rule H.3 of the UNJSPF were not met either;

c. “[e]ven if all [of the Applicant's] belated medical certificates [had] been endorsed by a Medical Board at the time, or at any later point in time, [she] would not have exhausted her sick leave entitlements, and her case could, therefore, not have been considered for a disability benefit. Consequently, the Administration should not be held liable for jumping steps in a procedure that had no impact on the Applicant's request for disability benefits”;

d. It follows that the Administration was under no obligation to submit the Applicant's case to the Medical Director, under art. 33(a) of the UNJSPF Regulations;

e. However, as the Applicant served out of Vienna and had never been seen by JMS, by proposing to the Applicant to undertake an IME to assess her medical conditions also for the purpose of certifying her claimed sick leave in 2013, JMS acted fairly; the Applicant accepted that course of action. The IME was performed by a recognized medical practitioner, Dr. P., who concluded that the Applicant's functional ability to work based on her physiology was normal;

f. Even though no test and no medical examination was conducted then by Dr. P., the IME was done properly; JMS confirmed that Dr. P. was the appropriate specialist and was provided with all documentation that the Applicant had made available to JMS; the Applicant's request to have her own specialist present during the exam was denied on the grounds that this was not part of an IME, unless the patient has a legal custodian based on severe medical impairments;

g. On the basis of the IME, which concluded that the Applicant's functional ability to work based on her physiology was normal, MSD concluded that the Applicant could not be recommended for a disability benefit by the UNSPC; the decision was rational, proper and legal;

h. The Applicant was aware as of October 2013 that her sick leave had not been certified, since she failed to provide the requested information despite several reminders; as a result, the salaries from October 2013 to 31 December 2013, the date of her separation, were withheld because her absences could not be certified as sick leave; the Applicant, at the time, failed to anticipate her losses; further, she was informed on 19 December 2013 that the certificate she had submitted on 5 December 2013 was not sufficient, and that her sick leave was not certified, which could result, *inter alia*, in a decision not to submit her case for disability;

- i. The Applicant was not precluded from presenting her case to have her 2013 sick leave certified, and she should have anticipated the possible outcome and had a legal obligation to take steps to mitigate her losses (cf. *Appleton* UNDT/2012/125);
- j. Since no illegality has been established and since she did not mitigate her losses, compensation cannot be granted; and
- k. The application should be dismissed.

Consideration

67. The application has been interpreted in line with the Appeals Tribunal's ruling in *Massabni* 2012-UNAT-238 and the Tribunal has determined that what the Applicant contests is the decision not to recommend her for consideration for a disability benefit by the United Nations Staff Pension Committee (cf. Order No. 88 (GVA/2015) of 20 April 2015).

Receivability

68. While this has not been raised by the Respondent, the Tribunal first has to examine whether the present application is receivable, *ratione temporis*. It recalls that the contested decision was notified to the Applicant on 29 December 2014. On 12 January 2015, the Applicant was informed by HRMS/UNOV that she had to request management evaluation, which she did on 25 January 2015. On 13 March 2015, the OIC, MEU, informed the Applicant that her request for management evaluation was not receivable since the contested decision was one based on the advice of a technical body. She then filed the present application on 8 April 2015.

69. Staff rule 11.2(b) provides that “[a] staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General ... is not required to request a management evaluation.” The Applicant had been informed, wrongly, by a competent authority

that the contested decision had to be subjected to management evaluation and, in reliance upon that advice, sought timely management evaluation.

70. When she was informed by the MEU that her request was not receivable, she submitted the present application within 90 days from the outcome of that management evaluation.

71. However, pursuant to art. 8 (d)(ii) of the Tribunal's Statute, when a decision is not subject to management evaluation, an application has to be filed within 90 days from the notification of the contested decision, which would have been on 30 March 2015.

72. The Tribunal reiterates that the Respondent did not question the receivability, *ratione temporis*, or otherwise, of the application. It also recalls that pursuant to art. 8, para. 3 of its Statute and art. 7, para 5 of its Rules of Procedure, it can waive the time-limit for the filing of an application in exceptional cases upon a written request by the Applicant.

73. While the Applicant did not make such a written request, the Tribunal finds it appropriate and equitable, under the circumstances of the present case, in which the Applicant had been wrongly advised with respect to the request for management evaluation and did in fact file the application within 90 days of receipt of the response to her request for management evaluation, to waive the time-limit for the filing of the application. The application is therefore receivable.

Applicable law

74. The present case has to be adjudicated in light of the legal norms and provisions of the United Nations Secretariat relating to sick leave and requests for disability benefits, and their interplay with the relevant rules of the United Nations Joint Staff Pension Fund. The Tribunal will therefore quote the rules here below to the extent they are relevant for the determination of the Applicant's case.

75. The relevant Regulations and Rules of the United Nations Joint Staff Pension Fund with respect to disability benefits provide the following:

Article 33 of UNJSPF Regulations

DISABILITY BENEFIT

(a) A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration.

Administrative Rule H.3 and H.4 of UNJSPF Administrative Rules

H.3 A request for a determination by the staff pension committee under article 33(a) of the Regulations shall be made by the organization:

(a) Whenever during, or on the expiry of, the appointment of a participant there is reason to believe that he or she may be incapacitated within the meaning of article 33(a); or

(b) Whenever a participant is placed, or is proposed to be placed, on leave without pay for reasons of health; or

(c) Whenever the appointment of a participant is terminated, or is proposed to be terminated, for reasons of health.

H.4 A determination under article 33(a) shall be made by the staff pension committee at the request of a participant:

(a) Whenever the organization has not acted in accordance with rule H.3 above; or

(b) Whenever a participant alleges that on the date of separation he or she was incapacitated within the meaning of article 33(a).

76. Within the United Nations Secretariat, the Staff Rules and administrative issuances provide for a system of social security, including granting of sick leave, in the following terms:

Staff rule 6.2
Sick Leave

(a) Staff 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.

Maximum entitlement

(b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

(i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;

(ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;

(iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

...

Obligations of staff members

(f) Staff 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.

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the Medical Director. When, in the opinion of the Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff

member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule.

Review of decisions relating to sick leave

(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.

(l) The cost of an independent practitioner or a medical board mentioned in paragraphs (j) and (k) above shall be borne by the Organization and by the staff member under conditions established by the Secretary-General.

77. Sec. 3.1 of ST/AI/1999/16 (Termination of appointment for reasons of health) relevantly provides:

3.1 When a staff member has used all his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether the staff member should be considered for a disability benefit under article 33 (a) of the UNJSPF Regulations, while the staff member is on sick leave with half pay.

3.2 If the medical conclusion is that the staff member's illness or injury constitutes an impairment to health which is likely to be permanent or of long duration, the Medical Director or designated medical officer shall so advise the relevant human resources officer at Headquarters or the local personnel office for notification to the staff member or, where appropriate, to a member of the staff

member's family. If the staff member disagrees with the medical conclusion, he or she may request a review of the matter by an independent medical practitioner or a medical board. The independent medical practitioner or medical board shall be selected in the same manner as provided in staff rule 106.2 (j) or (k), as appropriate, for review of decisions on sick leave.

3.3 Where the conclusion by the Medical Director or designated medical officer is either not contested by the staff member or is confirmed by the independent medical practitioner or medical board selected to review the matter, the relevant human resources officer at Headquarters or the local personnel office shall submit as soon as possible a request to the United Nations Staff Pension Committee ("the Committee") for the award to the staff member of a disability benefit. This request shall be in the form set out in the annex to the present instruction.

78. ST/AI/2005/3/Amend.1 (Sick leave) provides in its relevant parts that:

Section 2

Certification of sick leave

2.1 Unless uncertified sick leave is allowed under section 1.2 above, a staff member who is unable to perform his or her duties by reason of illness or injury must submit a medical certificate or a medical report, as provided in sections 2.2 and 2.3 below, no later than the twentieth working day following the initial absence from duty.

2.2 A total of up to 20 working days taken cumulatively or consecutively during a twelve-month period may be approved as certified sick leave by the executive or local personnel office upon submission by the staff member of a certificate from a licensed medical practitioner indicating the date or dates of absence from duty by reason of illness, injury or incapacitation, without identification of diagnosis, or upon submission by the staff member of form MS.40, duly completed and signed by the attending physician.¹

2.3 After 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.

2.4 However, no medical report need be submitted under section 2.3 above in the following cases:

(a) The period of absence owing to illness or injury has already been certified by the Medical Director or designated medical officer on the basis of a “sent home” slip;

(b) The staff member claims sick leave for half a day owing to a visit to a licensed medical practitioner, in which case certified sick leave may be approved by the executive officer or other appropriate official on submission of a medical certificate indicating that the staff member consulted the doctor or dentist.

2.5 If no certificate or report is submitted as required by sections 2.1 to 2.4 above or if the sick leave is not certified by the Medical Director or designated medical officer, absence shall be treated as follows for administrative purposes:

(a) For staff appointed under the 100 and 200 series of the Staff Rules, the absence shall be treated as unauthorized absence in accordance with staff rules 105.1 (b) (ii) and 205.1 (d). However, if the staff member belatedly submits the required medical certificate or report and establishes to the Secretary-General’s satisfaction that the late submission was attributable to circumstances beyond his or her control, the absence may be charged to sick leave upon certification by the Medical Director or designated medical officer;

(b) For staff appointed under the 300 series of the Staff Rules, the period of uncertified absence shall be treated as special leave without pay in accordance with staff rule 306.2 (iii).

Section 3 **Relationship of sick leave to other entitlements under the 100 and 200 series**

Exhaustion of sick leave entitlement

3.1 When the entitlement to sick leave has been exhausted, further certified sick leave shall be charged to annual leave. When the entitlements to sick leave and annual leave have been exhausted, the staff member shall be placed on special leave without pay.

3.2 When a staff member has used all of his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether that staff member should be considered for a disability benefit under article 33 (a) of the Regulations of the United Nations Joint Staff Pension Fund while the staff member is on sick leave with half pay. When

the staff member is being considered for such a benefit and paid leave entitlements have been exhausted because of a delay in the medical determination of the staff member's incapacity for further service or in the decision by the United Nations Staff Pension Committee whether to award a disability benefit, the staff member shall be placed on special leave with half pay until the date of such decision.

Merits

79. In the Tribunal's view, the Staff Rules and relevant administrative issuances provide staff members with a social security system that is rather generous: pursuant to staff rule 6.2(b), staff members are entitled to a maximum entitlement of 65 (or 195, as applicable) full pay days and 65 (or 195, as applicable) half pay days of certified sick leave, for a period of respectively 12 months (65 days) or four years (195 days), depending on the length of service and nature of appointment.

80. Pursuant to sec. 3.1 of ST/AI/1999/16 (Termination of appointment for reasons of health), the situation of a staff member shall be brought to the attention of the Medical Director when the staff member has exhausted all the entitlement to sick leave with full pay. At that moment, the Medical Director will determine whether the staff member should be considered for a disability benefit under art. 33(a) of the Regulations of the UNJSPF, while the staff member is on sick leave with half pay.

81. The Tribunal heard evidence that in practice, cases can and are sometimes submitted to the Medical Director prior to exhaustion of the sick leave with full pay in order to determine whether it should be submitted to the UNSPC. However, the Medical Director, Medical Services, Headquarters, stated in his email of 23 December 2014, when the Applicant's case was submitted for his review, "it is understood that [the Applicant] has exhausted her entitlement to sick leave". That email is in accordance with the wording of sec. 3.1 of ST/AI/1999/16, and the fact that ultimately, the granting of a disability benefit is dependent on the staff member having exhausted all sick leave entitlement, including with half pay. As a consequence, that a staff member exhaust all sick leave entitlements is a precondition for separation and payment of a disability benefit.

82. Consequently, the Applicant's status vis-à-vis exhaustion of sick leave entitlements will ultimately be determinative for the assessment of the legality of the Administration's decision not to refer her case to the UNSPC for consideration for a disability benefit.

83. The question whether a staff member has exhausted all sick leave entitlements relates to the system of reporting and certification, which is one of the pillars of the social security system provided for by the United Nations. Pursuant to staff rule 6.2(f) and (g), staff members are responsible to provide the required medical certificates or medical reports. Further, pursuant to sec. 2.2 of ST/AI/2005/3/Amend. 1 (Sick leave), a total of up to 20 working days may be approved upon submission by the staff member of a certificate from a licensed medical practitioner indicating the date or dates of absence from duty by reason of illness, without identification of diagnosis. That obligation on the part of the staff member is further increased in sec. 2.3 of the instruction, which requires that after 20 working days of sick leave have been certified in accordance with sec. 2.2, certification of further sick leave by the Medical Director shall be required and that "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". Pursuant to sec. 2.1, documentation pursuant to sec. 2.2 and 2.3 has to be provided "no later than the twentieth working day following the initial absence from duty".

84. The above rules show that while the Administration has a duty of care vis-à-vis its staff members in the management of the social security system and relevant entitlements, the system is based on certification and reporting, with the main responsibility for providing the Administration with the required medical certificates and reports lying on the staff member. Staff members must strictly comply with the legal requirements and provide complete material that contains sufficient precision, including the length of periods during which the staff member is not able to work ("unfit"). If a staff member does not follow the instructions given and does not provide the reports and certificates claimed by the Administration under the relevant rules, it may be difficult for the Administration to take an

informed decision and this may, at times, turn against the staff member, who may see his or her entitlements refused for failure to provide the required documentation in due time.

85. In the case at hand, the Applicant was requested repeatedly to provide the Administration with a detailed medical report by her treating specialist regarding the various diagnostic tests she underwent and therapy received.

86. Indeed, on 4 October 2013, HRMS/UNOV asked the Applicant:

While reviewing your leave records and following a meeting with the Joint Medical Service at Vienna (JMS) it revealed that despite several follow-up messages from JMS and also exchange of e-mail correspondence with our office, we still do not have the requested medical documentation for the sick leave periods from 2008 up to now on record. Consequently, Medical Services is not in a position to endorse your absences for health reasons. Furthermore, we are still expecting to receive your formal requests for Sick Leave Outside the Duty Station (SLOD) which are required. Therefore, please be reminded to urgently liaise with JMS and to provide the requested medical documentation without any further delay.

May I draw your attention to the respective ST/AI/2005/3 and Amend. 1, Section 2.1: ‘Unless uncertified sick leave is allowed under section 1.2 above, a staff member who is unable to perform his or her duties by reason of illness or injury must submit a medical certificate or a medical report, as provided in sections 2.2 and 2.3 below, no later than the twentieth working day following the initial absence from duty. If no certificate is submitted within these 20 days or if the sick leave is not certified, the absence should be treated as unauthorised absence’.

Please note that due to the above HRMS is not in the position to review your overall leave entitlement which might have an impact in the calculation of your October salary. Your earliest response by no later than 8 October 2013 is expected.

87. The Applicant did not provide the required documentation by the above quoted expected date.

88. Additionally, on 18 and again on 21 October 2013, the Medical Doctor, JMS/UNOV, informed the Applicant that JMS needed, *inter alia*, “a detailed report including a treatment schedule”, as well as the results that were still missing, as the

Applicant had mentioned in several previous emails. She stressed that since “[the Applicant had] been away from [her] duty station for such an extensive period, [JMS needed] the reports in such a detailed manner, because it might be possible to undergo certain therapies also at [the Applicant’s] duty station”. She noted that only upon receipt thereof could JMS decide about the approval of retroactive conversion of annual leave into sick leave. On 5 November 2013, JMS/UNOV, informed HRMS/UNOV that it had not received any final report from the Applicant’s specialist and that an independent assessment may be necessary.

89. Thereafter, on 11 November 2013, JMS wrote to the Applicant, noting the following:

We have received several short sick leave certificates by your doctor, furthermore some reports from specialists, most 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 that 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.

Only upon receipt of this detailed report will I be able to certify retroactive conversion from annual leave into sick leave.

90. It is important to note that during all that time, the discussion was not about a potential consideration of the Applicant’s case for a disability benefit. JMS’ statement was limited to the issue of conversion of annual leave into sick leave, for which the Applicant was requested to provide medical documentation. It was only later, once the Applicant had filed her request for consideration for disability, that the discussion was extended to the issue of the Applicant’s (in)capacity to work, for the purpose of a disability benefit. While that may have confused the Applicant, it did not mean that the matter of the determination of the status of her sick leave entitlements had been resolved, in one way or the other.

91. Finally, on 5 December 2013, the Applicant filed two certificates and an email requesting to be granted a disability benefit. The two certificates were from two different psychiatrists. The certificate from Dr. Be. dated 4 December 2013 indicated that the Applicant “is currently not able to undertake work activities” (translation), without providing a specific date until which she would be unable to work. The other certificate, from Dr. Bo., dated 3 December 2013, while also stating that the Applicant’s symptoms limited her autonomy even to undertake common daily activities, did not provide whether she was able to work and/or for what period. Both medical certificates also indicated that the Applicant was under medication.

92. Thereafter, several email exchanges ensued between the Applicant and a Medical Doctor at JMS/UNOV, with respect to the need to translate the medical reports into English; on 19 December 2013, the Medical Doctor, JMS, reiterated to the Applicant that her treating doctor in Italy should write “a very comprehensive report in English, including diagnosis, all the treatments [she] underwent during her stay in Italy, with exact dates”. She further specified the following:

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 judgement 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.

93. While the Applicant did not file a translated, detailed and comprehensive medical report with all treatments and exact dates from her treating physician, she did file the above-referenced reports of 3 and 4 December 2013 on 5 December 2013, as well as their translations in January 2014. As pointed out above, these certificates were open-ended and did not put a date as of which the

Applicant would again be fit to work. In light of the complexity of the matter, JMS expressed the need and actually requested that the case be reviewed by an independent specialist.

94. The Tribunal notes that it was made clear to the Applicant that any conversion from annual leave to sick leave, if any, could only be made on the basis of the documentation available at the time, that is, medical certificates and reports that had been provided by the Applicant. The record shows that the UNOV Administration acted in good faith with the Applicant at that time, and followed up many times with her to provide her with all opportunities to submit the required documentation. The Applicant's failure to fully present the relevant medical documentation and reports in a timely manner made it very difficult for the Administration to determine her sick leave status. The complication stemmed, *inter alia*, from the fact that the Applicant filed many different medical certificates from a variety of doctors, and that the diagnosis appeared to be changing.

95. The foregoing notwithstanding, the fact of the matter remains that the Administration, on the basis of the available medical record, including the medical certificates of 3 and 4 December 2013, which were open ended, did not consider they were in a position to make a determination about the Applicant's sick leave status as well as a potential submission for disability at the time of the end of her fixed-term appointment ("FTA"). Indeed, the Tribunal heard evidence from the Medical Director, JMS/UNOV, that since the documentation provided by the Applicant at the time had not been conclusive, they decided to submit the case for an independent medical assessment at that stage, to look into the conversion of the Applicant's annual leave into sick leave, as well as her (in)capacity to work for the purpose of a disability benefit. The Tribunal also heard evidence that the fact that the Applicant had filed several documents from different doctors and changing diagnosis made it difficult at the time to get a clear picture of what the Applicant's condition was. It therefore called for an independent medical evaluation by Dr. P..

96. The Tribunal is of the view that in light of the open ended medical certificates of December 2013, it was indeed the Administration's duty to further look into the matter of the Applicant's sick leave status at the time of her separation from service and, ultimately, whether her medical situation was such that she was entitled to further use and, in the end, exhaust her sick leave entitlements, if applicable. Once that determination had been made, the Administration had to consider, if applicable, the Applicant's incapacity for the purpose of a disability benefit from the UNJSPF.

97. The Administration, in an effort of good faith, decided to have a medical doctor, Dr. P., review the Applicant's case. However, for the reasons outlined in Order No. 24 (GVA/2016), the terms of reference of Dr. P. were deficient and the procedure followed was illegal. Thus, the Administration could not rely on Dr. P.'s report to take the contested decision.

Remedies

Rescission

98. It follows from the above and the reasons outlined in Order No. 24 (GVA/2016), a copy of which is appended to this judgment for completeness, that the primary decision notified to the Applicant on 29 December 2014 is illegal and has to be rescinded.

99. The Tribunal notes with regret that despite best efforts by both Counsel, the matter was ultimately referred back to the Tribunal, after the remand by Order No. 24 (GVA/2016). Since then, the Tribunal spent a significant amount of time trying to get the parties to resolve the matter, and regrets the failure by the parties' medical representatives—who were even changed in the course of the current proceedings to make progress—to agree on a Chair for the Medical Board. That being said, the Tribunal is concerned that the applicable legal framework of the United Nations does not provide for a conflict resolution mechanism in case of conflict with respect to the designation of the Chair of a Medical Board.

100. The foregoing notwithstanding, the Tribunal reiterates what it underlined several times in the framework of these lengthy proceedings, namely that it does not have jurisdiction to decide on the Applicant's sick leave and medical status, including her alleged incapacity, at the time of her separation, or today. Such can only be determined by an independent medical examination or a Medical Board. As the Tribunal constantly conveyed to the parties, as long as they do not agree on either of the two, the case will not be resolved and cannot be submitted or referred to the UNJSPF for the consideration of a disability benefit, if applicable. The Applicant's request for remedies in that respect must therefore fail.

Compensation and costs

101. The Tribunal has considered in-depth where the failure to resolve the present matter lays. It also reviewed the circumstances prior to the contested decision, and reiterates that as described in some detail above, the Administration showed a lot of good faith in its dealing with the Applicant at the time prior to her separation and that the Applicant was not entirely forthcoming with respect to the provision of the required medical documents, as was her obligation under the applicable rules.

102. The Tribunal also wishes to reiterate that there is no reason to doubt the good faith of the Respondent's Counsel, who clearly acted as a model litigant in this matter throughout.

103. The foregoing notwithstanding, the Tribunal reiterates that after all, at this point, the main issue of this case lies in the fact that the Organization'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, are glaringly deficient. That, ultimately, led to the matter being paralyzed for a long time, and until today.

104. Therefore, the Tribunal decides that the Applicant cannot be awarded any damages, however, it finds it appropriate to exceptionally grant the Applicant costs, in the amount of USD5,000 as, in the context, the entirely deficient regulatory regime provided has resulted in a long and abusive proceeding, in both an equitable and legal sense, which was entirely avoidable.

Conclusion

105. In view of the foregoing, the Tribunal DECIDES:

- a. The decision notified to the Applicant on 29 December 2014 is rescinded;
- b. The Applicant is awarded costs in the amount of USD5,000;
- c. Any other pleas are rejected.

(Signed)

Judge Rowan Downing

Dated this 29th day of January 2019

Entered in the Register on this 29th day of January 2019

(Signed)

René M. Vargas M., Registrar, Geneva



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

BEZZICCHERI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER REMANDING CASE FOR
INSTITUTION OF REQUIRED
PROCEDURE**

Counsel for Applicant:

François Lorient

Counsel for Respondent:

Jérôme Blanchard, UNOG

Introduction

1. By application filed on 8 April 2015, the Applicant contests the “reconsideration by the Secretary-General of [her] disability benefit claim”.

Facts

2. The Applicant entered the service of the United Nations Office on Drugs and Crime (“UNODC”) in Bangkok, Thailand, in April 2002. She was laterally re-assigned to the UNODC Office in Phnom Penh, Cambodia, in 2010, where she worked as an Associate Advisor (HIV/AIDS).

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

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

5. 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., Neurosurgeon.

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

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

8. 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.

9. 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.

10. 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., Neurosurgeon.

11. 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.

12. 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.

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

14. 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., Rheumatologist.

15. On 3 July 2013, JMS answered to the Applicant; on 11 July 2013, the Applicant replied by email, attaching a typed certificate from Dr. Z., Rheumatologist, and a certificate from Dr. I., Specialist in Internal medicine and dietetics, dated 10 July 2013. She provided a translation of the certificate in her email in question.

16. On 16 July 2013, JMS replied to the Applicant, requesting that she send a final report from her treating doctor, with as much detail 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.

17. 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..

18. 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.

19. 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.

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

21. 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 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 on 16 October 2013, and the Applicant replied on 18 October 2013, noting that she had not received the previous email.

22. 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 requested to submit a detailed medical report.

23. 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.

24. On 21 October 2013, JMS replied to the Applicant, informing her about the need to have the reports 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.

25. 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.

26. 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.

27. By email of 5 December 2013, the Applicant submitted two additional medical certificates to HRMS, UNOV/UNODC. In her email, she further noted that she would "like to apply for disability benefit".

28. 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.

29. 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.

30. 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.

31. 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.

32. On 12 January 2014, resent on 17 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. B., and a report from

Santo Spirito Hospital. She resent the documents on 17 January 2014 and, subsequently, JMS acknowledged the Applicant's submission.

33. 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.

34. 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 independent medical evaluation, 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 can be certified".

35. 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.

36. Dr. P.'s report, dated 25 April 2014, was sent to JMS, which forwarded it to the Medical Services Division ("MSD"), 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.

37. 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").

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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 did not recommend the Applicant for consideration for a disability benefit by the UNSPC.

44. 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.

45. 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.

46. 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.

47. 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.

48. The Applicant filed the present application on 8 April 2015, contesting the “[r]econsideration by the Secretary General of [her] disability benefit claim”, notified to her on 29 December 2014. The Respondent filed his reply on 14 May 2015.

49. On 10 April 2015, the Applicant filed an application for suspension of action, pursuant to art. 10.2 of the Tribunal's Statute and art. 14 of its Rules of Procedure, which was rejected by Order No. 88 (GVA/2015) of 20 April 2015.

50. On 15 May 2015, the Respondent filed his reply on the instant application.

51. By Order No. 203 (GVA/2015) of 19 October 2015, the Tribunal convoked the parties to a case management discussion, which took place on 12 November 2015.

52. Following instructions made by the Tribunal, the parties filed various additional documentation, including witness statements, by 7 January 2016.

53. The hearing on the merits was held from 12 to 14 January 2016; the Tribunal heard several witnesses called by both parties, and called one witness at its own motion.

Consideration

54. The Applicant contests the decision, taken by the Medical Service Division, NY, not to recommend her for consideration for a disability benefit by the UNSPC.

55. As will be explained here below, the Tribunal finds that in taking the contested decision, the Administration failed to follow the correct procedure; hence, it is appropriate to remand the case for institution of the required procedure, pursuant to art. 10.4 of the Tribunal's Statute and art. 20 of its Rules of Procedure.

Applicable law

56. The determination of a staff member's sick leave entitlements, and the determination of his or her entitlement to a disability benefit under the Regulations and Rules of the UNJSPF, are subject to the following legal instruments, which are quoted below in their most relevant parts.

On sick leave

Staff rule 6.2

(a) Staff 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.

Maximum entitlement

(b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

(i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;

(ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;

(iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

...

Obligations of staff members

(f) Staff 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.

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the Medical Director. When, in the opinion of the Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff

member shall comply promptly with any direction or request under this rule.

...

Review of decisions relating to sick leave

(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 (emphasis added).

(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.

(l) The cost of an independent practitioner or a medical board mentioned in paragraphs (j) and (k) above shall be borne by the Organization and by the staff member under conditions established by the Secretary-General.

ST/AI/2005/3/Amend.1 (Sick leave)

Section 2

Certification of sick leave

2.1 Unless uncertified sick leave is allowed under section 1.2 above, a staff member who is unable to perform his or her duties by reason of illness or injury must submit a medical certificate or a medical report, as provided in sections 2.2 and 2.3 below, no later than the twentieth working day following the initial absence from duty.

...

2.3 After 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 (emphasis added).

...

2.5 If no certificate or report is submitted as required by sections 2.1 to 2.4 above or if the sick leave is not certified by the Medical Director or designated medical officer, absence shall be treated as follows for administrative purposes:

(a) For staff appointed under the 100 and 200 series of the Staff Rules, the absence shall be treated as unauthorized absence in accordance with staff rules 105.1 (b) (ii) and 205.1 (d). However, if the staff member belatedly submits the required medical certificate or report and establishes to the Secretary-General's satisfaction that the late submission was attributable to circumstances beyond his or her control, the absence may be charged to sick leave upon certification by the Medical Director or designated medical officer;

...

Section 3

Relationship of sick leave to other entitlements under the 100 and 200 series

Exhaustion of sick leave entitlement

...

3.2 When a staff member has used all of his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether that staff member should be considered for a disability benefit under article 33 (a) of the Regulations of the United Nations Joint Staff Pension Fund while the staff member is on sick leave with half pay. When the staff member is being considered for such a benefit and paid leave entitlements have been exhausted because of a delay in the medical determination of the staff member's incapacity for further service or in the decision by the United Nations Staff Pension Committee whether to award a disability benefit, the staff member shall be placed on special leave with half pay until the date of such decision (emphasis added).

On a disability benefit

ST/AI/1999/16 (Termination of appointment for reasons of health)

**Section 3
Procedure**

3.1 When a staff member has used all his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether the staff member should be considered for a disability benefit under article 33 (a) of the UNJSPF Regulations, while the staff member is on sick leave with half pay.

3.2 If the medical conclusion is that the staff member's illness or injury constitutes an impairment to health which is likely to be permanent or of long duration, the Medical Director or designated medical officer shall so advise the relevant human resources officer at Headquarters or the local personnel office for notification to the staff member or, where appropriate, to a member of the staff member's family. If the staff member disagrees with the medical conclusion, he or she may request a review of the matter by an independent medical practitioner or a medical board. The independent medical practitioner or medical board shall be selected in the same manner as provided in staff rule 106.2 (j) or (k), as appropriate, for review of decisions on sick leave.

3.3 Where the conclusion by the Medical Director or designated medical officer is either not contested by the staff member or is confirmed by the independent medical practitioner or medical board selected to review the matter, the relevant human resources officer at Headquarters or the local personnel office shall submit as soon as possible a request to the United Nations Staff Pension Committee ("the Committee") for the award to the staff member of a disability benefit. This request shall be in the form set out in the annex to the present instruction.

UNJSPF Regulations

**Article 33
DISABILITY BENEFIT**

(a) A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or

illness constituting an impairment to health which is likely to be permanent or of long duration.

UNJSPF Administrative Rules

Section H

DETERMINATION OF INCAPACITY AND INABILITY TO ENGAGE IN GAINFUL EMPLOYMENT

Disability Benefit (article 33)

H.3 A request for a determination by the staff pension committee under article 33(a) of the Regulations shall be made by the organization:

(a) Whenever during, or on the expiry of, the appointment of a participant there is reason to believe that he or she may be incapacitated within the meaning of article 33(a).

Procedure followed in the case at hand

57. It follows from the record and the chronology above, that the Applicant was requested, from May 2013, to provide additional medical information to allow the Administration to make a determination about the status of her sick leave entitlements. While the Applicant provided numerous medical certificates up to the end of November 2013, the Administration was of the view that these reports did not allow it to make a determination with respect to the conversion of the Applicant's annual leave into sick leave. Therefore, the Administration considered, as of November 2013, that it was necessary for the Applicant to undergo an IME. This medical examination was ultimately conducted on 5 March 2014, following the Applicant's submission of additional medical reports between December 2013 and February 2014, as well as a request to be considered for a disability benefit filed on 5 December 2013.

58. The record further shows that the purpose of the IME was, on the one hand, to determine whether the Applicant's annual leave could be converted, retroactively, into sick leave, and, on the other hand, whether her case could be considered for a disability benefit under the Regulations and Rules of the UNJSPF. It thus had the double purpose of assessing her sick leave status and her suitability for a disability benefit.

59. Indeed, the questions to be answered by the “independent medical assessment”, as conveyed to Dr. P. by JMS (cf. para. 30 above), read as follows:

1. Did the medical condition of [the Applicant] require treatment outside the duty station and, if so for which diagnosis (ICD10) and for what period of time is the retroactive conversion of Annual Leave into Sick Leave medically justified?
2. What is [the Applicant’s] functional ability to work?
3. What is the prognosis of her medical condition?

60. The Tribunal further takes note of the Respondent’s submission that the IME, in the present case, was called for under staff rule 6.2(j) quoted above.

61. Staff rule 6.2(j) clearly provides for a referral to an independent practitioner or to a medical board subject to two conditions, namely:

- a. that a staff member dispute a decision refusing further sick leave or withdrawing the unused portion of sick leave; and
- b. that a staff member request referral to an independent practitioner or to a medical board.

62. Furthermore, under staff rule 6.2(j), if the referral shall be to an independent practitioner, the latter has to be “acceptable to both the United Nations Medical Director and the staff member”.

63. In addition to staff rule 6.2(j), the Tribunal notes that under staff rule 6.2(g), for the purpose of determination of sick leave entitlements or of a staff member’s ability to work, the Administration may, as a first step, request a staff member to either “submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director”. Under said staff rule, “[t]he staff member shall comply promptly with any direction or request under this rule”.

64. The Tribunal is concerned that the reference by the Administration to an IME was in fact a mischaracterization, and that what the Applicant underwent when she was examined by Dr. P. was a medical examination as per the terms of staff rule 6.2(g), rather than an IME under staff rule 6.2(j).

65. Indeed, the Tribunal notes that none of the conditions provided for under staff rule 6.2(j) were met in the present case:

a. First, the Administration explicitly stated that while the Applicant was requested several times to file a detailed medical report from her practitioner, and although she filed numerous certificates by November 2013, it considered that it was not in a position to make a final determination on the question of the conversion of her annual leave into sick leave before the matter was reviewed by an “independent medical practitioner”. No final determination on the Applicant’s sick leave entitlements had thus been made when the case was referred to Dr. P.;

b. Second, it was the Administration, rather than the Applicant, which called for an IME;

c. Third, it is doubtful, to say the least, if Dr. P. was really “acceptable” to the Applicant as required under staff 6.2(j), and whether she had been provided with enough information about him to actually determine whether he was “acceptable” to her. Indeed, during the hearing, the Tribunal heard evidence that the Applicant was not provided e.g. with Dr. P.’s qualifications or curriculum vitae before he examined her.

66. It follows that instead of an independent medical practitioner, agreeable to both the Administration and the Applicant, for the purpose of staff rule 6.2(j), Dr. P. rather acted as a medical practitioner designated by the United Nations under the terms of staff rule 6.2(g). Indeed, it seems that the Applicant simply followed the Administration’s instruction to see Dr. P. for a medical examination, for the purpose, *inter alia*, of determining her sick leave status and her functional ability to work.

67. The confusion was aggravated by Dr. P.'s terms of reference showing that the Administration, with no bad intention, conflated two procedures that are normally to be dealt with separately and consecutively, namely the procedure to determine a staff member's sick leave status and the eligibility to be submitted to the UNSPC for consideration for a disability benefit. Indeed, it is undisputed that the certification of a staff member's sick leave (and exhaustion of her sick leave entitlements) is a precondition to review that staff member's case for the purpose of submission for consideration for a disability benefit.

68. As such, had the Applicant, under staff rule 6.2(j), been given the opportunity to request an independent medical practitioner or a medical board to review her sick leave status, the question of the submission of her case to the UNSPC would have been conditional to a determination, on the basis of the report by either the independent medical practitioner or a medical board, that her annual leave be converted into sick leave, and, ultimately, the conclusion—if applicable—that she had exhausted all her sick leave with full pay.

69. This, however, is not what happened in the case at hand; rather, on the basis of Dr. P.'s report, the Deputy Director, MSD, NY, concluded that the Applicant's functional ability to work was normal and that her case was not to be submitted to the UNSPC. The Deputy Director, thus, assumed that the Applicant had exhausted her sick leave. However, the sick leave exhaustion question had not yet been properly determined.

70. By turning this two-stage process into a one-step procedure, the Administration circumvented, *de facto*, the Applicant's rights under staff rule 6.2(j).

71. Furthermore, the Tribunal is concerned that the questions asked to Dr. P. were unclear and created confusion as to which standards he should and did apply when examining the Applicant. This was confirmed by the evidence given during the oral hearing, both by Dr. P. and by JMS, as well as by the Deputy Director, MSD, NY. The Tribunal is further concerned that Dr. P. did not actually respond to the question of whether it was justified to convert some of the Applicant's annual leave into sick leave, and if so, to what extent (i.e., how many days).

72. Rather, he limited himself to examine whether her condition required treatment outside the duty station. In this respect, while finding that the Applicant's condition did not require treatment outside her duty station, he referred to the latter, in his report, as being Thailand instead of Cambodia (i.e., Phnom Penh). Dr. P. confirmed in his evidence before the Tribunal that he had no knowledge about the availability of the relevant treatment in Cambodia.

Institution of required procedure under art. 10.4 of the Statute

73. It follows from the foregoing, that all procedures leading to the decision with respect to the Applicant's sick leave status, and ultimately to the decision not to submit her case to the UNSPC, need to be repeated. Since Dr. P.'s terms of reference were procedurally unsound, it would be incautious, for the Administration, to rely on his report for the purpose of correcting the procedure. In other words, in making a determination of the Applicant's sick leave status, the Administration cannot—and should not—rely on Dr. P.'s report.

74. Once a determination as to the status of the Applicant's sick leave is made—either on the basis of the existing medical certificates provided by the Applicant, or on the basis of a medical report under staff rule 6.2(g)—it falls on the Applicant to exercise her rights under staff rule 6.2(j), if she so desires. Depending on the outcome of that procedure, a new decision with respect to the submission of the Applicant's case to the UNSPC, if applicable, may have to be made.

75. Having found that the Administration failed to follow the correct procedure, the Tribunal, at the hearing on the merits, sought the concurrence of the Secretary-General, to remand the case for institution or correction of the required procedure. The Tribunal commends the Respondent who, during the hearing and through his Counsel, sensibly agreed to the remanding of the case.

76. In this respect, the Tribunal remarks that its Statute and Rules of Procedure are silent with respect to the question as to what happens to a case when it is remanded under art. 10.4. of its Statute and art. 20 of its Rules of Procedure. In light of its location within the Statute, and to implement what must have been the

intention of the legislator, the Tribunal finds it appropriate to adjourn the hearing in this matter for a three-month period. Upon the expiration of the adjournment, the role of the Tribunal will be limited to examine compliance by the Administration with this order to institute the required procedure, and, on that basis, to decide whether the matter will be closed or whether proceedings in the present case will resume.

Conclusion

77. In view of the foregoing, the Tribunal ORDERS that:

- a. Pursuant to art. 10.4 of the Tribunal's Statute, the case be remanded for institution of the required procedure, within three months from the date of the present order, that is by no later than **Tuesday, 19 April 2016**;
- b. The proceedings in the present case be adjourned for the above-mentioned period;
- c. At the expiration of the three-month period, that is by no later than **19 April 2016**:
 - i. the parties inform the Tribunal about the institution of the required procedure, to allow it to strike the matter from its record and close the case; or
 - ii. should either party inform the Tribunal by **19 April 2016**, that the Administration failed to institute the required procedure by the above deadline, the proceedings in the present case shall resume for hearing of final submissions.

(Signed)

Judge Rowan Downing

Dated this 19th day of January 2016

Entered in the Register on this 19th day of January 2016

(Signed)

René M. Vargas M., Registrar, Geneva