



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HASSAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Yun Hwa Ko, UNFPA

Background

1. In a revised application dated 24 September 2019, the Applicant, a staff member of the United Nations Population Fund (“UNFPA”), is contesting UNFPA’s decisions: (a) to pay her daily subsistence award (“DSA”) for 23 – 29 November 2016 only, although she took several trips to Nairobi, Kenya, from Hargeisa, Somalia, for medical reasons between November 2016 and March 2017; and (b) not to consider the periods from 29 November 2016 to 12 February 2017 and 10 March to 29 April 2017 as a medical evacuation/sick leave (“the Contested Decisions”). The Respondent argues that the application has no merit and that it be dismissed. The Tribunal finds that the Applicant’s claims have been rendered moot and dismisses them in their entirety.

Facts and Procedure

2. The Applicant holds a fixed-term appointment as an Administrative/Finance Associate at the G-7 level in UNFPA’s Country Office in Somalia.

3. On 10 November 2016, Dr. Florence Fongang of the United Nations Clinic in Hargeisa, Somalia, requested “medical treatment travel” for the Applicant to the United Nations Joint Medical Services (“JMS”) at the United Nations Office at Nairobi (“UNON”). JMS forwarded the request to the United Nations Medical Services Division in New York (“MSD”).¹

4. In their response of 15 November 2016, MSD stated that the authority to approve medical evacuation is delegated to heads of departments or offices away from Headquarters and that the decision to evacuate should be taken upon the recommendation of the United Nations medical officer or the United Nations dispensary physician responsible for the provision of medical services to the

¹ Reply, Annex R/1, e-mail from Dr. Florence Fongang to UNON/JMS dated 10 November 2016.

department or office concerned.²

5. On 17 November 2016, Dr. James Mbai of UNON/JMS informed Njeri Wakogi, Administrative Associate, UNFPA Somalia, that the Applicant's case could not be considered a medical evacuation as it did not meet the criteria but that it fitted in the criteria for regional area of care enabling full cover of medical costs by the insurance. He added that the Applicant's case fitted in the criteria for medical treatment travel of non-fixed term staff under the United Nations Somalia Country Team Agreement of 2008 enabling UNFPA to cover certain costs related to the travel. Dr. Mbai copied the Applicant on this message.³

6. UNFPA Somalia arranged for the Applicant's travel to Nairobi from 23 to 30 November 2016 at no cost to her.⁴

7. On 6 December 2016, the Applicant made a sick leave request which was not certified due to incomplete medical information. An email was sent to her for a detailed medical report with sick leave dates on the same day but no response was received from the Applicant.⁵

8. On 13 December 2016, Ms. Wakogi asked UNON/JMS for an update on the Applicant's situation.⁶

9. On 6 January 2017, Dr. Mbai informed Ms. Wakogi that: the Applicant was cleared to return to Somalia; that the Applicant was expected to return for an evaluation; and that the Applicant was advised to collect and share the sick leave recommendation from her doctor for approval by MSD.⁷

² Ibid., e-mail from UNMSD to Dr. Fongang dated 15 November 2016.

³ Ibid., e-mail from Dr. Mbai to Ms. Wakogi dated 18 November 2016.

⁴ Ibid., e-mail from Mr. Botev to Ms. Wakogi dated 18 November 2016 and Annex R/2, travel authorization dated 22 November 2016.

⁵ Annex R/12, e-mail dated 16 March 2017 from Mr. John Gain of UNMSD to Ms. Wakogi.

⁶ Reply, Annex R/3, e-mail exchange between Ms. Wakogi and UNON JMS in December 2016.

⁷ Ibid., e-mail from Dr. Douglas Ochieng to Ms. Wakogi dated 6 January 2017.

10. On 10 January 2017, the Applicant travelled back to Somalia on a flight organized by UNFPA Somalia at no cost to her.⁸

11. On 2 February 2017, Mr. Nikola Botev, Representative, UNFPA Somalia, informed the Applicant, upon her request for a flight ticket to Nairobi, that: there was no provision for Medical Travel in the policy guidelines; flexibility was applied at the discretion of management; there was no provision for DSA in Medical Travel cases for staff; and that he would exercise management discretion to facilitate her round-trip to Nairobi for her follow-up medical visit in fairness to her.⁹

12. The Applicant travelled to Nairobi between 5 February and 16 February 2017. UNFPA Somalia organized both flights at no cost to the Applicant.¹⁰

13. On 20 February 2017, Mr. Botev further informed the Applicant that the guidelines regarding medical treatment travel that Dr. Mbai referred to in his email of 18 November 2016 applied only to non fixed-term staff under the United Nations Somalia Country Team Agreement.¹¹

14. On 8 March 2017, Mr. Arturo Pagan, Deputy Director, Division for Human Resources, advised UNFPA Somalia to treat the Applicant's first trip and first follow-up trip as Medical Evacuation Travel ("MET").¹²

15. On 10 March 2017, the Applicant travelled to Nairobi again for a second follow-up visit.¹³

16. On 21 April 2017, Dr. Ochieng of UNON/JMS wrote to UNMSD to request sick leave on the Applicant's behalf, for the periods 23 November 2016 - 13 February 2017 and 10 March – 30 April 2017 ("the contested periods"), attaching the relevant documents. On 25 April 2017, UNMSD informed the Applicant that sick leave could

⁸ Annex R/4, travel authorization dated 9 January 2017.

⁹ Annex R/5, e-mail from Mr. Botev to Applicant dated 2 February 2017.

¹⁰ Annex R/6, travel authorization dated 3 February 2017.

¹¹ Annex R/7, e-mail from Mr. Botev to Applicant dated 20 February 2017.

¹² Annex R/8, e-mail from Mr. Pagan to Mr. Botev dated 8 March 2017.

¹³ Reply, para. 14, application, section VIII.

not be certified for the contested periods because the relevant documents were submitted late, that is, not within 20 days of the initial absence.¹⁴

17. On 3 May 2017, following the Applicant's wish to reapply for sick leave, MSD advised her to provide the reasons for the late submission. Her response was that she could not get medical reports within 20 days of her initial absence and was not aware of the 20-day requirement.¹⁵

18. On 5 February 2018, Mr. Pagan informed the Applicant that the Organization would pay her DSA for the period 23 – 29 November 2016.¹⁶

19. The Applicant filed a request for management evaluation of the contested decisions on 9 April 2018.¹⁷

20. In June 2018, UNFPA paid the Applicant an amount of USD2,184 representing eight days' DSA in Nairobi from 23 – 30 November 2016.¹⁸

21. On 8 November 2019, MSD approved the Applicant's absence from 23 November 2016 - 13 February 2017 and 12 March 2017 - 30 April 2017 as certified sick leave, her first trip of 23 November 2016 – 10 January 2017 and the follow-up trip of 5 February to 16 February 2017 as supported by MEDEVAC.¹⁹

22. On 15 March 2020, the Organization decided to pay the Applicant an additional USD4,368 equivalent to 14 days' DSA.²⁰

¹⁴ Annex R/12, e-mail dated 16 March 2017 from Mr. John Gain of UNMSD to Ms. Wakogi and e-mail dated 21 April 2017 from Dr. Ochieng to UNMSD.

¹⁵ Annex R/13, e-mail dated 3 May 2017 from Mr. John Gain of UNMSD to Applicant.

¹⁶ Annex R/9.

¹⁷ Applicant's unnumbered annex.

¹⁸ Annex R/10.

¹⁹ Annex R/11.

²⁰ Respondent's closing submissions, para. 10 and annex R/CS2.

Parties' submissions

Applicant

23. The Respondent claimed that the applicable maximum DSA is 45 days according to UNDP's MET policy but this is not consistent with the office practice since a colleague's dependent was evacuated the same year and he and the evacuee were paid a DSA of 115 days. Denial of her entitlement or misinterpreting policy is unlawful and is a violation of her rights.

24. She has submitted to the Tribunal the MSD's initial MEDEVAC approval and follow-ups approved by the United Nations doctor in Nairobi who was handling the case and also a rejected referral from MSD. She travelled to Germany at her own cost when the doctor informed her that her health situation was deteriorating and that she needed surgery which could not be undertaken in Nairobi. She also approached the Ombudsman's Office in August 2017 but no decision was made until she travelled to Germany on 5 February 2018.

25. The final decision was made on 5 February 2018 by Mr. Pagan who informed her that her extended period of medical absence from 23 November 2016 until 12 February 2017 was not approved by MSD as it was submitted late. Therefore, DSA for this additional time was also not approved.

26. Contrary to this decision is an earlier email written by Mr. Pagan on 8 March 2017 and annexed as the Respondent's Annex R-8. In that email, the local United Nations Doctor sought clearance from Dr. Mbai who indicated that the Applicant's case fell within ST/AI/2015/3 (Medical insurance plan for locally recruited staff at designated duty stations away from Headquarters) where medical treatment could be sought in a neighboring country without the need for an approved medical evacuation and suggested that her type of travel fitted the criteria for medical treatment travel of non fixed-term staff under the United Nations Somalia Country Office Agreement as the Applicant is a staff member and whatever informal arrangements there may be at

the Country Office level were not based on policy and constituted an organizational risk.

27. On the basis of the response from Dr. Mbai, the Country Office authorized a round trip ticket, as the insurance should cover medical costs. The Applicant, however, did not receive DSA and other entitlements. Dr. Mbai appeared to have agreed to the informal arrangement which is not based on the policy.

28. Despite all the challenges as a woman serving in a high risk and non-family duty station where there is no family support and the trauma of losing friends and work mates on a continuous basis, she never expected the Organization to put her through stress and trauma for her entitlements when she is battling with health worries.

Remedies

29. The Applicant prays the Tribunal to award her the following remedies:

- a. to order payment of USD48,000 as compensation for the financial losses caused by the contested decision representing costs incurred (applicable DSA) when evacuated to Nairobi, follow-ups and referral;
- b. to order payment of USD50,000 as compensation for the moral damage that she has suffered; and
- c. any other relief that the Tribunal considers just, fair and necessary.

Respondent

Decision regarding payment of DSA

30. Between November 2016 and April 2017, the Applicant took multiple trips for medical reasons to Nairobi, Kenya, from Somalia. The Applicant never received approval MET for any of the trips in accordance with the UNDP Medical Evacuation Policy and related procedures, which UNFPA applies *mutatis mutandis*.

31. For MET not exceeding 45 days, the approving authority is the Head of Office, i.e. the UNFPA Representative in Somalia. For MET beyond 45 days, the approving authority is the MSD. The Applicant did not receive MET approval from the approving authority; to the contrary, the then Head of Office informed the Applicant multiple times that her trips were not considered MET. Therefore, the Applicant was not entitled to any DSA.

32. Despite the foregoing, in June 2018, the Organization paid the Applicant one week's DSA. The reason for the payment was out of fairness to the Applicant, including the fact that the Organization had informed the Applicant, albeit incorrectly, that the Applicant's first trip and first follow-up trip would be treated as MET.

Decision regarding certified sick leave

33. Between 23 November 2016 and 12 February 2017 and between 10 March 2017 and 29 April 2017, the Applicant was absent from duty. The Applicant had not followed the procedures set out in the Staff Regulations and Rules or the UNDP Sick Leave Policy in order to request and receive approval for certified sick leave.

Reversal of the Contested Decisions

34. In November 2019, the MSD reversed its original position. Namely, they approved certified sick leave for 26 November 2016 – 13 February 2017 and 12 March – 30 April 2017. MSD also approved as MET the Applicant's first trip to Nairobi, Kenya between 23 November 2016 – 10 January 2017 and first follow-up trip between 5 February – 16 February 2017, totaling 59 days of MET. The Organization subsequently paid the Applicant USD11,440 as DSA, bringing the total amount paid to the Applicant to 45 days' DSA.

35. On 15 March 2020, the Organization decided to pay the Applicant an additional USD4,368 equivalent to 14 days' DSA. Therefore, the total amount of DSA paid and will be paid to the Applicant comprise 59 days' DSA, the number of days that the MSD approved as MET in November 2019.

Applicant's claim regarding sick leave is moot

36. The Applicant's claim in relation to the Organization's decision not to certify her sick leave for the periods 23 November 2016 - 12 February 2017 and 10 March 2017 - 29 April 2017 is moot. That decision was overturned upon the MSD's advice of 8 November 2019, and the Applicant's absence during the above-mentioned period has been approved as certified sick leave.

The Applicant's claim regarding daily subsistence allowance (DSA) is moot

37. Only the Applicant's first trip and first follow-up trip have been approved as MET.

38. The e-mail message from MSD dated 8 November 2019 (reply, Annex R/11) is the only evidence in the record of any MET approval for the Applicant. In that e-mail, MSD approved as MET the Applicant's trips between 23 November 2016 – 10 January 2017 and 5 February – 16 February 2017.

39. The evidence shows that the Applicant did not receive MET approval for any of her trips, other than those specifically approved by the MSD in their e-mail of 8 November 2019.

The Applicant has received full DSA for the entire duration of approved MET

40. The Organization has decided to pay the Applicant DSA for all 59 days of MET as approved by the MSD on 8 November 2019. Therefore, the Respondent respectfully submits that the Applicant's claims in relation to MET and the payment of DSA are also moot.

Contested Decisions were lawful; Applicant provides no evidence otherwise

41. The Organization had made the Contested Decisions in accordance with the Staff Regulations and Rules, the UNDP MET Policy and the UNDP Sick Leave Policy. The Applicant's requests for certified sick leave were rejected by the MSD because the

Applicant failed to abide by the requirements set forth in staff rule 6.2 and the UNDP Sick Leave Policy. The Applicant's requests for more than one week's DSA had been rejected because the Applicant had failed to receive MET approval in accordance with the requirements set forth in the UNDP MET Policy and procedures.

42. The Applicant has failed to provide any evidence that the Organization acted in bad faith or out of improper motive when making the Contested Decisions. To the contrary, evidence shows that the Organization made efforts to assist the Applicant by directly appealing to the MSD on several occasions. Rather, it was the Applicant's own failure to comply with the relevant regulatory framework that led to the Contested Decisions. As a staff member, the Applicant is presumed to know the regulations, rules, policies and procedures that apply to her, and ignorance is not an excuse. The Applicant cannot plead ignorance and blame the Organization for the decisions that resulted from her own omissions.

43. Official acts enjoy a presumption of regularity unless the Applicant proves otherwise. Here, the Applicant failed to produce any evidence that the Contested Decisions were made unlawfully, so the presumption that the Contested Decisions were regularly made stands. The Respondent submits that the Contested Decisions were lawful at the time that they were made.

No basis exists to award the Applicant compensation

44. The Applicant claims that she should be compensated for her financial losses which she alleges are equivalent to the DSA she did not receive. The Applicant further claims that she should receive compensation for moral damages. It is the Applicant who bears the burden of proof but has not provided any evidence that would support her claims for compensation for her financial losses or moral damages. Therefore, the Applicant's claims for compensation fail.

Considerations

45. The issues arising for consideration in this case are: whether the Applicant's claims have been rendered moot; and whether the Applicant is entitled to the reliefs sought including moral damages.

46. The starting point in determining a staff member's appeal challenging an administrative decision is the presumption that official functions have been regularly performed. Once management satisfies this initial requirement, the burden shifts to the Applicant to show through clear and convincing evidence that the Administration acted irregularly.

Whether the Applicant's claims have been rendered moot

47. In her request for management evaluation and in her application, the Applicant contests the Organization's decision not to approve certified sick leave for the periods 23 November 2016 - 12 February 2017 and 10 March 2017 - 29 April 2017. She seeks MET related entitlements for the said periods.

48. On 3 May 2017, following the Applicant's wish to reapply for sick leave, MSD advised her to provide the reasons for the late submission. The Applicant's response was that she could not get medical reports within 20 days of her initial absence and was not aware of the 20-day requirement.²¹ As a result, MSD initially did not certify sick leave for the contested period because that office determined that the required documents were submitted late without any medical justification.²²

49. Staff rule 6.2 and the UNDP Sick Leave Policy state that it is the staff member's obligation to inform his or her supervisors as soon as possible of absences due to illness or injury and promptly submit any medical certificate or medical report required.

Staff rule 6.2(d) Certified sick leave

(d) Sick leave taken by a staff member in excess of the limits set in

²¹ Annex R/13, e-mail dated 3 May 2017 from Mr. John Gain of UNMSD to Applicant.

²² Reply, para. 25.

paragraph (c) above requires approval in accordance with conditions established by the Secretary-General. When those conditions are not met, the absence shall be treated as unauthorized in accordance with staff rule 5.1 (e) (ii).

Staff rule 6.2(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.

UNDP's Sick Leave Policy

3. Staff members are responsible for informing their supervisors and HR focal points/leave monitors promptly of absence due to injury or illness to enable timely entry into the ATLAS HR e-Services module ...

Certified sick leave

11. For sick leave beyond 20 working days, the staff member must submit the required medical certificate, the MS 24 form and medical report directly to the United Nations Medical Services Division or designated medical officer for certification as soon as possible and not later than the 20th working day following the initial absence from duty/the office.

50. The uncontested evidence before the Tribunal is that, in November 2019, MSD exercised its management discretion in favour of the Applicant by waiving the 20-day requirement and approved the Applicant's absence during 23 November 2016 - 13 February 2017 and 12 March 2017 - 30 April 2017 as certified sick leave.²³

51. The Tribunal is mindful that under art. 2.1(a) of its Statute it is "competent to hear and pass judgment on an application filed by an individual against the Secretary-General to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of employment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance". It follows that, the Tribunal must determine, that there is an appealable administrative decision.

²³ Reply, annex R/15.

52. An administrative decision was interpreted in former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V as:

...unilateral decision taken by administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

53. UNAT has reaffirmed this interpretation in its subsequent decisions and therefore it is binding authority on this Tribunal to consider when faced with an application challenging an administrative decision especially where the Respondent argues that the application is moot.

54. The Respondent has shown and the Applicant has not disputed through clear and convincing evidence that all relevant regulations, rules, administrative issuances and policies were complied with in considering the Applicant's medical entitlements. There is no administrative decision carrying direct legal consequences on the Applicant's terms of appointment or contract of appointment to adjudicate on, since subsequent to filing the application on 24 September 2018, the Applicant's claim was fully satisfied in November 2019.

55. The Respondent having rescinded its decision not to pay the Applicant's entitlements, the application is rendered moot. The Tribunal will not consider the reliefs sought because unlawfulness has not been proved.

Exercise of Management Discretion to pay DSA beyond 45 days

56. The Applicant was not represented. During the CMD and in subsequent submissions from her, she requests the Respondent to exercise discretion in her favour and pay her medical entitlements beyond the maximum allowance of 45 days. The Tribunal notes that the Respondent has exercised management discretion by paying her

DSA for 59 days representing all authorized medical entitlements. The Applicant has not, even after much probing from the Tribunal, produced any authorized medical entitlements which remain unpaid.

Judgment

57. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 7th day of August 2020

Entered in the Register on this 7th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi