UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/053
Judgment No.: UNDT/2024/111
Date: 16 December 2024
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

ADUNDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Tamal Mandal, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Security Officer in the Department of Safety and Security ("DSS") based in New York, contests the 18 July 2022 decision to place him on sick leave with half-day pay combined with a half-day annual leave in order for him to remain at full pay until his entitlement to sick leave at full pay was revived.

2. The Respondent contends that parts of the application are not receivable and that, in any event, the application has no merit.

3. For the reason set out below, the application is rejected.

Facts

4. Following an email exchange between the Applicant, a Captain in DSS, and a Human Resources Assistant in the Executive Office of DSS concerning the Applicant's sick leave balance in 2021 and 2022, the Human Resources Assistant informed the Applicant on 17 July 2022 that he had reached his maximum entitlement of 195 days of sick leave at full pay. She therefore requested him to "confirm if [he] would like to opt to combine [his] accrued annual leave (AL) with [his] sick leave at half pay (Half sick + Half AL) to remain at full pay, otherwise [she would] process as a half-pay for those absences from 22 July onwards".

5. On the same date (17 July 2022), the Applicant responded that "[y]ou can place me on annual leave with my sick leave at a half pay but [I] will request a redress for further investigation on my Sick Leave Cycle of 2021".

6. On 18 July 2022, the Human Resources Assistant advised the Applicant that "[a]s per your confirmation, I will process your absences from 22 June onwards as a half-sick plus a half annual … to remain at full pay until your entitlement to sick leave at full pay is revived". This is the contested decision.

Consideration

The legal framework for calculating a staff member's sick leave entitlements

7. According to the current staff rule 6.2, a staff member, who has held a fixed-term appointment for three years, is entitled to sick leave for up to 195 days, whereas the former staff rule 6.2 stipulated that this was nine months on full pay and another nine months on half pay. In ST/AI/1999/13 (Recording of attendance and leave), para. 3.5(b), it is, in any event, specified that the previously applicable period of nine months should "comprise 195 whole working days on full pay or half pay, as appropriate, in any period of four consecutive years". This is what is also known as the 195-day regime.

8. Section 3.5(e) of ST/AI/1999/13 provides that:

> … A staff member's sick leave entitlement shall be exhausted when the total number of working days on sick leave in any of the consecutive periods referred to in subsections (a) and (b) above reaches the maximum entitlement. The staff member's entitlement may arise again when, in a successive period of 12 months or four years, as appropriate, the amount of sick leave granted falls below the staff member's maximum entitlement.

9. The Respondent explains, with reference to sec. 3.5(e) of ST/AI/1999/13 and the Human Resources Handbook, that under "the 195-day regime, sick leave on full pay is calculated on a rolling basis and any sick leave taken is 'revived' (i.e., the entitlement to the same number of days acquired again) four years from the date the original sick leave was taken". The 195-day regime "encompasses both certified sick leave ["CSL"] and uncertified sick leave ["USL"]" and any "utilization of CSL or USL will reduce the 195 days quota".

10. Also referring to staff rule 6.2 and secs. 3.5(b) and (e) of ST/AI/1999/13 as the legal foundation for the contested decision, the Applicant does not dispute the Respondent's description of the 195-day regime, which is also endorsed by the Tribunal.

Receivability

Relevant legal framework

11. Staff rule 11.2(a) provides that a "staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment … shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision. For such request to be "receivable by the Secretary-General", it shall be "sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

12. The Respondent submits that "[t]he Application is not receivable *ratione materiae* because the Applicant did not comply with the statutory requirements for requesting management evaluation of: (i) the records of the Applicant's sick leave taken during the 2021 leave cycle; and (ii) the 23 September 2022 decision to correct the Applicant's UMOJA [the United Nations Secretariat's online administrative portal] records to include sick leave entries that were identified during an audit of his leave records".

The 2021 leave cycle

13. The Respondent contends that the "Applicant's challenge to the records of sick leave taken during the 2021 leave cycle is not receivable" because he "did not timely request management evaluation of any alleged incorrect entries", which is an absolute requirement and "a staff member cannot unilaterally determine the date of an administrative decision for the purpose of challenging it".

14. The Respondent argues that the Applicant's "assertion that the contested decision was 'based on all my records comprising … the 2021 leave cycle' and 'there was no contestable administrative decision' before 18 July 2022 is unfounded and misplaced". First, "the Applicant regularly received his monthly time statements for review and certification" and "had 60 days from receipt of those monthly statements to request management evaluation of any alleged incorrect

entries", which he did not. Second, DSS "informed the Applicant of his sick leave balances for 2021 on several occasions. On 24 March 2022, DSS "provided the Applicant with his 'certified and uncertified sick leave absences from 01 April 2021 to March 2022'". Similarly, on 3 May 2022, DSS "informed the Applicant of the number of days he had used on sick leave with full pay in 2021".

15. The Applicant, in essence, submits that his request for management evaluation was correct and timely.

16. The Tribunal notes that on 6 September 2022, the Applicant requested a management evaluation of the contested decision of 18 July 2022. The request was therefore filed within the 60-day time limit stipulated in staff rule 11.2(a). In response to this request, on 29 September 2022, the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG") informed the Applicant that she upheld the contested 18 July 2022 decision, but in this response, no mention was made of the request being time-barred.

17. In the context of the present case, the Tribunal finds that the electronic UMOJA notifications regarding the Applicant's time and attendance records, which were automatically sent to him on a monthly basis during the relevant four-year time period, were nothing but status updates on his leave records. The same applies to the 24 March and 3 May 2022 messages from DSS. All these status updates informed the Applicant concerning the balance of his leave records but, in and by themselves, did not produce any "direct legal consequences" affecting "a staff member's terms and conditions of appointment" and did not have "a direct impact on the terms of appointment or contract of employment of the individual staff member" (see, the Appeals Tribunal in *Hoxha* 2024-UNAT-1465, para. 43, as well as many other judgments). In terms of legal importance in the present proceedings, the status updates, at most, form part of factual background.

18. None of the status updates therefore constituted separate and individual administrative decisions in accordance with art. 2.1(a) of the Dispute Tribunal's Statute against which the Applicant must file a request for management evaluation in accordance staff rule 11.2.

19. Consequently, the Tribunal finds that the Applicant's management evaluation request was filed in a timely manner under staff rules 11.2(a) and (c),

The 23 September 2022 decision to correct the Applicant's UMOJA records

20. In the Applicant's submissions to the Tribunal, he makes no appeal against any decision of 23 September 2022 to correct his UMOJA records. The decision is therefore not under appeal before the Tribunal.

Conclusion

21. The Tribunal finds that the application is receivable in full.

Was the contested decision lawful?

22. The Applicant's submissions may be summarized as follows:

a. The "[principle] of rationality as a review ground requires only that a decision be rationally connected to the purpose for which it was taken and be supported by evidence". The "[principal] aim of proportionality review is to avoid an imbalance between the adverse and beneficial effects of an action with suitability of the means deployed to achieve the purpose".

b. There "was no imbalance" and, on 4 April 2022, the Applicant "lost a 20-week-old baby just because the money that [he] had already planned for the [mother's] medical treatment was unfortunately deducted leaving [him] with no choice".

c. There was "no presumption that official acts have been regularly performed". The presumption of regularity "advances efficiency, certainty, and finality in the administration of the [O]rganization which was not found in this case".

d. On 19 September 2022, the Applicant received an email from the Human Resources Assistant, which informed him of "raising an Ineed Help

Ticket to review [his] sick leave records". On the same date, the Applicant "wrote a protest email on the ticket" to which the Human Resources Assistant replied that "all the staff member's time and attendance are required … to be maintained up to date with all types of absence in Umoja".

e. The "[t]icket raised was in bad faith, which is a position that can be factually disapproved, yet its proponent continues to adhere to it, lacks basic respect for the rights". If "there was a good faith from the management, they should not have raised that ticket after they already made an administrative decision", and the Applicant "lost the rights of an appeal against this particular Ticket". He should not have been advised that they could "just raise another ticket to rectify" if the Tribunal found in his favour.

f. There "was no avoidance of an imbalance between the adverse and beneficial effects of the action". In the response to the Applicant's request for management evaluation, there "was no factual disagreement between [him] and the administration as to on what dates [he] was absent due to sick leave, whether certified or not".

g. It "was claimed that the issue arose on methodology that [DSS] applied towards calculating [his] sick leave quota and the revival of sick leave days in 2021", and "a detailed calculation" of [his] sick leave [was] presented in [a] table. (The Tribunal notes that the table to which the Applicant refers is an Excel spread sheet annexed to the reply titled, "Comparison of [the Applicant's] Sick Leave Requests and Entries in Umoja" ("Table 1"). Therein, the Administration outlines the Applicant's USL and CSL entries in UMOJA by reference to specific dates and the number of sick days taken by the Applicant from 28 June 2018 to 30 June 2022 based on which comments are made on some submissions of the Applicant in the application).

h. Some dates stated in Table 1 had "a double entry of accountability and cannot be used to give a final result of this particular table". In particular, errors were made concerning: (i) 30 January to 7 February 2021 as these days were indicated as USL, but the Applicant had by then already used his USL quota and he was telecommuting on 4 February 2021, which "was also deleted and reinstated back by that Ticket"; (ii) on 18 February 2021, where "they say CSU [unknown abbreviation] missed to enter sick leave".

i. DSS's calculation of the Applicant's sick leave "does not comport with the applicable rules and the contested decision was reached without a detailed review of my leave records and they are not transparent". The contested decision "was arbitrary, and [the Applicant] consider[s] it as a disguised disciplinary measure".

23. The Respondent, essentially, refers to another table of the Applicant's sick leave on full pay from 2011 to 2022, which was prepared by the Administration for the USG's response to his request for management evaluation, but subsequently also reproduced in a separate annex to the reply ("Table 2") as documentation for the Applicant's sick leave records. The Respondent submits that in Table 2, DSS "did not err in computing the Applicant's sick leave entitlements".

24. The Tribunal notes that it follows from the consistent jurisprudence of the Appeals Tribunal that "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (see para. 29 of *Islam* 2011-UNAT-115 as, for instance, affirmed in *Wathanafa* 2023-UNAT-1389, para. 36). As follows from the Appeals Tribunal's seminal judgment in *Sanwidi* 2010-UNAT-084, as part of the judicial review, the Tribunal can appraise "whether relevant matters have been ignored and irrelevant matters considered" and therefore also whether the facts underpinning the contested decision were correct (see para. 40).

25. Regarding Table 2, it is noted that it follows from the Respondent's contentions that the contested decision was based on the figures outlined therein. Table 2 was presented as follows in the USG's response to the Applicant's request for management evaluation and the annex to the reply:

Year	Sick Leave Entitlement Quota Balance	Sum of Quota (CSL plus USL) Deduction	Sick Leave Revived period	Number of days Reviving	Quota Remaining Balance
Column (1)	Column (2)	Column (3)	Column (4)	Column (5)	Column (6) = Column (6) for previous yr) - Column (3) + Column (5)
As of November 2011	195				
2011		5			190
2012		9			181
2013		21			160
2014		38			122
2015		90	2011	5	37
2016		21	2012	9	25
2017		39	2013	21	7
2018		8	2014	38	37
2019		35	2015	90	92
2020		55	2016	21	58
2021		98	2017	39	-1
2022		25	2018	1	-25

26. When reviewing Table 2, the Tribunal observes that all the internal calculations are, as such, correct. At the same time, in the USG's response to the Applicant's management evaluation request, it was stated that the figures in the Table derived from three different sources, namely: an "On Duty Scheduling

System", UMOJA and the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH"). In principle, Table 2 therefore constitutes hearsay evidence as its figures were not original data but instead derived from other sources and then compiled together thereon.

27. Hearsay evidence is, in principle, admissible before the Dispute Tribunal but its "probative value depends largely on the credibility … of the person giving such evidence" (see, paras. 72 and 73 of *Applicant* 2022-UNAT-1187). Whereas the Applicant describes the contested decision as a disguised disciplinary measure, it is "the well-established jurisprudence" of the Appeals Tribunal that "the burden of proving any allegations of ill-motivation rests with the applicant" (see, para. 38 of *Kisia* 2020-UNAT-1049). The Tribunal notes that the Applicant has provided no evidence to this effect, and that the Administration would have no apparent or perceived interests in misrepresenting the relevant figures in the Table.

28. Concerning Table 1, this is also hearsay evidence as it is not an actual UMOJA document but was produced by the Administration for the purpose of the present judicial proceedings. Some figures stated in Table 1 are also imprecise. For the consecutive time period from 13 December 2020 to 21 January 2021, it is stated that DHMOSH approved 23 CSL days for the Applicant—but when the Tribunal calculates the total number of working days for this time-period, it then comes up to 27 working days. Further, when counting the Applicant's sick leave days on full pay in total for 2021 based on entries of Table 1, the figure is 106 days, which is different from Table 2 in which this is stated as 98 days, which is more beneficial to the Applicant. Considering the inconsistencies and the best interests of the Applicant, the Tribunal will attach no evidentiary importance to Table 1.

29. The Tribunal further observes that the Applicant basically contends that DSS was incorrect when calculating his sick leave days on full pay because: (a) even if he had already used all his USL days by 30 January to 7 February 2021, these dates were erroneously indicated as USL, (b) he was telecommuting on 4 February 2021, and (c) a flawed entry was made on 18 February 2021 although it is not clear what the exact error was.

30. Even though some figures of Table 1 were wrong, the Tribunal observes that none of the Applicant's submissions, in and by themselves, show how any of the alleged mistakes could indeed have impacted his sick leave balance on full pay in 2021 and 2022 as recorded in Table 2. Thus, none of the circumstances to which the Applicant points could, in any possible way, have decreased the number of recorded sick leave days and brought his sick leave record on full pay below the 195-day limit at the time of the contested decision on 18 July 2022:

a. 30 January to 7 February 2021. The Applicant had initially requested these days as USL, but since all his USL days had already been used, they were apparently instead charged as annual leave. The Respondent submits that, "[t]he Umoja time and attendance module does not allow for double entry. If a user attempts to make multiple entries for the same dates, the Umoja system will automatically reject it and generate a warning message that it conflicts with other absences". The Tribunal endorses this submission by the Respondent, which is also undisputed by the Applicant. It further takes judicial note that (i) all leave days, such as USL, CSL, annual leave or otherwise, of a staff member are electronically recorded in UMOJA for each half (morning or afternoon) or full working day, and (ii) the dropdown menu in UMOJA for registering leave (or another event, such as telecommuting) only allows a staff member to choose one type of entry at the same time for each morning or afternoon of a specific working day. Dates could therefore not be deducted twice as submitted by the Applicant, and if recorded as annual leave instead of USL or CLS in UMOJA, this would only have affected his annual leave balance and not his sick leave on full pay balance. Even if the sick leave had been entered as CSL instead of USL, this would not have made a difference as both CSL and USL days are counted towards the 195-day limit under staff rule 6.2 and secs. 3.5(b) and (e) of ST/AI/1999/13.

b. 4 February 2021. The Applicant has produced no evidence to suggest that he was, in fact, telecommuting on that day. Rather, with reference to the above, the day was apparently instead charged as annual leave. It therefore could not have been counted as sick leave on full pay in

UMOJA, and even if he was actually telecommuting and this was also indicated in UMOJA, it would not have affected his balance of sick leave days on full pay.

c. 18 February 2021. According to the Applicant's own submissions, the day was counted as annual leave as he himself had requested this. If recorded as annual leave in UMOJA, the day could then not be counted as sick leave with full pay and, accordingly, it would not have affected his sick leave on full pay balance.

31. The Tribunal notes that it is debatable under the jurisprudence of the Appeals Tribunal what the applicable evidentiary standard is for a decision such as the contested decision: whether it is the preponderance of the evidence or the presumption of regularity (see, for instance, *Applicant* 2022-UNAT-1187, paras. 60 to 66, as well as *Toson* 2022-UNAT-1249, para. 29, *Noberasco* 2020-UNAT-1063, para. 42, *Ngokeng* 2017-UNAT-747, para. 33, *Soliman* 2017-UNAT-788, para. 33, *Nastase* 2023-UNAT-136, para. 24, and *Mirella* 2023-UNAT-1334, para. 61—the case-law is not consistent in terms of whether the evidentiary standard of presumption of regularity is only applicable to primarily non-selection and non-renewal cases or also applies to other types of appealable decisions under art 2.1(a) of the Dispute Tribunal's Statute).

32. Nevertheless, applying either evidentiary standard, in the absence of the Applicant providing any submissions and/or evidence to support his claim that the figures used by DSS were incorrect, the Tribunal finds that the Respondent has appropriately established that Table 2 was an accurate record of the Applicant's sick leave balance on full pay from his recruitment in 2011 and until the end of 2022.

33. As follows from Table 2, the Applicant ran out of sick leave days on full pay already in 2021, and at the end of the year in 2022, he was at minus 25 sick leave days on full pay under the 195-day regime. In accordance with Table 2, the Tribunal therefore finds that the Respondent has adequately substantiated that the Applicant had exhausted his entitlement of 195 days of sick leave with full pay at

the time of the contested decision on 18 July 2022. Consequently, the factual basis for the contested decision was correct, as per *Islam* and *Sanwidi*.

Conclusion

34. The application is rejected.

(Signed)

Judge Joelle Adda
Dated this 16th day of December 2024

Entered in the Register on this 16th day of December 2024

(Signed)

Isaac Endeley, Registrar, New York