



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BEZZICCHERI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**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 19<sup>th</sup> day of January 2016

Entered in the Register on this 19<sup>th</sup> day of January 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva