



International Civil Aviation Organization

APPEALS BOARD

Case No.: ICAO Appeal No. 2021-004

Decision No.: ICAO/2022/006

Date: 20 September 2022

Original: English

Before: Judge Rowan Downing KC, President
Ms. Alessandra Andrade, Member
Mr. Ciaran Carolan, Member

Registrar: Mr. Arie Jakob

CATALIN GHEORGHE RADU

v.

SECRETARY-GENERAL
OF THE INTERNATIONAL CIVIL
AVIATION ORGANIZATION

DECISION

Counsel for Applicant: Self-represented

Counsel for Respondent: Christopher Petras

Introduction

1. By application dated 28 December 2021, the Applicant contests the administrative decision in respect of his “Separation from service during certified sick leave”, which decision was notified to the Applicant on 8 November 2021. He disputes the decision on the primary ground that Staff Rule 110.1(11) provides for a mandatory step to be taken by the Secretary General before undertaking the disciplinary process when a staff member is on sick leave and that as the mandatory step was not taken, the decision to discharge the Applicant was void *ab initio*. This appeal does not deal with the merits of the Secretary General’s decision to discharge the Applicant for misconduct, which is subject of a separate application to the Board.

2. Before bringing this application, the Applicant requested administrative review of the decision on 12 November 2021, receiving a response on 26 December 2021, denying the request.

Procedural Matters

3. On 14 June 2022, the parties to this proceeding were called to a Case Management Discussion on 20 June 2022 to consider the joinder of three applications of the Applicant and other procedural issues, including a request by the Applicant to engage legal counsel of his choice to represent him before the Appeals Board. In Order No. 2 (2022), dated 20 June 2020 it was ordered, by agreement of the parties, that the current application would proceed on the papers, with a time table set.

4. Order No. 2 further noted that Staff Rule 111.1(15) was specific that a staff member may be assisted in an application “by any other active or retired staff member serving or residing at the duty station where the hearing is conducted.” The Appeals Board thus found it was unable to grant the request of the Applicant that he be represented before it by a lawyer of his choice. This was later clarified in Order No. 3 of 7 July 2022 that the Applicant could be assisted in his case by a lawyer of his choice, subject to the limitations set on any appearance before the Appeals Board contained in Staff Rule 111.1(15).

5. On 7 July 2022, by Order No. 4, the Applicant was requested to produce medical certifications and or other documentary evidence to support his contentions in respect of his medical condition and a report of 3 November 2021.

6. On 5 August 2022 the Applicant was asked by email from the Registrar to provide

- “Specific proof, if any, in respect of the asserted sick leave from 17 September 2021 to 29 September 2021;
- a copy of any email you may have approving an absence request following the provision of the Certificat d'incapacité dated "21/09/13".

7. On 18 August 2022, Order No. 5 was made following a Case Management Discussion held on 17 August 2022. This order set out a timetable for the parties to make submissions in respect of the validity of Staff Rule 110.1 (11). During the Case Management Discussion the Applicant clarified that his appeal was limited to the events of 8 November 2021 and that this was the import of his appeal and not otherwise. He advised that he did not complain about any issues concerning any steps taken on 21 September 2021.

Receivability

8. There are no issues concerning the receivability of the Application to the Appeals Board.

Grounds for contesting the decision

9. The Applicant's submission as set out in Form 178 were not clear, and thus in order to ascertain the grounds of review it was necessary, and appropriate, to have reference to both paragraph VII "Summary of the facts of the case or facts relied upon" and paragraph VIII "Grounds for contesting the administrative decision" in the application. The grounds thus found in the application are:

a. As the Applicant was on medical leave approved by the Medical Clinic from 26 September 2021 to 1 December 2021 the actions of the Respondent in enforcing procedures for responses related to an investigation were in breach of Staff Rule that Staff Rule 110.1(11) which provides:

"If a staff member is on certified sick leave, the disciplinary process shall normally proceed as envisaged in the present Rule, subject to consultation with the Medical Clinic. If the staff member is on any other leave, including maternity or paternity leave, the disciplinary process should normally proceed as envisaged in the present Rule".

b. The Applicant was harassed as a consequence of the actions taken against him during the course of an investigation in respect of misconduct.

c. In acting as he did, the Secretary General violated the following paragraphs of the ICAO Framework on Ethics:

- (3) -honesty, truthfulness, fairness, impartiality and incorruptibility,
- (4) -disobeying the purposes, principles and values of the United Nations system and of ICAO,
- (5) -independence by being influenced by the Council members representing their States,
- (8) -discrimination,
- (11) -respect of basic human rights like right to due process,
- (19)-respect of different customs and culture,
- (31) lack of accountability by the direct supervisors of the persons involved,
- (41) -discrimination; harassment; intimidation, retaliation and abuse of authority,
- (44) -violation of established policies, standards and regulations,
- (45) -harassment, retaliation, abuse of authority or staff, gross mismanagement,
- (47) -refusal to take in consideration received information,
- (50) -mishandling of complains of misconduct,
- (53)- no interim measures for more than three years,
- (57) -disregard of the established rules and procedures 90 (a, b, e, f, g), 91, 92 (b, c, d, f)

10. The Applicant referred to specific alleged abuses of authority. The Applicant also alleges, bias, breach of procedural fairness, taking irrelevant matters into account, a breach of a duty of care and acting in a manner which was *ultra viries* in respect of the consideration of his medical condition.

Submissions by the Parties

11. As the application was agreed to be determined on the papers, as a matter of fairness, further submissions were permitted from both parties until it could be said that they had exhausted their submissions. This decision sets out the submissions in some detail so as to provide context and an understanding of the matters taken into account when reaching the conclusions expressed herein. It is noted that references in the submissions in respect of the notice of 21 September 2022, have been deleted from

the submissions set out below, as the Applicant clarified on 17 August 2022 that this formed no part of his appeal.

12. The Applicant submitted in his application:
- a. He was on certified medical leave, approved by the ICAO Medical Clinic from 26 September 2021 to 1 December 2021.
 - b. His last two medical leave requests were in respect of the period 22 October 2021 to 8 November 2021 and 8 November 2021 to 1 December 2021.
 - c. That the requests were supported by medical certificates.
 - d. The Organization was informed through AGRESSO, as well as the Applicant's supervisor. The Applicant only receiving formal approval for the period on 28 November 2021.
 - e. That an officer of the Organization attempted to personally service some papers to the Applicant at his residence on 8 November 2021, which papers were not accepted. The Applicant asserts "My doctors had recommended I not engage in any official activity during my sick leave".
 - f. The decision of the Secretary General to separate the Applicant from service was communicated to the Applicant by email on 8 November 2021, that is during the time the Applicant was on certified sick leave and contrary to Staff Rule 110.1 (11), as the Medical Clinic has not been consulted.
 - g. The action of the premature termination of his employment deprived of any notice period, resulted in the cancellation of his medical insurance, thus restricting him in the access to his on- going medical care and deprived him of "additional earned sick leave and eventual consideration for a disability pension at the conclusion of his sick leave".
 - h. The decision further exacerbated his health situation.
 - i. The actions of the Respondent amounted to harassment and hampered his ability to defend himself. That as a consequence the Applicant had to engage the assistance of counsel.
 - j. That there were additional matters relating to the schooling of children and other administrative issues.

Relief initially claimed by the Applicant

13. The Applicant seeks the following remedies;
1. Rescission of the decision.
 2. Reinstatement on certified sick leave for as long as the Medical Service deems warranted
 3. Compensation for material prejudice due to the violation of rules
 4. Compensation for moral damages due to the impact on health and reputation
 5. Costs

The relief claimed was later expanded by the Applicant, as set out below in paragraph 55.

The Reply by the Respondent to the application

14. The Respondent set out effectively a chronology, which, save for matters which were argumentative is substantially adopted by the Appeals Board at paragraphs 80 and 81 below. There is a

disagreement between the parties as to the date upon which the sick leave commenced or was extant in September 2021. This no longer has relevance to the matters under consideration.

15. The Respondent fundamentally submitted that “*Staff Rule 110.1(11) does not mandate a per se suspension of the disciplinary process against a staff member who is on certified sick leave, nor does it require consultation with the Medical Clinic as a precondition to the execution of every step in the disciplinary process, so the Applicant’s appeal is without merit.*”

16. The Respondent asserted that the Applicant had a right to respond to the Investigation Report and to “*produce countervailing evidence.*”

17. The Respondent submitted that:

The clear intent of Staff Rule 110.1(11) and, more specifically, its provision for “consultation with the Medical Clinic”, is to thus safeguard the due process right of a staff member to effectively respond to allegations of misconduct and/or produce countervailing evidence while on certified sick leave, by ensuring that the Organization can verify and make appropriate accommodations for medical conditions that materially hamper the staff member’s ability to timely respond or altogether prevents them from responding. At the same time, Staff Rule 110.1(11) does not mandate a *per se* suspension of the disciplinary process against a staff member who is on sick leave, nor does it establish consultation with the Medical Clinic as a precondition to the execution of each step in the process”.

18. The Respondent further submitted that the Applicant had been notified on 21 September 2021, in accordance with Staff Rule 110.1(14), of a provisional decision to discharge him and provided with an opportunity to respond within 14 days, in accordance with Staff Rule 110.1(15). The Applicant provided his response on 5 October 2021.

19. It was noted that the Secretary General had considered the response of the Applicant and then followed this with a letter and email of 8 November 2021 confirming the provisional decision, with immediate effect. It was submitted that the assertions of the Applicant are misplaced and that Staff Rule 110.1(11) does not restrict the right of the Secretary General to continue to act as authorised by the Staff Rules in respect of the finding that discharge from the Organization was warranted.

20. The Respondent then submitted:

“The Applicant’s medical condition did not materially affect his ability to actively participate in the disciplinary process in this case, so his claim that the Secretary General’s communication of the final decision to impose the disciplinary measure of discharge against him during his sick leave violated of Staff Rule 110.1(11) is without merit”.

21. The Respondent further stated:

“the facts do not support the Applicant’s claim that he “was on certified medical leave, approved by the Medical Clinic, from 26 September 2021 through 1 December 2021.” In fact, the Applicant’s first period of certified sick leave was from 29 September to 8 October 2021. Then, on 22 October 2021, he submitted a medical certificate to the ICAO Medical Clinic from his treating physician in support of a request for paid sick leave to cover the period of 8 October to 8 November 2021. However, from 12-22 October 2021, the Applicant actually served in his official capacity as Secretary to the Safety Stream of the High-level Conference on COVID-19 (HLCC 2021); thus, he submitted a new medical

certificate on 26 October 2021 in support of a revised request for paid sick leave for the period of 22 October to 8 November 2021. And finally, on 5 November 2021, the Applicant submitted a medical certificate in support of a request to extend this sick leave period from 9 November to 1 December 2021, but he was then discharged from service with the Organization on 8 November 2021”.

22. The Applicant knew that a decision had been made in respect of his “provisional discharge”, such being communicated to him on 21 September 2021. The Applicant could not thus validly assert that he did not have notice. The provisional discharge triggered the 14 days reply period for the Applicant to respond to the provisional decision, as a necessary step towards a final decision, which in this case was to discharge the Applicant from service.

23. The Respondent asserted that the Applicant was, contrary to his assertions, not materially prevented by medical impairment to defend himself. The Respondent points to the fact that the Applicant was on sick leave from 29 September 2021 to 8 October 2021, but on 5 October 2021 he submitted a 10 page reply to the notice of 21 September 2021. This was within the 14 day period provided for. He did not request a stay or an extension of time.

24. Further, the Respondent asserts that the Applicant carried out duties as Secretary to the Safety Stream of the High-level Conference on COVID-19 from 12-22 October 2021, and that the Applicant had legal counsel assisting him through the process and thus any medical impairment cannot be said to have had a material impact on his ability to defend himself.

25. The Respondent noted by way of conclusion that:

... “the intent of Staff Rule 110.1(11) and its provision for consultation with the Medical Clinic is to safeguard the due process right of a staff member to effectively respond to allegations of misconduct and/or produce countervailing evidence while on certified sick leave, by ensuring appropriate accommodations for medical conditions that materially hamper a staff member’s ability to timely respond or altogether prevents them from responding—it cannot be selectively invoked by a staff member in an effort to block or otherwise impede the Secretary General’s proper and lawful execution of the disciplinary process, as the Applicant here seeks to do.”

The Applicant’s further submission pursuant to Order No 2

26. The Applicant repeated a number of matters already addressed in his application in respect of his sick leave, asserting that he remained on certified sick leave until 1 December 2021.

27. He noted “The decision has forced me to direct my attention to challenging the decision while under medical care, even if I was assisted by a team of lawyers during the process.” Addressing the arguments of the Respondent, the Applicant submitted:

“Since the suspension decision as well as the decision to remove me from my duties had, by themselves, an immediate, material, legal and adverse effect on my situation, and were not subsumed under the final decision taken at the conclusion of any disciplinary proceedings, they cannot be considered as mere steps leading to the final decision and can be challenged.”

28. The Applicant maintained his assertion that the conduct of the Secretary General amounted to an abuse of his authority. He maintained that the failure to consult with the Medical Clinic was a violation of Staff Rule 110.1. That this Staff Rule is a “clear conditional clause” and is mandatory.

29. The Applicant noted that the Respondent asserted that Staff Rule 110.1(11) is to protect the due process rights of staff members. He went on to submit that the Respondent has admitted to dismissing him while he was on sick leave. He submitted that:

“the scope of this rule is to protect personnel from being discriminated because of their illness as well as any unforeseen negative effect that such an action can bring on their health. It has nothing to do with the person’s capability to reply”.

30. Staff Rule 110.1(11) was introduced on 23 December 2020. The Applicant asserted that prior to this dismissal during certified sick leave was prohibited, the basis of this being that dismissal can hamper or aggravate a medical condition and also prevent a staff member from having access to medical care.

31. The Applicant then noted:

“Therefore, although the prohibition of dismissal during certified sick leave was lifted by the new ICAO provision, the principle of protection and duty of care of the staff remains.”

32. The Applicant further submitted that the assertion by the Respondent that between his participation from 12 to 22 October 2021 in a conference meant he was fit, was erroneous. He submitted that his participation in the conference was on medical advice and that it was noted in a report of 3 November 2021 that his condition had improved as a consequence of this participation.

Response of the Respondent

33. Respondent responded on 19 July 2022.

The Respondent specifically addressed the rights given to staff by Staff Rule 110.1 (11), asserting that the case for the Applicant was “that Staff Rule 110.1(11) gives the staff member the absolute right to demand that the Secretary General consult with the Medical Clinic as a precondition to taking disciplinary action against them while they are on sick leave.” The Respondent also stated that the Applicant was asserting that the “Applicant . . . contends that by virtue of Staff Rule 110.1(11), any disciplinary action taken against a staff member on sick leave without consultation with the Medical Clinic is *void ab initio*, effectively imbuing the Medical Clinic with the authority to halt the disciplinary process temporarily or altogether on medical grounds.”

34. The Respondent joined issue with these propositions. He was of the view that the propositions of the Applicant were contrary to the plain language of the provision, that it is the Secretary General alone who has the remit to impose disciplinary measures.

35. That the structure and context of the Rule is to safeguard the due process rights of the staff member “to effectively respond to allegations of misconduct and produce countervailing evidence while on certified sick leave”.

36. The Respondent then submitted:

The plain meaning of Staff Rule 110.1(11) precludes its application as a per se bar against execution of the disciplinary process against a staff member who is on certified sick leave.

That paragraphs 7 to 11 of Staff Rule 110.1 address “*Staff member’s right to respond and to produce countervailing evidence*”, as follows:

Staff member’s right to respond and to produce countervailing evidence

7. The staff member alleged to have committed misconduct has 30 calendar days from the date of receipt to respond, in writing, and produce countervailing evidence if the staff member so wishes. The staff member may request, in writing, additional time to respond. Any such request must be made prior to the expiration of the deadline and must contain reasons for the request. If no response to the allegations of misconduct is received within the specified time limit, the matter may nevertheless proceed, without further notice to the staff member.

8. The Secretary General may seek further information from any relevant source. Any new additional information received by the Secretary General must be provided to the staff member for a further response. The staff member shall be given 14 calendar days to respond to such additional information. The staff member may request, in writing, additional time to respond. Any such request must be made prior to the expiration of the deadline and must contain reasons for the request. If no response on the additional information is received within the specified time limit, the matter may nevertheless proceed, without further notice to the staff member. The Secretary General may also seek confirmation or clarification of information already in the record before the Secretary General.

9. During the disciplinary process, the staff member alleged to have committed misconduct shall be responsible for including in the staff member’s response and countervailing evidence all information relating to the allegations of misconduct that the staff member wishes the Secretary General to consider.

10. Adverse inference may be drawn in situations in which a staff member fails, during a fact-finding enquiry, to mention a matter or provide information without a satisfactory explanation, which the staff member subsequently seeks to rely on during a disciplinary process.

11. If a staff member is on certified sick leave, the disciplinary process shall normally proceed as envisaged in the present Rule, subject to consultation with the Medical Clinic. If the staff member is on any other leave, including maternity or paternity leave, the disciplinary process should normally proceed as envisaged in the present Rule.

37. In interpreting the Staff Rules UNAT has held that they must be read as a whole. Reference was made to *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, at para. 28. *Lee v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1170, para. 30. *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018- UNAT-847, para. 53 and *Scheepers et al v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-556.

38. The Respondent contended that “the plain meaning of Staff Rule 110.1(11) is that the disciplinary process will indeed normally proceed against a staff member who is on sick leave, but may be “affected by” or “possibly affected by” consultation with the Medical Clinic. In other words, Staff Rule 110.1(11) does not expressly prohibit the Secretary General from taking disciplinary action against a staff member who is on sick leave; to the contrary, it specifically allows for the normal disciplinary process to progress but be adjusted on the basis of information obtained from the Medical Clinic, as necessary, to protect *the staff member’s right to respond and to produce countervailing evidence*.”

39. The Respondent contended that the interpretation of the Applicant is untenable given the structure of Staff Rule 110.1(11) and the whole of Staff Rule 110.1(11). The staff must have a right to respond and file “countervailing evidence”. That the subheadings need to be taken into account and that the Staff Rule 110.1(11) is under the heading “*Staff member’s right to respond and to produce countervailing evidence*”. That the Rule as a whole sets out the steps to be taken and does not limit the authority of the Secretary General. The Respondent asserts that the Medical Clinic is not involved in the disciplinary process or the exercise by the Secretary General of his authority in respect of such.

40. The Respondent examined the hierarchy of regulatory instruments, asserting that the contentions of the Applicant in respect of interpretation would be inconsistent with Staff Regulation 10.1 and Staff Rule 110.1(2).

41. The Respondent then addressed the following:

Even assuming arguendo that the Applicant exercised his sick leave entitlement in good faith, as his medical condition did not materially affect his ability to actively participate in the disciplinary process, his claim that the Secretary General’s failure to consult with the Medical Clinic pursuant to Staff Rule 110.1(11) vitiates the decision to discharge for misconduct during his sick leave and entitles him to compensation is without merit.

42. It was noted that Staff Regulation 6.2 provides that “[s]taff members who are incapacitated from the performance of their duties by illness or injury” are to be granted sick leave. The Respondent suggests that the Appeals Board draw a number of inferences in respect of the fact that the Applicant came off sick leave to return to work to serve as Secretary to the Safety Stream of the High-level Conference on COVID-19 and the effect of this.

43. The Respondent drew the attention of the Appeals Board to *Nyakossi v. Secretary General of the United Nations*, Judgment No. 2012-UNAT-254, para. 19 where it was noted in respect of a claim for compensation:

[n]ot every violation of a staff member’s legal rights or due process rights will necessarily lead to an award of compensation. Where the staff member does not show the procedural defect ‘had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences’ or harm from the procedural defect, compensation should not be awarded.

44. The Respondent submitted that the medical condition of the Applicant did not materially impact upon his ability to actively participate in the disciplinary process and he has not demonstrated any consequent pecuniary loss by the failure to consult the Medical Clinic, then there is no justification in awarding damages.

45. The Respondent further noted that the UNAT has further held in *Zeid v. Secretary General of the United Nations*, Judgment No. 2014-UNAT-401, para. 18 that “damages for moral injury” may arise

[f]rom a breach of the employee’s substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed [or]...where there is evidence produced... of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights.

46. The Respondent went on to contend the assertions of the Applicant were erroneous in respect of the effect of Staff Rule 110.1(11) acting as a suspension of the disciplinary process during sick leave or, alternatively, as requiring consultation with the Medical Clinic as a precondition to execution of the disciplinary process. In any event, even if there had been a breach of the requirements, there is no entitlement to damages as it is merely speculative as to what the consultations with the medical clinic would have resulted in.

Response by the Applicant

47. To these submissions of the Respondent, the Applicant replied on 25 July 2022. He pointed out that the sick leaves dates asserted by the Respondent were wrong and that correct sick leave dates are from “13 September to 1 December 2022”¹. The Applicant provided evidence of such to the Appeals Board on 13 July 2022.

48. The Applicant joined issue with the Respondent in respect of the interpretation of Staff Rule 110.1(11), asserting that it is “designed to regulate the way in which the disciplinary process is used when a staff member avails himself or herself or an earned entitlement to sick leave, which is a social benefit guaranteed as a condition of service.” It is not only designed to ensure that due process rights are given, but to guarantee the “social benefit to approved sick leave, which also entails the possibility of eventual consideration for full or partial disability...”

49. The Applicant went on to urge a different conclusion from that of the Respondent through the application of the plain meaning interpretation of Staff Rule 110.1(11):

“Moreover, the plain meaning of the rule has been consistently interpreted until now as giving precedence to the exercise of sick leave over other administrative action.

In *Applicant UNDT/2021.091*, in which the UN Dispute Tribunal addressed the same issue, finding that not only was consultation with the Medical Service required before allowing the disciplinary process to proceed, but that this entailed a meaningful examination of the medical issues.

“... *The Tribunal does not accept that the word of MSD on whether the Applicant was well enough to be interviewed was conclusive. There is nothing on the record to show how MSD, who had certified the Applicant’s sick leave, came to the conclusion that he was nevertheless well enough to be interviewed as a subject of an investigation. The Tribunal considers this process, as reported, fatally flawed since any medical professional who is going to comment on the availability of a person on sick leave to be interviewed should first examine or at least speak to that person about the nature of their illness. There is no*

¹ This is clearly an error and the Appeals Board assumes that this date is 2021.

evidence that they did so.”

While the Appeals Tribunal has not pronounced judgment on this particular issue, it may be due to the fact that the prevailing practice is not to interfere with the right of staff to avail themselves of sick leave. (see e.g. Sarrouh, 2017-UNAT-783: “*The Applicant remained on sick leave from February 2014 until 31 July 2015 after which she was separated from service.*”)

50. The Applicant joined issue in respect of the consideration of the hierarchy of norms argument of the Respondent. He asserted that there is no contradiction in the use of the words “subject to” which would affect the authority of the Secretary General in respect of the authority over disciplinary measures.

51. The Applicant submitted that the reference to the medical clinic was to ensure that its advice was taken before making a decision. He asserted that the failure to seek the advice was also a breach of “principle of protection and duty of care of the staff which he submitted had been violated.” The Applicant submitted that it is not for the Respondent to be evaluating his health as he did when he suggested that the Applicant was suffering from “a deep-seated aversion to the on-going disciplinary process” and not an alleged medical impairment. In essence the Applicant asserted that the medical reports speak for themselves and the Respondent has no right to question such.

52. The Applicant submitted that the jurisprudence in respect of disciplinary cases is such that the right to a defense is mandatory and if denied then such “is a material flaw which requires setting aside the impugned decision”.

53. The Applicant submitted that the assertions of the Respondent prove that his medical condition was “totally disregarded” on several occasions. And that “the Respondent willingly refused to consult the medical clinic as it was uncertain and anxious of the medical advice the clinic could have given that could have altered the intended outcome.”

54. In respect of damages, the Applicant submitted that he should not have been separated from service, which he asserts was disproportionate punishment and should have been “treated with proportional remedies”, depriving him of an important entitlement. The Applicant noted specifically the adverse effect of the withdrawal of medical insurance.

55. He concluded by reformulating the relief he seeks:

1. The impugned decision of 8 November 2021 should be set aside, and any consecutive legal effect should be implemented immediately.
2. Compensation for material prejudice due to the violation of Staff Rule 110.1(11) for the effect on him of being dismissed in the circumstances in which he was. Estimated at 15,000 dollars.
3. Compensation for moral prejudice due to the impact on the Applicant’s health and the withdrawal of the Organisation’s health insurance. Estimated at 30,000 dollars.
4. Reimbursement of legal fees, if any.

56. Following the production of evidence requested from the Applicant on 5 August 2022, and provided on 9 August 2022, the Applicant provided the following further submissions in which he clarified his understanding of when he was on sick leave and that his supervisor knew that he had requested sick leave. He stressed that he was on certified sick leave on 8 November 2021.

57. The Respondent replied noting that the Applicant had stated in Part VII of his Application:

“1. I was on certified medical leave, approved by the Medical Clinic from 26 September 2021 through 1 December 2021.

2. My last two medical leave requests (22 October – 8 November and 8 November - 1 December) were certified by the Medical Clinic.”

The Respondent maintained that the statements made by the Applicant in his Form 178 are accurate.

58. The Respondent relevantly noted that HR had confirmed that the Applicant’s certified sick leave for “the period of 22 October to 8 November 2021 was approved *ex post facto* based upon a medical certificate issued and submitted to the Medical Clinic on 26 October 2021.”

59. The Respondent concluded the response by asserting:

“Finally, the additional submissions of the Applicant, there is no prohibition under ICAO Regulations and Rules on imposing disciplinary measures (including discharge) against a staff member who is on certified sick. If Staff Rule 110.1(11) required the *per se* suspension of disciplinary proceedings as the Applicant claims, the termination of a staff member suffering severe mental/emotional distress in the face of such an action (an understandable and likely very common condition under the circumstances) would effectively be impossible. For the reasons offered in Respondent’s previous submissions, such an interpretation is not sustainable.”

Response by the parties to Order no. 5 of 18 August 2022

60. On 22 August 2022 the parties filed their submissions in respect of the validity of Staff Rule 110.1(11). On 24 August 2022 the Applicant filed a reply to the submissions of the Respondent. On 25 August 2022, the Respondent filed a response to the submission of the Applicant.

The submissions made by the parties went further than requested, and were repetitive of matters already submitted, save for the matters referred to below.

The Applicant

61. The Applicant asserted that the Respondent was bound to comply with the terms of Staff Rule 110.1(11), applying the principle of *tu patere legem quam ipse fecisti*. That is, the Organization is bound by its own rules and must apply them.

62. The Applicant essentially submitted that the interpretation of Staff Rule 110.1(15) was straightforward and that there was no need for implementing procedures, as it is “perfectly clear”. It is up to the Organization to work out how to implement the Rule and that confidentiality of medical records is not a valid reason for not following the Rule.

63. The Applicant asserted that the Staff Rule is there and that it is up to the Organisation to work out how to implement it. That the consultation with the Medical Clinic is mandatory and that confidentiality of medical records is not a valid reason for not following the rule. He asserted that the fact of the consultation is required is sufficient to allow for a medical opinion to be given medical Opinion and that no access to the medical files is required for this to be done. The Applicant repeated his assertion that the purpose of the Staff Rule is to examine the medical condition of a staff member before termination can occur, with the Respondent admitting that it is “*very common condition under the circumstances*” for a staff member to suffer severe mental/emotional distress in the face of such an action (termination).”

64. On the question of the retroactivity of medical leave approval the Applicant noted that the norm is retrospective approval of the certification of medical leave due to the very circumstances of medical conditions.

The Respondent

65. The Respondent submitted that by its nature certified sick leave is an *ex post facto* “designation of a staff member’s absence from work as justified for medical reasons.” It is calculated against the authorised number of days allowed for certified sick leave. If there are not sufficient sick leave days remaining for a staff member then the days absent are classified as annual leave or possibly special leave without pay.

66. The Respondent noted that the Applicant claims that as he was “on certified sick leave” on 8 November 2021 that the Staff Rule therefore “gave him an absolute right to demand that the Secretary General consult with the ICAO Medical Clinic as a precondition the Secretary General’s communication of the final decision.... and that the Secretary General’s failure to consult renders the entire disciplinary process void ab initio.” The Respondent went on to submit that the “process, whereby a staff member’s absence from work is subsequently deemed justified for medical reasons and thus categorized as “certified sick leave”, makes it indisputably clear that Staff Rule 110.1(11) cannot be understood as requiring the Secretary General to consult with the Medical Clinic as a precondition to the Secretary General’s communication of the final decision in this case.”

67. The Respondent noted that the sick leave regulation authorizes a delay of five days between the initial absence from duty and the first day that the medical consultant of ICAO can approve the certified sick leave. The staff member has a period of three days built in to provide a medical certificate. The Respondent provided an example of how the period before notification to a supervisor of illness could be up to nine days. He referred to Staff Rule 106.2(1) (a).

68. Addressing the application of the Staff Rule when a staff member is granted certified sick leave retrospectively, and the effect of such, the Respondent made the following submissions:

“ Obviously, a disciplinary action taken against a staff member when Staff Rule 110.1(11) does not apply – for example, on their first working day of absence (i.e., before the staff member has filed a certified sick leave application, obtained and submitted the required medical evidence, and secured the approval of the ICAO medical consultant) – cannot retroactively become subject to the Staff Rule 110.1(11) consultation mandate when the application is subsequently approved and, by operation of the “certified sick leave” accounting designation, the first working day of absence and all other intervening duty days missed are thereafter allocated against the staff member’s balance of authorized “certified sick leave” days. Thus, if Staff Rule 110.1(11) is to be interpreted as requiring the Secretary General to consult with the Medical Clinic as a *precondition* to taking disciplinary action

with respect to a staff member “on sick leave” as the Applicant contends, the obligation can logically – and consistent with Staff Rule 106.2(1) (a) – attach only *after* the staff member’s application is officially approved. And the Applicant’s own evidence establishes that his certified sick leave application for the period of 22 October to 8 November 2021 was not so approved until 30 November 2021”

69. The Respondent asserted that a staff member’s application for certified sick leave has no regulatory connection with the disciplinary process. The issue is whether the staff member’s ability to defend “themselves is hampered by medical impairment”. The purpose of Staff Rule 110.1(11) is “*to protect the staff member’s right to respond and to produce countervailing evidence.*” It does not cause there to be a suspension of the disciplinary procedures or to cause the Secretary General to consult with the medical clinic as a precondition to taking a step in the disciplinary process.

70. The Respondent maintained the validity of Staff Rule 110.1(11), asserting that the Applicant had exercised his last right under the Rules, that is the provision of the response to the provisional decision of 21 September 2022 to dismiss him, as provided for in accordance with Staff Rule 110.1(15). The Respondent noted that the Applicant raised no issues concerning his ability to provide a response. After having examined the Applicant’s response, the Secretary General properly communicated his final decision to the Applicant on 8 November 2021, in accordance with Staff Rule 110.1(16). The Respondent submitted that it did not matter whether the Applicant was on sick leave or not for the purposes of Staff Rule 110.1(11) as no consultation with the Medical Clinic was required prior to notifying the Applicant of the final decision on 8 November 2022. There was no right for the Applicant to respond to the decision made under Staff Rule 110.1 (16).

71. The Respondent then raised an issue of estoppel for the first time. This matter is not considered as it was not responsive to the request for submissions in respect of the validity of Staff Rule 110.1(11).

72. The Respondent concluded by repeating that the import of Staff Rule 110.1(11) is to safeguard “the due process right of a medically impaired staff member to effectively respond to allegations of misconduct and/or produce countervailing evidence, by ensuring that the Secretary General can verify and make appropriate accommodations for medical conditions that materially hamper the staff member’s ability to timely respond or altogether prevent them from responding. A staff member found to have committed misconduct, as the Applicant was here, should not be permitted to misuse sick leave as a shield to fend off accountability.”

73. The Applicant responded to the submission of the Respondent on 23 August 2022. He asserted that the primary rule of interpretation is that words are to be given their obvious and ordinary meaning and that the staff rule did not prevent the taking of disciplinary action, but that this could only be done after consultation with the medical clinic. He submitted that if there is any ambiguity then *contra proferentem* rule should be beneficially applied in favour of the Applicant.

74. On 24 August 2022 the Respondent replied to the original submission of the Applicant. He submitted that Staff Rule 110.1(11), is one of five provisions to be found under the heading “Staff member’s right to respond and to produce countervailing evidence”, and is limited to a staff member being on certified sick leave.

75. The Respondent asserted that the “Applicant’s own evidence shows he was not “on certified sick leave” on 8 November 2021, as his application had not yet been approved.”

76. Reference was then made to the import of Staff Rule 106.2, providing that a staff member's absence is designated as "certified sick leave" when the leave was approved by the medical consultant, taking into account the medical evidence that the staff member must submit within five days of their initial absence. The Respondent then provided details of the mechanism whereby the approval is actually obtained and the fact that the sick leave of the Applicant for 8 November 2022 was not certified until 30 November 2022.

77. The Respondent referred to *Patkar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1173 the UNAT which he asserted "upheld the conclusion of the UNDT that the staff member's sick leave had not been granted or approved, notwithstanding the fact that the staff member had received an email from the United Nations Medical Services Division (MSD) which reported the approval of this sick leave request, because there was no evidence that the Administration approved such leave. Specifically, "[t]he UNDT determined that the purpose of the MSD E-mail was to certify the Appellant's fitness to work based on the medical report she had submitted, not to approve any related absence" and that under the applicable procedures the "Administration would have had to approve [the staff member's] sick leave." Noting that the relevant rules governing the approval process for sick leave required that "[a]ll sick leave must be approved on behalf of, and under conditions established by, the Secretary-General" the Appeals Tribunal held that the UNDT was correct in its conclusion."

78. The Respondent went on to argue that applying the learning from *Patkar* the Applicant has admitted that his certified sick leave application was not approved for the period 22 October 2022 to 8 November 2022 until 30 November 2022, and thus his argument cannot be sustained.

Relevant Facts found

Disciplinary procedures taken

79. It appears that the chronology below, which was essentially provided by the Respondent, is not, in general terms, disagreed to by the Applicant. The disputes between the parties in respect of the facts relate to the certification of sick leave.

80. The Applicant had been under investigation in respect of alleged disciplinary offenses since April 2019. The investigation was conducted by United Nations Office of Internal Oversight Services Investigations (OIOS), in respect of which a report was provided to the Respondent in January 2020.

-On 6 February 2020, a copy of the OIOS investigation report and the supporting evidence were provided to the Applicant. He was invited to provide a written statement in response and to produce any countervailing evidence within 30 calendar days.

-On 4 March 2020, the Applicant requested an extension of the statutory 30-calendar day period to submit his response "if possible until the end of March."

-On 6 March 2020, the Secretary General approved a 15-calendar day extension for Applicant to submit his response until 21 March 2020; as the extended deadline date fell on a Saturday, the Applicant was given until Monday, 23 March 2020.

-On 23 March 2020, the Applicant submitted his response.

-The Applicant requested an additional four to five weeks to review with legal counsel in New York his submissions he had already filed. This request was refused.

-On 9 September 2021, the Secretary General concluded third-party consultations, which had been conducted with the consent for the provision of materials being first obtained from the Applicant in July 2021, There was correspondence to OIOS with respect to the factual and procedural irregularities that had been alleged by the Applicant.

-On 16 September 2021, the Secretary General wrote to the President of the ICAO Council pursuant to Staff Regulation 9.9, to request approval to terminate the Applicant's appointment, as the Applicant had a post level of D1.

-On 21 September 2021, the President of the Council approved the termination of the Applicant's appointment.

-On 21 September 2021, the Secretary General notified the Applicant of his provisional decision to impose the disciplinary measure of discharge against the Applicant for misconduct. Pursuant to Staff Rule 110.1 (15) the Applicant was "given an opportunity to submit, within 14 calendar days from the date of receipt of the Secretary General's provisional decision, a statement in writing on the action proposed to be taken".

-On 22 September 2021, the Applicant sent an email to the Secretary General requesting information following the receipt of the email of 21 September 2021. He also asked advice about his right to appeal.

-On 5 October 2021, being within the time allowed, the Applicant submitted a statement in writing in response to the email from the Secretary General of 21 September 2021.

-During the period 12-22 October 2021, the Applicant returned to work serving in his official capacity as Secretary to the Safety Stream of the High-level Conference on COVID-19.

-On 8 November 2021, the Secretary General notified the Applicant that he had decided to confirm the decision to impose the disciplinary measure of discharge against the Applicant and that he was released of his employment with immediate effect. The Applicant declined to accept personal service at his home of the letter from the Secretary General. The Applicant was subsequently notified of the decision by an email of 8 November 2021.

-On 10 November 2021, the Applicant requested that the Secretary General suspend application of the discharge pending a hearing on the matter by the Appeals Board.

-On 12 November 2021, the Secretary General notified of his denial of the request for suspension of the decision.

-On 12 November 2021, the Applicant submitted a *Staff Member Request for Administrative Review by the Secretary General* based on the assertion that there had not been compliance with Staff Rule 110.1(11).

-On 26 December 2021, the Secretary General advised the Applicant that Staff Rule 110.1(11) does not mandate the suspension of disciplinary proceedings against a staff member who is on sick leave, and that the facts demonstrated that his medical condition had not affected his participation in the disciplinary process and that the decision would stand.

-On 28 December 2021, the Applicant submitted an appeal to the Appeals Board contesting his “[s]eparation from service during certified sick leave,” which is the basis for current application before the Appeals Board.

Sick leave of the Applicant

81. The Applicant and the Respondent have submitted evidence which allows the Appeals Board to reach the following finding in respect of the periods of certified sick leave of the Applicant.

-From 13 to 17 September 2021, a certificate was provided from a doctor at the CHUM hospital. This was subsequently certified by the ICAO medical consultants.

-On 17 September 2021 the Applicant further requested sick leave for the period 20-22 September 2021. The Applicant entered this into AGRESSO on 21 September 2021. On 22 September 2021 the ICAO Medical Clinic asked the Applicant for the original medical certificate, which was a requirement before the certification could be considered. The certification for sick leave on 21 September 2021 was not certified until 23 September 2021 by the Medical Clinic.

-From 29 September to 8 October 2021, the Applicant was on certified sick leave, it being certified based on a medical certificate of 1 October 2021.

-On 22 October 2021, the Applicant submitted a medical certificate from his treating physician in support of a request for sick leave to cover the period of 8 October to 8 November 2021.

-On 26 October 2021, the Applicant submitted a medical certificate from his treating physician in support of a revised request for sick leave for the period of 22 October to 8 November 2021, due to his participation in the conference from 12-22 October 2021.

-On 5 November 2021, the Applicant submitted a medical certificate from his treating physician in support of a request to extend this certified sick leave period from 9 November to 1 December 2021.

-On 9 November 2021 the Applicant emailed the ICAO Medical Center to confirm that the extension of his certified sick leave from 9 November to 1 December 2021 had been approved and requested guidance concerning how the Staff Rule 110.1(11) provision relating to “consultation” with the Medical Clinic applied in disciplinary proceedings involving a staff member on certified sick leave.

82. The parties do not appear to agree as to when the sick leave of the Applicant commenced. The Applicant stated in his Application that he was on certified sick leave from 13 September 2021 to 1 December 2021, whereas the Respondent places the commencement of the sick leave as being from 29 September to 8 November 2021.

83. Relevantly for this application the Appeals Board finds that the sick leave of the Applicant was certified from 22 October until 8 November 2021. The application for approval was submitted on 26 October 2021. Certification did not occur until 30 November 2021. The sick leave of the Applicant was ultimately certified to 1 December 2021, the effect of this is discussed below.

Considerations

84. In this matter it is essential to ascertain the meaning and application of Staff Rule 110.1(11) (the Staff Rule), noting that the complaints made by the Applicant relate to its application, or lack thereof. The Applicant asserts that the decision to discharge him was *void ab initio*, as the precondition to the continuation of the “disciplinary process” was not authorised, as the essential step of consulting the Medical Clinic was not taken.

It is useful to set out again the terms of the Staff Rule:

11. If a staff member is on certified sick leave, the disciplinary process shall normally proceed as envisaged in the present Rule, subject to consultation with the Medical Clinic. If the staff member is on any other leave, including maternity or paternity leave, the disciplinary process should normally proceed as envisaged in the present Rule.

85. The norm is that the “disciplinary process” shall proceed if a staff member is on certified sick leave, but “subject to consultation with the Medical Clinic”.

86. The Applicant contends that the provisions of this Staff Rule are to not only to ensure that the staff member is able to fully exercise his or her due process rights, but also to be protected from having an illness exacerbated by the continuation of the disciplinary process and to allow the staff member to exercise other rights which may arise, such as to seek to be placed on a disability pension. This is examined below after the consideration of the base interpretation of the Staff Rule.

87. The Respondent contends that the import of the Staff Rule is to provide for due process rights for staff on certified sick leave who may be unable to properly exercise their rights due to illness. The Respondent asserts that the Applicant was able to exercise all his due process rights when on certified sick leave. The Respondent does not agree with the contentions of the Applicant in respect of the exacerbation of an illness being a matter of concern or the right to apply for other benefits consequent upon the certified illness. The Respondent further contends that in any event there was no need for the Medical Clinic to be consulted on 8 November 2021, as the Applicant had no further due process rights to exercise in the disciplinary process. The Respondent further submits that consultation with the Medical Clinic on 8 November 2021 would not have shown that the Applicant was on certified sick leave on that day, the certification only occurring on 30 November 2021.

Interpretation of the Staff Rule

88. In order to give meaning to the Staff Rule it is necessary to consider the precise sub-requirements of the Staff Rule in more detail.

1. What is meant by “certified sick leave” and when is such ascertained or applicable?
2. What is meant by the words “disciplinary process” in the context of the Staff Rule 110.1?
3. In what manner and to what end or purpose is the consultation with the Medical Clinic?

89. What is meant by “certified sick leave” and when is such ascertained or applicable?

The meaning of certified sick leave is to be found in Staff Rule 106.2. There is a two stage process involved in being on “certified staff leave”. The first stage is that of the production “a certificate from a duly qualified medical practitioner to the effect that the staff member is unable to perform the staff member’s duties and stating the nature of the illness and the probable duration of incapacity.” Refer to Staff Rule 106.2. The second stage of the process is that of the approval of the “grant of sick leave” through the approval of the Secretary General. This is achieved through an approval process potentially involving the medical consultants in the Medical Clinic. See Staff Rule 106.2. Thus, the precondition for the operation of the Staff Rule is a formal process and must be met through these two steps before *certified sick leave* exists. Merely producing a medical certificate or notifying your supervisor of sickness is not sufficient to meet the requirements of certification. The primary purpose of the approval appears to be for accounting purposes in respect of the proper allocation of sick leave days as part of an entitlement. It is thus not unusual for such approval to be given after the occurrence of an illness.

90. What is meant by the words “disciplinary process” in the context of the Staff Rule 110.1?

It is apparent that the “disciplinary process” is just that, it is a process involving a number of phases or steps leading to the making of a final decision. The “*Disciplinary process*” is defined with reference to Articles (4) to (17) of Staff Rule 110.1. Participatory rights are given to a staff member in paragraphs (7) to (10) and (15). These rights appear under the heading *Staff member’s right to respond and to produce countervailing evidence* and under the heading of *Disciplinary Action*. Under this later heading, if the Secretary General has found that disciplinary action is required, a provisional decision as to what this action will be is made and notified to the staff member under paragraph (14). Paragraph (15) gives a right to the staff member to provide a statement in response to a provisional decision as to the sanction to be imposed. It is, in effect, a right to provide plea material as to why the provisional sanction should not be imposed. There are thus provisions where the staff member has rights to exercise and there are provisions where decisions are made. After the staff member has exercised his rights of comment in respect of the *Disciplinary Action* phase, the staff member takes no further active part in the procedures. A final decision is taken and notified. The rights of the staff member to comment and provide statements or submissions have been exhausted in full. There is no logical or legal reason for the consultation with the Medical Clinic in respect of the notification of the final disciplinary decision. It is not part of the disciplinary process. It is just the notification of the conclusion of the process, with no right for the staff member to respond in any way whatsoever to such final decision. This is clearly the only proper interpretation, unless there is some other reason for the consultation with the Medical Clinic, as is asserted by the Applicant and discussed further below.

91. In what manner and to what end or purpose is the “consultation with the Medical Clinic”?

Before discussing the other reason for the need to consult the Medical Clinic, it is necessary to further examine the actual operative clause of the Staff Rule, that is, “subject to consultation with the Medical Clinic”. The word “subject”, places a mandatory conditionality on the continuation of the disciplinary process, insofar as it still involves the staff member exercising the right to *respond and to produce countervailing evidence* (Staff Rule, paragraphs (4) to (11)) or to make a statement (Staff Rule paragraph (15)). The Staff Rule does not actually spell out the purpose or nature of the consultation, or what is to happen in respect of the information which may be gained from the consultation and to what decision it is to be actually applied. One may infer that it relates to the ability of the staff member on certified sick leave to take part in the “disciplinary process”, when there is a right to *respond and to produce countervailing evidence*. The need to consult is also based upon a presumption that the records would show, on the day the consultation with the Medical Clinic is to take place, that the staff member was on “certified sick leave”, a mandatory precondition to the operation of the Staff Rule. The Appeals Board assumes that the consultation is to take place on the day when the next step or phase involving the staff member in the “disciplinary process” is to take place. This would enable a decision to be made as to whether the staff

member was medically able to *respond and to produce countervailing evidence*, as may be a right then afforded as part of the disciplinary process.

92. There is a difficulty which is not addressed in the Staff Rule in respect of the “consultation with the Medical Clinic”, as nowhere is it contemplated how any medical information concerning a staff member is to be provided to those involved in the consultation with the Medical Clinic. All medical information, other than the fact that an illness is such that the staff member has been granted certified sick leave, is confidential. The staff member controls the use of such information. A doctor cannot release any information unless authorised to do so. The Staff Rule does not appear to have the staff member involved in the process. Paragraph 88 of Annex I to the Service Code, Framework on Ethics makes the issue of confidentiality very clear:

Duty to cooperate with the Ethics Officer, the investigative entity, and the external ethics entity

88. All staff members have the duty to cooperate with the Ethics Officer, the investigative entity, and the external ethics entity, and to provide access to all records documents and information requested by the said entities. The exceptions to this are medical records, which would not be available without the express consent of the staff member concerned, and records that are subject to confidentiality requirements.

93. This paragraph does not authorise the giving of a medical opinion as to whether a staff member is able to take part in the disciplinary process. It thus has no application to the Staff Rule, which would certainly require an opinion to be expressed by a medical practitioner. The Applicant has asserted that an opinion can be given without reference to the medical files of the staff member. This cannot be the case, as the opinion must be based upon conclusions reached after reviewing records of the staff member. An opinion provided without such review would be of no worth, as it would have no proper evidentiary basis.

94. Even applying a very generous interpretation in the favour of the Applicant in respect of the medical consultation, it is difficult to see how the Staff Rule is to function in practical terms. The failure to make proper provision for the operation of the provision makes it impossible for the process to actually be reviewed, if it were undertaken.

95. Issue of the Staff Rule having a wider purpose than the right *respond and to produce countervailing evidence*

96. The Applicant has further argued that the Staff Rule is

“designed to regulate the way in which the disciplinary process is used when a staff member avails himself or herself of an earned entitlement to sick leave, which is a social benefit guaranteed as a condition of service.”

The Appeals Board is not able to agree with this interpretation.

97. The Applicant has referred the Appeals Board to the case of *Applicant v. the Secretary General of the United Nations* UNDT/2021.091 in support of his assertion. The Applicant stated “the UN Dispute Tribunal addressed the same issue, finding that not only was consultation with the Medical Service required before allowing the disciplinary process to proceed, but that this entailed a meaningful examination of the medical issues.” The Applicant then referred to the following passage to support his contention:

“... *The Tribunal does not accept that the word of MSD on whether the Applicant was well enough to be interviewed was conclusive. There is nothing on the record to show how MSD, who had certified the Applicant’s sick leave, came to the conclusion that he was nevertheless well enough to be interviewed as a subject of an investigation. The Tribunal considers this process, as reported, fatally flawed since any medical professional who is going to comment on the availability of a person on sick leave to be interviewed should first examine or at least speak to that person about the nature of their illness. There is no evidence that they did so.*”

98. It appears that the learned judge in *Applicant* was specifically referring to the examination of the medical issues in respect of the ability of the staff member to be “interviewed as a subject of an investigation”. There is no consideration of the issue of the impact upon the staff member of a decision to terminate employment. In the case of *Applicant*, the disciplinary process was at a stage of the taking of evidence when the staff member was on certified sick leave. That is, the question posed was could the rights of the staff member be properly exercised, or not, on the basis of a certified illness, and the need to discuss the matter with the staff member? Central to the issue was the consideration of whether the nature of the illness was such as to have an effect on whether the staff member was well enough to be interviewed and thus be fairly involved in that part of the “disciplinary process”. This case was not at the decision making phase and involved the active participation of the staff member the subject of the investigation. The staff member was required by operation of the relevant rules to have considerable input. Staff members do not have a right to remain silent and their participation in interviews with investigators is mandatory. The staff member would need to be able to respond to questions properly and even have the right to challenge questions asked, suggesting lines of enquiry. For this a staff member needs to be fully *compos mentis*. When the learning in the case of *Applicant* is applied to the considerations of the disciplinary processes as contemplated in the Staff Rule it is to have the effect of ensuring that a staff member is medically fit to be able to properly participate in the disciplinary process. This participation relates either when a staff member is required to participate, or when an opportunity to respond is given. The case of *Applicant* cannot be used to support the contention of the Applicant that it supports the consideration of a social benefit or is referable to the exercise of other rights.

99. The Appeals Board finds that it also appropriate to examine the Applicants asserted interpretation by looking at the plain, literal and ordinary sense of the Staff Rule, when viewed in the overall context of the Staff Rules and the ICAO Service Code. See *Scott v. Secretary-General of the United Nations*, Judgment No 2012-UNAT-225 at paragraph 28.

100. On a plain reading, the Staff Rule does not mention sick leave entitlements or any rights to possible consideration of other benefits, being considerations to be taken into account as part of the disciplinary process. It mentions merely “subject to consultation with the Medical Clinic”. It is clear that the purpose of the disciplinary process is to examine alleged misconduct. If it is found to exist there are a number of decisions which can be made in respect of the outcome. Such decisions include discharge from employment or summary dismissal under Staff Regulation 10.1 (g) or (h) respectively, as set out in the ICAO Service Code. In both cases, there is no right to claim full or partial disability or other benefits which exist as part of the employment benefits when one is employed. All such rights come to an end upon separation from the Organisation, if not already [in] processed before the separation. Anything to the contrary would have to be specifically provided for, it is not.

101. The Applicant has referred to the judgment in *Sarrouh v. the Secretary General of the United Nations*, 2017-UNAT-783 where it was observed that “*The Applicant remained on sick leave from February 2014 until 31 July 2015 after which she was separated from service.*” This is not a relevant case, as it involved a Secretariat staff member and did not involve a dismissal or separation at the conclusion of

a disciplinary process, rather it involved an abolition of post when the fixed term staff member was on sick leave. ST/AI/2005/3 was applicable to that staff member. This United Nations Administrative Instruction does not, in any event, apply to ICAO staff.

102. The case of *Archana Patkar v. Secretary General of the United Nations Judgment* No. 2021-UNAT 1173 makes it clear that sick leave entitlements do not outlive the employment of a staff member. That case involved an appellant who was terminated while on sick leave, at the expiration of her fixed term contract. The appellant, who had worked for UNOPS argued that ST/AI/2005/3 applied and that she had a right to remain employed until the expiration of her sick leave. It was determined that ST/AI/2005/3 did not apply to UNOPS, as it was an agency of the UN and not part of the Secretariat. The appellant in that case further argued that the UNOPS Staff Rule 6.2, in respect of sick leave, applied to all sick leave notwithstanding that the underlying employment contract was at an end. See paragraphs 16, 26, 27 and 42 to 49 of the judgment.

103. The UNOP Staff Rule 6.2 provided that: “(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.”

104. The ICAO Staff Regulation 6.2 provides “Staff members who are incapacitated from the performance of their duties by illness or injury, or whose attendance is prevented by public health requirements, shall immediately inform their supervisor. They moreover have to produce evidence acceptable to the Secretary General of such incapacity. In such case, the staff members shall be granted sick leave in accordance with the entitlements at Regulation 6.3.”

105. Of the UNOP provision, UNAT noted that “The ordinary reading of the provision is that entitlement to sick leave is conditioned on the staff member having duties to perform and work to attend to”. That is, there must be a continuing employment arrangement in place for one to receive the benefits of employment, once the contract is at an end, for whatever reason, the entitlement to the sick leave, as a benefit, cease, as there are no duties to perform, as the relationship of employer and employee is at an end. The ICAO Staff Regulation 6.2 is to the same effect. Once discharged or terminated from employment there are no further duties to perform. The claimed right for the Applicant to be considered on sick leave to 1 December 2021 does not exist.

106. Further, no mention of the rights claimed by the Applicant is to be found in Article VI of the ICAO Service Code, which deals with both Pensions and Sick Leave under the heading “Social Security”.

107. It is noted that the ICAO Staff Rule 106.2 contains no right to remain with the Organization until the exhaustion of sick leave. The Applicant has stated that the right existed prior to amendments made to the Staff Rules on 23 December 2020 to introduce the Staff Rule. Such would have to specifically refer to discharge for misconduct and not rules of general application. The Appeals Board has been unable to locate such a rule or regulation, even of general application. The Applicant has asserted such rule existed, but has not identified it to the Appeals Board. In any event, if such had existed, they would no longer be applicable given that they would not have applied to the disciplinary process in which the Applicant was involved.

108. An examination of Article IX “Termination” and Article X “Disciplinary Matters” of the ICAO Service Code discloses no mention or contemplation of continuing benefits after termination, and none can be inferred.

Conclusion in respect of the beneficial rights argument of the Applicant.

109. The Staff Rule is clearly directed to the exercise of due process rights by a person the subject of the disciplinary process. It is not directed to sick leave and its exhaustion or otherwise. It is not directed to being able to remain in employment so that some other benefit, such as an invalidity pension may be claimed. It is not directed to any consideration of the health of a staff member before a decision to terminate for misconduct is made. There is nothing to support the contentions of the Applicant. The Staff Rule is not disclosed, either directly, or in any contextual manner, to be “*designed to regulate the way in which the disciplinary process is used when a staff member avails himself or herself or an earned entitlement to sick leave, which is a social benefit guaranteed as a condition of service.*” Importantly, if this were such a purpose or designation in respect of the making of the final decision, then it would have to be provided for a specific consideration to be taken into account by a decision maker before reaching that a decision to discharge or terminate a staff member for misconduct. This is not provided for in any rule or regulation the Appeals Board has been able to locate and the Applicant has not identified such. There must be certainty in the decision making process, as all steps in the process need to be specified so that compliance with such can be clearly ascertained.

Finding as to the application of the Staff Rule

110. The Appeals Board has some very real concern about the operation of the Staff Rule. Notwithstanding these concerns, assuming it is valid, the Appeals Board finds that on a plain reading of the Staff Rule and having examined the sources of alternative interpretations, the purpose of the Staff Rule is that when a staff member is on certified sick leave, there is a requirement to consult with the Medical Clinic before the giving of any required notice providing for the participation of a staff member in the disciplinary process and that such is ensure that the staff member is, or is not, well enough to exercise any due process participatory rights or to comply with any obligations in respect of the participation in the disciplinary process. This would include the investigative stage as well. If there are no rights to be exercised by the staff member then there is no requirement to consult the Medical Clinic, as the staff member is no longer involved in the disciplinary process, in the sense of having a participatory right. The need to consult the Medical Clinic cannot be considered as an absolute obligation where no purpose to be served by undertaking the consultation and the action to be taken is only the final notification of the final and determinative decision. The Staff Rule is to be read in such a manner as to consider the words “disciplinary process” as being referable to that part of the process where the staff member may participate in the “process”. To interpret the Staff Rule otherwise is to directly interfere with the duties of the Secretary General to make a final decision in a disciplinary matter.

If there had been a clear breach of the Staff rule, what would have been the consequence?

111. It is appropriate, in any event, to examine the issue of damages, if the Appeals Board were to be wrong in its conclusion. The Respondent has drawn the attention of the Appeals Board to *Nyakossi v. Secretary General of the United Nations*, Judgment No. 2012-UNAT-254, para. 19 where it was noted in respect of a claim for compensation:

[n]ot every violation of a staff member’s legal rights or due process rights will necessarily lead to an award of compensation. Where the staff member does not show the procedural defect ‘had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences’ or harm from the procedural defect.

112. Thus, even if there had been a breach of the rights of the Applicant in respect of compliance with the Staff Rule, the Appeals Board would have needed to determine whether the alleged non-compliance would have been such as to prevent the Applicant from exercising his rights and or causing him

damage such that there should be rescission of the decision to discharge him from employment. Compensation should not be awarded.

113. As observed above, there were no further rights for the Applicant to exercise. He was thus not prevented from exercising anything. He had merely to await the final decision following the submission that he filed on 5 October 2021. This process proceeded without complaint from the Applicant at the time, and without a request for review in respect of any possible breach of the Staff Rule in respect of the notice given to him on 21 September 2021. Should the Applicant's interpretation of the Staff Rule be accepted, the Secretary General would remain entitled to take any decision he saw fit after a consultation within the limits of what would be possible bearing in mind medical confidentiality, and there is no reason to believe that there would have been any difference in the way in which the process proceeded.

114. Further, given the finding that there is no interpretation open to the Staff Rule that there are considerations of the social benefit and the rights of the staff member in respect of the ability to claim a disability pension or the like, there has been no prejudice to the Applicant by a failure to comply with the requirement to consult the Medical Clinic, as he has completed in full the exercise of his rights provided for as part of the disciplinary process.

Other complaints of the Applicant

115. Bias and other complaints have not been made out, and were not fully argued in any event. There is no evidence other than that the Secretary General was carrying out duties in respect of which he had an obligation and that he carried them out in the manner provided for in the Staff Rules and the Service Code of ICAO. There is a presumption of regularity which has not been rebutted by any of the material put before the Appeals Tribunal. See *Rolland v. Secretary General* Judgment No.2011-UNAT-122 at paragraph 26 and *Krioutchov V. Secretary General* Judgment No. 2021-UNAT-1103 at paragraph 29. There has been no abuse of authority as alleged, rather the authority has been properly exercised. The complaints about the manner of delivery of the notification to the Applicant on 8 November 2021 are not matters referable to the validity of the decision given on that day. They may, however be agitated in respect of the actual decision making processes, which will be considered in the other applications of the Applicant.

Observations concerning the Staff Rule and its operation

116. The Appeals Board has expressed concern about the operation of Staff Rule 110.1(11). The rule requires "consultation with the Medical Clinic", but there is no discussion in the Staff Rule as to the nature of the consultation and how this is to be undertaken. It is noted that the heavily redacted Clinical notes provided by the Applicant to the Appeals Board and coming from the Medical Clinic have the following notation "This document is confidential and cannot be accessed by users referred to therein". The medical information which may provide an assessment of whether a disciplinary process should be delayed or not, is, by its very nature, "confidential". It is apparent that without a breach of confidence that the Medical Clinic could not have provided any useful information as a result of the consultation. There is nothing in the Staff Rule which appears to amount to a contractual waiver by a staff member of the right to confidentiality, as such would have to be quite specifically provided to form part of the employment contract. There is nothing in the Staff Rule which directs obtaining the consent of the staff member to the giving of an opinion. The actual implementation of the Staff Rule is entirely missing. No procedures are provided which could be the subject of review or examination. The Appeals Board is left to wonder the precise nature of the consultation? It appears that the matter is entirely uncertain and may not be capable of operation, as currently formulated. The Secretary General, and those advising him, are asked to review the Staff Rule so as to provide for its certainty of operation, especially in circumstances where it appears the

norm, and it is actually provided for, that the approval of certified sick leave is given retrospectively. Clarity in respect of the operation of the Staff rule is essential, as it involves the exercise of due process rights of staff members. In this Application, if the Applicant had been denied a participatory right in respect of the disciplinary process due to sickness which was retrospectively approved and certified, then the effect of such retrospectivity would have been of great import, given the apparent purpose of the Staff Rule in respect of participatory rights. Given the findings, the Tribunal did not have to consider this matter or the precise operational nature of the Staff Rule. Rules of ICAO need to be very clear and transparent of operation. They form part of the employment contract of staff. Invalidity, ambiguity and uncertainty have no part in an employment contract, especially where the exercise of rights by an employee are concerned. Certainty and clarity are essential.

Conclusion

117. The Staff Rule applies only to give a staff member subject to the disciplinary process a right to exercise due process rights, that is to *respond and to produce countervailing evidence*. The Staff Rule does not provide for additional purposes as asserted by the Applicant.

118. That the Staff Rule provided no obligation on the Respondent to consult with the Medical Clinic on 8 November 2021, as the disciplinary process had entered a phase that did not call for the participation of the Applicant, giving no rights to *respond and to produce countervailing evidence*.

119. That there was no requirement for the Respondent to take the medical condition of the Applicant into account when making or communicating the decision to discharge the Applicant from his employment with ICAO.

120. That the rights of the Applicant to have applied for a disability pension or other like matters were not considerations valid to the decision to discharge the Applicant from employment following a finding of misconduct.

Order

For the reasons above expressed, the Application is dismissed in full.

Dated this 20th day of September 2022



Judge Rowan Downing QC

President

Entered in the Register on this 20th September 2022



Arie Jakob

Registrar