



Case No.: UNDT/NY/2012/078

Judgment No.: UNDT/2012/145

Date: 1 October 2012

Introduction

1. By application filed with the New York Registry of the Dispute Tribunal on Friday, 21 September 2012, the Applicant, a staff member of the Human Resources Policy Service, Office of Human Resources Management (“OHRM”), Department of Management (“DM”), sought a suspension of action of the termination of her permanent appointment due to health reasons as a result of the 25 April 2012 approval by the United Nations Staff Pension Committee (“UNSPC”) of her disability benefits.

2. The Respondent was duly served and directed to file a reply by 10 a.m. on Wednesday, 26 September 2012. As this matter was filed on urgency basis, I deemed it imperative to call a case management hearing on the morning of Friday, 28 September 2012, in order to decide the future conduct of the matter.

Background

3. On 20 May 2011, the Applicant sustained spinal and knee injuries following an elevator accident on premises occupied by the United Nations. This incident resulted in the Applicant having to undergo medical treatment and surgery. The Applicant was placed on medical leave effective 23 May 2011.

4. On 15 October 2011, the Applicant submitted a claim for service-related injuries to the Advisory Board on Compensation Claims (“ABCC”).

5. On 3 February 2012, the Applicant met with a doctor from the UN Medical Service Division (“MSD”) who assessed her medical status at the time and determined that “according to [her] current medical condition, [she] may not be able to return to work anytime sooner”.

6. On 17 February 2012, in response to a request from the Applicant, MSD informed the Applicant that they were extending her sick leave period until 31 March

2012 for the purpose of enabling her to pursue further treatment outside the United States.

7. On 21 February 2012, the Applicant informed MSD that she would be admitted for treatment in India from 25 March 2012 until 14 April 2012, following which she would need to be on complete bed rest for two weeks. The Applicant also informed MSD that she expected to return to the United States on 30 April 2012.

8. On 25 April 2012, the UNSPC determined that the Applicant was “incapacitated for further service and consequently entitled to disability benefit”. On 26 April 2012, OHRM informed the Applicant that, as a result of the UNSPC’s decision, they would soon be processing her separation from service via the preparation of a personnel action form.

9. On 1 May 2012, the United Nations Joint Staff Pension Fund (“UNJSPF”) addressed a letter to the Applicant informing her of the 25 April 2012 decision that had been taken by the UNSPC.

10. On 5 May 2012, upon her return from her previously approved leave for the purpose of obtaining medical treatment abroad, the Applicant informed OHRM in writing that she had not yet opted for disability and that she would be scheduling an evaluation with MSD.

11. However, on 10 May 2012, during her consultation with the MSD doctors, the Applicant was informed that her long-term disability benefits had been approved and would become effective following the expiry of her various leave entitlements following which her permanent appointment would be curtailed.

12. On 15 May 2012, the Applicant was informed by the Deputy Executive Officer (“DEO”), DM, that she would have exhausted her entitlement to 195 days of sick leave with half pay by 30 September 2012, though she would be able to maintain

1 October 2012 her remaining annual leave balance constituting of 8.5 days would take her up to 11 October 2012 on which day “her separation on disability benefit would be effected, as per the approval already obtained from the PFC [Pension Fund Committee] on MSD’s recommendation for [her] disability benefit”. The DEO also informed the Applicant that “depending on the decision of the ABCC [her] separation cob date may change if any special sick leave credits are awarded”.

13. On 22 August 2012, the ABCC requested additional information and documentation in support of the Applicant’s claim. The requested documentation was provided to the ABCC on 6 September 2012. A final decision regarding the Applicant’s claim is currently tentatively scheduled to be rendered following the ABCC’s next meeting which is to be held in November 2012.

Applicant’s submissions

14. The Applicant’s principal contentions may be summarized as follows:

Prima facie *unlawfulness*

a.

b. As a result of the unauthorized action by the MSD, the Applicant requests that “no unilateral action on the termination of her permanent contract be taken on the grounds of diPag487036(Ju).8()-5.1(n)1(phasistin)6.321 -1.4-26.4 5w00

h. Should the ABCC award her additional sick leave or annual leave credits, the Applicant would be able to extend her permanent appointment thereby providing her with the opportunity to fully recover from her injuries and then return to work on a full-time basis.

Respondent's submissions

15. The Respondent's principal contentions may be summarized as follows:

Receivability

a. The Applicant has not exhausted the applicable administrative procedures with regard to contesting the findings of MSD. Indeed, as notified on 24 May 2012, "the only way to challenge the decision of the Pension Fund is to request a Medical Board to review [the] case";

b. The Dispute Tribunal does not have jurisdiction over decisions of the UNJSPF as such decisions fall within the purview of the United Nations Appeals Tribunal. Furthermore, the UNJSPF has its own review process;

c. The Applicant identifies the contested decision to separate her as having been taken on 25 April 2012. The statutory deadline to request a management evaluation of that decision would therefore be 25 June 2012, however, the Applicant waited until 21 September 2012 to file an application with the Tribunal. The application should therefore be dismissed as it is not receivable due to being time-barred;

d. With reference to the ABCC decision, this is not an administrative decision within the meaning of the Dispute Tribunal's Statute. Furthermore, there is no ABCC recommendation or decision in this case and no final administrative decision has been i

during the pendency of a management evaluation. This is a requirement which the Applicant does not meet thereby further rendering this application not receivable.

16. Furthermore, the Respondent contends that the Applicant does not satisfy the requirements for a suspension of action, namely, *prima facie* unlawfulness, urgency and irreparable harm.

Prima facie Unlawfulness

a. The Applicant has not, nor does she appear to be, contesting the lawfulness of the decision;

Urgency

b. This is self-created urgency as the UNSPC decision of 25 April 2012 was communicated to her by OHRM on 26 April 2012;

c. The Applicant also waited until she only had 21 days of sick leave remaining to request a suspension of the UNSPC decision pending the recommendation of the ABCC;

Irreparable damage

d. There is no showing that the harm that may be suffered by the Applicant could not be adequately compensated by damages.

Consideration

17. The Applicant seeks an order from the Tribunal for a suspension of the decision to separate her from service following the expiration of her leave entitlements as a result of a finding by the UNSPC that she is “incapacitated for further service and consequently entitled to disability benefit”. The Applicant seeks “to be maintained on full payroll status until the ABCC makes a final decision”.

Applicable law

18. Article 2.2 of the Dispute Tribunal Statute states that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

19. Article 10.2 of the Dispute Tribunal Statute states that:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

Receivability

20. Article 2.2 of the Dispute Tribunal's Statute provides an applicant with a measure of urgent interim relief in the form of a suspension of the implementation of a contested administrative decision, pending the review of the matter via management evaluation.

21. Art. 10.2 of the Dispute Tribunal's Stat

22. In terms of the above provisions, the Tribunal can only consider suspending the implementation of a decision pending management evaluation, or grant interim relief once a substantive appeal has been filed before it.

23. In the present case, the Applicant submits that the administrative decision being contested is the decision to separate her from service upon the expiry of her various leave benefits and entitlements as a result of the 25 April 2012 finding by the UNSPC, based on the MSD's recommendation, that she was incapacitated from service.

24. Whether the decision being contested is the one taken by OHRM to separate the Applicant from service, or the earlier decision taken by UNSPC, or the pending decision of the ABCC, there is currently no case that is pending management evaluation. There is also no substantive application before the Tribunal in relation to which this request for interim relief could be considered. In any event, art. 10.2 of the Dispute Tribunal's Statute provides that a suspension of the implementation of the contested administrative decision may not be granted in cases of termination, which includes separation for reasons of health and incapacity for further service (see staff rule 9.6(c)(iii)). In this regard the application stands to be dismissed.

25. As expressed during the 28 September 2012 oral hearing, there are processes in place to challenge the medical findings of MSD and the decision of the UNSPC (see section K) that resulted in OHRM's decision to separate the Applicant from service. Although the Applicant alleges that her protests or interventions have not

amicable solution. In particular, this case being a no-fault termination, and in light of the Applicant's long service history of nearly 20 years, and her contention that she has documentation that Respondent's Counsel may be unaware of, the Tribunal invited the parties to explore avenues such as mediation or informal inter-party discussions. The Tribunal appreciates any efforts that Counsel may undertake in this regard.

Conclusion

26. In light of the above findings, the application for suspension of action is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of October 2012

Entered in the Register on this 1st day of October 2012

(Signed)

Hafida Lahiouel, Registrar, New York