UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2010/028/ UNAT/1664
	Judgment No.:	UNDT/2011/209
	Date:	8 December 2011
	Original:	English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

SHANKS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Teresa Lopez Posse, UNDP

Introduction

1. The Applicant was an Administrative Associate in the United Nations Development Programme ("UNDP") who was seriously injured in a motor vehicle accident en route to work. She was hospitalised and remained on sick leave for many months. Following an assessment by the United Nations Medical Services Division ("MSD"), the United Nations Joint Staff Pension Fund ("UNJSPF") found her to be incapacitated for further service for which reason UNDP separated her from service. The Applicant appealed the decision of UNDP to terminate her contract.

The scope of the present case

2. The Applicant conceded that the issue of the recommendation of MSD that the Applicant was medically unfit for further service is not receivable as a substantive matter before the Tribunal as, prior to her separation from service, she did not request a Medical Board or otherwise a review by an independent practitioner. Neither did she request an administrative review of this decision under former staff rule 111.2.

3. Following a substantive hearing, the Applicant acknowledged that she was no longer seeking to attribute any bad faith to any of the relevant decision-makers but alleges that they failed to act with the requisite due diligence involved in the impugned administrative decision.

4. Accordingly, the principle issue of the present case is whether it was proper for the Respondent to terminate the Applicant on the grounds of medical disability.

Facts

5. The following facts are taken from a joint statement of facts submitted by the parties before the hearing as well as evidence given at the substantive hearing by the Applicant and her witness, Dr. Alex Moroz, the attending private physician who supervised her rehabilitation at the Rusk Institute of Rehabilitation Medicine, New York University, and by the three witnesses for the Respondent: Dr. Agnes Pasquier-Castro, MSD; Mr. Yiping Zhou, the Applicant's supervisor and Director, Special Unit for South-South Cooperation ("SSC"), UNDP; and Ms. Leonor Lee, then Human Resources Business Advisor, Office of Human Resources ("OHR"), UNDP.

6. The Applicant first joined the United Nations in June 1992 as an Administrative Assistant. Following several renewals and promotions, on 1 November 2003, she joined SSC at the G-6 level in the position of Administrative Associate in New York.

7. On 27 September 2004, a taxi in which the Applicant was travelling to work was hit by a United States Postal truck. The Applicant sustained serious injuries and was admitted to hospital. While there, the Applicant was visited by some colleagues from SSC who, under the instruction of the SSC Director, also handed her a Results and Competency Assessment ("RCA") of her past performance at SSC for her signature. After taking advice, the Applicant did not sign it as she was undergoing serious medical treatment. At the substantive hearing the Respondent accepted that, due to her acute condition, the Applicant should never have been handed over the RCA at that time for her signature. The SSC Director, however, stated that her performance was praised in the RCA as one of the best in the Unit.

8. In December 2004, she was released from the hospital for home-care and in January 2005, began daily outpatient rehabilitation overseen by Dr. Moroz for 8 hours per day, decreasing progressively to 3.5 hours. After treatment from a number of treating therapist, from January to March 2006, she underwent a vocational

programme at the Rusk Institute to assess her readiness to return to work, which included simulations of work situations relevant to the Applicant.

9. From the date of the accident until 10 June 2005 the Applicant was placed on sick leave with full pay. Upon exhaustion of her entitlement to sick leave with full pay, she was placed on sick leave with half pay combined with annual leave from 11 June 2005 until 8 December 2005, followed by sick leave with half pay from 9 December 2005 until 29 March 2006. Upon exhaustion of all her sick leave entitlements, the Applicant was placed on special leave with half pay from 30 March 2006.

10. The Applicant's former supervisor, Mr. Zhou, the SSC Director, told the Tribunal that, during the entire period of her incapacity, her work duties and functions were redistributed among the existing staff of the SSC, particularly to another Administrative Associate. In effect, the Applicant's position was kept open awaiting her return and not filled until 2009 when her position was combined with that of the Administrative Associate who in her absence had shared most of her tasks with other staff members and who later received a promotion to the P-3 level.

11. Dr. Moroz gave regular medical certificates to the SSC Director and to MSD, including to Dr. Pasquier-Castro in support of extensions of the Applicant's leave. Materially, he gave a follow-up report on 10 February 2006 which concluded that: "I expect that [the Applicant] will be ready to return to work by March 29 2006".

12. In response to this message, on 7 March 2006, Dr. Serguei Oleinikov, Deputy Director, MSD, informed OHR that "according to medical certificate received from [the Applicant's] attending physician, [the Applicant] may return to work by 29 March 2006. Her sick leave has been approved through the end of March 2006". That same day, OHR advised the SSC Director:

> Please see message below from Dr. Oleinikov. If you wish [MSD] to reconsider her case or to review her medical condition more in detail, kindly

> advise. Otherwise, [the Applicant] is cleared to return to work on 29 March 2006.

13. On 13 March 2006, Dr. Oleinikov advised Ms. Lee that considering the Applicant's long illness she would have to be cleared by MSD to return to work.

14. When the Applicant was advised of this, she made an appointment with MSD and saw Dr. Pasquier-Castro on 3 April 2006. Dr. Pasquier-Castro told the Tribunal that before this appointment she read the Applicant's file, but would not have seen the 10 February 2006 letter from Dr. Moroz as she did not consider it important to check the previous medical reports. The reason for her seeing the Applicant was because she had exhausted her entitlements to sick leave.

15. Dr. Pasquier-Castro did not undertake a medical evaluation of the Applicant on 3 April, but discussed with her the two options proposed by OHR. These were either to request disability or to take special leave without pay. Dr. Pasquier-Castro expressed reservations about the latter option considering the Applicant's difficult financial situation but did not inform the Applicant that if she was granted disability she would be terminated from her employment with UNDP. Although the Applicant told her that she was not sure that she wanted to stop working, Dr. Pasquier-Castro did not discuss with her the possibility that she could resume her duties gradually and on a part-time basis. Dr. Pasquier-Castro told her she could not evaluate her without Dr. Moroz's assessment but advised her about the possibility of filling a claim for her injuries from the accident with the Advisory Board on Compensation Claims ("ABCC"), and promised that she would consult ABCC regarding the claim as it should normally have been submitted within some weeks of the accident.

16. The Applicant explained that she could not get Dr. Moroz's assessment on her capability to return to work at that time, since he was at a conference and the results from her vocational training program at the Rusk Institute had not yet been finalised.

17. After this meeting, Dr. Pasquier-Castro concluded that the Applicant was not fit for work in the foreseeable future. Her opinion was based on the Applicant's

ongoing rehabilitation treatment; what the Doctor described as her chronic depression; a carpal tunnel syndrome issue; and her short-term memory problems which the Doctor believed were demonstrated by the fact that the Applicant took notes and relied on a note book during their meeting. Under cross-examination the Doctor accepted that taking such notes was not necessarily a result of memory impairment, but could also be a compulsive habit. Dr. Pasquier-Castro admitted that she had not been in contact with the Applicant's workplace, SSC, to learn more about her functions but based her opinion on her general knowledge about working at the United Nations.

18. When questioned about her diagnosis of chronic depression and anxiety, Dr. Pasquier-Castro explained that this came from a consultation with the Applicant in 2003. Under cross-examination she accepted that the Applicant did not in fact suffer from a chronic condition of this sort. The Applicant explained to the Tribunal that, in 2003, she had consulted Dr. Pasquier-Castro for her assistance to obtain sick leave for stress as her mother was dying and her office had refused her request for leave to take care of her family.

19. On 4 April 2006, Dr. Pasquier-Castro phoned Dr. Moroz. He told her that he thought that it was unlikely the Applicant would return to her previous level of health as far as cognitive impairment was concerned and believed that she might be better off going on a disability benefit. Dr. Moroz explained to the Tribunal that the spirit of the conversation was about the options for the Applicant and what would suit her best if she were not to return to work. At that stage, he did not realise that taking disability meant that she would be terminated from her employment as no one from the United Nations had explained this to him; instead, he thought that it would result in her being provided with monthly stipends and continued health care coverage.

20. On 7 April 2006, Dr. Oleinikov, MSD, advised the Copenhagen office of OHR that MSD was "recommending [the Applicant] for a disability benefit", and

requested OHR to "[p]lease make sure that UNDP forwards a similar request to the Secretary of the Pension Board".

21. On 10 April 2006, Dr. Moroz advised MSD in writing:

> I have seen [the Applicant] the day after we spoke on the telephone. We reviewed her medical history and progress so far as well as the options available to her under the [United Nations] guidelines that you explained to me. [The Applicant] took a few days to think it over and we agreed that the best course for her would be the long-term disability. She will not reach her baseline level of functioning and will not be able to perform her duties without limitations.

22. Also on 10 April 2006, OHR advised the Applicant of MSD's decision to recommend her for a disability benefit to the United Nations Staff Pension Committee ("UNSPC"), which by delegation from the Standing Committee has the power to determine incapacity for the purpose of award of disability benefits.

23. The same date, the Applicant responded to OHR: "I hereby confirm that you may proceed as per the recommendation of the [MSD] regarding my disability". The Applicant told the Tribunal that OHR had requested her to revert with precise language reaffirming that MSD could proceed, but that OHR had not explained her that the consequence would be of termination of her employment with UNDP if she was found to be disabled. She became aware of that only later the same day after speaking to a colleague.

24. On 11 April 2006, the Copenhagen office of OHR submitted a request to UNSPC "for the award of a disability under Article 33 of the [UNJSPF] Regulations". The email was copied to a number of United Nations staff, including Ms. Lee (who was based in New York) and appears to have been sent at 11:50 a.m., Copenhagen time or 5:50 a.m., New York time. The Applicant was not copied on the email.

25. Also on 11 April 2006, after having been informed of the implications of taking a disability allowance by her colleague, the Applicant changed her mind and

decided instead that she wanted to return to work. She therefore wrote to Ms. Lee at 11:50 a.m., New York time, as follows:

> I know I sent an email regarding [recommendation for disability] yesterday, I just want to confirm that there is absolutely no other option available to me. Is there a possibility that I could return to work on a part-time basis/or with light duties with gradual progression.
>
> The only two options that were offered were: Special leave without pay or separation with disability.

26. On the same day at 1:22 p.m., the Applicant wrote Ms. Lee another email stating:

> I have been thinking about the recommendation for disability and would really like to explore the possibility of gradually returning to work on a parttime basis for a short period and if I really cannot cope then take the disability. I really would like to give this a try before fully accepting the recommendation for disability.

27. The Applicant also spoke to someone at MSD and tried to speak to Dr. Moroz and another professional involved in her rehabilitation to obtain the information required to provide her with the proper clearance.

28. In response at 4:19 p.m. (New York time) on the same date, after OHR Copenhagen's email to UNSPC, Ms. Lee advised the Applicant that "any return to work on part-time basis/or with light duties with gradual progression has to be recommended/cleared by [MSD]". She informed the Applicant that MSD had instead recommended disability to the UNSPC. As for the procedure, she explained that, "[f]ollowing consideration of the request and the advice of the UN Medical Director [i.e., the head of MSD], [UNSPC] will determine whether or not you are incapacitated within the meaning of Article 33(a) of the UNJSPF [rules and regulation]". She suggested the Applicant to "speak to the [MSD] on their recommendation for disability", explained to her that "[s]pecial leave without pay will not be appropriate when there is a recommendation for disability". She also encouraged her to "revert to [UNDP] after [she had] spoken to [MSD]".

29. Ms. Lee did not tell the Applicant that OHR's Copenhagen office had already emailed UNSPC on the same date recommending the Applicant for disability nor did she alert her that she would need to take action to prevent UNSPC from declaring her disabled. She told the Tribunal that it was not for UNDP or OHR to contact the UNSPC; normally MSD would do this.

30. On 18 April 2006, on the advice from Dr. Pasquier-Castro given on 3 April 2006, the Applicant submitted a claim to ABCC for compensation under Appendix D to the Staff Rules for the injuries that she sustained on 27 September 2004. In her claim, the Applicant described the nature of the injuries and indicated that "all of the above injuries continue to cause pain and limitations". The Applicant explained to the Tribunal that these claims for injuries were made regarding her condition as it was in 2004, immediately after the accident, when she was partly paralysed and could not read or write, and that they were not related to her much improved condition in April 2006.

31. On 25 April 2006, having spoken to someone at the UNSPC who told her that her disability was up for consideration the next day, the Applicant emailed Ms. Lee, OHR, copying Dr. Sudershan Narula, the then United Nations Medical Director, (the Director), and Dr. Moroz:

> I would appreciate your assistance to have my disability hearing postpone[d] until I am able to reach [Dr. Moroz] my doctor at NYU medical center for further clarification on my medical status.
>
> Thanking you in anticipation for your urgent assistance.

32. In Dr. Narula's email response, apparently of the same date, copied to Ms. Lee and Dr. Moroz, she pointed out to the Applicant that the implications of UNSPC postponing its determination would be that, as her sick leave was exhausted, she would be placed on leave without pay and this would have an impact on her health insurance. She said, "I wanted to tell you that before I make a request that we should not present your case tomorrow".

33. The Applicant immediately responded to Dr. Narula, copying Ms. Lee and Dr. Moroz stating that, "[b]ased on the progress I have made so far, I would like to be given the opportunity to return to work with gradual progression with the possibility of medical re-evaluation within 1 month".

34. On the same date, 25 April 2006, Dr. Narula replied by email, copying Ms. Lee and Dr. Moroz, "if your attending physician is now of the opinion that you could return to work part-time, we will have no objection".

35. On 26 April 2006, at 11:55 a.m., Dr. Moroz sent an email to MSD stating: "[the Applicant] can return to work with specific time and activity limitations. I will have written recommendations ready by the end of the week".

36. However, UNSPC was not asked to postpone its consideration of her disability and, at a meeting later on 26 April 2006, based on the information before it decided that the Applicant met the established criteria for incapacity and that she was thus entitled to a UNJSPF disability benefit under art. 33 of the UNJSPF regulations and rules. Dr. Narula was present at this meeting, but did not make any comments about Dr. Moroz' declaration that the Applicant was fit to return to work with certain limitations or her wanting to return to work and therefore not being declared disabled. OHR did not take any action or make any efforts to ensure that Dr. Narula would put forward to UNSPC the Applicant's request to have the hearing of her case postponed.

37. After receiving the results from her vocational training program, on 27 April 2006, Dr. Moroz reaffirmed her capacity to return to work as of 1 May 2006 subject to the following limitations:

> a. [The Applicant] should begin with reduced schedule consisting of four hours a day, four days a week (total of 16 hours weekly);
> b. Frequent breaks should be incorporated in the workday (15 minutes every two hours) as needed;

c. A working environment with the least amount of noise and other distractions should be provided;

d. Assignments with clear directions and a timeframe for expected date of completion should be provided;

e. A telephone headset should be provided if [the Applicant's] responsibilities will include using a telephone;

f. A lumbar rest needs to be attached to her office chair;

g. One assignment at a time will allow [the Applicant] to focus on the task fully;

h. [The Applicant] should continue using her hand orthoses when using computer keyboards.

38. Dr. Moroz told the Tribunal these limitations were merely suggestions and that they could be adapted to the specific circumstances of the Applicant's work situation. For instance, when asked in evidence whether the Applicant could work 20 hours a week, which is the minimum amount of hours that UNDP allows for part-time employees, he said that this would have been feasible.

39. He also stated that he expected that the Applicant "[would] be able to work progressively longer and perform progressively complex assignments".

40. The Applicant wrote to Mr. Zhou, the SSC Director, telling him she had been cleared to work from 1 May 2006, but was waiting for MSD to issue medical clearance. When Mr. Zhou told her he was waiting for the final decision, she wrote to Dr. Narula to follow-up on her medical clearance following the advice from Dr. Moroz. Mr. Zhou did not contact Dr. Moroz or MSD to inquire about the suggested accommodations. After the Applicant's accident, Mr. Zhou had only contacted her once, which was when she was hospitalized and with the purpose of having her sign her RCA.

41. The Applicant was invited to a meeting on 15 May 2006, with Ms. Lee and Dr. Narula, to discuss the option of returning to work on a part-time basis. Ms. Lee told the Tribunal that she probably knew the outcome of the UNPSC decision before this meeting. Dr. Narula advised the Applicant to think carefully about what disability

meant, including the protection of her after-service health plan. In Ms. Lee's evidence, she said she did not think the work accommodations suggested by Dr. Moroz were possible, but that she had decided to go back to the SSC to find out the possibility of a return. She did this by sending an email to the SSC director, Mr. Zhou, directly after the meeting.

42. On the same day SSC advised OHR:

> Based on Dr. Moroz' medical certification, the management has reservations to provide [the Applicant] this kind of arrangement as this will not be fair for both (the staff member as well as the corporate) as there is no 100 % assurance that [the Applicant] will fully recover. The situation might be detrimental in the end, as we cannot ensure that we will always be sensitive to her needs as the work will demand focusing on what we will commit to the Organization and to the Member States. For your information, most of the function that is [sic] assigned to her would require a lot of computer usage (using the Atlas system budget forecasting to name a few), a lot of telephone dealings, fully blown conference room renovation, and a lot of distribution of publications via website and hard copies.
>
> Since this is becoming to be a HR [sic] issue more than a management one, we would like [OHR] to advice [sic] the [SSC] management on how to move forward given the commitment we are about to report and pledge to the Executive Board and the Member States as well as the pending reprofiling because of the expanded activity set in the vision of the Director.

43. On 17 May 2006, the Applicant was advised by UNJSPF that the "UNSPC [had] determined [her to be] incapacitated for further service and consequently entitled to a disability benefit".

44. On the same date, Ms. Lee advised the Applicant that SSC had "reservations" about her wish to return to work on a part-time basis given the limitations imposed by Dr. Moroz as well as the "job requirements" and "work situation/work pressure" at the office.

45. On 19 June 2006, the Applicant requested OHR to take all necessary steps to arrange her return to work as early as possible in accordance with Dr. Moroz's certification that she was capable of returning to work from 1 May 2006.

46. However, in a letter dated 22 June 2006, which was copied to, *inter alia*, Dr. Narula and Mr. Zhou, Ms. Lee advised the Applicant that:

> Since the [UNSPC] has determined that you are incapacitated for further service and you were informed of this decision on 17 May 2006, UNDP as your employer is bound by it and has no other choice than to comply with it. We are therefore proceeding with the implementation of this decision and the termination of your appointment with UNDP for health reasons in accordance with UN [S]taff [R]egulation 9.1 (a).
>
> If you do not agree with [UNSPC's] decision, you can appeal it in accordance with Section K of the UNJSPF Regulations and Rules. Your appeal is against [UNJSPF], not against UNDP. I am attaching Section K of the UNJSPF Regulations and Rules for your information.

47. On 26 June 2006, in a letter from the Manager, Benefits & Entitlements Services, OHR, it was recommended for the OHR Director's approval that the Applicant's fixed-term appointment be terminated by 30 June 2006 for reasons of health pursuant to staff regulation 9.1(b). The reason given was that UNSPC, upon recommendation from Dr. Oleinikov, had determined that the Applicant was "incapacitated for further service". Her entitlements were calculated as 10.2 months of net base salary less amount of disability benefit received and 3 months' net base salary in lieu of notice.

48. On 27 June 2006, the OHR Director approved the recommendation to separate the Applicant. Ms. Lee confirmed to the Tribunal that the termination was not because of the inability of the Organization to accommodate the conditions that the Applicant needed to return to work but because of the award of disability. Ms. Lee said that where a disability award is granted by UNSPC, UNDP always proceeds to termination for health reasons and that she has never seen an exception to that.

49. From that time, the Applicant took a number of steps to appeal the decision, including a request to suspend the decision to terminate her services with UNDP, an administrative review and an appeal to the Joint Appeals Board ("JAB"). She also appealed against the UNSPC's decision. She exhausted those remedies without success. Although the JAB found that the Respondent had violated certain procedures, this was not accepted by the Secretary-General. At no stage during that process was she afforded a hearing of her case to enable her to explain the circumstances.

50. On 24 October 2006, the Applicant was paid compensation from ABCC under Appendix D in the amount of USD100,435.14. According to the Applicant, this only partly covered the medical expenses she had paid herself.

51. On 28 November 2008, the Applicant was offered a fixed-term appointment by UNIFEM after a competitive selection process.

52. On 6 January 2009, the Coordinator of the Panel of Counsel on behalf of the Applicant requested that the Applicant be given medical clearance to start her appointment with the United Nations Development Fund for Women ("UNIFEM"). The new UN Medical Director advised OHR/UNIFEM that he could not issue medical clearance in the absence of new medical information.

53. The post which the Applicant had encumbered was kept open until February 2009. Mr. Zhou told the Tribunal that he was looking forward to welcoming the Applicant back. No other person was recruited or assigned against the position.

54. In the following months, the Applicant underwent further medical testing as required by the UN Medical Director but before this could be completed, on 15 June 2009, UNIFEM withdrew the offer of appointment for lack of medical clearance.

55. On 10 July 2009, Dr. Moroz found that at the time of writing there were no medical contraindications to full-time employment within the Applicant's occupation.

56. On 3 August 2009, the Applicant furnished the UN Medical Director with the results of the further medical testing.

57. On 24 August 2009, the UN Medical Director informed the Applicant that on the basis of the new medical information his Office would favorably consider a future request for medical clearance.

58. On 26 April 2010, the UNSPC, upon receipt of new medical reports by MSD, decided to discontinue the disability benefit awarded to the Applicant in April 2006.

59. Throughout this time, although the Applicant was entitled to the disability benefit payable from 1 July 2006 to 28 February 2009, she refused to accept it. The Applicant told the Tribunal that she would be breaking federal laws if she received disability while being capable of working and that she was applying for other positions. Since April 2006, she has held different temporary employments with Colgate-Palmolive, Limited Brands and the United Nations Industrial Development Organization. She also volunteered as a public relations person for congressional events. Currently, she is studying Public Health, but does not hold any paid employment.

Law

Former staff regulation 9.1 concerning termination

60. Former staff regulation 9.1(a) and (b) materially provides that the Secretary-General may terminate a staff member holding a fixed-term appointment if s/he is incapacitated for further service for reasons of health.

The UNDP Prescriptive Content on "Termination of Appointment for Reason of Health" ("Prescriptive Content")

61. The Prescriptive Content covers the situation when a UNDP staff member is terminated for reasons of health and the procedure to award a disability benefit under UNJSPF. The following provisions are of relevance to the present case:

> **Definitions**
>
> **Termination.** Termination is an action initiated by the Organization to end a staff member's:
>
> a) fixed-term appointment prior to its normal date of expiration; or
>
> b) permanent appointment.
>
> **Incapacity**. For the purposes of the present document and in accordance with Article 33(a) of [UNJSPF], "incapacity" shall mean "incapacity for further service reasonably compatible with a staff member's abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration."
>
> **Conditions**
>
> For a staff member's appointment to be terminated for reasons of health under UN Staff Regulation 9.1(a) or (b), the staff member's incapacity must be established by conclusive medical evidence that results in the award of a disability benefit under the UNJSPF Regulations.
>
> …
>
> **Review by UN Medical Director**
>
> After reviewing the staff member's [sick leave] records, medical reports and other relevant documentation/information, the UN Medical Director will determine whether or not the staff member's illness or injury constitutes impairment to health which is likely to be permanent or of long duration.
>
> The UN Medical Director will notify his/her conclusion to:
>
> a) if an internationally-recruited staff member, the OHR Service Centre Chief serving the duty station or organizational unit;
>
> …

for notification to the staff member or, where appropriate, to a member of the staff member's family.

If the UN Medical Director concludes that such impairment does not exist and if the staff member disagrees with the conclusion of the UN Medical Director, he/she may request a review of the matter by an independent practitioner acceptable to both the UN Medical Director and the staff member or by a medical board.

…

Request to UNJSPF

When the medical determination is that an impairment does exist, a request must be submitted as soon as possible to [UNSPC] for the award to the staff member of a disability benefit.

The request must be submitted for:

> a) internationally-recruited staff members, by the OHR Service Centre Chief serving the duty station or organizational unit;

…

Review by UNJSPF

The review of [UNSPC] is governed by the UNJSPF Regulations and Rules. [UNSPC] meets twice a year, normally in April and November.

Following consideration of the request and the advice of the UN Medical Director, [UNSPC] will determine whether or not the staff member is incapacitated within the meaning of Article 33(a) of the UNJSPF Regulations and, if a positive determination is made, will award a disability benefit.

…

Termination

General

Approving Authority. The Administrator has the sole authority to terminate the appointment of any staff member. For termination of appointments for reasons of health, this authority has been delegated to the OHR Director.

Request to OHR Director

When the UNJSPF Committee has decided to award a disability benefit, a recommendation for the termination of the staff member's appointment for reasons of health under UN Staff Regulation 9.1(a) or (b), as appropriate must be submitted as expeditiously as possible to the OHR Director for approval on behalf of the Administrator, for:

> a) internationally-recruited staff members, by the OHR Service Centre Chief serving the duty station or organizational unit;
>
> …
>
> **Notice of Termination**. Following the approval by the OHR Director of the termination of the staff member's appointment, the appropriate notice of termination, as indicated in the next paragraph, will be issued to the staff members as follows:
>
> a) for internationally-recruited staff members, by the OHR Service Centre Chief serving the duty station or organizational unit;
>
> …

Regulations, Rules and Pension Adjustment System of the UNJSP Fund

62. Article 33(a) of the UNJSP regulation and rules states as follows regarding disability benefits:

> A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration.

Employers' code of practice of the International Labour Organization ("ILO")

63. The ILO employers' code of practice (2002), "Managing disability in the workplace", states in section 6.1.1 that:

> In developing a strategy for managing disability in the workplace, employers should include measures for job retention including:
>
> …
>
> (b) measures for a gradual resumption of work;
>
> (c) opportunities for workers with disabilities to test work or obtain experience in an alternative job if they are unable to resume their previous jobs;
>
> (d) the use of support and technical advice to identify any opportunities and any adjustments which might be required.

Submissions

The Applicant

64. The Applicant submits that this case demonstrates a collective failure on behalf of a number of officials in various offices to act with due diligence. In particular, she is critical of those in the MSD who did not advise the UNSPC of the Applicant's plea to suspend the consideration of her case; the failure of her supervisor to revert to the MSD for guidance on the possibility of accommodating the Applicant part time; the failure of MSD and OHR to consult with the Applicant's supervisor about the same matter; and the failure of MSD to consult with Dr. Moroz about the list of limitations he had prescribed for her return to work.

65. The Applicant submits that the decision not to allow the Applicant to return to work with limitations was improper, given that her duties were already being performed by others and the addition of her part-time efforts with anticipated progressive improvement would have been of assistance to them.

66. The Applicant contends that her termination was humiliating and warrants repair.

The Respondent

67. The Respondent submits that it acted in full compliance with the applicable law. In summary, it contends:

a. UNDP complied with the Prescriptive Content by requesting MSD to determine the Applicant's potential incapacity for further service and by sending the disability request to UNSPC

b. UNDP complied with the prescribed procedures when terminating the Applicant's appointment for reasons of health;

c. UNDP was under no obligation to allow the Applicant to return to work on a less than a part-time basis given the medical limitations prescribed. The proposed arrangement for the Applicant did not satisfy the definition of part-time work and was not reasonable in the circumstances;

d. The Respondent had no obligation to communicate the Applicant's desire to return to work on a less than part-time basis to UNSPC;

e. UNDP acted on the basis of the decisions made by independent bodies properly constituted by technical experts, such as MSD and UNSPC, which do no fall under UNDP's authority and whose decisions it has no authority to challenge, reverse, or set aside. The decisions of these bodies, having been already challenged by the Applicant, cannot be subject to review by the Tribunal.

Considerations

The process leading up to the termination decision

68. A human resources office, such as OHR, has the obligation to ensure that its administrative decisions are taken on a proper factual basis and, if necessary, make the necessary enquiries to ensure this to protect the affected staff member's rights.

69. Related to the termination decision, but preceding it, was the fact that twice before the UNSPC met, the Applicant had clearly communicated her request to have the disability hearing postponed until she was able to reach her private attending physician, Dr. Moroz, for further clarification on her medical status. The Applicant had relied on Dr. Narula, MSD, to convey this to UNSPC before it looked into her case. OHR was fully aware of this, but did nothing. Prior to this, OHR also failed to inform the Applicant, or MSD for that matter, about the possibility of her gradually resuming to work on a part-time basis. At the meeting between the Applicant and Dr. Pasquier-Castro on 3 April 2006, apparently at the advice of OHR, the latter only

presented the Applicant with two options: disability or special leave without pay. Furthermore, OHR neglected to inform both the Applicant and Dr. Moroz that if UNSPC declared her disabled she would then automatically be terminated from UNDP as OHR's position on this matter did not follow from the UNDP rules, particularly the Prescriptive Content.

70. This was not a usual case of a disabled staff member actively seeking a ruling of disability from UNSPC. The first decision to approach UNSPC was done at the instigation of Dr. Pasquier-Castro, MSD, who believed that she was assisting the Applicant who was in financial difficulties due to her sick leave being exhausted. When the Applicant initially agreed to this course of action she was not aware that this meant automatic termination of her appointment. Within 24 hours of her consent to being declared disabled she withdrew this agreement, and asked for the consideration to be delayed. OHR knew she had changed her mind but took no steps to stop the matter proceeding further.

71. Subsequently, OHR knew that at the time the Applicant's case was being put forward for consideration to the UNSPC she was actively obtaining her own medical evidence from Dr. Moroz to support her case for a return to work.

72. When OHR Copenhagen recommended the Applicant for a disability benefit to UNSPC on 11 April 2006, it relied on the advice of Dr. Oleinikov, MSD, of 7 April 2006. However, with the Applicant realising the legal consequences of her being declared disabled by UNSPC and, in result, withdrawing her former consent to this on 11 April 2006, matters had become much less clear.

73. By 25 April 2006, Dr. Narula, MSD, had advised the Applicant and Ms. Lee that "if your attending physician is now of the opinion that you could return to work part-time, we will have no objection". From this time, at least, OHR was on notice that the conclusions of the MSD of 10 April 2006 had altered and were dependent on an update from the Applicant's own physician, who was the specialist in the field. Dr. Pasquier-Castro admitted in her evidence that she had no expertise in brain injuries or

related rehabilitation. This was not the first time in this case that the advice of an MSD officer had changed. On 7 March 2006, Dr. Oleinikov, MSD, had declared that the Applicant "may return to work by 29 March 2006". However, on 13 March 2006, he modified his earlier finding by stating that the Applicant would need MSD's clearance before returning.

74. This case was plainly not a straight-forward one. The MSD officers, and medical advisors to OHR, remained dependent on advice from Dr. Moroz, the Applicant's private attending physician, as late as 25 April 2006, and they had changed their assessments more than once over a period of a couple of months in reliance on his advice. MSD did not undertake any individual examination of the Applicant of which OHR was, or at least should have been, aware. However, both OHR and MSD ignored Dr. Moroz's advice of 26 April 2006, when he, prior to the UNSPC hearing on the same date, changed his opinion and declared the Applicant fit to return to work with certain limitations after he had received the result from her vocational training program at the rehabilitation center.

75. While there can be no doubt that as of April 2006 the Applicant still suffered some impairment, the question of whether that was an "illness or injury [that] constitute[d] impairment to health which [was] likely to be permanent or of long duration" had not been definitively decided by the UN Medical Director and communicated to OHR before the matter was considered by UNSPC as the Prescriptive Content otherwise explicitly required it to be. There was a surprising variation of medical opinions offered by MSD about the Applicant's level of disability and all were subject to the recommendations of Dr. Moroz.

76. Nowhere in the record is there an unequivocal statement by the UN Medical Director that the Applicant's "illness or injury constitute[d] an impairment to health which [was] likely to be permanent or of long duration". This is an essential precondition to the initiation of the disability, and therefore also the termination, process under the Prescriptive Content.

77. To the contrary, by the date of the UNSPC hearing, MSD and OHR had received the medical clearance for the Applicant to return to work from Dr. Moroz, which Dr. Narula, the UN Medical Director, had in advance accepted as sufficient for not declaring her incapacitated by 25 April 2006, the day before the UNSPC hearing.

78. MSD, through Dr. Narula, also made a specific commitment to the Applicant that the advice of Dr. Moroz would be acted on and also, after having given her appropriate warning of the consequence, that she would advise the UNSPC that the Applicant did not want to proceed. Even then, OHR did nothing.

79. Accordingly, the Tribunal finds that OHR failed to inform the Applicant and the relevant medical advisors about the consequences of her being declared disabled by UNSPC and about her possible alternatives. OHR also failed to delay the examination of the Applicant's case by UNSPC. All these circumstances breached the Applicant's rights to fair and diligent treatment. Furthermore, OHR proceeded with the case to UNSPC in violation of the procedures set out in the Prescriptive Content.

The Applicant gradually returning to work on a part-time basis

80. An associated decision was UNDP's refusal to give the Applicant an opportunity to gradually return to work. Certainly, it was considered and the Applicant was given the chance to meet to talk about this on 15 May 2006, but there was no one present from the SSC, her work unit; only representatives from OHR and MSD were in attendance. The evidence of Ms. Lee and Mr. Zhou demonstrated that they both regarded the notion of a gradual return to work by the Applicant as too difficult. Ms. Lee relied on the requirement of UNDP that the need for part-time work be no less that 50 percent and Mr. Zhou on the practical difficulties of having a person in the workplace who would have some limitations caused by her disabilities.

81. The Tribunal acknowledges that at the relevant time the SSC was particularly busy on important and demanding work assignments and, in addition, was disrupted

by some physical alterations to the office. Mr. Zhou said he would have had no difficulty in accommodating any physical limitations but was of the belief that the heavy demands of the office at that time would have presented the Applicant with too many difficulties. He was concerned for her welfare. He therefore decided that a gradual return would not be possible. In this, he was supported by OHR.

82. This is another example of a decision being taken without proper consideration. The ability of the Applicant to return to productive work was not something that any lay-person could accurately assess. This was the province of a rehabilitation specialist, such as Dr. Moroz. Neither Ms. Lee nor Mr. Zhou knew, for example, that the Applicant had undergone a programme of work simulation under the supervision of Dr. Moroz as part of her vocational training program at the rehabilitation center. Mr. Zhou assessed her ability to return on the basis of the duties that she had fulfilled before her accident. These were set out in the letter from SSC to OHR on 15 May 2006. However, during her absence, the Applicant's duties had been shared by a number of staff members and a gradual return by the Applicant could, in fact, have assisted them. This was relevant for Mr. Zhou and Ms. Lee's assessment of her ability to return to work, but was apparently not considered by any of them.

83. The Convention on the Rights of the Persons with Disabilities was adopted by the General Assembly on 13 December 2006, but did not enter into force until 3 May 2008. However, ILO guidelines concerning employers' code of practice for "Managing disability in the workplace" had been in place since 2002 and, even if not binding, should have been a strong indicator of the matters to be considered in the case of a disabled person seeking to re-enter the work place after becoming incapacitated. There was no evidence of any strategy for such disabled persons in the legal framework regulating employment in UNDP. From the case record, it rather appears that OHR was not aware of the ILO guidelines which, as a human resources office, it should have been.

84. Ms. Lee already knew of the disability decision before meeting with the Applicant on 15 May 2006 and in the light of that could not see any alternative to the termination of the Applicant's appointment. This case was very much out of the ordinary type of case encountered by OHR. The Applicant, although she was considered disabled, was not seeking termination and the benefits that would follow. Instead, she wanted the chance to retain her working relationship with UNDP. Unfortunately, UNDP lacked the flexibility to arrange for that or for alternative employment and fettered its discretion by taking the usual path of automatic termination following a UNSPC decision.

85. The Tribunal finds that the Applicant's request for a gradual return to work was not fairly or adequately considered by neither OHR nor SSC.

The termination decision

86. The termination decision of the OHR Director only referred to UNSPC's disability determination.

87. Ms Lee, OHR confirmed that the reason for the termination of the Applicant's appointment with UNDP was that UNSPC had determined that the Applicant was incapacitated; she said that UNDP was bound by this decision and had no other choice than to comply with it.

88. These statements blur the distinction between the roles of UNSPC and OHR when dealing with terminations by reason of disability. The role of the OHR Director, UNDP, is to make the decision whether to terminate an appointment. UNSPC's role is to make decisions on the eligibility of staff members for the disability pension based on its findings about the level of the staff member's incapacity. These two roles intersect to the extent that the medical decision about disability informs OHR about an important factor to be considered in relation to termination for disability, but UNSPC has no further role in that decision. OHR may be guided by the decision of UNSPC but is not necessarily obliged to comply with it. Pursuant to the Prescriptive

Content, the sole decision-maker is the OHR Director. That decision maker must retain his discretion and apply an open mind about whether to accept a recommendation. This discretion is reflected in former staff regulation 9.1(a) which says that "[t]he Secretary-General *may* terminate the appointment of a staff member … if he or she is, for reasons of health, incapacitated for further service".

89. In most cases where UNSPC makes a finding of disability, termination will naturally follow, but it cannot be the only consequence of such a finding because the discretion of the person who makes the decision about termination should not be fettered by the decision of UNSPC. The OHR Director in the proper exercise of his discretion must weigh up all relevant considerations about the particular case in hand before making the decision taking into account, but not limiting himself to, UNSPC's position on the matter.

90. In the present case, the OHR Director's decision to terminate the Applicant was made exclusively in reliance on UNSPC's determination. This was in spite of two facts. The first was that OHR knew the Applicant wanted her case to be delayed. Second, Dr. Oleinikov's initial medical statement of 7 April 2006 recommending disability had been superseded by Dr. Narula's statement on 25 April 2006 that MSD would have no objection to the Applicant returning to work part-time. This was subject to Moroz's clearance of the Applicant for resumption to work which was given with certain limitations the next day.

91. OHR did not take into account these two very relevant considerations in spite of the on-going dialogue between the Applicant and OHR and their respective medical advisors about her willingness and ability to return to work on a graduated work plan.

92. Most seriously, under the Prescriptive Content, a staff member may only be terminated based on conclusive medical evidence. As at 25 April 2006, the day before UNSPC considered the Applicant's case, OHR must have been aware that

there was no conclusive evidence of the Applicant's incapacity for further service as evidenced by Dr. Narula's statement of that date which had been copied to Ms. Lee.

93. The Tribunal therefore finds that the OHR Director's reliance solely on the findings of UNSPC, and the resulting termination of the Applicant's appointment, was in breach of UNDP's obligation to act fairly towards the Applicant and was a breach of the proper exercise of his discretion under the Prescriptive Content.

Conclusions

94. The Tribunal agrees with the Applicant that this case demonstrates a collective failure of officials to act with due diligence. None of these failures appear to have been deliberate or done out of any improper purpose. In fact, it seems that, at all times, the UN officials both in MSD and OHR hoped that the Applicant would take the disability termination in order to relieve her financial problems and to ensure some security of health care in the future. However, this is not what the Applicant wanted. She wanted the opportunity to resume work and was prepared to take the risk of receiving no disability benefits.

95. In summary, OHR violated the Applicant's rights under her employment contract by:

a. Not advising in a timely manner the Applicant or her private attending physician, Dr. Moroz, that the consequence of a disability finding by UNSPC would be termination of her appointment. If she had had that information before 10 April 2006, it is unlikely that she would have given consent for her case to go to UNSPC;

b. Not informing the Applicant, or any of the relevant medical advisors, about the possible alternative of her gradually returning to work on part-time basis instead of her obtaining disability or special leave with pay;

c. Not telling the Applicant on 11 April 2006, when she had changed her mind, that the case had already been submitted to the UNSPC so that she could take steps to rectify the situation at an early stage;

d. Not ensuring that UNSPC knew that the Applicant had had a change of heart regarding her being declared disabled;

e. Continuing with the referral to UNSPC contrary to the Applicant's explicit request;

f. A systemic failure in the lack of any policy for a gradual return to work for the Applicant which meant that neither OHR nor SSC ever gave this option proper consideration;

g. Terminating the Applicant when the medical evidence of her incapacity was inconclusive as Dr. Moroz had already cleared her for resuming her duties albeit with some limitations.

96. It is not for the Tribunal to review the medical decisions of MSD. It is a separate and independent division but other United Nations entities, such as OHR rely on its advice. The role of MSD in making critical decisions that affect the personal and professional lives of staff members invests it with the responsibility to act in a consistent and coordinated manner in the best interests of staff members and the Organisation. MSD failed to meet that responsibility in the Applicant's case. Its actions and inactions contributed to the failures of the Respondent in this case.

Remedies

97. Having decided on the liability of the present case, the Tribunal wishes to provide the parties with the opportunity of settling the question of remedies in an amicable manner, given the complexity of the matter and the range of options available to the parties.

98. The Tribunal therefore directs the parties to attempt to find an agreement on remedies and notify it about the outcome of their efforts no later than 16 January 2012.

99. If the settlement negotiations fail, the following orders shall be complied with:

a. By 23 January 2012, the Applicant is to file and serve a submission on remedies;

b. By 6 February 2012, the Respondent is to file and serve a response;

c. By 13 February, the Applicant is to file and serve her comments, if any, on the Respondent's response.

(*Signed*)

Judge Coral Shaw

Dated this 8th day of December 2011

Entered in the Register on this 8th day of December 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York