Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2012/028
Judgment No.:	UNDT/2012/050
Date:	16 April 2012
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

KAMANOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By application dated 9 April 2012, the Applicant requested suspension of action on the decision dated 5 April 2012 by which she was given notice that her failure to report for duty no later than 17 April 2012 would be considered abandonment of post and would lead to a recommendation for her separation.

Facts

2. The Applicant entered the service of the United Nations on 11 December 1989 at the P-2 level on a short-term appointment in the Department of Economic and Social Affairs ("DESA"). On 1 April 1995, she was granted a permanent appointment and in 1997, she was promoted to the P-3 level as a Statistician in the Statistics Division of DESA.

3. On 31 May 2011, after seven months' sick leave, the Medical Services Division of the Office of Human Resources Management ("OHRM") medically cleared the Applicant to return to work, specifying that it would be advisable for her to do so in a different location and under a different supervisory arrangement.

4. The following day, the Chief of the Personnel Section of the DESA Executive Office invited her to a meeting to discuss her return to active duty.

5. By e-mail dated 3 June 2011, a Human Resources Officer from OHRM requested the Applicant to continue to work within DESA while an alternative placement was sought. That request was reiterated on 10 June 2011.

6. Between June 2011 and January 2012, the Applicant and the DESA Executive Officer had several discussions concerning the arrangements for the Applicant's return for duty.

7. On 31 January 2012, the DESA Executive Officer informed the Applicant that, in order for the existing arrangements to continue, it was necessary for the Medical Services Division to conduct a medical evaluation.

8. On 6 February 2012, the Applicant sent the Executive Officer her medical evaluation dated 31 May 2011, stressing that nothing had changed.

9. On 6 March 2012, after explaining to the Applicant that the Medical Services Division was required to assess her current situation, a Medical Officer in the aforementioned Division informed her that he had undertaken a new return to work assessment. Based on her medical file and information provided by DESA regarding her job description and proposed work arrangements, he stated that the Applicant was cleared for full duties as a Statistician (P-3) in the Demographic and Social Statistics Branch effective the following day, 7 March 2012. That new clearance superseded the previous clearance dated 31 May 2011.

10. Various offices within the Organization sent the Applicant numerous communications in the weeks that followed. She was requested on several occasions to report for duty. In particular, by memorandum dated 22 March 2012, the DESA Executive Officer instructed the Applicant to report to work by 23 March 2012, informing her that her unauthorized absence from work could create a reasonable presumption of intent to separate from the Secretariat unless she was able to demonstrate that such absence was involuntary and was caused by forces beyond her control.

11. The Applicant replied by e-mail dated 26 March 2012, maintaining, *inter alia*, that the medical clearance issued by the Medical Services Division on 6 March 2012 was improper, that staff members were required to follow instructions only where they were consistent with the rules of the Organization and that she was still waiting for the Administration to facilitate her redeployment elsewhere in the Secretariat.

12. By memorandum dated 30 March 2012, the DESA Executive Officer noted that the Applicant had not reported to work and instructed her to do so no later than 3 April 2012, failing which he would transmit the case to OHRM for its further action.

13. The Applicant replied by e-mail dated 3 April 2012, recalling that the Medical Services Division had recommended that she should return to work under different working conditions.

14. On 5 April 2012, OHRM sent the Applicant a letter informing her that failure to report for duty no later than 17 April 2012 would be considered abandonment of post and would lead to a recommendation for her separation.

15. On 9 April 2012, the Applicant submitted her application for suspension of action to the Geneva Registry of the Dispute Tribunal in the form of a request for temporary relief, pursuant to article 10.2 of the Statute, in relation to Case No. UNDT/GVA/2011/088.

16. The Tribunal registered the application and forwarded it to the Respondent for reply. The Respondent submitted his reply on 11 April 2012, raising solely issues of receivability and, in particular, the failure to request a management evaluation of the contested decision.

17. On 12 April 2012, the Applicant submitted to the Tribunal an *ex parte* request for a management evaluation of nine decisions, including the one threatening to consider that she had abandoned her post.

18. By Order No. 76 (GVA/2012) of 13 April 2012, the Tribunal forwarded that document in its entirety to the Respondent and requested him to respond to the application on its merits, which he did the same day. The Tribunal also requested the Applicant to provide a copy of the medical clearance issued on 31 May 2011, which she submitted to the Tribunal.

Parties' contentions

19. The Applicant's contentions may be summarized as follows:

Prima facie *unlawfulness*

a. Despite her efforts, DESA refused to implement the Medical Services Division's recommendation of 11 July 2007, reiterated on 31

May 2011, that she should be redeployed to a different location. In Case No. UNDT/GVA/2011/088, the Applicant contested the decision of DESAand OHRM not to implement the request of the Medical Services Division, thereby forcing her to take disguised administrative leave. By way of relief, she requests, *inter alia*, that the Tribunal order DESA to cooperate in good faith with a view of facilitating her redeployment out of the Department. The letter dated 5 April 2012 confirms the Administration''s refusal to do so;

b. While OHRM maintains that the measure described in the aforementioned letter is consistent with administrative instruction ST/AI/400 on abandonment of post, administrative instruction ST/AI/2005/5 amending the former provides that "[t]he absence of a staff member …, unless properly authorized as leave …, as special leave …, as sick leave …, or as maternity or paternity leave …, may create a reasonable presumption of intent to separate from the Secretariat ...";

c. The aforementioned administrative instructions cannot be applied twice to the same situation;

d. Her unauthorized absence from work since June 2011 was caused by reasons of force majeure beyond her control, namely the refusal of DESA to provide her with the tools and working conditions required for her to return to work, including an office in a different location, a workplan, a job description and a supervisor. The fact that the Applicant has witnessed numerous irregularities within DESA for more than a decade is an added reason of force majeure preventing her from working in the Statistics Division while also meeting her obligations under the Staff Rules and Regulations;

e. Her absence cannot therefore constitute abandonment of post within the meaning of rule 9.3 of the Staff Rules. The decision not to give her another post in accordance with medical recommendations contravenes article 23.1 of the Universal Declaration of Human Rights and has compelled her to be absent from her post since 1 June 2011. Thus, her

absence was initiated by the Administration and not by her. Moreover, the reasons for her absence from 1 June 2011 to 6 March 2012 are the same as for her absence from 7 March to the present;

f. The Medical Services Division's 31 January 2012 request for a medical evaluation, as well as the medical clearance issued by that Division on 6 March 2012, are in violation of the provisions of administrative instruction ST/AI/2005/12 on medical clearances and examinations. In particular, section 9.1 of that administrative instruction provides that "all staff members may be required at any time to undergo medical examination, when requested by the United Nations Medical Director or a medical officer duly authorized by the Medical Director, to protect the health and safety of staff members". But that was not the aim of DESA and the Medical Services Division with regard to the Applicant;

g. The Applicant was ready to return to work as of 1 June 2011 and has remained at the Organization's disposal for the discharge of any function assigned to her in accordance with the aforementioned medical recommendations;

Urgency

h. OHRM will recommend her separation from the Organization unless she reports for duty by 17 April 2012;

Irreparable damage

i. The Applicant risks being separated from service, which would have serious consequences for her personal situation and career prospects. Implementation of the decision would also affect her health.

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

Receivability

a. Under the terms of article 2.2 of the Statute of the Tribunal, a suspension of action may be granted only while the management evaluation is pending. The contested decision in the present case has not been submitted for management evaluation;

b. The Applicant was wrong in basing her application on article 10.2 of the Statute of the Tribunal. The facts alleged in the present application are distinct from those that gave rise to Case No. UNDT/GVA/2011/088;

c. The contested decision does not constitute an administrative decision within the meaning of article 2 of the Statute of the Tribunal. The letter dated 5 April 2012 from OHRM merely informs the Applicant of the relevant rules on unauthorized absences, as well as the applicable procedures and the recommendation that would be made if she did not report for duty. It therefore constitutes a preparatory step. Preparatory decisions do not fall within the scope of the Tribunal;

Prima facie *unlawfulness*

d. Pursuant to regulation 1.2(c) of the Staff Regulations, staff members are subject to assignment to other activities by decision of the Secretary-General. Once the Medical Services Division had assessed that the Applicant was fit to resume full duties, it was within the Secretary-General's lawful authority to require the Applicant to report for duty to the Chief of the Demographic and Social Statistics Branch. The Applicant was provided with instructions to report to a specific individual on a specific date and at a specific office. As she failed to report, the Administration gave her further opportunities to do so; however, she did not report for work and did not provide any good reason for her failure to do so. Accordingly, the procedure laid down in administrative instruction

ST/AI/400 on abandonment of post was instituted and the provisions of that instruction were followed;

Urgency

e. Any urgency in the present case has been created by the Applicant herself since the procedure laid down by administrative instruction ST/AI/400 was instituted over three weeks ago and she did not submit her application for suspension of action until the week preceding the deadline for her to return to work;

Irreparable damage

f. The Applicant has failed to demonstrate that reporting for work would cause her irreparable damage. She has not provided any evidence to suggest that the medical clearance issued by the Medical Services Division is incorrect, nor has she indicated what damage she might suffer should she report for work.

Consideration

21. In asking the Tribunal to find the application non-receivable, the Respondent maintains, *inter alia*, that the contested decision of 5 April 2012, by which the Applicant was given notice that failure to report for duty no later than 17 April 2012 would be considered abandonment of post, is not an administrative decision appealable before the Tribunal since it is merely a preparatory step leading to a possible future finding of such abandonment. However, it is clear from the contested decision that it requires the Applicant to return to work no later than 17 April 2012, whereas the Applicant claims that she is prevented from doing so by a reason of force majeure. Thus, the contested decision, if it is deemed unlawful, could be prejudicial to the Applicant's rights arising from her contract and her status. Consequently, it must be declared appealable to the Tribunal.

22. Article 10.2 of the Statute of the Tribunal provides 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.

23. Article 14 of the Rules of Procedure implementing the above article provides that:

> 1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief 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.

24. It is clear from these provisions that the Tribunal is empowered to order the suspension of action on a decision as temporary relief during the proceedings only if an application on the merits has been filed against the same decision (see *Oummih* UNDT/2011/187).

25. The subject of the present application is a different decision from those contested by the Applicant in Case No. UNDT/GVA/2011/088, pending before the Tribunal. In the present application, the Applicant requests suspension of action on the decision by which she was informed that failure to report for duty no later than 17 April 2012 would be considered abandonment of post, whereas in the aforementioned case, she criticizes the decisions (i) to impose on her a letter of censure constituting a disciplinary measure against her and (ii) to place her on administrative leave since 1 June 2011. Consequently, the Applicant cannot base the present application on the aforementioned articles.

26. However, since the Applicant has unambiguously stated her intention to obtain suspension of action on a clearly identified administrative decision, the

Tribunal must consider whether the present application is receivable under article 2.2 of the Statute of the Tribunal.

27. That article provides 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.

28. Although the present application was not receivable on the date on which it was filed before the Tribunal owing to the absence of a prior request for a management evaluation, as of the date of the Tribunal's ruling the Applicant has regularized her application for suspension of action by submitting, on 12 April 2012, the request for management evaluation required under the aforementioned article. That document, which was submitted to the Tribunal the same day, indicates that the Applicant contests, *inter alia*, the decision by which the Administration claims that she is subject to a measure whereby she would be considered to have abandoned her post. The Tribunal deems it sufficiently clear that she is referring to the letter dated 5 April 2012 from OHRM. Consequently, the application must be deemed receivable under article 2.2 of the Statute.

29. However, whereas article 10.2 allows the Tribunal to grant interim measures other than suspension of action, the scope of the aforementioned article 2.2 is limited to suspension of action. For that reason, the Tribunal will not rule on the other measures that the Applicant has requested in her application.

30. Having ruled on the receivability of the application, the Tribunal must now determine whether the three cumulative conditions for granting a request for suspension of action, established in article 2, paragraph 2, of the Statute of the Tribunal, have been met. First, it must consider whether the contested decision appears *prima facie* to be unlawful.

31. Paragraph 5 of administrative instruction ST/AI/400 on abandonment of post, as amended by administrative instruction ST/AI/2005/5, provides that:

> The absence of a staff member from his or her work, unless properly authorized as leave under staff rule 105.1(b), as special leave under staff rule 105.2, as sick leave under staff rule 106.2 or as maternity or paternity leave under staff rule 106.3, may create a reasonable presumption of intent to separate from the Secretariat unless the staff member is able to give satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control.

32. The absence of the Applicant since 1 June 2011, the date on which she was medically cleared to return to work, is not authorized under any of the rules referred to in the aforementioned paragraph. On the contrary, the Administration has requested the staff member to return to work on several occasions and has warned her that her conduct could be considered abandonment of post within the meaning of ST/AI/400.

33. The Applicant states that she was prevented from returning to active duty by the Organization's failure to make the necessary provisions for her to work in a different location and under a different supervisory arrangement, as the Medical Services Division had recommended on 31 May 2011, and characterizes these circumstances as a reason of force majeure.

34. While it is not necessary for the Tribunal to rule on the question of whether the medical recommendation in question gave the Applicant the right to refuse to return to work under the conditions offered her, the fact remains that the medical evaluation issued by the Medical Services Division on 31 May 2011 was superseded by the medical clearance of 6 March 2012, which established that the Applicant's state of health allowed her to resume her previous duties in the same office. In taking the contested decision, the Administration based itself on that clearance, which was more recent and had been issued by the competent office.

35. However, the Applicant contests the legitimacy of this new medical clearance. She maintains that DESA was not authorized to ask her to undergo a further medical evaluation and that the Medical Services Division could not

conduct an evaluation of her condition that would supersede the previous evaluation.

36. Rule 6.2(g) of the Staff Rules provides that:

> A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director. When, in the opinion of the United Nations Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule.

37. The Applicant maintains that, contrary to section 9.1 of administrative instruction ST/AI/2005/12 on medical clearances and examinations, the evaluation in question was not requested with a view to protecting her health and safety as a staff member. However, it is clear that the Organization may conduct such medical examinations not only with a view to protecting staff members, but also in its own interests.

38. Moreover, the Applicant cannot claim that she had reported to duty as of 1 June 2011 on the grounds that she was sitting in the cafeteria or in other premises of the United Nations in New York since the Administration gave her specific instructions as to the location to which she should report for duty and the individuals to whom she should report. Any other conduct on her part which did not comply with those directions cannot be deemed an effective resumption of her work. Furthermore, it constitutes a failure to comply with the requirement that staff members "follow the directions and instructions properly issued by the Secretary-General and by their supervisors" pursuant to rule 1.2(a) of the Staff Rules.

39. Thus, the Applicant has failed to establish that the contested decision was prima facie unlawful and it is unnecessary to consider whether the other two conditions –of urgency and irreparable damage– have been met.

Conclusion

40. In view of the foregoing, the application for suspension of action is rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 16th day of April 2012

Entered in the Register on this 16th day of April 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva