



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

SURI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Duke Danquah, OSLA

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

## **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 her status of being on full pay as a result of combining her sick leave with the remainder of her annual leave. The Applicant was also informed that as of

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. While the MSD had authorized the Applicant to travel out of the country for further treatment, neither DM nor MSD apprised her of the fact that they were recommending her case to the Pension Fund Disability Board resulting in a breach of her due process rights as ST/AI/1999/16 (Termination of appointment for reasons of health) states at para. 3.2:

If the medical conclusion is that the staff member’s illness or injury constitutes an impairment to health which is likely to be permanent or of long duration, the Medical Director or designated medical officer shall so advise the relevant human resources officer at Headquarters or the local personnel office for notification to the staff member or, where appropriate, to a member of the staff member’s family. If the staff member disagrees with the medical conclusion, he or she may request a review of the matter by an independent medical practitioner or a medical board.

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 disability until the ABCC considers her case and makes a decision on her service-incurred injury claim” (emphasis in original);

c. Accordingly, the Applicant requests a suspension of the administrative decision to separate her from service on the grounds of her disability effective 11 October 2012, in order that she is able to maintain her appointment on full payroll status until the ABCC considers her claim and makes a final decision on the matter;

*Urgency*

d. As a result of the 25 April 2012 decision from the UNSPC the Applicant’s separation from service is imminent and will become effective on 11 October 2012 resulting in a loss of permanent appointment status after almost 20 years of service;

e. There is currently no scheduled date for the final decision from the ABCC and it is requested that the Tribunal maintain the Applicant on full payroll status until such a decision is taken;

*Irreparable damage*

f. The implementation of her separation from service as a result of the decision that she is incapacitated for further service will result in the loss of her permanent appointment;

g. The income provided by the disability payments will be much less than her current income resulting in extreme financial hardship due to certain financial obligations, including having two children who are attending college;

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 issued by the Secretary-General;

e. More generally, issues of receivability aside, under art. 2.2 of the Dispute Tribunal's Statute, a suspension of action may only be granted

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 Statute empowers the Tribunal to provide an interim measure, to provide temporary relief to either party, in relation to a case which is already before the Tribunal. Such relief may include an order to suspend the implementation of a contested decision "except in cases of appointment, promotion or *termination*" (emphasis added).



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 been considered, there is insufficient information as to whether all the internal mechanisms under Section K of the Regulations, Rules and Pension Adjustment System of the UNJSPF (Review and Appeal) or, for example, placing the Applicant on special without pay under sec. 3.1 of ST/AI/2005/3 (Administrative instruction), have been exhausted. At the hearing, the Tribunal indicated to the parties that whilst it is strictly bound by the Statute and the Rules of Procedure in the granting or rejecting of an application for a suspension of action, the facts of this case appear ripe for further discussion between the parties for the purpose of potentially achieving an

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 1<sup>st</sup> day of October 2012

Entered in the Register on this 1<sup>st</sup> day of October 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York