Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

KONTIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. The Applicant, a former staff member of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), contests his separation from service following the non-renewal of his appointment with effect from 14 March 2016.

Facts

2. The Applicant joined ICTY on 21 February 2002 as a Data Entry Clerk, at the G-4 level, under a fixed-term appointment. He was later promoted as Language Assistant (G-5), the position he encumbered at the time of his separation from service.

3. The Applicant was on sick leave as of 14 January 2015. On 24 July 2015, he requested advanced certification of his (partial) sick leave over at least the next five months. In this connection, the Senior Medical Officer, ICTY, asked for an external medical evaluation of the Applicant's condition and, as per a report dated 6 August 2015, the external physicians mandated to conduct the evaluation concluded that the Applicant was partially fit for office duties, and recommended that he be gradually phased back to full-time work.

4. The Applicant did not report to work further to the conclusions of the external evaluation. He was invited twice to meet with the Deputy Chief, Human Resources Section ("HRS"), in mid-September 2015, to discuss his return to work on a part-time basis. The Applicant never attended such a meeting.

5. By memorandum dated 16 August 2015, HRS, ICTY, informed the Applicant that, further to the results of the Comparative Review 2015 conducted within the context of the ICTY downsizing process, the maximum budgetary duration of his post was 31 December 2015 and that, as a result, his contract would not be extended beyond that date.

6. By email of 25 September 2015, the Chief, HRS, noted that the Applicant had not reported to work, which, absent a supporting authorisation, could

constitute "abandonment of post". Accordingly, she urged the Applicant to either report for duty immediately or to provide a plausible explanation for his absence.

7. The Applicant replied on 14 October 2015, denying to have abandoned his post and reiterating that he was sick and under treatment. The Chief, HRS, replied on 16 October 2015 that "ICTY accept[ed] [the Applicant's] e-mail as a formal request of review of [his] case" and asked him, in this connection, to choose, by 23 October 2015, between identifying an independent practitioner acceptable to both the United Nations Medical Director and himself, or having the case submitted to a Medical Review Board. He was advised that failure to make a choice within the deadline, would trigger the procedures for abandonment of post. By email of 23 October 2015, the Applicant chose to have his case submitted to a Medical Board.

8. In light of the Applicant's choice, the Chief, HRS, urged him, on 26 October 2015, to submit the name of his selected medical practitioner by 30 October 2015. The Applicant did so on 27 October 2015.

9. As of mid-December 2015, the Board had not yet been convened, seemingly, at least in part, as the physician designated by the Applicant had not contacted the Organization's medical service. By email of 22 December 2015, the Chief, HRS, informed the Applicant that his contract would be extended until 31 January 2016 "for the sole purpose of concluding the Medical Board". His appointment was subsequently renewed again, pending completion of the Board's review.

10. The Medical Board, including the Applicant's designated physician, held session on 22 February 2016. It rendered a report dated 29 February 2016, complemented by an attachment dated 5 March 2016, concluding that:

a. The 6 August 2015 advice of the external medical evaluation report was incorrect for several reasons;

b. The Applicant's phased return to work should have started three months later than the external evaluators recommended, i.e., 1 December 2015; and

c. The 6 August 2015 reintegration advice with the build-up timeline was reasonable.

11. Accordingly, the Medical Board recommended that the Applicant be placed on full sick leave until 30 November 2015, followed by his progressive reintegration through a phased 12-week schedule during the period from 1 December to 1 March 2016, in accordance with the timeline set out by the medical evaluation report of 6 August 2015.

12. The Senior Medical Officer, ICTY, conveyed these conclusions to the Applicant by email of 10 March 2016. Copies of the aforementioned Medical Board report and attachment were posted by certified mail, and the Applicant confirmed receipt of these documents by email of 13 April 2016.

13. The Applicant did not report for duty at any point, including as of 1 March 2016, the date on which the Board had considered that he would be fit to resume full-time work. The Applicant's appointment was extended two further weeks, according to the Administration, to enable his orderly separation, and he was separated from service on 14 March 2016.

14. The Applicant was informed that his appointment would not be renewed beyond 14 March 2016, by email of 14 April 2016, that is, one month after its expiration.

15. On 15 April 2016, the Applicant wrote to the Medical Unit, ICTY, seeking assistance to register in the Dutch social assistance system, as he had been "left without work and pay since 14 March [2016]". He was referred shortly thereafter to the in-house expert for host country matters.

16. By email of 5 May 2015 to the Chief, HRS, the Applicant inquired about "the precise reasons why [he had been] let go on 14 March 2016", stating that he

was still sick and unable to work. Having obtained no reply, he reiterated his request to the Deputy Chief, HRS, on 11 May 2016.

17. On 12 May 2016, the psychiatrist that had acted as part of the Medical Board upon designation by the Applicant, certified that, due to the severity and recurrence of his illness' symptoms, he was not able to perform his work in March 2016 and up to the date of issuance of the certificate.

18. On 13 May 2016, the Chief, HRS, ICTY, replied to the Applicant that following the downsizing of his position on 31 December 2015, his appointment had been extended solely to allow him to use his sick leave entitlement. He also informed the Applicant that the matter of his sick leave had been reviewed and resolved by the Medical Board that he had requested and that, as the Medical Board concluded that he was fit to work at 100% after 12 weeks as from 1 December 2015, he was not on sick leave status by the time his appointment expired on 14 March 2016.On 17 May 2016, HRS, ICTY, in response to a query from the Applicant, informed him that, as of 14 March 2016, he had a balance of zero days of sick leave at full pay and of 79 days at half pay.

19. On 20 May 2016, the Applicant wrote to HRS stating that, under sec. 4.9 of Administrative Instruction ST/AI/2013/1 (Administration of fixed-term appointments), his contract should be extended for the existing balance of 79 days of sick leave with half pay.

20. The Applicant requested management evaluation of his separation on 31 May 2016. The Management Evaluation Unit rejected this request, by reply letter of 1 June 2016, on the grounds that Medical Boards are technical bodies for the purpose of staff rule 11.2(b) and, therefore, decisions based on their advice are not subject to management evaluation.

21. The Applicant filed this application on 8 July 2016, namely within 90 days from the notification of the contested decision to him. The Respondent filed his reply on 11 August 2016.

22. By Order No. 176 (GVA/2016) of 30 August 2016, the Tribunal requested additional information from both parties and invited them to file comments, if any, on its intention to determine the case on the basis of the written submissions. In response, the Applicant and the Respondent made further submissions on 6 September 2016 and 12 October 2016, respectively. None of them objected to the case being adjudicated without holding an oral hearing.

Parties' submissions

23. The Applicant's principal contentions are:

a. There is no Medical Board report in relation to his fitness to resume work neither on the date originally set for the expiration of his contract, 31 December 2015, nor on the date of his actual separation, 14 March 2016;

b. Pursuant to sec. 4.9 of ST/AI/2013/1, his appointment should have been extended for the remaining of his sick leave entitlement, specifically, 79 days of sick leave with half pay;

c. The Applicant communicated with the ICTY Administration—HRS in particular—shortly after having been advised of the non-renewal of his contract, expressly stating that he was still sick. A medical report provided to the Applicant shows that he was unable to perform work since the day of his separation until the filing of his application; and

d. The Applicant was notified only one month later (14 April 2016) of the decision to separate him on 14 March 2016.

24. The Respondent's principal contentions are:

a. The Applicant did not meet the requirements for an extension of appointment under ST/AI/2013/1, which can only be granted for a certified illness;

b. For an illness to be certified, as per Staff Rule 6.2(f) and sec. 2.1 of ST/AI/2005/3 (Sick Leave), a staff member shall inform his or her

supervisors as soon as possible of absences due to illness and submit a medical certificate or a medical report no later than the twentieth working day following the initial absence from duty. The Applicant did not follow the procedures for certification of illness. He submitted the 12 May 2016 letter to the Organization for the first time as an annex to his request for management evaluation, on 31 May 2016. In any event, a certificate dated 12 May 2016 for an illness that commenced in March 2016 does not meet the deadline of 20 working days established by the rules;

c. A staff member has to exhaust internal remedies regarding certification of sick leave under staff rule 6.2(j) before filing an application before the Tribunal. The Applicant has not followed this procedure;

d. The Applicant was notified on 22 December 2015 of his contract extension for the sole purpose of concluding the review by the Medical Board; he was also notified on 9 and 10 March 2016 of the Medical Board's conclusions that he was fit to work full-time as of 1 March 2016. Following these notifications, the Applicant did not report for work, nor did he provide evidence of his claim for the use of his remaining sick leave entitlement; and

e. The delay in the formal notification of the Applicant's separation was due to personnel shortages in the period of March to April 2016 as a result of the implementation of Umoja some months earlier, which led to a moratorium on leave for HRS staff from July to December 2015. Following the end of the moratorium, staff members in HRS took significant periods of annual leave.

Consideration

25. The decision under review in this case is that to separate the Applicant from service upon the expiration of his fixed-term appointment.

26. At the outset, it should be recalled that the reason for the non-renewal of the Applicant's contract, effective 31 December 2015, was the abolition of the post he

encumbered, as part of the staff downsizing process in the framework of the ICTY closure strategy. There is no indication whatsoever, nor does the Applicant claim, that the abolition of his post was ill-motivated or otherwise improper, or that the non-renewal of his contract was based on his health condition.

27. Rather, the challenge in this application focuses on the contention that the Administration was under the obligation to extend the Applicant's appointment until exhaustion of his sick leave entitlement. This is the central issue to be determined. Nonetheless, in light of the particular circumstances of the case, it is also important to examine the correctness of the implementation of the impugned decision, particularly with regard to the timeliness of its notification to the Applicant.

Duty to extend a fixed-term appointment to utilise sick leave

28. The Applicant grounds his claim on sec. 4.9 of ST/AI/2013/1, the administrative instruction governing the administration of fixed-term appointments, which is the type of contract the Applicant held. The above-referred section, entitled *Extension of fixed-term appointments for utilization of sick leave*, reads:

> When a staff member on a fixed-term appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he or she shall be granted an extension of the appointment, after consultation with the Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay and half pay under staff rule 6.2.

29. It is plain that this provision does not confer a right to have one's contract extended as long as the sick leave entitlement lasts no matter the circumstances. On the contrary, the first condition set out is that the concerned staff member be "incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment".

30. Some minimal procedural requirements must be fulfilled for a given health condition to be established and to trigger legal effects. Indeed, staff rule 6.2 clearly stipulates that:

> **Obligations of staff members**
>
> (f) Staff members shall inform their supervisors as soon as possible of absences due to illness or injury. They shall promptly submit any medical certificate or medical report required …
>
> (g) 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.

31. Furthermore, since the existence and/or continuation of an illness incapacitating a staff member for his or her duties may be, and often is, contentious, staff rule 6.2 foresees specific mechanisms to settle controversies of this nature, as follows:

> **Review of decisions relating to sick leave**
>
> (j) Where further sick leave is refused or the unused portion of sick leave is withdrawn because the Secretary-General is satisfied that the staff member is able to return to duty and the staff member disputes the decision, the matter shall be referred, at the staff member's request, to an independent practitioner acceptable to both the United Nations Medical Director and the staff member or to a medical board.

32. In the present case, after a prolonged certified sick leave of approximately half a year, the Applicant requested advance certification of at least five further months. In addition, his request for that advance certification mentioned that he intended to travel to Brazil while on sick leave. The Tribunal observes that, if not unlawful, this course of action was utterly unusual. Consequently, it finds fully justified that, against this background, the Organization requested the Applicant to undergo an external medical evaluation, in accordance with the above-cited staff rule 6.2(g).

33. The Medical Board concluded that the Applicant:

a. was to remain on certified sick-leave from early August 2015 until the beginning of December 2015;

b. was fit to resume work part-time as of 1 December 2015 (that is, after some eleven months on certified sick leave); and

c. was to progressively build-up from part-time work to resume full-time work by 1 March 2016.

34. The Applicant did not report to work, even part-time, at any point. He stated by email that he was still sick, but it appears from the record that between August 2015, when the external medical evaluation report was issued, and March 2016, he presented no medical certificate or medical report supporting his assertion, as staff rule 6.2(f) prescribes. This notwithstanding, the Organization extended the Applicant's appointment at least twice after the effective date of abolition of his post. It thereby interpreted the applicable legal framework rather favourably for the staff member, as his sick leave was no longer certified on a full-time basis at that point.

35. Moreover, given that the Applicant ostensibly opposed to the conclusions of the external medical evaluation, the Organization gave him the choice between the two mechanisms envisaged in staff rule 6.2(j) in case of a dispute on a sick leave decision. By explicitly opting for the Medical Board and designating the practitioner to be selected by the staff member, he acquiesced to this way forward.

36. A Medical Board was constituted, comprising one member selected by the staff member, as required by staff rule 6.2(k). When it could finally meet, it conducted its own assessment of the Applicant's state of health. In spite of some criticism of the prior external medical evaluation, it endorsed its overall view that the Applicant was fit to resume work on a part-time basis as from 1 December 2015 and to carry out his duties full-time as of 1 March 2016. This belies the Applicant's contention that no Medical Board report was issued in relation to his fitness to resume work neither on the date originally set for the expiration of his contract, 31 December 2015, nor on the date of his actual separation, 14 March 2016. Instead, the Medical Board pronounced itself on this very point, and deemed the Applicant fit for work as of 1 March 2016. This solved, in the negative, the question as to whether the Applicant was to continue on sick leave status at all beyond that date.

37. This finding was reached at the Board's session of 22 February 2016, and couched in writing in the 29 February 2016 report and its attachment of 5 March 2016. This determination was made fairly contemporaneously to the date set for the Applicant's medical ability to fully resume his duties (1 March 2016). Therefore, the Tribunal sees no reason to fear that the assessment and resulting conclusions could be disconnected from the actual state of health of the Applicant on the critical date. Further, the fact that the date of return to work full-time predated, by four days, the document in which the Board last asserted the end of the Applicant's certified sick leave (the attachment of 5 March 2016 to the Medical Board's report) is not an issue, since the Administration took the precaution not to draw the legal consequences from it as of the very 1 March 2016. Instead, the Applicant's separation from service was made effective only on 14 March 2016, once the Board's conclusions were duly officialised and, importantly, communicated to the Applicant.

38. In conclusion, the Tribunal finds that, since a determination that the Applicant was fit to work on the date of his separation from service had been made through the statutory mechanisms specially designed to settle sick leave related matters, and in conformity with the established procedures, the Organization was not bound, under sec. 4.9 of ST/AI/2013/1, to further extend his contract, despite the fact that he still had a balance of sick leave days on half pay.

39. The medical certificate of 12 May 2016 does not change the foregoing. To begin with, it is legitimate to question the reliability of a professional opinion by a doctor who, as a member of the Medical Board, first endorsed the determination that the Applicant was fit for work as from 1 March 2016, whereas she later blatantly contradicted this conclusion by retroactively diagnosing an incapacitating illness going back more than two months, precisely to the time when she had held the exact opposite view.

40. Irrespective of its credibility, it stands that the 12 May 2016 certificate had not been issued, let alone submitted to the Organization, at the time the contested decision was made, nor when such decision was notified to the Applicant. Further, it could not take precedence over the conclusions reached by the Medical Board.

41. For all of the above, the Applicant was not entitled to have his contract further renewed to enable him to use his remaining sick leave entitlement.

Late notification of the decision to separate the Applicant

42. After having patiently gone through a heavy procedure to clarify the Applicant's sick leave status, and upon determining that he was not entitled to a contract renewal under sec. 4.9 of ST/AI/2013/1, the Administration rightly separated the Applicant from service effective 14 March 2016. However, it took the Administration one entire month, counted as of the effective date of separation, to advise the Applicant of his separation from service.

43. The Tribunal specifically asked about the reason for the delay. The Respondent explained that it was due to a temporary personnel shortage because the deployment of Umoja entailed a moratorium on leave from July to December 2015 for the HRS, ICTY staff, and each of the concerned staff members subsequently took significant periods of annual leave. As a result, only one out of three Human Resources Assistants ("HRA") was on duty at the Staff Administration Section, ICTY, in March-April 2016. The HRA responsible for the Applicant was on leave in March 2016, and the only one remaining was unable to address the matter of his separation due to her heavy workload. Consequently, the documentation for the Applicant's separation was prepared and sent upon the return of the HRA responsible for the Applicant's administration.

44. In this respect, this Tribunal has recently ruled that the introduction of a new ERP system cannot justify a prolonged breach of an important obligation (*Kings* UNDT/2017/043. See, *mutatis mutandi*, regarding human oversight, *Ho* UNDT/2017/013). Moreover, the delay appears all the more avoidable that only an email was required to duly inform the Applicant.

45. The failure to timely inform a staff member of an administrative decision affecting him or her constitutes a breach of the obligations incumbent on the Organization (*Wu* 2010-UNAT-042, *Sina* UNDT/2010/060, confirmed in this respect by *Sina* 2010-UNAT-094).

46. Having said that, although the Organization should expeditiously notify separations from service to its staff members, in this case the Applicant was already aware of the abolition of his post and of the Medical Board's conclusions. Since he learnt, on 10 March 2016, that the Medical Board had found him fit for work, he knew, or should have known, that his contract would not be further extended. Accordingly, it appears that the late notification of his separation, while unfortunate, caused no harm to the Applicant. At any rate, he did not adduce evidence supporting that he sustained any damage, and no compensation may be awarded where no harm has been suffered (*Sina* 2010-UNAT-094, para. 25).

Conclusion

47. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(*Signed*)

Judge Teresa Bravo

Dated this 23rd day of June 2017

Entered in the Register on this 23rd day of June 2017

(*Signed*)

René M. Vargas M., Registrar, Geneva