UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2019/042
UNDT/NBI/2019/065
Judgment No.: UNDT/2020/076
Date: 28 May 2020
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ORIES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George G. Irving

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Nusrat Chagtai, AAS/ALD/OHR, UN Secretariat

Introduction and Procedural History

1. The Applicant is an Associate Security Officer with the United Nations Mission in Iraq ("UNAMI"). He serves on a fixed term appointment at the P-2 level. He filed applications on 6 April 2019 and 18 June 2019 challenging: (i) the Respondent's refusal of his request for a transfer to a different duty station on medical grounds (Case No. UNDT/NBI/2019/042); and (ii) his failure to afford the Applicant the proper duty of care by continued delay and the refusal of his transfer request (Case No. UNDT/NBI/2019/065), respectively.

2. By Order No. 066 (NBI/2020), dated 9 April 2020, the Tribunal granted the Applicant's motion for consolidation of the two matters for adjudication. The parties were requested to consider resolving the matter *inter partes* and to advise the Tribunal if, failing that, they are amenable to the dispute being adjudicated on the basis of their written submissions.

3. On 24 April 2020, the parties filed a joint response to the Order informing the Tribunal that: alternative dispute resolution is unlikely in this case, and they are amenable to the case being decided on the papers but request the opportunity to make brief closing submissions. The Applicant moved for leave to file a medical report that was not available at the time of the filing of the second case.

4. On 27 April 2020, the Tribunal issued Order No. 078 (NBI/2020) granting the Applicant leave to file his medical report.

5. The Respondent and Applicant filed their respective closing submissions on 6 and 12 May 2020.

Facts and Submissions

6. On 6 December 2013, the Applicant sustained injuries from an attack by a fellow staff member in Erbil.

7. In 2015, the Advisory Board for Compensation Claims ("ABCC") found that his injuries were incurred during the course of service. The Controller approved this finding on 9 December 2015. The cost of medical care occasioned by the injuries he sustained were borne by the Organization.

8. Following certified sick leave in the United States, the Applicant returned to the duty station on 18 September 2014.

9. On 11 October 2015, the Applicant wrote to Mr. Yashpal Singh, the Chief Security Adviser, seeking a transfer from Erbil to either Kirkuk or Baghdad. This request was supported by medical reports with recommendations from the Applicant's psychologist Dr. John Benesek, who had been treating the Applicant since February 2014.

10. On 26 January 2016, the Chief of Mission Support wrote to the Applicant approving his reassignment from Erbil to Kirkuk effective 17 February 2016.

11. On 5 February 2016, the decision to reassign the Applicant was rescinded on the ground that there was no P-2 post in Kirkuk against which the Applicant could be placed.

12. On 17 September 2018, the Applicant's current treating physician wrote a medical report which the Applicant submitted to the Organization in further pursuit of the requested re-assignment. The medical report referred to the earlier recommendations of Dr. Benesek as having been ignored by the Organization thereby causing the Applicant psychological trauma which resulted in the need for permanent retirement on medical grounds. On 30 September 2018, the Applicant was informed that "per information available at this point" he could not be re-assigned on medical grounds as there was no medical documentation as of the end of August 2018

supporting his request to be reassigned. The Applicant has challenged this decision before the UNDT.

13. On 18 June 2019, the Applicant filed a second application challenging the Respondent's "failure to afford him proper duty of care by continued delay and refusal to accommodate his medical condition by transferring him on medical grounds." The Applicant's case is that this challenged decision is to be implied from the 21 April 2019 Broadcast emailed by UNAMI-DSA-ADMIN to all Staff Members informing them that one TS had been assigned as Head of the Guard Force Unit in Baghdad. This was a position that the Applicant had expressed an interest in a few days earlier on 17 April 2019.

14. The Applicant was informed on 24 May 2019, prior to the filing of this application, that he would be reassigned to Basra. The reassignment took effect on 11 July 2019.

15. It is the Applicant's case that the Respondent's dilatory conduct in addressing his injuries and his requests for transfer caused him harm. The Applicant's reassignment was refused on the ground that there was no medical documentation to support it, which he says was untrue. The Applicant's request to be reassigned to a post that he was qualified for at a different duty station within the same mission was also refused, and the post was subsequently filled by another staff member. It was only after his second request for management evaluation, and the combined efforts of the Management Evaluation Unit (MEU) and Medical Services Division (MSD) at informal resolution of the dispute, that the reassignment to Basra was eventually effected. The Applicant submits that the Respondent's conduct in the circumstance of this case gives cause to his claim for moral damages.

16. The Applicant further contends that the Respondent's submission that he was under no obligation to reassign the Applicant on medical grounds violates staff regulation 1.2(c). The Respondent owed the Applicant "reasonable accommodation" of his condition and a duty of care, as a contractual obligation. The Respondent's

refusal to consider his request was a "major source of his impairment" and resulted in the need for extended sick leave.

17. The Respondent challenges the receivability of both applications. The Respondent's position is that the applications are not materially receivable before this Tribunal. In respect of the Applicant's claims that the care he received following the incident was inadequate, and that the Respondent was negligent and tardy in his response to the Applicant's grievances, the Applicant should have properly sought management evaluation within the statutory timeframes. He did not. His applications before this Tribunal were only filed in 2019 to address an injury that was sustained in 2013, despite the fact that he has had legal representation since 2014.

18. The Respondent is under no obligation to reassign a staff member on medical grounds. The authority to reassign a staff member is discretionary and it is incumbent on the Applicant to show that that discretion was improperly exercised. The Applicant has availed himself to the entitlements pursuant to Appendix D of the Staff Rules.[1] As a result of the ABCC's finding, the costs of the Applicant's medical care resulting from the injuries he sustained was borne by the Organization.

19. The Respondent further underscored that the Applicant's treating physician, Dr. Bruce Stevens, who had been treating the Applicant since 9 September 2018 only certified him as being fit to return to work on 1 May 2019, following which further sick leave was certified through to 19 July 2019. Prior to that date, the Applicant's treating physician had in his medical reports dating back to September 2018, when the challenged decision was made, indicated that the Applicant's prognosis was poor. He was certified by Dr. Stevens as "in need of permanent disability" and "not capable of

[1] Staff rule 6.2 (sick leave); staff rule 6.4 (compensation in the event of death, injury or illness attributable to the performance of official duties in accordance with Appendix D).

returning to work in any capacity." There was therefore nothing untoward about his reassignment in July 2019.

20. According to the Respondent the Applicant's claim for compensation is misconceived. The Applicant has neither shown a breach of any of his procedural or substantive rights; nor has he produced any evidence of harm resulting from the reassignment decisions in September 2018 and April 2019.

Considerations

21. In this matter my determination will be Judgment in favour of the Respondent as it relates to the two applications that were consolidated.

22. This conclusion follows from the fact that the Respondent has presented a strong argument that the Applicant's case is not receivable and in any event is without merit. In that regard, it is the staff member's responsibility to ensure that he is aware of the applicable procedure in the context of the administration of justice at the United Nations.[2]

23. The Applicant has done little to address the receivability issues that have been raised by the Respondent, including in his closing submissions. The Applicant's failure to address the jurisdictional challenges raised by the Respondent is fatal to the two applications before me.

24. In Case No. UNDT/NBI/2019/042, the 30 September 2018 decision challenged was expressed as follows "as of the end of August there is no medical documentation supporting your request to be re-assigned to a duty station different from Erbil. Therefore, **per information available at this poin**t, the organization is not in a position

[2] *Jennings* 2011-UNAT-184.

to reassign you to a duty station different than Erbil on medical grounds" [emphasis added].

25. The information available at that point to the Respondent was an MSD sick leave form dated 10 September 2018 wherein early medical retirement was recommended by the Applicant's doctor instead of a return date for work. The prognosis was stated as poor for the Applicant. By medical report dated 17 September 2018, the same doctor explained that sick leave with a view to permanent retirement was required rather than a return to work while being treated.

26. The Respondent makes a strong case to challenge the temporal and material receivability of the application.

i. *Ratione materiae* – there was no decision from which the Applicant suffered adverse legal consequences. The claim regarding negligence is not receivable unless subject to a decision by the Secretary-General and thereafter management evaluation. The Applicant contends that the Organization failed to recognize its proper duty of care to adopt measures to protect his health and safety as a staff member. However, the Applicant did not submit a claim for negligence to the Secretary-General for consideration. As such, there is no decision by the Secretary-General on such a claim to be reviewed by the Dispute Tribunal.

ii. *Ratione temporis* – the decisions complained of were refusals to reassign the Applicant and lack of proper treatment dating back to 2014. At that time, the Applicant's former doctor had issued medical reports recommending that the Applicant, who had recovered from his physical injuries and was back at work, be assigned to another duty station. Eventually in 2016, a decision was made to move the Applicant but it was later revoked. The Applicant did not challenge that decision at that time. Instead it was not until 2019, by way of these two applications, that the Applicant is "challenging the last response to a number of

> requests to his Mission in Erbil Iraq refusing to reassign him to a different duty station on medical grounds." There has been no timely request for management evaluation or application to the UNDT in relation to either those prior requests dating back to 2014 or the decision in 2016 to stop a transfer that had been approved.

27. In so finding, I am guided by the appellate jurisprudence on the material and temporal receivability of applications.

28. In *Servas,* the United Nations Appeals Tribunal ("UNAT") held that[3]

> A staff member must be familiar with the Staff Rules and understand her obligation to act in conformance with those rules. This means that a request for management evaluation must be submitted *prior to* bringing an application before the Dispute Tribunal. As we have noted many times, the requirement of management evaluation assures that there is an opportunity to quickly resolve a staff member's complaint or dispute without the need for judicial intervention.

29. Substantively, I also agree with the Respondent's submission that there is no merit to the application. There is no staff rule or regulation mandating a right to reassignment on medical grounds. In any event there was no basis for the transfer from the documentation provided by the Applicant's doctor. The Applicant's medical report of 17 September 2018 stated that he "is unable to perform any duties in his line of work with the United Nations" and recommended "early medical retirement" and "permanent disability". It was not until 11 April 2019 [4] that the Applicant was cleared to return to work at the end of his latest sick leave period which expired on 1 May 2019. Thereafter the MSD only certified him by email dated 4 June 2019 as cleared to return

[3] 2013-UNAT-349. *See also Monarawila* 2016-UNAT-694.
[4] Applicant's Annex 9 (2019/065).

to work. There is no basis for compensation as the Applicant has already availed himself of his sick leave entitlements under staff rule 6.2.

30. In Case No. UNDT/NBI/ 2019/065, the decision challenged was the 21 April 2019 UNAMI Broadcast informing staff that a position in Baghdad, which the Applicant felt he should have been re-assigned to, had been filled.

31. On receivability, I agree with the Respondent's argument that this second application is not receivable for the following reasons:

i. The application duplicates application 2019/042.

ii. There is no reviewable decision under art. 2.1(a) of the UNDT Statute because the broadcast was not an administrative decision.

iii. The Applicant's view of the broadcast as an implied decision refusing to re-assign him is not receivable because he has admitted in his applications that the said refusals commenced as far back as 2014. Neither this application nor the request for management evaluation preceding it were therefore made within the time limit for receivable challenges to these decisions. There has been no administrative decision concerning negligent handling of the Applicant's medical concerns as alleged in the application.

iv. Additionally, the broadcast is not a reviewable decision because the Applicant suffered no adverse results. At all times the Applicant was on paid sick leave receiving all of the salary, benefits and entitlements he was due.

v. Additionally, no staff rule or regulation required the Applicant to be assigned to the post in question. Neither of the regulations cited by the Applicant, namely staff regulations 1.2(c) and 6.2 provides a right to reassignment that has been breached by the Respondent.

vi. When the application was filed, there was no pending decision refusing to assign the Applicant to a post at a duty station other than where he was attacked. This is so as it is acknowledged in the application that the MEU had advised on 24 May 2019, just one month after the alleged decision being challenged, and before the filing of this application, that the Applicant would be reassigned to a duty station other than Erbil. Although the Applicant had on 17 April 2019 indicated an interest in the Baghdad posting, he later heard on 21 April 2019 that the position was awarded to another person, there was no evidence in his application for a finding that the posting should have been awarded to him and not to the other person.

32. The Respondent argues that this application, too, cannot succeed on the merits. I agree. If, in the award of the Baghdad posting to another person there was an implied decision against re-assignment of the Applicant as alleged, it was lawful. The Applicant has no rule-based right to reassignment on medical grounds. Under staff regulation 1.2(c), the Respondent has the authority to assign a staff member to any of the offices of the United Nations. In so doing he must seek to ensure that necessary safety and security arrangements are made for staff carrying out their assigned duties. The question as to whether the Respondent has properly carried out this authority to assign duties can only be whether his discretion was properly exercised. In the instant case, the Applicant has not established any basis for a finding that the Respondent exercised the discretion in a manner that was unlawful, procedurally incorrect or irrational in either taking into account irrelevant matters or failing to consider relevant matters. On the contrary, the Respondent was bound to take into consideration that the medical reports put forward by the Applicant from September 2018 to April 2019 certified him as unfit to return to work. The decision to fill the Baghdad position would have been made long before the broadcast of the result. The decision was taken before the Applicant was cleared as fit to return to work. There was no rational basis on which he could have been considered at that time for the position or for re-assignment to another

duty station. It was only a few weeks later when he was cleared as fit for work that he could be so considered and he was then duly re-assigned.

33. The application is, in any event, moot. The Applicant was only cleared for return to work from sick leave on 1 May 2019. This was before the filing of Case No. UNDT/NBI/2019/065 on 18 June 2019. Since then, he has been assigned to a post at Basra, a duty station away from where he was attacked. Thus, even if the issue raised in the application had been receivable it was without merit. The issue complained of was moot.

34. In my view, the Respondent had an iron clad case as it relates to the Applicant's complaint being moot. This concept is well explained in *Kallon* 2017-UNAT-742, as applied in *Azar* UNDT-2020-067.

35. In the final closing submission, the Applicant does not challenge that the issue raised as to re-assignment is now moot. Instead he contends that even though the relief sought by the Applicant, namely being assigned to work in an alternate duty station, has now been provided by the Respondent he is still entitled to compensation for the delay in making the assignment. The submission must fail however, as it is based on a false premise that there was delay.

36. The Applicant could only be entitled to damages for delay if his applications were receivable and had merit in the first place. It is clear on a review of the record that this is not so. The Respondent's challenge to the Applicant's case was well supported in the reply's filed and has now been very persuasively reiterated in the submission filed on 6 May 2020. It is clear that there was no delay in placing the Applicant at a new duty station because he was at the time material certified by his own doctor as unfit to return to work. This was so until April 2019, and he was on paid sick leave.

37. Within a few days of the alleged decision to overlook the Applicant for the Baghdad posting around 21 April 2019, the Respondent wrote to the Applicant in the MEU letter dated 24 May 2019 advising him that following medical clearance he would

be posted to a duty station other than Erbil. This clearance came on 4 June 2019, and the Respondent has honoured the promise to re-assign the Applicant.

38. The question asked by the Applicant concerning delay is "why it took five years and formal legal proceedings" for the Respondent to respond to the Applicant's requests for a re-assignment. The Applicant has failed to show that this delay even if it occurred is a matter to be taken into account in the instant proceedings. Instead it was the Applicant who was entitled, if he felt aggrieved since 2016 by the failure to re-assign him to have sought redress through the appropriate channels. He failed to do so; although it is on record that he has had the assistance of Counsel as far back as 2015, when he submitted his claim before the ABCC. The timing of the re-assignment in 2019 was based on the time taken by the Applicant to be cleared to return to work. There has been no delay for which damages can be awarded.

39. The Tribunal is not persuaded by the argument that even though the Applicant was declared medically unfit by his own doctor he should have been afforded the entitlements of a person with disabilities and as such allowed to return to work at a new duty station before being declared fit. This argument was not, from my reading, the focus of the applications as filed.

40. The Applicant appears to have been seeking multiple avenues for relief based on the same unfortunate circumstances. While the Tribunal empathises with the difficulties that have confronted the Applicant since he sustained the injuries, the claims in his applications do not provide a basis on which moral damages can be awarded.

41. In conclusion, the consolidated applications are dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 28th day of May 2020

Entered in the Register on this 28th day of May 2020

(Signed)

Abena Kwakye-Berko, Registrar, UNDT, Nairobi