



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

PATKAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Kong Leong Toh, UNOPS

Introduction

1. The Applicant, a former P-5 fixed term appointment holder with the Water Supply and Sanitation Collaborative Council (“WSSCC”), filed an application contesting the decision “to terminate or retract [her] sick leave causing her separation”.

Facts and procedural history

2. At the time of the contested decision, the Applicant—whose fixed-term contract expired on 31 March 2018—worked as Head of Policy at the P-5 level in WSSCC, which is hosted by the United Nations Office for Project Services (“UNOPS”) in Geneva.

3. As a consequence of a restructuring exercise, on 24 November 2017 the Applicant was informed that her appointment would not be renewed beyond 31 March 2018. The Applicant requested management evaluation of this decision on 7 February 2018.

4. The Applicant was on sick leave from 23 February 2018 to 3 March 2018. On 1 March 2018, the Applicant received an automated email from the United Nations Medical Services Division (via the “EarthMed” system) indicating that her sick leave request from 4 March 2018 to 13 April 2018 had been approved.

5. On 31 March 2018, the Applicant was separated from service.

6. On 5 April 2018, the Applicant, who was by then in India, her home country, contacted a UNOPS Human Resources Manager requesting an extension of her legitimation card and that of her husband to be able to come back to Geneva and “attend to various pending matters”.

7. The same day, the UNOPS Human Resources Manager replied to the Applicant indicating that to extend her legitimation card, UNOPS needed to extend her contract and that this would jeopardize UNOPS’ position in relation to the Applicant’s ongoing challenge of the non-renewal of her contract.

8. On 6 April 2018, the Applicant filed a request for management evaluation contesting the decision to terminate or retract her sick leave.

9. By letter of the same day, UNOPS informed the Applicant of the outcome of the management evaluation, namely, that “UNOPS did not ‘terminate or retract’ [her] sick leave because [she] [was] never entitled to any sick leave beyond the date [her] contract expired (31 March 2018)”.

10. On 5 July 2018, the Applicant filed the present application and on 3 August 2018, the Respondent filed his reply.

11. On 8 August 2018, the Respondent filed a motion requesting leave from the Tribunal to include in the case file an email dated 7 August 2018 from the United Nations Medical Services Division, which was attached to the motion.

12. By Order No. 42 (GVA/2020) dated 6 April 2020, the Tribunal decided to reassign the case to the undersigned Judge.

13. By Order No. 49 (GVA/2020) dated 9 April 2020, the Tribunal decided, *inter alia*, to grant the Respondent’s motion dated 8 August 2018.

14. On 10 June 2020, the Applicant filed a motion to adduce additional evidence and on 11 June 2020, the Respondent filed a reply to said motion.

15. On 12 June 2020, the parties filed their respective closing submission.

Parties’ submissions

16. The Applicant’s principal contentions are:

- a. Sick leave is an entitlement that accrues through service as per staff rule 6.2. Sections 3.9 and 3.10 of ST/AI/2005/3 on Sick leave provide for the extension of temporary appointments exclusively for the utilisation of sick leave entitlements;

b. Sections 3.9 and 3.10 of ST/AI/2005/3 demonstrate that the entitlement to sick leave does not require an underlying post or appointment. Therefore, the Applicant's rights under 6.2 survived any decision not to renew her appointment;

c. Prior to her separation, the Applicant was granted sick leave up until 13 April 2018. The document indicating approval of her sick leave by the United Nations Medical Services Division was shared with UNOPS Human Resources;

d. The Applicant's supervisor failed to consider the Applicant's sick leave request; and

e. The exhaustion of sick leave entitlements at full pay is the only trigger for consideration for disability; separating a staff member before they can use their entitlement would deny them the opportunity to be considered for disability.

17. The Respondent's principal contentions are:

a. Staff rule 6.2 does not contain any obligation to extend a staff member's appointment for the sole purpose of allowing that staff member to be on sick leave during the period of that extension. Any such obligation would be inconsistent with the provisions of the Staff Regulations and Rules restricting the extension of temporary appointments;

b. The Process and Quality Management System ("PQMS") creates a legal requirement that the Applicant's supervisor approve her sick leave, and this was never granted;

c. No sick leave beyond 31 March 2018 had been approved by any UNOPS staff and, therefore, there was no sick leave for UNOPS to "terminate or retract";

d. The email from the United Nations Medical Services Division to the Applicant is not a decision to grant her sick leave for the period of 4 March 2018 to 13 April 2018 but only a certification of the Applicant's fitness to work. The Applicant still needed to provide this e-mail to UNOPS Human Resources and obtain sick leave; and

e. Nothing prevents the Applicant from informing the Pension Fund that she has exhausted her sick leave entitlement for the purpose of obtaining a disability pension.

Consideration

18. It is well established in the Staff Rules and UNAT's jurisprudence that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, and shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

19. In the Applicant's case, her fixed-term contract expired on 31 March 2018 and the record shows that she was granted sick leave from 23 February 2018 to the end of her contract.

20. The record also shows that the purpose of the automated email dated 7 August 2018, from the United Nations Medical Services Division, concerning the Applicant's sick leave was only to certify her fitness to work based on the medical report that she had submitted. However, she was required to "share this answer with [human resources] for the proper process of the related absence". There is no evidence that the UNOPS Administration approved such leave.

21. Therefore, given that the Applicant was separated from service effective 31 March 2018 and that no sick leave beyond that date had been approved by the UNOPS Administration, the Tribunal finds that there is no sick leave to "terminate or retract" as claimed by the Applicant.

22. In fact, the Tribunal finds that the effective content of the challenged decision communicated to the Applicant on 5 April 2018 concerns the non-extension of her fixed-term appointment for the sole purpose of allowing her to be on sick leave during the period of that extension.

23. Consequently, the legal issue for determination in the present case is whether UNOPS is under an obligation to extend a fixed-term appointment for the sole purpose of allowing a staff member to utilize his or her sick leave entitlement.

24. The answer is negative, as there is no evidence in the case file to conclude that the legal framework of UNOPS provides for such obligation.

25. The Applicant relies on staff rule 6.2 whereby “[s]taff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave.”). However, said staff rule does not contain any obligation for the Administration to extend a staff member’s appointment for the sole purpose of enabling him or her to utilize his or her sick leave entitlement.

26. The Applicant also refers to sections 3.9 and 3.10 of ST/AI/2005/3, which is applicable in the Secretariat. However, this Tribunal has already ruled in *Edwards* UNDT/2018/058 that “there is no evidence that the Secretariat Sick Leave Policy (ST/AI/2005/3) expressly provides for its applicability to UNOPS”.

27. Furthermore, the Applicant has not shown that UNOPS has accepted the applicability of said policy or that a similar policy establishing the Applicant’s right to have her contract extended for the sole purpose of using her sick leave entitlement exists at UNOPS.

28. Finally, the Tribunal notes that UNOPS Administrative Instruction AI/HRPG/2013/02, para. 13.2, provided that:

In cases of expiration of fixed-term appointment or of termination, the date of separation may be postponed if the staff member is on certified sick leave at the time of separation to enable the staff member to utilize any sick leave entitlement. Staff member's appointment shall be extended until the end of his/her certified sick leave to enable the staff member to exhaust his/her sick leave entitlement. Such extension will not give rise to any further entitlements to salary increment, annual leave, sick leave or home leave, etc.

29. Nevertheless, that Administrative Instruction was abolished and replaced by UNOPS Operational Directive OD.PCG.2017.01 on Human Resources, Ethics and Culture that came into effect on 15 August 2017—prior to the Applicant being placed on sick leave—and does not include a similar provision.

30. It follows that, in the circumstances, the Applicant is not entitled to the remedies requested.

Conclusion

31. In view of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Francesco Buffa

Dated this 10th day of August 2020

Entered in the Register on this 10th day of August 2020

(Signed)

René M. Vargas M., Registrar, Geneva