UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/101
Judgment No.: UNDT/2021/094
Date: 4 August 2021
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

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

Introduction

1. The Applicant, an interpreter at the P-4 level with the Department for General Assembly and Conference Management ("DGACM"), contests the "[d]ecision to stop implementing [a Medical Services Division ("MSD")] approved return to work plan". The Tribunal notes that since the filing of the application, MSD has changed name and is now called the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH").

2. The Respondent contends that the application is without merit.

3. For the reason set out in the below, the Tribunal rejects the application.

Facts

4. In response to Order No. 11 (NY/2021) dated 11 February 2021, the parties presented the agreed facts as follows:

> … The Applicant is an Interpreter, P-4 level. The Applicant interprets from Russian to English and French to English.
>
> … The generic job descriptions for Interpreters indicates the need to be able to work under continuous stress. Interpretation Services has P-3, P-4 and P-5 Interpreters, for P-4 Interpreters their functions include "to routinely cover sensitive meetings". The Interpretation Service considered Security Council meetings, [the Advisory Committee on Administrative and Budgetary Questions ("ACABQ")], Fifth Committee meetings to be within the category of sensitive meetings.
>
> … The level of demand for interpretation services varies during the year and is determined by the schedule of regular programme meetings and other scheduled meetings. There are also meetings where interpretation is requested on an "if available" basis. During periods of higher workload DGACM engages local freelance interpreters (on When Actually Employed contracts).

… The assignment of meetings to Interpreters follows [a] set guidelines. The maximum number of sessions that may be assigned to an Interpreter per week is seven. Eight sessions can be assigned on an exceptional basis. The session limits are absolute, and they are set in recognition of the stress and endurance for the whole week (not parts of a week). Also, an Interpreter can only be assigned two sessions per day of a duration between two and a half to three hours. The combination of these limits dictates the distribution of assignments over the week.

… The Applicant worked from 2-23 January 2018 and went on sick leave from 24 January – 19 February 2018.

… On 2 November 2018 the Applicant wrote to her first reporting officer (FRO):

> To follow up on our phone call, my doctor's recommendations when I initially return to work are: "she should avoid stressful meetings; not work outside of normal working hours; and not be part of meetings that extend beyond three hours. She may require other accommodations during a stressful period."
>
> The idea is to build up gradually, first in time (hence, the week-on, week-off initial configuration) and then, once I am able to sustain a full 7-meeting week without undue fatigue, to gradually remove the other restrictions.
>
> I would assume avoiding "stressful meetings" would be something we should discuss and define together. Here are my thoughts: initially, the least stressful meetings for me would be those I am most familiar with (2nd, 3rd and 4th committees, and GA Plenary, along with certain special events, G77, etc.).
>
> The most stressful meetings, in my experience, would be the Security Council and the ACABQ, then 5th Committee; somewhere in the middle would be 1st and 6th Committees, since I don't have much experience with them, and second-tier Council meetings (open debates after the initial morning assignment and subsidiary bodies of the Council). Feel free to call me [phone number redacted] to discuss further or respond via e-mail, whichever you prefer.
>
> Did you find anything in your inbox from Dr. [AS (name redacted)]? I can certainly send him another message

> inquiring about formalizing the back-to-work plan. I could give him your cell number if you think that would facilitate contact but I, of course, don't want to do that unless you will find it helpful. Please let me know.
>
> You can also contact Dr. [AS] a directly about my return-to-work plan. His e-mail is [email address redacted]. His telephone number is listed as: [phone number redacted].
>
> Hoping to speak with you again soon and looking forward to being back on board[.]

… On 5 November 2018, the Medical Services Division (MSD) (now the Division of Healthcare Management and Occupational Safety and Health (DHMOSH)) sent an email to DGACM which stated:

> [The Applicant] has been medically cleared to return to work after an extended sick leave. The following plan was put in coordination with her doctor:
>
> Start: As of November 7th 2018. She will be working on alternate weeks i.e. one week of work then one week of sick leave. This arrangement will continue till 31 Dec 2018, after which she will start working full time.
>
> Tasks: Full time. She should not be assigned to stressful meetings or meetings that last for more than 3 hours. She will not work beyond the regular working hours or in the weekends.
>
> Review: Will not be required unless there are any issues.

… On 7 November 2018, the FRO sent an email to DHMOSH stating:

> I am glad [the Applicant] is well enough to return to work; we will make every effort to abide by the terms of the plan.
>
> As I mentioned, our meetings normally run for three hours but occasionally they exceed this duration. The Interpretation Service does not know in advance whether/where this will happen.
>
> While we will do our utmost to accommodate the three-hour requirement, we are unable to guarantee that meetings to which [the Applicant] is assigned will never overrun.

> In order to contain [the Applicant's] exposure to stress the Service will refrain from assigning her to meetings considered to be particularly stressful. I have to point out that entirely eliminating stress is impossible as it is a regular component of an interpreter's work and a certain level of stress is present at every meeting. Thank you for clarifying in the course of our conversation that the term "full time" means our standard workload of 7 meetings per week.

… From 7 November 2018 to 31 December 2018, the Interpretation Service implemented medical accommodations for the Applicant, as advised by the Medical Services Division. The accommodations included working on a full-time basis on alternate weeks, no assignments to "stressful meetings" or meetings longer than three hours, and not working beyond regular working hours or on the weekends.

… On 19 December 2018, the FRO wrote to DHMOSH stating:

> We are nearing the end of the year and I note that your email on the Return-to-Work Plan for [the Applicant] below states "this arrangement will continue till 31 Dec 2018, after which she will start working full time". I understand this to mean that all conditions under the Return-to-Work Plan expire on 1 January and in the new year [the Applicant] can be assigned to any meeting and carry out tasks such as weekend duty and/or evening assignments (all standard for UNHQ staff interpreters).
>
> If this understanding is incorrect please let me know as soon as possible so that we can adjust our 2019 work program.

… On 20 December 2018, DHMOSH responded:

> Thank you for your follow up email. I assessed [the Applicant] today and had a discussion with her doctor. She is making a lot of improvement. Therefore we will move on with the stage 2 of the plan as follows:
>
> Start: As of January 1st. 2018. She will be working every day.
>
> Tasks: Full time. She should not be assigned to stressful meetings or meetings that last for more than 3 hours. She will not work beyond the regular working hours or in the weekends.

> Review: I will review [the Applicant] close to the end of February for another assessment to determine what will be the next steps.

… On 25 February 2019, the FRO wrote to DHMOSH stating:

> Could you update me on the Return-to-Work Plan for [the Applicant]? Does it remain the same/is lifted/is modified? Please let me know so that we can organize our work program accordingly.

… On 25 February 2019, DHMOSH responded:

> Thank you for your follow up email. I reviewed [the Applicant's] case and confirm that the current arrangement highlighted below should continue at least until end of March. I will review [the Applicant's] case again in mid/end-March and provide updated guidance to ensure a safe [return-to-work] plan for both the [staff member] and the Organization.

… On 26 February 2019, the FRO sent an email to DHMOSH stating:

> Thank you for your quick reply. We will make every effort to abide by the terms of the plan.
>
> As I mentioned in my email to Dr. [AS] on 7 November at the start of [the Applicant's] RTW plan, our meetings normally run for three hours but occasionally they exceed this duration. The Interpretation Service does not know in advance whether/where this will happen. While we will do our utmost to accommodate the three-hour requirement, we are unable to guarantee that meetings to which [the Applicant] is assigned will never overrun.
>
> In order to contain [the Applicant's] exposure to stress the Service will refrain from assigning her to meetings considered to be particularly stressful. I have to point out that entirely eliminating stress is impossible as it is a regular component of an interpreter's work and a certain level of stress is present at every meeting.

… On 1 March 2019, DHMOSH responded:

> Thank you for your email and for your effort.

> Please reach out to me if this RTW is not working and we will revise to ensure the utmost safety of our s/m as well as the Organization.

… From 25 to 26 March 2019, the Applicant took uncertified sick leave (2 days).

… On 28 March 2019, DHMOSH wrote to the FRO stating:

> I reviewed [the Applicant's] case and confirm that the current arrangement highlighted below should continue at least until end of April. I will review [the Applicant's] case again in mid/end-April and provide updated guidance to ensure a safe RTW plan for both the s/m and the Organization.
>
> Arrangement:
>
> 1) s/m will continue working every day.
>
> 2) s/m should not be assigned to stressful meetings or meetings that last for more than 3 hours.
>
> She will not work beyond the regular working hours or in the weekends.

… On 29 April 2019 DHMOSH sent an email stating:

> I reviewed [the Applicant's] case and confirm that the current arrangement highlighted below should continue at least until end of June. I will review [the Applicant's] case again in mid/end-June and provide updated guidance to ensure a safe RTW plan for both the s/m and the Organization.
>
> Arrangement:
>
> 1) s/m will continue working every day.
>
> 2) s/m should not be assigned to stressful meetings or meetings that last for more than 3 hours.
>
> She will not work beyond the regular working hours or in the weekends.

… At a meeting on 13 May 2019 the Applicant was informed that the Interpretation Section would no longer accommodate the return to work plan from 1 June 2019.

… On 15 May 2019, the FRO sent an email to DHMOSH stating:

> It is my understanding that the RWT is a recommendation.
>
> The RWT plan for [the Applicant] has now been in force for 6 months. Because of the needs of the Interpretation Service as of June 1st we will no longer be able to abide by all the terms of the RWT. Please note that [the Applicant] was informed of this on May 13 in a meeting with me and the Chief of Interpretation Service.

... On 15 May 2019, DHMOSH responded:

> This is noted. Thank you for the support you have given to our [staff member] in her [difficult return-to-work].

… From 13 May 2019 to 28 May 2019, the Applicant exchanged emails with DHMOSH concerning her sick leave and her return to work plan[.]

… From 3 June to 31 July 2019, the Applicant was absent from work. During this period, the Applicant was granted certified sick leave, including days combining a full day of certified sick leave at half pay with a half-day of annual leave to maintain full pay status.

… On 3 July 2019 the Applicant sought management evaluation of the 13 May 2019 decision not to implement the return to work plan recommended by DHMOSH.

… On 29 July 2019 DHMOSH communicated the following to the Applicant:

> As per the physician's advice and review of your case, we recommend that:
>
> - You begin, as of now, to take assignments that corresponds to medium level-stress/difficult meeting, on full time basis[,]
>
> - As of September, evening meetings (until 10:00PM) be added to your workload,
>
> - As of October, the most stressful/difficult meetings (one type per month) be introduced, and
>
> - You resume weekends after the above has been successfully introduced[.]
>
> Please kindly share this return to work plan with your supervisor.

> Our division is advising on the flexible working arrangement as above to accommodate medical restrictions or limitations as part of a time-limited return-to-work programme. Such advice is for the FRO and it could only be rejected under principles of reasonable accommodations for short-term disability if the requested accommodations represent a disproportionate or undue burden on the workplace (as per ST/SGB/2019/3 [(Flexible working arrangements)].
>
> Should your supervisor wish or need to speak with us, we will be available to further discuss.

… The Applicant duly forwarded DHMOSH's email. On 30 July 2019 [GM, name redacted] communicated to DHMOSH stating:

> Please be advised that upon [the Applicant's] request the Interpretation Service's decision to discontinue her return-to-work plan is currently being reviewed by the Management Evaluation Unit.
>
> We regret that we cannot implement the recommendations in your email. A detailed justification is provided in our submission to the Management Evaluation Unit.

… On 1 August 2019, the Applicant returned to work full time.

… On 9 August 2019, the Applicant took certified sick leave (1/2 day).

… On 27 August 2019, the Applicant took certified sick leave (1/2 day).

… On 23 September 2019, the Applicant sent an email to the Chief, Interpretation Service stating:

> Thank you for meeting with me on 11 September and for your commitment to continue implementing medical accommodations so as to help ensure my long-term recovery; it is reassuring.
>
> I have noted down the gist of our meeting and the plan we agreed on moving forward over the next few months. Please let me know if anything needs to be clarified or amended according to your understanding:
>
> You said that you were aware of the meeting limitations that had previously been in place (not be assigned to

stressful meetings or meetings that last for more than 3 hours; not work beyond the regular working hours or in the weekends) and that the programmers had been following those guidelines at your instruction as of August. Thank you. This is appreciated.

Prior to our meeting, you had not been made aware of medical recommendations for the gradual lifting of those limitations. I provided you with a printout of the e-mail message from MSD dated 29 July 2019 containing their recommendations for this gradual process, along with a printout of the e-mail message dated 2 November 2018 defining the categories of meetings, essentially:

- most stressful meetings: ACABQ, Security Council (Chamber and Consultations), and Fifth Committee

- medium-stress meetings: subsidiary bodies of the Security Council and open debates after the initial morning assignment; First and Sixth Committees

Using those documents as guidelines, we discussed how to move forward over the next few months. Due to the needs of the Service, we agreed it was best to lift the restriction on evening meetings first (rather than increasing to more stressful meetings initially), beginning during high-level week, and to discuss again in late October, with the idea of lifting the restriction on medium-stress meetings at that point, to begin with subsidiary bodies of the Security Council, most likely introducing the [working group] on CAC [unknown abbreviation] and sanctions committees first. As outlined in the MSD plan, there would be a period of two months after beginning medium-stress meetings before considering moving on to the most stressful meetings.

I will keep you informed of how things are going and let you know if any issues arise, as you requested. I look forward to our meeting in October.

Again, I am grateful to you for your understanding and support, and to the programming officers for their flexibility. I am attaching a copy of the documents I provided to you during our meeting.

> If I can provide any further information, please don't hesitate to let me know.

… On 23 September 2019, the Chief of the Interpretation Service responded as follows:

> As per our conversation, this is to confirm that the Interpretation Service agrees to continue to implement your return to work arrangements which would allow for your gradual re-integration into work as per the agreement. This agreement will be reviewed at the end of the year. This is based on your explanation of the case and the medical notes which you gave me. I will be happy to discuss any questions you may have regularly to help with the progress. I am also grateful for your effort to move along this path and help our Service excel at the tasks we are given.

… On 24 September 2019, the management evaluation unit issued a moot letter.

… On 21 October 2019, the Executive Office proposed, with the Applicant's agreement, that the Applicant be temporarily assigned as an Editor, P-4, in the Editing Section, English Translation and Editorial Service, Documentation Division, DGACM. This temporary assignment has been extended numerous times in accordance with the Applicant's request.

Consideration

Scope of the case

5. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

6. After closely perusing the parties' submissions, following the Tribunal's decision in Order No. 25 (NY/2021) dated 18 March 2021, the principal issues of the case can be identified as:

a. With reference to the mootness doctrine adopted by the Appeals Tribunal in *Kallon* 2017-UNAT-742, if the decision of 13 May 2019 not to implement the return-to-work plan for the time period from 3 June to 31 July 2019, although it was superseded by the decision to implement the new plan from 1 August 2019, had a negative consequence for the Applicant or if the application is moot? In this regard, the Tribunal will consider whether the sick leave that the Applicant took during the relevant time period was a result of the contested administrative decision;

b. If the application is not moot, was the contested decision a lawful exercise of the Administration's discretion? This review will entail an assessment of whether the reason(s) provided for rejecting to implement the return-to-work plan were lawful and correct.

c. If not, to what remedies is the Applicant entitled?

7. Regarding the issue of mootness, the Applicant submits in her closing statement that the contested administrative decision had an effect beyond 31 July 2019, arguing that:

a. It is "inaccurate to state that the Applicant's [return to work] plan was reimplemented from 1 August 2019" and that "no evidence supports this bare assertion";

b. It is "inconsistent with refusal of implementation two days prior, the contemporaneous communication of the Chief of Interpretation Service indicating the decision was pursuant to information provided to him on 11

September 2019, the language of the management evaluation response, and the fact the Applicant did not cover medium stress meetings during the period from 1 August 2019";

c. On 30 July 2019, the Applicant's office "continued to defend the decision on non- implementation" to the Management Evaluation Unit, and "as a direct result" of the request for management evaluation, her office "rescinded the decision";

d. It was "clear from the outset that the proposal was for a single [return to work] plan with multiple phases".

8. The Tribunal notes that by DHMOSH's email to the Applicant of 29 July 2019, DHMOSH changed its previous advice of 29 April 2019 regarding the Applicant's return-to-work plan. According to DHMOSH's initial 29 April 2019 advice, the Applicant would continue working every day, but not be assigned to stressful meetings or meetings that last for more than 3 hours and not work beyond the regular working hours or in the weekends. This advice was rejected on 13 May 2019 by the Applicant's office. In contrast, pursuant to DHMSOH's subsequent 29 July 2019 advice, the Applicant was also to work full-time but transition back to undertaking all her previous duties, by adding to her workload: (a) medium level-stress/difficult meetings on an immediate basis; (b) evening meetings by September 2019; and (c) the most stressful/difficult meetings by October. This advice was rejected the following day (30 July 2019) by the Applicant's office.

9. The two rejections are therefore two separate and distinct administrative decisions, because even though they both concern the Applicant's return-to-work plan, each rejection concerns different advice from DHMOSH. In this regard, it is further noted that the provided advices are indeed not even the same—not only are they given

at different dates (29 April and 29 July 2019, respectively), but they also differ in terms of scope and content.

10. In the Applicant's management evaluation request of 3 July 2019, she only challenged the 13 May 2019 rejection—basically, it would have been impossible for her to contest the 30 July 2019 rejection as the decision was only made later in time. It therefore did not form part of this request, and there is no evidence on file that the Applicant filed a separate request for management evaluation of the 30 July 2019 rejection. Also, nothing in the management evaluation response dated 24 September 2019, or, for that matter, in any other documentation on record, indicate that this response also concerned the 30 July 2019 rejection.

11. Accordingly, as the Applicant has made no separate management evaluation request of the 30 July 2019 rejection, the Tribunal upholds that the present application only concerns the Applicant's office's 13 May 2019 rejection of implementing the 29 April 2019 advice, because under staff rule 11.2, a request for management evaluation is a statutory requirement for contesting an administrative decision.

Is the application moot?

The parties' submissions

12. The Respondent's submissions may be summarized as follows (this summary is stated first, as the Respondent is the moving party in the question):

> a. Where "a contested decision ceases to have any legal effect, the application is rendered moot as there is no longer a live issue upon which the Dispute Tribunal is competent to pass judgment". In *Kallon*, the Appeals Tribunal noted that "the doctrine of mootness should be applied with caution, in particular where there were 'continuing collateral consequences'" following the original decision. In the present case, the contested decision is moot,

because it was "superseded by the later decision to resume implementing medical accommodations from 1 August 2019";

b. The Applicant has not established any such "continuing collateral consequences". The "mere assertion of such a consequence does not vest the Dispute Tribunal with jurisdiction", and the Applicant "must present credible evidence of collateral consequences" therefor but has failed to do so;

c. Also, the contested decision "caused no ongoing material consequences", and the material harm claimed by the Applicant "is not attributable to the contested decision". The Applicant's sick leave "followed the Applicant's underlying illness, and her "use of sick leave and annual leave in accordance with staff rule 6.2(a) does not constitute material harm". The Applicant was "paid her full salary and entitlements during those dates despite being absent from work", and, on 14 July 2020, the Organization, "as gesture of good faith, granted [her] the material relief she requested in paragraph 60 of the Application. Accordingly, the Applicant had "restored a total 44 days of sick leave and annual leave (17 days of sick-leave at full-pay, 26 days of sick leave at half-pay, and 14 days of annual leave used to supplement sick-leave at half-pay)";

d. The contested decision "caused no ongoing moral consequences" and the Applicant's "claims in relation to her infections in May 2019 are medically unsound". There is "no scientific evidence supporting a connection between minor variations in the immune system associated with stress and illness". The proximity "in time between an administrative decision and the infections does not logically establish a connection between the two";

e. The medical notes dated March 2020 and April 2020 are of "no evidentiary value", because they are "not contemporaneous evidence of the

source of the Applicant's May 2019 infections and they were created after the fact for the purpose of litigation by individuals who did not treat the Applicant in May 2019". In addition, the notes are "based on no more than the Applicant's hearsay account and general statements with no citation to scientific or medical literature", and "ignore the Applicant's specific circumstances, including her job description". Lastly, the notes "fail to consider the positive aspects of stress, including motivating the Applicant to compete for her new position as Chief, English Translation and Editing Unit in the Economic Commission for Africa (ECA), and to fully reintegrate to full-time work";

f. In *Kallon*, the Appeals Tribunal "recognized that a case may become moot if subsequent events have 'deprived the proposed resolution of the dispute of practical significance'", and the Applicant's reassignment on 14 May 2021 to the ECA "rendered her case without practical significance". "An order to rescind the contested decision would have no concrete effect on the Applicant's assignment at the ECA" for which reason "[s]uch an order would be academic".

13. The Applicant, in essence, contends that the application is not moot, stating that she seeks (a) an award of six months' salary for "moral damages for illness caused by the contested decision", (b) compensation for three days of sick leave from 20-22 May 2019, and (c) her absences from 13 May to 15 October 2019 to be converted into "Special Leave with Full Pay".

The mootness doctrine and its application to the present case

14. In *Kallon* (para. 44) the Appeals Tribunal held that "[a] judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any

ruling having an actual, real effect". The Appeals Tribunal further explained that the "mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions", and noted that "[j]ust as a person may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency". The Appeals Tribunal concluded that the "doctrine accordingly recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision".

15. The Appeals Tribunal further held in *Kallon* (para. 45) that "[s]ince a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution". The Respondent may seek to "moot out" a case against him "by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal". The Dispute Tribunal "should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences".

16. The Tribunal notes that whereas the return-to-work plan was eventually resumed as communicated by the Management Evaluation Unit on 24 September 2019, the rejection of DHMOSH's 29 April 2019 recommendation was upheld for the period from 3 June to 31 July 2019. While the Applicant was absent from work due to a combination of sick and annual leave, the rejection could, in principle, at the same time have resulted in compensable non-pecuniary damages to her. This is also what the Applicant is submitting, and the subsequent restoration of the Applicant's relevant sick and annual leaves does not repair this damage.

17. On the other hand, it could be argued that these non-pecuniary sufferings stemmed from other difficulties experienced by the Applicant than the contested decision during the same period of time and therefore not relevant to the present case. The Applicant herself has, for instance, submitted that she also suffered from an E. coli infection and sepsis in the period leading up to 3 June 2019. The Respondent has,

however, not made any such contention. In line herewith, on the basis of the documentation on record, the Tribunal does not find that this has been established.

18. Rather, the Respondent submits that the Applicant's suffering from an E. coli infection and sepsis was not related to the contested decision. The Tribunal notes when the Applicant requests compensation for "illness" this could not only concern the stated maladies but also other conditions. More importantly, the question of the nexus between an alleged unlawful act or omission and a particular type of damages is, if relevant, to be reviewed as part of the assessment of remedies (see, for instance, *Kebede* 2018-UNAT-874, para. 20).

19. Accordingly, the Tribunal finds that in accordance with *Kallon*, the application is not moot.

Was the contested decision a lawful exercise of the Administration's discretion?

The parties' submissions

20. The Applicant's submissions may be summarized as follows:

a. Following management evaluation, the Administration "purported to rescind the contested decision", and following the application in the present case, the Administration "purported to restore entitlements used as a result of the contested decision". This "reflects the Respondent's true assessment of legality";

b. The "unilateral decision to cease implementation of the Applicant's [return-to-work] plan contravened the obligation to ensure the safety and security of staff, the decision maker neither alleged nor established the [return-to-work] plan represented a disproportionate or undue burden, by not consulting with the Applicant, DHMOSH or making any attempt to find a

reasonable accommodation the decision maker ensured such burden was not met". The decision-maker considered "irrelevant facts and failed to consider relevant facts and failed to act fairly, justly and transparently with the Applicant";

c. The Applicant's office "did not explore whether alteration of the [return-to-work] plan could allow for [the office's] needs and medical needs to be met" despite DHMOSH "explicitly suggesting such". That "the Applicant's medical needs were not a relevant factor" in the contested decision "runs contrary to the need to establish a 'disproportionate burden'". It was not "medical information" that "prompted a decision to reimplement" the return-to-work plan, which is "a *post facto* explanation" provided by the Respondent in the present case. In conclusion, the decision-maker "did not establish 'disproportionate or undue burden on the workplace'";

d. The Respondent provides "multiple different justifications for the decision at different stages in the case claiming it was due to the burden on interpreters, a peak period of activity and latterly that the plan was not implementable". This indicates "there was no defendable justification" and the "reasons provided for the decision do not correspond with the facts";

e. It has been shown that "accommodations were common, not burdensome, non-implementation caused freelance staff to be recruited to cover only meetings the Applicant could cover on the [return-to-work] plan, so the burden for other staff interpreters remained the same". It has been "shown that claims that non-implementation resulted from a peak period are false", and "[t]hese justifications do not correspond to the facts";

f. The argument that the return-to-work plan was "not implementable, relying on evidence gathered from [Dr. R, name redacted] a year ago on 12 May

2020, should be struck from the record" as "[n]o justification is provided for filing this immediately prior to closing submissions". In so doing, "opportunity to respond is limited" and "[n]o justification is provided for not securing evidence from one of the two DHMOSH occupational health specialists actually involved in the Applicant's case, noting [Dr. A, name redacted, and Dr. AS] remain in the employ of the [United Nations]". Dr. R "criticizes the [return to work] plan he suggests derived from the treating physician", which was, "in fact, recommended by [Dr. AS] and then [Dr. A] who are 'duly authorized Medical Officer[s]' working in DHMOSH, in line with the rule, which allows for [return-to-work] plans to be recommended exclusively by DHMOSH". Dr. R "seeks to provide evidence on [the Applicant's office's] work requirements about which he has no expertise and non-expert factual evidence on the impact of the [return to work] plan though he was never involved in such";

g. Dr. R's "justification for the decision is contradicted by the fact that the decision maker never raised such justification to DHMOSH, the staff member or to the [Dispute Tribunal]. It is "contradicted by the fact that the [return to work] plan was successfully implemented for a period of time and that, following management evaluation, the Administration decided to re-implement the [return to work] plan without alteration". These "all indicate that the DHMOSH recommended RTW plan could be implemented";

h. The provision of "multiple conflicting accounts as to why the decision was taken while at the same time purporting to rescind the decision and compensate albeit in a manner not making the Applicant whole, demonstrate the unlawful nature of the decision".

21. The Respondent, in essence, submits that the contested decision fell within the discretion of the Administration.

22. The Tribunal notes that the parties agree that the contested decision is regulated by sec. 2.2 of ST/SGB/2019/3. This provision stipulates that if the "advice" of "the Medical Director or a duly authorized Medical Officer" on accommodating "medical restrictions or limitations as part of a time-limited return-to-work programme" is rejected, then "the manager would be required to establish that the requested accommodations represent a disproportionate or undue burden on the workplace".

23. At the same time, the Tribunal notes that whereas the Administration is bestowed with a margin of appreciation under sec. 2.2 of ST/SGB/2019/3, this discretion is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

24. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

25. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals

may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

26. Also, for the staff member to understand and possibly defend her/his rights through the internal justice system, the Administration must disclose its reason(s) for an administrative decision upon the request of a concerned staff member (see, for instance, *Obdeijn* 2012-UNAT-201 and *Abdeljalil* 2019-UNAT-960), Such reason(s) must be supported by correct facts (see, for instance, *Islam* 2011-UNAT-115), which also implicitly follows from the Administration's duty "to act fairly, justly and transparently in dealing with its staff members" (see, for instance, para. 33 of *Obdeijn*). The reason(s) should, at latest, be provided at the management evaluation stage in order to allow the staff member to fully consider her/his further options, including in terms of whether to file an application to the Dispute Tribunal (see, for instance, *Obdeijn* and *Pirnea* 2013-UNAT-311).

27. Concerning the Administration's duty to provide reasons for administrative decision, in *Bantan Nugroho* 2020-UNAT-1042 (para. 40), the Appeals Tribunal added that "[i]t is therefore good practice for the Organisation to provide a general guidance for its managers that a well written statement of reasons, albeit sometimes succinct depending on the circumstance, is fundamental for the correct identification of the matters, concerns and reasoning process of the decision-maker, as well as for the accurate implementation, which will more likely reflect the decision maker's intent". The Appeals Tribunal reasoned that "[a]t the same time, this practice provides better grounds of adequate explanation for those adversely affected by these decisions, perhaps even facilitating their acceptance and hence diminishing instances of disputes" and that "[w]hat is more, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts". The Appeals Tribunal concluded that "[i]n short, there is a threefold purpose for providing reasons for

decisions, which is intelligibility (enabling both implementation and acceptance), accountability and reviewability".

28. In the present case, it is not indicated in the agreed facts what reason(s), if any, the Applicant's office provided at the 13 May 2019 decision when rejecting DHMOSH's 29 April 2019 advice (the contested decision). At this point in time, the Applicant's office should ideally have done so in writing pursuant to *Bantan Nugroho*. Neither does it follow from any of the written evidence provided to the Tribunal that a reason was provided to the Applicant at the stage of the management evaluation as per *Obdeijn* and *Pirnea*. Instead, it follows from the case record that the reasons for rejecting the Applicant's return-to-work plan on 13 May 2019 were only presented to the Applicant in the Respondent's reply submitted by Counsel for the Respondent.

29. This was evidently a procedural error. The scope of this irregularity was exacerbated by the statutory requirement of sec. 2.2 of ST/SGB/2019/3, which demands "*the manager* … to establish that the requested accommodations represent a disproportionate or undue burden on the workplace" (italics added). The Applicant's manager was not Counsel for the Respondent before the Dispute Tribunal.

30. The non-provision of any reason(s), however, does not by itself render an administrative decision unlawful (see, for instance, *Obdeijn* and *Abdeljalil*). Under the so-called "no difference" principle, for a procedural irregularity to render an administrative decision unlawful, it must have prejudiced the relevant staff member's situation (see, for instance, *Kallon* 2017-UNAT-742, para. 54, and *Allen* 2019-UNAT-951, para. 38). In line herewith, "only substantial procedural irregularities can render an administrative decision unlawful" (see *Thiombiano* 2020-UNAT-978, para. 34). This will further be examined in the following.

31. In the Respondent's reply, the reasons for rejecting the Applicant's return-to-work plan on 13 May 2019 were stated as follows:

a. "DGACM lawfully determined that the second medical accommodations requested by the Applicant represented a disproportionate or undue burden on the Interpretation Service from 1 June 2019 in accordance with section 2.2 of ST/SGB/2019/3";

b. "For nearly eight months, from 7 November 2018 to 30 May 2019, DGACM implemented the first and second medical accommodations requested by the Applicant. The medical accommodations were modified or extended a number of times. During this period, no medical advice was provided by DHMOSH to DGACM indicating when the medical accommodations would cease";

c. "The accommodations made by DGACM had an impact on the operations of the Interpretation Service. First, senior managers in [the English Interpretation Section ("EIS")], Programming Officers and the Interpretation Service devoted additional time to managing the process of assigning meetings to Interpreters, including checking that the Applicant's assignments fell within the scope of the medical accommodations and reassigning assignments to other Interpreters. Second, the Interpreters with the same language combination as the Applicant had a higher burden in terms of the number of sensitive meetings they were assigned and, if needed, assigned to meetings outside regular working hours and on the weekend";

d. "In April and early May 2019, the implementation of the medical accommodations had an increased impact on the EIS and Interpretation Service's operations and became a disproportionate or undue burden [reference to footnote omitted]. May and June are months with the highest number of meetings, and in 2019 there was an increase in the number of sensitive meetings compared to the previous two months";

e. "From April, the higher number of meetings resulted in additional burdens in terms of managing the process of assigning meetings. Also, there was a higher burden placed on other Interpreters as they received more assignments, including a higher number of sensitive meetings, and assignments outside regular working hours";

f. "After careful consideration, the Chief, EIS, and the Chief, Interpretation Service, determined that continuing to implement the second medical accommodations after 1 June 2019 represented a disproportionate or undue burden. At the meeting on 13 May 2019, DGACM gave the Applicant over two weeks' notice that the medical accommodations would not continue as of 1 June 2019. No updated medical advice on medical accommodations was received, which DGACM could consider before 1 June 2019";

g. "DGACM resumed implementing the second medical accommodations from 1 August 2019, when the accommodations for the Applicant no longer constituted a disproportionate or undue burden".

32. In the closing statement, the Respondent, in essence, restates these reasons. Despite the Tribunal's explicit instructions in Order No. 45 (NY/2021) dated 5 May 2021 only to base the submissions in the closing statement on previously filed pleadings, the Respondent, nevertheless, added that the "disproportionate burden was due in part to the medical accommodations proposed by the Applicant's physicians", who are "not occupational physicians and do not understand the Applicant's work or her workplace". Instead of recommending medical accommodations that targeted the technical characteristics of the Applicant's work, the physicians "used subjective and non-technical terms that do not exist in DGACM such as 'medium level stress meetings'". Such medical accommodations "could not be effectively implemented during peak work periods". With reference to Order No. 45 (NY/2021), these subsequent submissions by the Respondent are therefore rejected.

33. The Tribunal observes that in accordance with sec. 2.2 of ST/SGB/2019/3, a return-to-work plan is "a time-limited programme" in order "to accommodate medical restrictions or limitations". The plan is therefore by definition a transitional and temporary arrangement that, due to a medical condition of a staff member, is installed to eventually allow her/him to fully resume her/his functions. Whereas no maximum time limit is given on how long time this arrangement can be in place, it is clear that it is not intended to be a permanent feature.

34. When the Applicant's return-to-work plan was rejected for the first time on 13 May (the decision under review in the present case), this transitional and temporary arrangement had already been in place for almost eight months (her first return-to-work plan started on 7 November 2018). The Applicant's medical problems, however, went further back in time, as according to the agreed facts, she also went on extended sick leave from 24 January 2018 to 19 February 2018. At the time of the contested decision, the situation was therefore not new, and taking into account that the Applicant served as a P-4 level interpreter, her daily and regular contribution to the work output of the office would have been important to the successful delivery on her office's mandate.

35. As the Applicant's inability to cover any strenuous or overtime meetings persisted as per the return-to-work plan, the Tribunal finds that it was only reasonable for her office to insist that a more sustainable solution had to be found. Obviously, the accommodations negatively impacted the work situation of her peers and supervisors as they had already—for almost eight months—had to replace her at these meetings and administer her return-to-work plan. Also, using freelancers, as submitted by the Applicant, was evidently not a long-term answer to the situation in terms of expenditure and work quality. The Tribunal is further convinced by the Respondent's submission that May and June 2019 were particularly busy periods for the Applicant's office.

36. Consequently, after almost eight months of the Applicant having already served on a return-to-work plan that limited her work capacity and facing a particularly busy

period, the Tribunal finds that it was not unreasonable for the office to require the Applicant to fully reassume her duties, at least until the workload had diminished, in order to avoid a disproportionate or undue burden on the workplace in accordance with sec. 2.2 of ST/SGB/2019/3.

37. While the untimely provision of the reasons is regrettable, the Tribunal does not find that this impacted the contested decision or the Applicant's possibility of subsequently accessing justice before the Dispute Tribunal. Similarly, whereas under sec. 2.2 of ST/SGB/2019/3, it was for the Applicant's manager to establish that the requested accommodations represented a disproportionate or undue burden on the workplace and not Counsel for the Respondent, the Tribunal also finds that this error was not of such significance that, by itself, it rendered the decision unlawful. Rather, it would appear that for the preparation of the reply, Counsel for the Respondent had sought information from the Applicant's manager, who then provided the belated reasons. It is therefore telling that the Applicant has not made any submissions regarding the delay in providing reason(s) and therefore by herself has not claimed prejudice from any of the identified procedural irregularities.

38. The Applicant is also challenging the background for rejecting the return-to-work plan for 1 June to 31 July 2019 on other grounds, but the Tribunal also rejects these contentions:

a. The Tribunal does not see in any admission of illegality in the fact that the return-to-work plan was resumed, but is rather convinced by the Respondent's explanation that the situation in the office had changed at that time as the work burden had now lessened;

b. The Tribunal further does not see any logic in the Applicant's argument that the "multiple justifications" provided for the rejection demonstrate that the reasons did not correspond to the facts;

c. Also, the Tribunal does not find that the Applicant's office had a duty to present her with an alternative scheme to the rejected return-to-work plan. Rather, the Applicant was in a much better position to do so, because she was the one who suffered from a medical condition and best knew her limitation in light of the requirements of her role as a P-4 level interpreter;

d. Finally, the Tribunal finds that the Applicant's office did not put her safety and security at risk by rejecting the return-to-work plan on 13 May 2019. As the situation played out, the Applicant indeed did not work at all during the relevant period of time from 1 June to 31 July 2019, but was instead placed on a combination of sick and annual leaves, which were eventually also fully restored to her advantage.

39. Accordingly, the Tribunal finds that by rejecting the Applicant's return-to-work plan on 13 May 2019, the Administration did not exceed its scope of discretion under *Sanwidi*. It is therefore also not necessary to consider the issue of remedies. The Tribunal further notes that this conclusion would not have changed even if the second rejection of 30 July 2019 was to be considered as part of the present judicial review—the Tribunal's considerations would essentially be the same as for the initial 13 May 2019 rejection.

40. The Tribunal finally notes that by the Respondent's submission dated 19 May 2021, he appended a written witness statement signed by a United Nations Senior Medical Officer concerning the rejected return-to-work plan allegedly not being implementable on its own terms. In the Applicant's motion dated 26 May 2021 and closing statement, she requested that this witness statement would not be admitted into evidence. With reference to the Tribunal's above considerations and findings, it is noted that the witness statement has not been given any consideration in the present Judgment.

Conclusion

41. The application is rejected.

(Signed)
Judge Joelle Adda

Dated this 4th day of August 2021

Entered in the Register on this 4th day of August 2021
(Signed)
Nerea Suero Fontecha, Registrar, New York