



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/052/T

Judgment No.: UNDT/2022/040

Date: 3 May 2022

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Evelyn W. Kamau, OSLA

Counsel for Respondent:

Yehuda Goor, ALD/OHR, UN Secretariat

Introduction

1. On 21 June 2021, the Applicant filed an application challenging: (a) the denial of her sick leave entitlements; and (b) alleged discriminatory practices against her.
2. The Respondent filed his reply submitting that the application was not receivable on three grounds. First, the application is moot as the Applicant has been granted the relief she requested. The Organization has certified the Applicant's sick leave requests from 1 October 2020 to 30 March 2021. Second, the Applicant does not precisely identify the specific administrative decision she relies on to demonstrate the alleged discriminatory practice. Third, the discriminatory practices claim is not receivable because the Applicant did not exhaust internal remedies.
3. For the reasons stated below, the application is denied.

Facts

4. The Applicant joined the Organization on 3 October 2017 at the P-3 level on a fixed-term appointment with the Child Protection Unit in a hardship mission ("the Mission").
5. On 17 October 2019, the Applicant left the Mission for her home country due to medical reasons and remained on certified sick leave until 15 April 2020.
6. On 16 April 2020, the Applicant was cleared by her doctor to return to work. However, due to the COVID-19 pandemic, working remotely was advised. Accordingly, the Mission allowed the Applicant to telecommute until the end of June 2020.
7. The Applicant sought further extension of her telecommuting beyond 30 June 2020. The Applicant's request was denied because she was found medically fit to return to the duty station.
8. The Applicant was placed on special leave with pay ("SLWP") from 1 July 2020 to 7 September 2020, and then on special leave without pay ("SLWOP") from 8 September 2020 to 30 September 2020.

9. On 24 September 2020, the Applicant submitted another request to continue working from home after 1 October 2020. She attached a letter from the medical services in her home country, which she had received in April 2020, advising her on how to keep safe during the COVID-19 period, considering that she has underlying medical conditions. On the same day, the Mission rejected her request stating that “the position of child protection officer in the field requires the presence of the staff member on the ground and no one has any idea as to when COVID-19 will come to an end”.

10. The Mission Human Resources Office advised the Applicant to return to the duty station by 1 October 2020 failing which she should apply for the sick leave or annual leave or SLWOP.

11. The Applicant remained on sick leave from 1 October 2020 to 30 March 2021.

Consideration

The denial of the Applicant’s sick leave entitlements

Sick leave claim for the period 1 October 2020 to 30 March 2021

12. In her application, the Applicant challenged the denial of her sick leave entitlement for the periods: 1 October 2020 to 1 December 2020; and 2 December 2020 to 30 March 2021.

13. The Tribunal notes that in her further submission dated 22 February 2022, the Applicant informed the Tribunal that her sick leave requests from 1 October 2020 to 1 December 2020 and 2 December 2020 to 30 March 2021 were certified by medical section in February 2021.

14. It follows that the relief sought by the Applicant in connection with certification of her sick leave for the period 1 October 2020 to 30 March 2021 is now moot because the Administration has certified her sick leave. Accordingly, there is no justiciable matter before the Dispute Tribunal regarding these contested decisions.

Sick leave claim for 4 October 2019 to 12 December 2019

15. As for certifications of sick leave for the period 4 October 2019 to 12 December 2019, the Tribunal agrees with the Respondent's positions that the Applicant's request is not receivable *ratione materiae* as she did not seek management evaluation of the decision within the prescribed deadline.

16. The Applicant did not seek management evaluation within 60 days from when she was notified of the decision not to certify her sick leave for the period 4 October 2019 to 12 December 2019, as required by staff rule 11.2(a) and art. 8(1)(c) of the Dispute Tribunal's Statute. The 60-day deadline for requesting management evaluation began to run from 9 August 2020 when the Applicant was first notified of the decision to reject her sick leave request for the period 4 October to 12 December 2019. The decision was confirmed the following day, on 10 August 2020. The management evaluation deadline was, therefore, 8 October 2020. The Applicant requested management evaluation on 11 November 2020, 34 days late.

Placement of the Applicant on SLWOP and recovering her salary at the end of September 2020

17. In her application, the Applicant further contests the decision to place her on SLWOP for the period 4 October 2019 to 12 December 2019. The Applicant states that on 24 September 2020, the Applicant received her September 2020 pay slip, which reflected a deduction of the majority of her salary to cover SLWOP for the period 4 October 2019 to 12 December 2019.

18. The Tribunal notes that the contested deduction for SLWOP reflects the period from 4 October 2019 to 12 December 2019 for which the Applicant's claim of sick leave was rejected. As noted above, the Applicant's claim for the period from 4 October 2019 to 12 December 2019 is not receivable *ratione materiae* as she did not seek management evaluation of the decision within the prescribed deadline.

Abuse of discretion in the continued denial of telecommuting requests for 1 July 2020 to 30 September 2020

19. The Applicant claims that the Administration abused its discretion when it placed the Applicant on SLWP from 1 July 2020 to 7 September 2020, and on SLWOP for the period from 8 September 2020 to 30 September 2020, instead of providing reasonable accommodation due to her medical vulnerability and enabling her to work. The Applicant requests that this period be transformed in telecommuting status and this be reflected in her attendance records.

20. The Respondent states that the Applicant's request is without merit as the Applicant was not medically required to telecommute for the periods she was placed on SLWP and SLWOP. The Tribunal notes that the record corroborates that the Applicant did not have a medical exemption to telecommute for the relevant period.

21. The Tribunal notes that the Applicant was placed on SLWP while she was waiting for her visa to be able to travel back to her duty station, and in SLWOP after getting her visa. The Applicant undertook no work-related duties during that time. She does not deny these facts. In any event, the Applicant's argument that she was deprived of her right to work is tenuous, as she was in fact requested to work by the Organisation in her duty station (noting her functions as a child protection officer could not be performed remotely) and not medically required to telecommute. The Respondent is correct to point out that the Applicant is not entitled to payment for the period in which she was on special leave without pay and did not perform work. For the same reasons, the Applicant's request to have her "corresponding performance record" amended is unwarranted.

Alleged discriminatory practices against the Applicant

22. The Applicant claims that the decisions taken by her manager and the Mission are also discriminatory in nature, further constituting an abuse of discretion. The Applicant states that there appears to be disparity of treatment in how the Applicant's case was handled by the Administration.

23. In the Respondent's further submission dated 30 March 2022, at the Tribunal's request, the Respondent provided further submissions on the practice of telecommuting in the Applicant's section. The Respondent stated as the Applicant's manager had reiterated to her, the type of work performed by child protection officers requires presence on the ground. Therefore, and subject to the duty station's pandemic measures, the Applicant's manager established a rotation system that

meant to ensure on site presence of child protection officers at all times. The Respondent explained that the rotation was also meant to create an opportunity for rest and recuperation for staff members who have not left the duty station in a long time, including due to lack of personnel resulting from the absence of the Applicant and others.

24. The Applicant's manager stated the following to the Mission's Chief-of-Staff when explaining why the rotation policy is crucial and why telecommuting is of limited value:

We are currently working towards supporting the Parties to the conflict in the implementation of the Action Plan to prevent violations against children signed early this year. We are also continuing to conduct the Security Council mandated tasks of monitoring and reporting on the grave violation ... These tasks require the presence of staff on the ground at all times so as to maintain the engagement with the parties including the conduct of verifications of the information related issues. In short, ours is a purely field based operation with limited benefits from telecommuting ...

[W]e have to continue to ensure that children are released from the parties even during Covid 19 but consistent with the [World Health Organization] guidelines for the prevention of Covid-19 and the Mission's policy to maintain a light foot print ... There is also no way we can effect the release of children at this time without the presence of Child Protection officers on the ground.

25. The Tribunal notes that the Applicant was away from work on sick leave from 4 October 2019 to 16 April 2020. Upon the conclusion of this sick leave period, the Applicant's supervisors approved her request to telecommute through the end of June 2020. The Applicant's manager then stressed the importance of the Applicant and other staff members' return to the duty station under the rotation policy. The manager made a request to the Chief-of-Staff on 24 June 2020, seeking the return to duty station of not only the Applicant but also other staff members to allow for the relief of colleagues who have been on the ground for extended periods of time.

26. The Tribunal finds no evidence to support the Applicant's claim that she was discriminated against. Disclosure by the Respondent confirms that a global rotation policy was implemented universally in the section, resulting in the return of different staff members to the duty station to replace and relieve others, as well as to ensure crucial presence on the ground. The Applicant was not treated differently from other staff members in her section. She was granted permission to telecommute from 17 April 2020 to 30 June 2020. A chart provided by the Respondent shows that

other staff members telecommuted for roughly similar periods, with one exception where a staff member telecommuted for a longer period due to complex individual difficulties resulting from the pandemic and beyond their control.

27. The circumstances of the COVID-19 pandemic no doubt caused stress to staff members, especially those whose functions required them to serve on site and in hardship duty stations such as in the Applicant's case. It is quite clear that the Applicant's role as a child protection officer needed presence on the ground and that telecommuting was not appropriate for the functions of her role. The Applicant did not have a medical exemption to telecommute. This was the primary reason for the refusal of her request to extend her time telecommuting. The record clearly shows that the reason was true and that the Applicant was afforded the same discretion as other members of her team. Furthermore, it was reasonable to request the Applicant to return to duty station to alleviate others who had not been able to take a break.

28. As none of the decision challenged were unlawful, the Applicant is not entitled to any of the remedies she requests.

Conclusion

29. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 3rd day of May 2022

Entered in the Register on this 3rd day of May 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York