



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/052

Judgment No.: UNDT/2023/055

Date: 14 June 2023

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Isaac Endeley

GOLDENBERG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Christopher Davis

Nicholas Bittner

Counsel for Respondent:

Yehuda Goor, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member with the Department for Safety and Security (“DSS”), contested the advice provided by the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”) regarding her request to telecommute for five days per week due to personal and medical circumstances.
2. On 1 December 2022, the Respondent filed its reply submitting that the application is not receivable *ratione materiae* because DHMOSH’s advice is not a final reviewable administrative decision, or in the alternative, the application has no merit.
3. On 15 March 2023, the case was assigned to the undersigned Judge.
4. For the reasons below, the Tribunal rejects the application.

Facts

5. The Applicant serves on a continuing appointment as a Desk Assistant with DSS at the G-5 level, based in New York.
6. From mid-March 2020 to April 2022, staff members, the Applicant included, were permitted to telecommute on a full-time basis due to COVID-19.
7. In March 2022, Applicant went directly to her First Reporting Officer (“FRO”) with supporting documentation attesting to the fact that she needed an accommodation to telework for five days a week for both medical and personal reasons, with the latter pertaining to her need to provide care for an elderly relative. The Applicant’s request was made “in anticipation of the ‘Next Normal’ policy at the UN, which would assume that employees were able to return to work at least two days per week”. Her request was denied by the FRO.
8. On 30 March 2022, the Applicant submitted a request to the Director of her division (“the Director”) seeking permission to telecommute five days per week.

9. Upon receiving the Applicant's request, the Director permitted the Applicant to telecommute for five days per week on an interim basis, pending review of her request.

10. In early May 2022, the Director met with the Applicant. The Director advised the Applicant that her request to telecommute five days per week due to personal reasons would not be approved. As for the Applicant's medical reasons for requesting to telecommute on a full-time basis, the Director explained that a recommendation from DHMOSH was required. The Applicant requested DHMOSH's advice on 15 May 2022.

11. On 17 May 2022, DHMOSH informed the Applicant that her "request for advice about a workplace accommodation has been reviewed" and that "DHMOSH does not support [the] request".

12. On the same day, 17 May 2022, the Applicant responded to DHMOSH and requested a reconsideration of her case. DHMOSH informed the Applicant that in order to escalate her request for reconsideration, a request to the Medical Director was required. The Applicant made such a request on 2 June 2022.

13. On 30 June 2022, the Applicant's managers informed her that they would extend their approval of full-time telecommuting on an interim basis pending DHMOSH's recommendation.

14. On 18 July 2022, the authorized medical officer ("the Medical Officer") informed the Applicant that her request was not supported by DHMOSH and that the original advice of 17 May 2022 remains valid.

15. On 3 August 2022, DSS's Executive Office inquired directly with DHMOSH regarding the status of the Applicant's request for advice. DHMOSH responded on the same day reiterating its advice which was previously conveyed to the Applicant on 18 July 2022.

16. On 31 October 2022, the Applicant filed her application with the Dispute Tribunal.

Consideration

The preliminary question of receivability

17. The Respondent's contention is that the application is not receivable *ratione materiae* as the Applicant has elected to contest DHMOSH's advice, rather than her manager's decision as the contested decision. The Respondent submits that DHMOSH's advice is not a reviewable administrative decision and that the Applicant had been put on notice of this fact on multiple occasions.

18. Upon review of the file, the Tribunal finds that the Applicant's manager's decision to not grant her request to telecommute five days per week was in essence based on DHMOSH's determination that the Applicant did not require workplace accommodation. Therefore, the Tribunal finds that although DHMOSH's advice is indeed not a reviewable administrative decision, being primarily medical in its nature, the Tribunal may review the Director's decision which took into consideration DHMOSH's advice dated 3 August 2022. The Tribunal therefore finds the application receivable *ratione materiae* in regard to the Director's decision regarding the Applicant's request to telecommute for five days per week due to personal and medical circumstances.

The denial of the Applicant's request to telecommute five days per week

The applicable legal framework

19. Pursuant to section 3.7 of ST/SGB/2019/3, Flexible working arrangements ("the FWA policy"), managers have general discretion to allow staff members to telecommute for up to three days per week:

3.7. A manager may allow a staff member to telecommute within the duty station up to a maximum of three days during the work week. Telecommuting may be authorized in units of half or full days, as an ad hoc or a regular arrangement.

3.8. In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute

within the duty station for more than the maximum number of days set out in section 3.7 above.

20. As is relevant in this case, sec. 2.2 of the FWA policy provides that:

Certain components of the flexible working arrangements may be advised by the Medical Director or a duly authorized Medical Officer as being suitable to accommodate medical restrictions or limitations as part of a time-limited return-to-work programme.

21. In her application, the Applicant challenged the denial of her request to telecommute five days per week due to personal and medical circumstances. The Applicant originally made her request for reasonable accommodation in March 2022 directly to her FRO with supporting documentation attesting to the fact that she needed an accommodation to telework for 5 days a week for both medical and personal reasons. Her request was denied by the FRO.

22. On 4 May, 2022, the Director wrote to the Applicant to state that her request could only be granted if there were “personal, compelling circumstances,” and that her medical conditions would have to be evaluated by DHMOSH before the Director made any determination.

23. The Applicant argues that she did have “personal, compelling circumstances” which consisted of caregiving obligations to an immediate elderly relative. The Applicant argues that no formal review was done of the Applicant’s request for personal accommodation relating to her need to care for her relative. More specifically, the Applicant states that she repeatedly explained to the Director and her management that her relative was just recently hospitalized and subsequently released from the hospital which fits the definition of “sudden and unexpected events” justifying an accommodation under FWA policy relating to “care of elderly”. The Applicant states that although the Director promised to “reflect” on this matter, he never responded.

24. In terms of the Applicant’s medical circumstances, the Applicant’s request was evaluated by a medical officer who, on 18 July 2022, determined that they did not support the workplace accommodation of telecommuting five days a week.

25. The Applicant notes that the Administration was capable of granting telecommuting five days a week to be reviewed in three- to six-month intervals with status determinations. However, this solution was never considered.

26. The Respondent responds that the contested decision was a lawful exercise of the Director's discretion making as a manager. The Respondent states that the Applicant's personal circumstances and medical condition were carefully considered and balanced against the Administration's operational needs and the burden on other staff members. Here, the Administration's decision not to allow the Applicant to telecommute five days per week—i.e., the entire work week—was a legal, rational, procedurally correct, and proportionate exercise of discretion. The Respondent states that the Applicant's managers properly exercised their discretion in denying the Applicant's request after considering and weighing all the relevant facts and circumstances. As provided in the FWA policy, staff members have no right to flexible working arrangements. Rather, managers must balance the need and benefit of the requesting staff member against operational needs, as well as the resulting burden that approving the request would impose on other colleagues. Here, the Respondent states that the Applicant was already allowed to work remotely for three days per week. The Respondent submits that there was an operational reason for the Applicant to return physically to the office. In the Europe and Americas Desk where the Applicant works, there is only one other General Service staff member. The Respondent states that, therefore, in the absence of the Applicant, all in-person demands fall on this staff member alone. This fact, too, weighed against allowing the Applicant to telecommute for the entire work week, as opposed to spending two days per week in the office.

27. The Tribunal notes that the FWA policy grants managers general discretion to allow staff members to telecommute up to three days per week. In cases where a staff member has "compelling personal circumstances," managers have broader discretion to allow such staff member to telecommute up to five days per week. The FWA policy makes clear that "there is no right to flexible working arrangements," and that such arrangements "are voluntary arrangements agreed between staff and managers".

28. The FWA policy further provides that certain components of the flexible working arrangements may be advised by the Medical Director or a Medical Officer as being suitable to accommodate medical restrictions or limitations as part of a time-limited return-to-work programme.

29. Before commencing its review, the Tribunal must recall that the Dispute Tribunal's scope of review is limited to determining whether the exercise of the Administration's discretion is legal, rational, reasonable and procedurally correct, so that it does not lead to unfairness, unlawfulness or arbitrariness (*Nadeau* 2017-UNAT-733). In this regard, the Dispute Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. It is not the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General (*Sanwidi* 2010-UNAT-084).

30. The Applicant based her request to telecommute five days per week on personal and medical circumstances. In terms of the medical component of the Applicant's request, the Tribunal finds that the Director reasonably based his decision to not approve the Applicant's request on medical grounds on DHMOSH's determination that they did not support the workplace accommodation of telecommuting five days a week. In addition, the Director acted reasonably by permitting the Applicant to telecommute for five days per week on an interim basis, pending review of her request by DHMOSH.

31. The Tribunal takes note that the Applicant did not inform the Director or other supervisors of the Medical Officer's 17 May 2022 advice and her request for a review of her case, and continued telecommuting for five days per week under the interim arrangement. On 27 July 2022, without disclosing the Medical Director's decision not to support her telecommuting request, the Applicant requested her managers to further extend her permission to telecommute five days per week on an interim basis through August 2022, purportedly pending DHMOSH's advice. It is not clear why the Applicant failed to inform her managers of the completion of the DHMOSH's review in a timely manner. The Tribunal understands that the circumstances of the COVID-19 pandemic caused stress to staff members and that the Applicant was trying to balance

her personal situation with her professional obligations. However, it would have been helpful for the Applicant to be forthright with her managers.

32. The Applicant further claims that she “is a person with disabilities” and that her “requested accommodation is reasonable, and her managers’ refusal to grant it is [disability] discrimination”. She further argues that nothing in the FWA policy should be read to supersede a disabled employee’s right to a reasonable accommodation. The Tribunal notes that DHMOSH reviewed the Applicant’s medical condition twice and found that she did not require a workplace accommodation. The Tribunal finds that the Director reasonably relied on DHMOSH determination regarding the status of the Applicant’s health.

33. The Tribunal notes that the FWA policy was essentially enacted to allow for flexibility for staff members’ healthier work-life balance and also to support staff members who are experiencing difficult personal circumstances. While it is true that the difficult personal circumstances are anticipated to be generally unexpected and temporary in nature, managers do have an obligation to apply a good-faith approach in exercising their discretion (see, for instance, *Jafari* 2019-UNAT-927).

34. In the present case, the Tribunal notes that the Director explained to the Applicant that providing care to an elderly parent may amount to compelling personal circumstances in certain instances, such as during sudden, unexpected events requiring immediate and temporary support. The Director further stated that the Applicant described her situation as permanent and, as such, it is similar to the situation of many staff members who have caretaking responsibilities for elderly parents, spouses, minor children, or other relatives. The Director advised the Applicant that he was prepared to approve telecommuting for three days per week, in line with the prevailing policy.

35. Upon review of the record, the Tribunal is of the view that the Applicant’s managers could have been more sensitive and accommodating to the Applicant’s situation regarding her elderly relative and it is unclear why the Director did not respond to the Applicant’s disclosure that her relative had just returned from the hospital. In the Tribunal’s view, this situation would amount to “compelling personal

circumstances” and furthermore, the managers do have discretion to grant accommodations for limited periods of time.

36. However, the Tribunal must also take note that the Applicant was in fact allowed to telecommute on a full-time basis for approximately four months (from April to August 2022) pending consideration of her request. The Respondent also submitted in his reply dated 1 December 2022 that the Applicant has “telecommuted for five days per week since March 2020 and has not yet returned to the office”. It follows, therefore, that the Applicant has been telecommuting for five days a week for over 2 and half years, if not longer. Evidently, the Applicant has been absent from the office for a considerable added period now, yet she submits that she still requires the same accommodation. While it is understandable that the Applicant wishes to provide full-time care to her elderly relative, that wish does not create an obligation for the Administration to allow her to not report to the office. Many staff members have caregiving responsibilities, which they must balance against their work obligations.

37. The Tribunal also takes note that there is an operational need for the Applicant to return to work. The Director reasonably, weighed this operational fact against allowing the Applicant to telecommute for the entire work week, as opposed to spending two days per week in the office.

38. The Tribunal finds that in these circumstances, it was not unreasonable nor unlawful to require the Applicant to work from the office for two days per week. The Administration, therefore, properly exercised its discretion in declining the Applicant’s request to work from home for the entire work week.

39. Based on the above, the Tribunal finds that the Applicant has been afforded reasonable accommodation for her situation. The Applicant has been able to work remotely on a full-time basis from March 2020 to December 2022. In addition, should further compelling circumstances occur, the Applicant may submit a request for workplace accommodations for a specified period. The Tribunal notes that the FWA policy is not intended to provide staff members with the opportunity to work remotely full time for indefinite periods at their duty stations, but rather, it is intended to be a

policy which can offer managers a degree of flexibility in response to a staff member's personal compelling circumstances, as and when they arise. The policy requires a good-faith approach from both the managers and staff members alike.

40. It follows that the contested decision was lawful.

Conclusion

41. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 14th day of June 2023

Entered in the Register on this 14th day of June 2023

(Signed)

Isaac Endeley, Registrar, New York