



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

CHERNEVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Miles Hastie, UNICEF

Introduction

1. By application filed on 5 December 2017, the Applicant requests suspension of action, pending management evaluation, of the decision to place her on special leave without pay (“SLWOP”) effective 9 November 2017.
2. The application was served to the Respondent who filed his reply on 7 December 2017.

Facts

3. The Applicant started service in October 2016 as a Corporate Research Officer (P-2), with the Private Fundraising and Partnerships Division, United Nations International Children’s Emergency Fund (“UNICEF”), under a two year fixed-term contract.
4. After an incident on 17 May 2017, the Applicant was placed on certified sick leave (“CSL”) with full pay. Effective 9 August 2017, and following exhaustion of the Applicant’s entitlement to CSL with full pay, she was placed on CSL with half pay combined with half annual leave to keep her on full-pay status. Upon exhaustion of her annual leave balance, the Applicant was placed on CSL with half pay effective 24 August 2017. The Applicant exhausted all leave entitlements on 8 November 2017.
5. By letter dated 9 September 2017, the Applicant requested whistleblower protection from the UNICEF Ethics Office.
6. By email of 17 October 2017, the Chief, Human Resources, Private Fundraising and Partnerships Division, UNICEF, (“Chief, HR”) informed the Applicant of the status of her leave entitlements, and notified her that based on her leave use she would be placed on SLWOP effective 9 November 2017.

7. According to a witness statement filed by the Respondent, the Chief, HR, had a telephone conference with the Applicant on 15 November 2017, during which he discussed with her the “exhaustion of paid sick leave and the possibility to have her case submitted to the [United Nations] Medical Director and to the [United Nations Staff Pension Committee (“UNSPC”)], for consideration for medical termination and disability benefits from the United Nations Joint Staff Pension Fund [(“UNJSPF”)]”. He also informed the Applicant that her health insurance coverage would expire in light of her being on SLWOP.

8. By letter dated 6 December 2017, the UNICEF Ethics Office informed the Applicant of its view that no *prima facie* case of retaliation had been established.

Parties’ contentions

9. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. Provided that they submit all requested certificates, staff members may not have their salary and benefits cut while on medical leave; to retroactively inform her in October 2017 about a decision that was apparently taken in August is unlawful;
- b. The decision was based on extraneous grounds and related to her claim for retaliation;

Urgency

- c. She continues to regularly consult a psychological counsellor and a doctor since the communication that her salary and benefits were cut; the Tribunal should prevent UNICEF from cutting her insurance coverage prospectively; if her medical insurance coverage is stopped, she will no longer be able to cover her medical expenses; her medical condition and expenses arise directly from her experience at UNICEF;

d. She tried to resolve the matter of the October 2017 decision through informal resolution with the Human resources Office to no avail;

Irreparable damage

e. She was put in a stressful and harmful situation by the October 2017 decision. The Tribunal should step in to prevent further psychological harm to her health; the decision of 17 October 2017 should be suspended and she should be reinstated in her full salary and full benefits moving forward; UNICEF should be ordered to compensate her and return her full salary and any benefits she may have lost for the months looking back.

10. The Respondent's primary contentions may be summarized as follows:

a. The Applicant's claim for retrospective relief is not receivable; the application can only seek prospective relief;

Prima facie unlawfulness

b. The Applicant exhausted her paid leave entitlement; hence, she was placed on unpaid service; no issue of retaliation arises;

c. The decision to discontinue the Applicant's pay and to place her on SLWOP followed inexorably from (i) the exhaustion of her paid leave benefits; and (ii) her stated desire to not be considered for medical termination and a disability benefit;

d. The Applicant does not identify a legal or factual error in the calculation of her paid leave entitlements and maximum entitlement under staff rule 6.2(b)(ii);

e. There was no advertent decision, coincident with the filing of her Ethics Office complaint, to give her leave unusual treatment; she filed for whistleblower protection as her paid leave was about to be exhausted;

f. The Ethics Office did not forestall disposition of her case to exacerbate her leave situation or otherwise prejudice her; simply, it found no retaliation;

g. The possibility of continued half pay was available to the Applicant, had she expressed a desire in being considered for medical termination and disability benefits pending such determination (DHR/PROCEDURE/2017/006 (Sick leave)); she declined that process; UNICEF would still be ready to forward such a claim, properly supported by medical evidence, in accordance with its sick leave and medical termination procedures, should the Applicant request it; should the Medical Services Division support her application, but there be any delay in processing her termination, she would be placed on special leave with half pay (and indeed, UNICEF would be willing to grant such leave retroactively in support of a well-supported claim);

h. The Applicant did not file a claim under Appendix D to the Staff Rules, which she should do if she believes there is a proper claim to workplace injury or illness;

Urgency

i. Fifty-one days elapsed between the decision of 17 October 2017 and the impending expiry of her paid leave, at which point the Applicant sought the suspension for a maximum of 45 days; however, UNICEF is sensitive to the nature of the Applicant's medical claims, which might suggest an inability to pursue the matter with diligence;

Irreparable damage

j. It is conceded that the inability to receive medical treatment, if proven, would constitute harm of an irreparable nature (notwithstanding the apparent absence of evidence of medical costs or inability to pay during management evaluation period, and notwithstanding the decision not to pursue medical termination and disability benefits).

Consideration

11. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of a management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. It is clear that all three conditions have to be satisfied before an application for suspension of action is granted.

Receivability

12. As this Tribunal has consistently held, an application for suspension of action may only be granted if the contested decision has not yet been implemented (see, e.g., *Applicant* Order No. 167 (NBI/2014); *Elkeiy* Order No. 43 (GVA/2015); *Kawas* Order No. 297 (NY/2014)). However, when a decision produces continuous legal effects, it can only be deemed to be implemented in its entirety when these effects cease (see, e.g., *Calvani* UNDT/2009/092; *Kompass* Order No. 99 (GVA/2015)).

13. In the case at hand, the contested decision to place the Applicant on SLWOP produces continuous legal effects for her, and is only deemed to have been implemented in its entirety at the end of the special leave (cf. *Calvani* UNDT/2009/092). In view of the foregoing, the Tribunal finds that the application for suspension of action is receivable.

Prima facie unlawfulness

14. The Tribunal recalls that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

15. The Tribunal takes note of the Respondent's argument that "the decision to discontinue the Applicant's pay and to place her on SLWOP followed inexorably from (i) exhaustion of her paid leave benefits; and (ii) her stated desire to not be considered for medical termination and disability benefit". It also notices the Respondent's continued willingness to place the Applicant on special leave with half-pay should she agree to be considered for medical termination and disability benefit, pending such determination.

16. It appears that at the time of the contested decision, the Applicant had indeed exhausted her sick leave entitlements pursuant to sec. 6.2 of DHR/PROCEDURE/2017/006 (UNICEF procedure on sick leave), and her accrued annual leave. According to sec. 28 of the instruction,

When the entitlement to sick leave has been exhausted, further certified sick leave shall be charged to annual leave. When the entitlements to sick leave and annual leave have been exhausted, the staff member may be placed on special leave without pay, subject to endorsement by Head of Office or Regional Chief and approval by the Director, Division of Human Resources.

17. . However, the Tribunal observes that pursuant to sec. 29 of that instruction (emphasis added):

When a staff member has used all of his or her entitlement to sick leave with full pay, the designated HR specialist *shall* bring the situation to the attention of the Chief, HQ Liaison Section who will contact the UN Medical Director in order to determine whether that staff member should be considered for a disability benefit under article 33 (a) of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF) while the staff member is on sick leave with half pay.

18. The Applicant exhausted her sick leave with full pay on 8 August 2017. Pursuant to sec. 29 of the administrative instruction, it is at that point that the Applicant's situation should have been brought to the attention of the Chief, HQ Liaison Section, for the latter to contact the UN Medical Director.

19. The Respondent does not refer to any contact established by the Chief, HQ Liaison Section with the UN Medical Director "in order to determine whether [the Applicant] should be considered for a disability benefit under article 33 (a) of the

Regulations of the [UNJSPF]”, neither in August, nor in November 2017, nor at any other point in time. He simply filed a witness statement from the Chief, HR, according to which the latter discussed with the Applicant the possibility to have her case submitted to the United Nations Medical Director for the first time on 15 November 2017, and the Applicant rejected such submission. That discussion took place after the Applicant had exhausted not only her entitlement for sick leave with full pay, but also that with half pay. Again, at no point in time did the Administration refer the matter to the UN Medical Director.

20. The Respondent seems to be of the view that the referral for determination to the UN Medical Director, under sec. 29 of the instruction, is only possible with the Applicant’s consent. The Tribunal disagrees with this interpretation. Nothing in sec. 29 suggests that at the moment of referral of a case for a *determination* by the UN Medical Director as to whether a staff member’s case should be *considered* by the UNJSPF for a disability benefit, the staff member’s consent is required. Rather, according to that provision, the Administration is compelled (“shall”) to bring the situation to the attention of the Chief, HQ Liaison Section, who, in turn, has to (“will”) contact the UN Medical Director for a determination. No discretion (“may”) is provided for in this provision, nor does it in any way require the staff member’s consent.

21. Further, sec. 29, last sentence, provides that “[w]hen the staff member is being considered for such a benefit and paid leave entitlements have been exhausted because of a delay in the medical determination of the staff member’s incapacity for further service or in the decision by the [UNSPC] whether to award a disability benefit, the staff member will be placed on special leave with half pay until the date of such decision”. Again, no discretion is granted to the Administration with respect to the placement of the staff member on special leave with half pay during that determination by the UN Medical Director and/or pending the UNSPC decision.

22. The Tribunal observes that unlike the UN Secretariat, the UNICEF administrative instruction does not address the matter of disagreement of a staff member once and if a positive medical determination is made by the UN Medical Director that that staff member's illness or injury constitutes an impairment to health which is likely to be permanent or of long duration. Indeed, ST/AI/1999/16 (Termination of appointment for reasons of health), applicable at the UN Secretariat, provides that "[i]f the staff member disagrees with the medical conclusion, he or she may request a review of the matter by an independent medical practitioner or a medical board". It is not clear what the process at UNICEF would be in case a positive determination is made by the UN Medical Doctor and a staff member is in disagreement with that conclusion.

23. This is, however, immaterial for the case at hand. Clearly, under the applicable rules, it was the Administration's duty to submit the Applicant's case for determination to the UN Medical Director. Pursuant to sec. 29 that submission had to be made when the Applicant had used all her entitlement to sick leave with full pay (i.e., on 8 August 2017), independently of her consent. That, however, did not occur. It follows that no determination has yet been made by the UN Medical Director about whether the Applicant's case shall be submitted to the UNSPC for consideration of a disability benefit.

24. The Administration's failure to act timely under sec. 29, and its mistaken belief that it needed the Applicant's consent to refer the case to the UN Medical Director for determination, led to the decision to place the Applicant on SLWOP upon the exhaustion of her paid leave entitlements, without such a determination being made. This is in clear contradiction with the letter and spirit of sec. 29 of the UNICEF instruction, which seeks to avoid that staff members face a situation like the one the Applicant was placed in, i.e., being without pay before a determination has been made by the Medical Director as to whether a case shall be submitted to the UNSPC.

25. The Tribunal is of the view that under these circumstances, and upon exhaustion of her sick leave entitlements with full and half pay, and accrued annual leave, the Administration was obliged to place the Applicant on special leave with half pay, in analogous application of sec. 29. Therefore, the Tribunal finds that the decision to place the Applicant on special leave without pay is *prima facie* illegal.

Urgency

26. The Tribunal agrees with the Respondent that the circumstances of this case suggest an inability for the Applicant to pursue the matter with due diligence. Hence, despite the time that elapsed since the contested decision was notified to the Applicant until she filed her application for suspension of action, it will not find that the urgency was self-created in this case. Therefore, and in light of the Applicant's health and lack of medical coverage as a result of her placement on SLWOP, the Tribunal finds that the requirement of urgency is met.

Irreparable damage

27. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. In each case, the Tribunal has to look at the particular factual circumstances.

28. The Tribunal is concerned about the Applicant's health situation and lack of medical insurance coverage as a result of her being placed on SLWOP. Therefore, and in light of the resulting potential inability for the Applicant to receive medical treatment, it finds the requirement of irreparable harm to be satisfied.

29. Notwithstanding its above finding of the receivability of the present application for suspension of action, the Tribunal notes that it is not competent, under its Statute, to grant the Applicant's claim for retrospective relief. Indeed, its competence is limited to suspending the decision prospectively, that is, from the moment of its decision until the completion of management evaluation review.

Conclusion

30. In view of the foregoing, the application for suspension of action is granted and the decision to place the Applicant on special leave without pay is suspended, as of the date of the present decision until the completion of the management evaluation review.

(Signed)

Judge Teresa Bravo

Dated this 12th day of December 2017

Entered in the Register on this 12th day of December 2017

(Signed)

René M. Vargas M., Registrar, Geneva