UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2018/022
Order No.:	64 (GVA/2018)
Date:	22 March 2018
Original:	English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

COCA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION PENDING MANAGEMENT EVALUATION

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 14 March 2018, the Applicant requests suspension of action, pending management evaluation, of the decision to "separate [her] for medical reasons and to refer [her] case for disability".

2. The application was served on the Respondent, who filed his reply on 19 March 2018.

Facts

3. The Applicant is a Programme Management Officer (P-3) at the United Nations Conference for Trade and Development ("UNCTAD"). She joined UNCTAD on 12 January 2015, under a temporary appointment that was renewed several times until 31 January 2016. On 1 February 2016, the Applicant was given a one-year fixed-term appointment ("FTA") that was subsequently extended until 31 January 2019.

4. In July 2017, the Applicant went on sick leave. She filed a claim under Appendix D to the Staff Rules on 27 December 2017, asking that her psychological illness be recognized as having been work incurred.

5. On 26 October 2017, the Human Resources Management Service, United Nations Office at Geneva ("HRMS/UNOG") informed the Applicant that she had "exhausted [her] entitlement to sick leave with full pay on 10 October 2017 (65 days over a 12-month period)." Through her signing a memorandum dated 25 October 2017, the Applicant accepted to combine sick leave with half pay with a half day of annual leave as of 26 October 2017.

6. Having calculated that the Applicant had exhausted all her sick leave entitlements on 16 January 2018, HRMS placed her on special leave with half pay ("SLWHP") as of 17 January 2018, pending a disability assessment.

7. During a telephone conversation on 26 January 2018, a Medical Doctor, UNOG, informed the Applicant that her case would be referred to the United Nations Joint Staff Pension Fund ("UNJSPF") for a decision on the award of a disability benefit to be taken during April 2018.

8. The Medical Service, UNOG, informed HRMS/UNOG on 5 February 2018 that the current medical condition of the Applicant required the presentation of her case for consideration for disability at the end of her leave entitlements.

9. The Applicant received an email on 8 February 2018 from HRMS/UNOG, informing her that she had been placed on SLWHP and that her case had been referred to the UNJSPF for consideration for a disability benefit.

10. The HRMS/UNOG formally referred the Applicant's case to the United Nations Staff Pension Committee ("UNSPC") on 27 February 2018. According to the Respondent, at the time of his reply, the medical report from the Medical Services Section, UNOG, had, however, not yet been sent to the Medical Director, Medical Services Division, United Nations Headquarters.

11. On 14 March 2018, the Applicant sought management evaluation of the decision to separate her for medical reasons and to refer her case for disability based on an incorrect calculation of sick leave.

Parties' contentions

12. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. Her sick leave entitlement has been inappropriately calculated, which resulted in a decision to terminate her appointment prior to her actual exhaustion of sick leave entitlement;

b. Her service should be considered continuous for the purpose of the determination of the amount of sick leave entitlement pursuant to staff rule 6.2(b)(iii);

c. Unlike what is the case for the granting of permanent appointments, staff rule 6.2(b)(iii) does not require that continuous service be on the same contractual modality or on fixed-term appointments; the fact that the rules on conversion to permanent appointments stipulate a contractual modality while staff rule 6.2(b)(iii) does not is significant for the broader interpretation of the notion of continuous service under the latter staff rule;

d. There was no temporal break between the Applicant's temporary and fixed-term appointments and an email of the Applicant's supervisor indicates that the transition was not to involve a "break in service"; personnel actions ("PAs") related to her separation and re-appointment indicate that the transition to a fixed-term appointment was "[without a] break", which indicates continuity of service; therefore, her work on both temporary and fixed-term appointments should be considered when establishing the Applicant's length of continuous service;

e. The Administration's reliance on staff rule 4.12(c) is not relevant since no conversion of a temporary appointment to a fixed-term appointment would be needed for service to be continuous for the purpose of staff rule 6.2(b)(iii), which does not require continuous service to be on the same contractual modality;

f. The annual leave earned under her temporary appointment was carried over into her fixed-term appointment and the settling-in grant for international recruitment was paid pursuant to the Applicant's fixed-term appointment but on the basis of travel carried out pursuant to her temporary appointment; this indicates that service was continuous and the Administration's reliance on staff rule 4.17(b)—which provides that "the terms of the new appointment shall be fully applicable without regard to any period of former service"—to allege a break of continuity of service in the Applicant's case is equally not convincing;

g. The instant case can be distinguished from the circumstances addressed in *Asensi Monzo* UNDT/2017/085, which dealt with the requirements of continuous service for the purpose of eligibility for continuous appointment, where, explicitly, continuous service must be on fixed-term appointments; it was also considered significant in that case that there was a temporal break of nine days between appointments during which no contractual relationship existed;

h. The Tribunal defined a break in service in *Rockliffe* UNDT/2012/033 and *Dunda* UNDT/2013/034, as a temporal break during which no contractual relationship existed;

i. No break in service occurred between the Applicant's temporary and fixed-term appointments, hence her service can only be considered as having been continuous;

j. Since she had accrued three years of continuous service as of 11 January 2018, staff rule 6.2(b)(iii) applied, requiring a different calculation of sick leave entitlement as of that date; under her re-calculated sick leave entitlement, the Applicant would not yet even have exhausted her entitlement to sick leave on full pay, and the decision to terminate her appointment for medical reasons is thus contrary to sec. 3.2 of ST/AI/2005/3;

Urgency

k. Referral for disability entails medical separation whether the disability benefit is granted or not. However, when the Applicant was informed on 26 January 2018 that her case had been referred for disability, this was not obvious to her; that confusion, paired with her medical condition, impacted on her ability to take prompt action and bring a challenge;

l. Given her situation and the lack of a clearly articulated formal communication to her indicating her situation, the urgency was not self-created;

m. Her case will be considered for disability in April; whether disability is granted or not, she will be separated; it follows that a suspension of the separation is required to create the space for the management evaluation process to take place; therefore, the criteria of urgency is clearly met;

Irreparable damage

n. If the Applicant were given a reasonable time to recover, she is hopeful that she might be able to resume her work. Her separation—even if it were on disability—would cause her an irreparable damage by denying her the opportunity to recover her health and return to work; and

o. Loss of UN employment is not merely viewed in terms of financial loss but also in terms of loss of career opportunity (*Khambatta* 2012/UNDT/058), and as such can constitute irreparable harm.

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

Receivability

a. The decision that the Applicant requests to be suspended, namely the decision to separate her from service for medical reasons and to refer her case for disability "was based on the decision to grant [her] sick leave entitlements based on her contractual status", namely three months—equivalent to 65 days—of sick leave with full pay. The Applicant exhausted that entitlement on 10 October 2017, and that she was notified accordingly on 25 October 2017. Since the Applicant failed to request management evaluation of her sick leave entitlement under 6.2(b)(ii) within 60 days of being informed of its exhaustion, she can no longer challenge it;

b. It is not contested that the Applicant submitted a request for management evaluation and that the decision to terminate her contract for health reasons has not been implemented yet;

Prima facie unlawfulness

c. The Applicant was entitled to sick leave for three months on full salary, and the calculations were properly made;

d. The maximum entitlement for sick leave under staff rule 6.2(b) depends on the *nature and duration of a staff member's appointment*; the maximum entitlement for temporary appointments and FTAs/continuing appointments is different and cannot be compared or computed; unused sick leave cannot be carried over from one contract to the other, let alone from one type of contract to another;

e. The maximum entitlement of nine months with full pay applies only when a staff member has completed three years of continuous service under FTAs; previous service under another type of contract is irrelevant. Since the Applicant did not complete three years of continuous service under FTAs, she is only entitled to three months with full pay over a 12 months period, under staff rule 6.2(b)(ii);

f. Staff rule 6.2(b)(iii) does not apply: the structure of staff rule 6.2(b) supports a reading that staff rule 6.2(b)(iii) provides for the maximum entitlement for continuing appointments, or for a staff member holding one FTA of three years or more but who has not completed three years of service yet, or for a staff member holding several subsequent FTAs amounting to three years or more of continuous service;

g. Alternatively, there was no continuity of service between the Applicant's temporary appointment and her FTA since she was separated and re-appointed under a new contract, which, pursuant to staff rule 4.17 broke the continuity; the fact that there was no break in service is irrelevant; contrary to what is submitted by the Applicant, her unused annual leave from her temporary appointment was paid to her, and was not carried over to her FTA;

h. The Applicant was thus reemployed under a new type of contract, which broke the continuity of service as per staff rule 4.17; sick leave entitlements are not one of the exceptions provided for in staff rule 4.17(c) in case of re-employment;

i. In light of the Applicant having exhausted her sick leave entitlement with full pay, HRMS properly brought the Applicant's case to the attention of the Medical Service, UNOG, pursuant to sec. 3 of ST/AI/1999/16 (Termination of appointment for reasons of health); the referral to the United Nations Joint Staff Pension Fund by HRMS is not prima facie unlawful; if the Applicant disagrees with the medical conclusion, she can request a review of the matter by an independent medical practitioner or a medical board;

Urgency

j. The requirement of urgency is not met; the Applicant was notified on 25 October 2017 that she had exhausted her entitlement to 65 days of sick leave with full pay on 10 October 2017;

k. Her case has not yet been referred to the UNSPC by the Medical Services, UNOG; the UNSPC will render a decision at the end of April 2018 and the Administration will inform the Applicant in due course of its intended actions; and

l. The application for suspension of action should be dismissed.

Consideration

14. The Tribunal has to examine whether the decision to refer the Applicant's case to the UNSPC for consideration for a disability benefit and, most likely, to separate her for medical reasons on the basis of the challenged calculation of sick leave entitlements shall be suspended. To make that determination, the Tribunal has to consider whether the Applicant's sick leave entitlement has been properly calculated, and whether at the time that HRMS/UNOG submitted her case to the

UNSPC, she had indeed exhausted her sick leave entitlement with full pay, as sustained by the Respondent.

Receivability

15. The Respondent's claim that the Applicant's challenge against her 65-day sick leave entitlement with full pay under staff rule 6.2(b)(ii) is not receivable cannot be entertained and is irrelevant.

16. When back in October 2017, HRMS/UNOG informed the Applicant about the exhaustion of her sick leave entitlement with full pay, the calculation was based on the legal regime then applicable to her. Requesting management evaluation would have been futile. Furthermore, the Applicant is contesting a decision taken months after the October 2017 notification and the implementation of a combination of sick leave on half-pay with annual leave, namely the January 2018 decision to refer her case for disability and to separate her from service for medical reasons.

17. The grounds for the Applicant's challenge are indeed related to the calculation of her sick leave entitlement but due to a change of the legal regime applicable to her. Indeed, the Applicant claims that having completed three years of continuous service on 11 January 2018, she has a sick leave entitlement with full pay under staff rule 6.2(b)(iii) (nine months, equivalent to 195 days) greater than the one under staff rule 6.2(b)(ii) (three months, equivalent to 65 days).

18. The Tribunal considers that if one were to accept that the Applicant is entitled to 195 days of sick leave with full pay as of 11 January 2018, a new entitlement calculation cycle would start as of that day, and any previous decision, such as the one of October 2017, concerning exhaustion of sick leave entitlement would then be superseded.

19. The Applicant was notified orally by UNOG Medical Services of the decision that her case would be referred for consideration of disability on 26 January 2018. The Respondent contests that the Applicant was informed on 26 January 2018 by UNOG Medical Services that her contract would be terminated as of

31 March 2018, claiming that such a decision "is a Human Resources matter". The Respondent did not contest, however, that the Applicant will be separated regardless of whether she is or is not granted a disability benefit. Rather, he noted that "it is not contested that the decision to terminate [the Applicant's] contract for health reasons has not been implemented yet" and that the Applicant requested management evaluation thereof. The Respondent thus admits the existence of such a decision.

20. By filing a request for management evaluation against the decision to separate her for medical reasons and to refer her case for disability based on an incorrect calculation of sick leave on 14 March 2018, the Applicant respected the statutory time limits. The application for suspension of action is thus receivable.

Prima facie unlawfulness

21. 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)).

22. The Tribunal has to determine whether concluding that the Applicant had exhausted her entitlement to sick leave with full pay, and deciding to refer her case to the UNSPC, on the basis of that conclusion, were prima facie unlawful. To make that determination, the Tribunal has to examine the sick leave days to which the Applicant was entitled, and had used, if any, at the time of the contested decision.

23. Staff rule 6.2 (Sick leave)relevantly provides the following:

> **Maximum entitlement**
>
> (b) A staff member 's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

> (i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;
>
> (ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;
>
> (iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

24. The Respondent argues that the Applicant was only entitled to three months on full salary and three months on half salary in a period of 12 consecutive months, pursuant to staff rule 6.2(b)(ii), and that staff rule 6.2 (b)(iii) does not apply to her because she does not fulfil the requirement of three years of continuous service.

25. The Tribunal disagrees with the Respondent's interpretation of the notion of continuous service in the framework of staff rule 6.2(b)(iii). If the legislator had wanted to consider continuous service only under FTAs, he would, and should have, expressly provided for such a restriction. Counsel for the Applicant rightfully pointed out that e.g., for the purpose of eligibility for conversion to a permanent appointment, the relevant legal provisions explicitly require such continuity to be on FTAs. Indeed, sec. 1(a) of ST/SGB/2009/10 provides that "[t]o be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009: (a) Have completed, or complete, five years of *continuous service on fixed-term appointments* under the 100 series of the Staff Rules" (emphasis added).

26. No such requirement exists for the determination of sick leave entitlements, as staff rule 6.2(b)(iii) merely requires, as an alternative (use of "or"), that a staff member completes "three years or more of continuous service". The Respondent's argument that the maximum sick leave entitlement for temporary appointments and FTAs/Continuing appointments is different and cannot be compared or computed,

or carried over or paid out are irrelevant for that consideration. A literal reading of the above rule can only mean that upon completion of three years or more of continuous service, independently of the type of appointment, the maximum entitlement of up to nine months on full salary and nine months on half salary in any period of four consecutive years applies.

27. The foregoing notwithstanding, the Tribunal notes that under the applicable legislative framework, a scenario in which a staff member is on continuous service for three years or more on temporary appointments or on a combination of temporary appointments and FTAs should normally not occur. The relevant administrative instruction, ST/AI/2010/4/Rev.1 (Administration of temporary appointments), limits temporary appointments to a maximum of 729 days (sec. 2.7), provides for re-employment in case of any appointment granted following a temporary appointment (sec. 1.2) and also precludes the recruitment of a person employed on a temporary appointment against a FTA for the same position (sec. 5.7). However, if the Organization, nevertheless, recruits a staff member first on a temporary appointment and then on an FTA against the same position/functions, and if such service is continuous, there is no re-employment within the meaning of the staff rules and the staff member should benefit from the same social security benefits as any other staff member.

28. The Tribunal recalls that the Staff Rules prevail over administrative instructions. Hence, administrative instructions have to be interpreted and applied in accordance with the Staff Rules. It follows from the above and the literal meaning of staff rule 6.2(b)(iii) that it covers continuous service of three years or more under any type of appointment. In the absence of any ambiguity, a more restrictive interpretation would be against the literal meaning of the staff rule and would disadvantage staff members. It follows that a staff member who has completed three years or more of continuous service, on any type of appointment, is—as of the date of completion of the three years of continuous service—entitled to nine months of sick leave with full pay and nine months of sick leave with half pay, in a term of four consecutive years.

29. The Respondent alternatively argues that the Applicant's service was not continuous, as her re-employment under a new type of contract broke the continuity of service as per staff rule 4.17. The Tribunal will examine whether although she first had temporary appointments and then FTAs, the Applicant's service was continuous for three years for the purpose of staff rule 6.2(b)(iii).

30. Relevantly, the Tribunal found in *Katulu* UNDT/2017/040 (not appealed) that while in case of re-employment there is no continuity of service (staff rule 4.17(b)), such re-employment implies that a separation from service did indeed occur. To consider whether the Applicant was separated between her temporary appointment and her FTA, and was actually re-employed, the Tribunal will apply the test set out in *Katulu*.

31. Unlike in *Katulu*, the Applicant's temporary appointment expired before she was granted an FTA effective 1 February 2016. However, expiration of an appointment does not necessarily imply/lead to a separation from service. Rather, the Tribunal needs to examine whether a separation did in fact occur. It thus has to consider whether "the factual circumstances surrounding the Applicant's transition from the [temporary appointment] to an FTA demonstrate that the Organization effectively treated her as being continuously employed, and that it did not proceed with an actual separation from service and dealt with the effects that it entails" (*Katulu* at para. 29).

32. First of all, the Tribunal is satisfied, through the evidence submitted by the Respondent, that the Applicant's entitlement to annual leave accrued during her temporary appointment was paid to her with her salary of March 2016, i.e., two months after being granted an FTA. That could speak for a re-employment of the Applicant under an FTA, hence, a lack of continuity. However, the Tribunal also notes that the Applicant's "Annual Time and Attendance Statement Certification" as of 31 March 2016—that is, after two months on FTA—shows an annual leave balance of 17.5 days. This documentary inconsistency creates an ambiguity which sheds doubt about the actual processing of the Applicant's separation.

33. The Tribunal further notes that it appears from the available personnel actions and the Applicant's letter of appointment that she continued to perform her functions as Programme Officer at the Competition and Consumer Policies Branch, UNCTAD, at the P-3 level, without any interruption. The Respondent indeed acknowledged that the Applicant did not have a "break in service".

34. It is also noteworthy that the Applicant's first performance evaluation ("e-Pas") covers the period from 12 January 2015 to 31 March 2016, that is, the entire period of her temporary appointment(s) together with two months of her first FTA during which she performed the same functions. Had she been separated and recruited against another position on the FTA, she should have obtained an e-Pas for the period of the temporary appointment(s) through 31 January 2016, as mandated by sec. 6.1 of ST/AI/2010/4/Rev.1, and a separate one for the period from 1 February 2016 to 31 March 2016.

35. Further, the Tribunal observes that the two Personnel Actions on file, dated 1 February 2016, indicate as action type "special separation [without] break" and "reappointment [without] break". As held in *Katulu*, the separation PA and reappointment PA are not sufficient, in and of themselves, to establish that the Applicant was separated from the Organization and then re-employed (cf. *Katulu*, at paras. 42 ff). Rather, the reference to a "Special separation [without] break" suggests that the Applicant's service with the Organization was not interrupted which seems to be incoherent with the definition of separation set out in the staff rules and related consequences (cf. *Katulu* at para. 44).

36. Moreover, the Tribunal notes that the Respondent did not contradict the Applicant's statement—supported by evidence—that she was paid the settling-in grant for international recruitment, upon the granting of the FTA, but on the basis of travel carried out pursuant to her temporary appointment. That is a further indication that the employment was continuous, and that no actual separation occurred.

37. In the absence of any additional evidence as to a settlement process showing the actual separation of the Applicant from the Organization, the Tribunal finds, for the purpose of the present proceedings of a suspension of action, that the Applicant's service for the purpose of staff rule 6.2(b)(iii) appears prima facie to be continuous. Upon completion of three years of continuous service on 11 January 2018, the Applicant appears to have been entitled to a sick leave entitlement of 195 days with full pay and 195 days with half pay. Therefore, her referral to the UNSPC, and subsequent termination/separation from service, on the assumption that she had exhausted her sick leave entitlements, are prima facie unlawful.

Urgency

38. As this Tribunal held in *Onana* UNDT/2009/033, "[i]t is the timeline to the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent".

39. The Tribunal notes that the Applicant's case will be considered for disability during the upcoming meeting of the UNSPC in mid-April. The Tribunal is mindful of sec. 3.5 and 5(c) of ST/AI/1999/16. However, it observes that, in practice, staff members who have exhausted their sick leave entitlements on full and half pay at the time of consideration of their case by the UNSPC are separated effective the day after the date of the UNSPC decision. Thus, the Applicant will most likely be separated from the Organization sometime in mid-April 2018 with or without a disability benefit.

40. Further, the Tribunal is of the view that in light of the Applicant's medical condition, any delay in the filing of the present application precludes a finding that the urgency was self-created (cf. *Jitsamruay* UNDT/2011/206).

Irreparable damage

41. The Tribunal notes that the Respondent did not submit any argument with respect to irreparable damage.

42. This Tribunal has held that harm to professional reputation and career prospects, including unemployment, and harm to health may be irreparable (cf. *Kasmani* UNDT/2009/017; *Kananura* UNDT/2011/176).

43. The Tribunal considers that the mere referral to the UNSPC and consideration of the Applicant's case by the latter are not susceptible to cause the her irreparable harm. That decision shall therefore not be suspended.

44. The Tribunal is mindful that suspending the referral to the UNSPC at this stage, depending on the outcome of the management evaluation, may lead to a situation where the Applicant's case cannot be reviewed by the UNSPC before November 2018 (date of the UNSPC's next meeting), and may ultimately put her in a limbo as to her entitlements while her case is submitted for consideration by the UNSPC.

45. The foregoing notwithstanding, irreparable harm will result from the Applicant's separation from service and termination of appointment following the UNSPC's assessment. In that respect, the Tribunal notes that under the assumption that the Applicant exhausted her sick leave entitlements, once her case is reviewed by the UNSPC, her appointment will be terminated and she will be separated (unless she is no longer on sick leave at that time). The resulting loss of employment and of career opportunities will constitute an irreparable damage for the Applicant.

46. Therefore, the Applicant's forthcoming separation from service upon assessment of the UNSPC shall be suspended, pending management evaluation, independently from the UNSPC's decision concerning the award of a disability benefit for the Applicant.

Conclusion

47. In view of the foregoing, the application for suspension of action is granted and the Applicant's forthcoming separation from service following the decision of the UNSPC shall be suspended, pending management evaluation.

(*Signed*)
Judge Teresa Bravo
Dated this 22nd day of March 2018

Entered in the Register on this 22nd day of March 2018
(*Signed*)
René M. Vargas M., Registrar, Geneva