



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bart Willemsen, UNICEF

Introduction

1. By application filed on 12 April 2018, the Applicant requests suspension of action, pending management evaluation, of the decision of 5 April 2018 by the Chief, Policy and Administrative Law Section (“PALS”), United Nations Children’s Fund (“UNICEF”) to refer her case to the United Nations Staff Pension Committee (“UNSPC”) for consideration for a disability benefit, based on the conclusion of the United Nations Medical Director that the Applicant is incapacitated for further service.
2. The application was served on the Respondent, who filed his reply on 13 April 2018.
3. The Applicant filed several motions, respectively on 12 April 2018 (asking the Tribunal to also look at Case No. UNDT/GVA/2018/038), 14 April 2018 (motion for leave to respond and for the production of documents) and on 16 April 2018 (motion for leave to file a submission). She already filed her response/submission together with her motions.

Facts

4. By email of 5 April 2018, the Chief, PALS, UNICEF, informed the Applicant that the United Nations Medical Director had concluded that the Applicant is incapacitated for further service and that, therefore, her case would be forwarded to the UNSPC for consideration for a disability benefit at its upcoming meeting on 18 April 2018.
5. The Applicant filed a request for management evaluation of the above decision on 11 April 2018 with the United Nations Under-Secretary-General for Management.

Parties' contentions

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

Prima facie unlawfulness

7. The application is receivable and the Administration unduly influenced the medical process and the determination by the Medical Director of the United Nations to find her incapacitated.

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

Receivability and Prima facie unlawfulness

a. The decision to recommend the Applicant for a disability benefit is not an administrative decision;

b. Management evaluation is not the appropriate avenue to contest the decision by the United Nations Medical Director and the Tribunal is not competent to order its suspension, pending management evaluation;

c. Pursuant to UNICEF's policy on Separation from service, the correct avenue for the Applicant to contest the United Nations Medical Director's decision is to request its review either by an independent medical expert or a medical board; such request for review puts on hold the process to recommend a staff member for a disability benefit;

Irreparable harm

d. Implementation of the decision would not cause the Applicant irreparable harm; any subsequent decision by the UNSPF to award a disability benefit is subject to appeal in accordance with the Regulations and Rules of the United Nations Joint Staff Pension Fund.

Consideration

9. Pursuant to art.2.2 of its Statute,

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

10. The Tribunal has to examine whether the decision to refer the Applicant's case to the UNSPC for consideration for a disability benefit shall be suspended. It took note of the Respondent's submission that in case the UNSPC were to grant the Applicant a disability benefit, her appointment with UNICEF would be terminated for health reasons.

11. The Tribunal notes that the present application for suspension of action is receivable, since the referral of the Applicant's case to the UNSPC by UNICEF, on the basis of the conclusion by the United Nations Medical Director that the Applicant is incapacitated, is an administrative decision for the purpose of art. 2.1(a) of the Tribunal's Statute (cf. *Coca* Order No. 64 (GVA/2018)).

Prima facie unlawfulness

12. The Tribunal recalls that the threshold required in assessing the condition of *prima facie* unlawfulness 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)).

13. The Tribunal also recalls that in assessing *prima facie* unlawfulness, it is limited to review any procedural or administrative aspects leading to the contested decision (see, as an example for a referral for consideration for disability, *Coca* Order No. 64 (GVA/2018)). Therefore, the Tribunal cannot enter into any review of matters relating to a medical determination without exceeding its competence (cf. *Karseboom* 2015-UNAT-601). It will thus not entertain any consideration of the medical determination made by the United Nations Medical Director that the Applicant was incapacitated for further service, which constitutes the basis for the decision by UNICEF to refer her case to the UNSPC.

14. The Tribunal takes note of the Applicant's argument that UNICEF senior management unduly influenced the medical process and the determination by the United Nations Medical Director that she was incapacitated, and that for that purpose UNICEF senior management abused its authority by convincing UNICEF staff to write false testimony with respect to the Applicant's mental health.

15. While the Tribunal notes that it falls within its competence to review allegations of procedural irregularities or of undue influence, it recalls that the burden of proving whether the Administration unduly influenced the United Nations Medical Director or the medical process falls on the Applicant who is making such allegations (cf. for undue influence in a selection exercise, *Aliko* 2015-UNAT-540).

16. Having carefully reviewed all of the Applicant's submissions, the Tribunal is concerned that she merely makes speculative assertions without providing it with a scintilla of evidence.

17. In the absence of such evidence, the Tribunal decides to reject the Applicant's request contained in her application for suspension of action and in her motion of 14 April 2018 for production of "all communication and interaction between UNICEF staff members, on [the] one hand, and [Medical Doctors of UNOG and of the United Nations Medical Services] and the Medical Director staff, on the other hand, in relation to her case".

18. Further, it finds that the Applicant failed to establish “serious and reasonable doubts” about the lawfulness of the decision to refer her case to the UNSPC. The Tribunal concludes that the decision to refer the Applicant’s case for disability is therefore not *prima facie* unlawful.

19. With respect to the possibility to request an independent medical examination of a medical board, the Tribunal took note of the Applicant’s email to the Chief, Policy and Administrative Law Section, of 13 April 2018, informing him that in case the Tribunal does not grant her request for suspension of action, she “will undergo, in the form of an appeal, an independent evaluation or a review by a Medical Board”.

20. Having concluded that no *prima facie* illegality is established, and since the three conditions set out in art. 2.2 of the Tribunal’s Statute are cumulative, it is not necessary to ascertain whether the other two requisite conditions for granting a suspension of action—to wit, urgency and irreparable damage—are fulfilled.

21. The Tribunal is aware that normally, and in the name of transparency, an Applicant’s name shall be on judicial decisions. However, in order to protect the Applicant’s health and reputation, the Tribunal finds it appropriate to anonymize the present order.

Conclusion

22. In view of the foregoing, the Applicant’s application for suspension of action and her motion for production of evidence are rejected.

(Signed)

Judge Rowan Downing

Dated this 16th day of April 2018

Entered in the Register on this 16th day of April 2018

(Signed)

René M. Vargas M., Registrar, Geneva