



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

KOOSHAK

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:

Federica Midiri, UNDP

Introduction

1. The Applicant, a staff member of the United Nations Development Programme (“UNDP”), requests suspension of action, pending management evaluation, of the decision to separate him from service on health grounds effective 31 July 2020.

Facts

2. On 9 September 2015, the Applicant filed a claim before the Advisory Board on Compensation Claims (“ABCC”), under Appendix D to the Staff Rules (ST/SGB/Staff Rules/Appendix D/ Rev.1, consolidated text, hereinafter “Appendix D”), for Post-Traumatic Stress Disorder (“PTSD”) in connection with an attack on the Parliament of Afghanistan and two previous attacks in Kabul on 19 and 29 November 2014 while he was on service.

3. On 21 November 2019, the United Nations Staff Pension Committee (“UNSPC”) informed the Applicant of its determination that he was incapacitated for future service and of his entitlement to a disability benefit from the United Nations Joint Staff Pension Fund. In the Applicant’s case, this benefit will be payable as of the day following his date of separation from service.

4. By letter dated 19 February 2020, the ABCC recognized the Applicant’s claim for service-incurred injury and determined his entitlement to compensation in the amount of USD31,436.00 for 10% Partial Loss of Function.

5. On 2 March 2020, the Applicant *inter alia* asked for a reconsideration of the ABCC’s determination of his disability pursuant to art. 17(a) of Appendix D. In his request, the Applicant reiterated that he would like ABCC’s consideration of all appendix D provisions related to his case including but not limited to arts. 11.2.(a), (b), (c) and (d) as well as 11.4(b).

6. By email of 1 July 2020, a Senior Human Resources Business Partner/Advisor, Regional Bureau, Office of Human Resources, Bureau for Management Services, UNDP, informed the Applicant about his separation for reasons of health effective 31 July 2020.

7. On 19 July 2020, the Applicant requested management evaluation of the 1 July 2020 decision to separate him from service for reasons of health. On the same day, he filed the application referred to in para. 1 above, which was served on the Respondent.

8. On 22 July 2020, the Respondent filed his reply. By email of 23 July 2020, the Applicant inquired about the procedural possibility to upload his comments to the Respondent's reply, which were set forth in the email in question. The undersigned Judge decided to include the Applicant's email to the case record and to share it with the Respondent without requesting him further observations.

Parties' contentions

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

Prima facie unlawfulness and urgency

a. Given the wording of art. 11.2(d) of Appendix D, separating him from service before the ABCC decides on his Appendix D claim under that article is unlawful because it will deprive him from compensation provided therein. Also, in view of this, his imminent date of separation from service, namely 31 July 2020, supports the urgency of his application.

Irreparable damage

b. As there is no other "time-bound requirement" for the Secretary-General's determination of his award for compensation *after* his separation from service, there may never be such a determination thus leaving the Applicant with no legal recourse to protect his rights and depriving of critical income for his livelihood.

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

Prima facie unlawfulness

a. The decision to terminate the Applicant's appointment was lawful as it was taken in accordance with the applicable legal provisions and after the decision from the UNSPC to award him a disability benefit;

b. The Applicant's separation from service would not result in his loss of entitlement to compensation under Appendix D as consideration of service-incurred matters are not connected to the administrative status of a staff member. Also, there is no requirement that a staff member be in service for a claim or appeal under Appendix D be considered;

Urgency

c. Since the Applicant has been awarded a disability benefit effective the date following his separation from service and will be entitled to the payment of compensation under Appendix D already granted to him, the matter is not urgent;

Irreparable damage

d. In addition to the above, the Applicant's claim that the Secretary-General will fail to act on his Appendix D claim appeal is unfounded and unsupported. As his Appendix D claim appeal will be decided upon, there is no irreparable damage in the case at hand.

Consideration

11. Applications for suspension of action are governed by art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure. They provide that the Tribunal may 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.

12. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The contested decision has not yet been implemented;
- c. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

13. In the present case, while no issue is raised about conditions a), b) and c) mentioned above, the Respondent contests that conditions under d), e) and f) have been fulfilled.

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 preliminary observes that the administrative decision to terminate the Applicant’s appointment was taken in accordance with the applicable legal provisions and that termination is adequately reasoned.

16. The Applicant's argument in support of prima facie unlawfulness is based on his reading of art. 11.2(d) of Appendix D that leads him to conclude that a determination of his claim must be done prior to his separation from service. The provision reads:

Where, upon the separation of a staff member from United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity, he shall be entitled to receive such proportion of the annual compensation provided for under article 11.1 (c) as corresponds with the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience.

17. Firstly, the Tribunal notes that there is no explicit article in Appendix D conditioning the determination of claims to a staff member being in service. The Tribunal further notes that the wording under art. 11 even corroborates that consideration of the Applicant's case may occur after separation (emphasis added):

In the event of an injury or illness of a staff member, **or of a former staff member**, which is attributable to the performance of official duties on behalf of the United Nations, the following provisions shall apply[.]

18. Secondly, the Respondent has confirmed that consideration of the Applicant's case before the ABCC will continue after his separation from service.

19. The said conclusion is also supported by this Tribunal's Judgment *Massi* UNDT/2016/100, of which the Applicant is aware of as he referred to it in his 23 July 2020 email to the Tribunal's Geneva Registry. In that case, the Tribunal dealt with a case concerning an Appendix D claim filed in 1995, where the staff member was separated from service in 1999 and the award of compensation under 11.2(d) from 1 May 1999 to 30 April 2001 was decided on 13 January 2000, namely after that staff member's separation from service.

20. To further substantiate his claim of prima facie unlawfulness, the Applicant cited a specific part of *Massi*:

62. Given that compensation for loss of earning capacity is meant to replace a salary in case of partial disability, the Tribunal is of the view that, in principle, there should be no interruption of payment as long as the disabling condition persists. It is therefore of the utmost importance that review of the entitlements be made in a timely manner and not otherwise.

21. The above, however, does not support the contention that a staff member must be retained in service while an ABCC claim is pending.

22. Therefore, there is no requirement that the staff member be in service for his appeal to be considered and acted upon and the Applicant's contention that the termination of his appointment will render him unable to be considered for Appendix D is unfounded.

23. Consequently, the Tribunal finds that the contested decision is not prima facie unlawful.

24. The principle above recalled does mean, however, that the Organization has a duty to timely examine claims and decide on them. The time related element in art. 11.2(d), namely "upon separation from service", determines the date at which entitlement to compensation accrues. As such, as elaborated in *Massi*, if the Organization fails to undertake a timely review and determination of Appendix D claims, it will be financially liable for delays incurred upon unless they are attributable to the staff member/former staff member concerned. Noting that the Applicant's case arose in 2015, the Tribunal encourages all those involved to bring the determination of his Appendix D claim/appeal to a close at the earliest time possible.

25. Having reached the said finding and given the cumulative nature of the legal test related to the consideration of applications for suspension of action, the Tribunal will not examine the remaining requirements of urgency and irreparable damage.

Conclusion

26. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Francesco Buffa

Dated this 27th day of July 2020

Entered in the Register on this 27th day of July 2020

(Signed)

René M. Vargas M., Registrar, Geneva