



Before: Judge Teresa Bravo
Registry: Geneva
Registrar: René M. Vargas M.

ARGYROU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Nicole Wynn, AAS/ALD/OHR, UN Secretariat
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Introduction

1. By application filed on 27 May 2022, the Applicant, a staff member of the United Nations Peacekeeping Force in Cyprus (“UNFICYP”), requests suspension of action, pending management evaluation, of the decision to place him on Special Leave Without Pay (“SLWOP”) upon exhaustion of his entitlements to sick leave and annual leave on 8 June 2022.

2. The application for suspension of action was served on the Respondent, who filed his reply on 1 June 2022.

Facts

3. The Applicant went on sick leave on 15 January 2021.

4. By email of 18 March 2022, the Officer-in-Charge, Human Resources Section (“HRS”), UNFICYP, informed the Applicant that “[t]aking into consideration that [he would] exhaust [his] leave (annual leave, sick leave with full and half pay) by 06 June 2022, [UNFICYP] submitted a request to the United Nations Pension Fund for disability benefit in line with HR policies in place”.

5. By email of 24 March 2022, the Division of Healthcare Management and Occupational Safety and Health, Office of Support Operations, United Nations Headquarters, informed, *inter alia*, of its determination that his case “[did] not qualify for a recommendation for separation from service for reasons of health (disability)” (“medical determination”).

6. By memorandum dated 28 April 2022, the Applicant requested review of the above-mentioned medical determination pursuant to ST/AI/2019/1 (Resolution of disputes relating to medical determinations).

7. By memorandum dated 30 April 2022, the Applicant inquired, *inter alia*, about the Organization’s decision regarding his contract, due to expire on 30 June 2022, in the event he were to exhaust all his entitlements to sick leave and annual leave before finalization of his above-mentioned request for review.

8. By email dated 10 May 2022, the Chief Human Resources Officer (“CHRO”), HRS, UNFICYP, confirmed to the Applicant that upon exhaustion of his entitlement “to special leave with half pay COB 3 June 2022”, he would be placed on SLWOP “through the end of [his] current fixed-term contract COB 30 June 2022”.

9. On 23 May 2022, the Applicant requested management evaluation of the above 10 May 2022 decision.

10. By email of 31 May 2022, the CHRO, HRS, UNFICYP, informed the Applicant, *inter alia*, that he would exhaust his entitlements to sick leave and annual leave on 8 June 2022.

Consideration

11. Art. 2.2 of the Tribunal’s Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative; in other words, they must all be met in order for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

12. It is the Respondent’s case that, on the one hand, the application is not receivable and, on the other hand, that it does not meet the above-mentioned cumulative requirements.

Receivability

13. In support of his receivability challenge, the Respondent submits that the application is “premature” and “not ripe for review” because the Applicant “will be placed on SLWOP only if he does not return to work after exhausting his sick leave entitlements and annual leave”. The Respondent thus affirms that “the decision will not be implemented unless those two events occur so there is nothing to suspend”.

14. The Tribunal underlines that non implementation of a contested decision is one of several mandatory and cumulative requirements linked to applications for suspension of action. Once an administrative decision is implemented, an application for suspension of action cannot succeed. It follows that the very legal nature of applications for suspension of action calls that they be filed before a contested decision is implemented.

15. The 10 May 2022 email from the CHRO, UNFICYP, to the Applicant is an administrative decision (placement of SLWOP) that the Organization intends to implement upon the Applicant exhausting his entitlements to sick leave and annual leave. It has not yet been implemented and the Tribunal can examine its suspension.

16. In view of the foregoing, the Tribunal finds the application receivable.

Prima facie unlawfulness

17. 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)).

18. At the outset, the Tribunal underlines that the applicable legal instrument in the case at hand is administrative instruction ST/AI/2005/3 (Sick leave) and not ST/AI/1999/16 (Termination of appointment for reasons of health). Indeed, the latter administrative instruction governs “terminations”, namely separations from service initiated by the Organization following a determination that a staff member is no longer fit for work. This is not the Applicant’s case. The Organization does not intend to initiate or has not initiated his separation on health grounds but expects him to return to work based on a medical report from the Applicant’s treating physician.

19. It is the Applicant's case that he should be placed on sick leave with half pay during the pendency of his request for review of the 24 March 2022 medical determination. In support of this, the Applicant submits that sec. 4 of ST/AI/1999/16, sec. 8.2 of ST/AI/1999/12 (Family leave, sick leave and maternity leave), and sec. 3.2 of ST/AI/2005/3 enjoin the Organization to do so. Deciding, however, to place him on SLWOP is therefore unlawful.

20. The Respondent argues that the applicable legal provision is sec. 3.1 of ST/AI/2005/3, which requires the Organization to place a staff member on SLWOP upon exhaustion of the entitlements to sick leave and annual leave.

21. The key provision for the Tribunal's assessment of the lawfulness of the contested decision is sec. 3.2 of ST/AI/2005/3. It reads:

3.2 When a staff member has used all of his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer 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 while the staff member is on sick leave with half pay. When 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 United Nations Staff Pension Committee whether to award a disability benefit, the staff member shall be placed on special leave with half pay until the date of such decision.

22. The Respondent argues that the Applicant has no right to be placed on sick leave with half pay under the above provision because there was already a medical determination that his condition did not warrant referral to the United Nations Staff Pension Committee ("UNSPC").

23. The Tribunal notes that sec. 3.2 of ST/AI/2005/3 replicates the language of sec. 8.2 of ST/AI/1999/12 and sec. 3.1 of ST/AI/1999/16. These provisions are the materialization of the Organization's duty of care towards its staff in situations of exhaustion of entitlements arising from sick leave. It is clear for the Tribunal that the lawmaker's intention was to ensure that no staff member on sick leave be left

unprotected when absence from work can no longer be charged to either sick leave or annual leave.

24. In line with this duty of care, sec. 3.2 of ST/AI/2005/3 mandates that the Organization act timely. Indeed, it requires to bring a staff member's situation to the attention of the Medical Director upon exhaustion of the entitlement to sick leave with full pay. Doing so ensures that, unless exceptional circumstances arise, all parties involved have enough time to assess the situation and, if needed, exercise their rights to have a final medical determination before exhaustion of the entitlements to sick leave and annual leave.

25. The Applicant's absences' record in Umoja, that the Respondent annexed to his reply, shows that the Applicant exhausted his entitlement to sick leave with full pay on 30 July 2021. However, as per the record, it was only on 18 March 2022 that the Organization took action to determine if the Applicant could be considered for a disability benefit.

26. Noting that the Applicant's appointment is set to expire on 30 June 2022 and that he requested review of the medical determination, it seems unlikely to have said review completed before the expiration of the Applicant's appointment. By failing to act timely, the Organization has placed the Applicant in a precarious situation and has severely hindered the Applicant's ability to properly exercise his rights under ST/AI/2019/1. The Tribunal finds that this is tantamount to delaying a final medical determination of the Applicant's incapacity for further service, which in turn entitles him to the protection afforded by sec. 3.2 of ST/AI/2005/3, namely his placement on sick leave with half pay.

27. In view of the above, the Tribunal concludes that the 10 May 2022 decision to place the Applicant on SLWOP until the expiration of his contract is unlawful.

Urgency

28. The Tribunal observes that the Applicant's contract is set to expire on 30 June 2022 and that he acted timely to challenge the contested decision. The Tribunal is thus satisfied that the Applicant's application for suspension of action meets the requirement of urgency.

Irreparable damage

29. The Respondent argues that the Applicant has suffered no harm, *inter alia*, because he has no right to be placed on special leave with half pay. However, the Tribunal having found that the Applicant is entitled to be placed on such leave, the requirement of irreparable damage is met. Furthermore, the Tribunal notes that if the Applicant were to be separated prior to the conclusion of his request for review of the medical recommendation, no monetary compensation could offset the harm derived from such separation such as inadequate or non-existing medical insurance and/or negative impact on career prospects as he claimed.

Conclusion

30. In view of the foregoing, it is **ORDERED** that the 10 May 2022 decision to place the Applicant on SLWOP upon exhaustion of his entitlements to sick leave and annual leave **be suspended pending the outcome of the management evaluation.**

(Signed)

Judge Teresa Bravo

Dated this 7th day of June 2022

Entered in the Register on this 7th day of June 2022

(Signed)

René M. Vargas M., Registrar, Geneva