UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/056
Order No.: 253 (NY/2016)
Date: 31 October 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KORTES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 25 October 2016, the Applicant, a Senior Editorial Assistant at the G-7 level in the Development Policy and Analysis Division in the Department for Economic and Social Affairs, filed an application for suspension of action pending management evaluation of the decision to determine her ineligible for after service health insurance ("ASHI") when she retires on 1 November 2016.

Relevant factual and procedural background

2. In her application for suspension of action, the Applicant describes the background for her case, which has not been contested by the Respondent, as follow:

> … I joined the United Nations ["UN"] on 3 December 2007. I was very drawn to serving the Organization and its ideals. Apart from the ideals of the UN, a key reason for deciding to join the UN was the security and benefits offered, health insurance being at the top of the list for my husband and I, who had been freelancers with difficulty affording proper health insurance for a long time before that.
>
> … After joining, I was discussing the post-retirement health insurance options with a staff member in human resources [name redacted]. She stated that that [sic] I would be qualified to receive After Service Health Insurance (ASHI), but that if I had less than 10 years of service at the time of retirement, I may have to make some additional payments myself.
>
> … As someone from the US where there is no nationalized health insurance, and as someone married to a dependent spouse who had no other insurance coverage, I wanted to be sure to confirm that we would have coverage under ASHI. So, on 25 January 2011, I wrote an-email to the UN Insurance Service to ask for this confirmation [reference to annex omitted]. My query was this:
>
> > Dear [name redacted]:
> >
> > I will only have worked 9 years at age 62, my mandatory retirement age, but I understand that 10 years of service is required in order to receive health insurance coverage at the time of separation/retirement.

> I was told by [name redacted] in [the Office of Human Resources, "OHRM"] (now retired) that in a case like this a staff member can pay premiums for one year after retirement and then be covered like all other retirees. Can you confirm this and/or let me know if anything has changed? I couldn't find information on this on the website.

… On the same day [a staff member from (name redacted)] from the Insurance Service responded to me by email [reference to annex omitted]. The response I received was this:

> Dear [The Applicant]: This information is correct, however you must have been covered for those nine years you have been employed.

… [The staff member from the Insurance Service] did not state anything else. He did not say that his answer depended on any other facts.

… Again, on the same date, 25 January 2011, I responded to [The staff member from the Insurance Service], thanking him for his prompt reply, and giving him further details [reference to annex omitted]. I pointed out that I would actually be 13 months less than the 10 years required to have regular ASHI coverage without having to "buy in". I did this just to confirm that it wouldn't make a difference that it was 13 months, rather than the "one year" I had previously mentioned. [The staff member from the Insurance Service] responded in-line to my email some hours later confirming that it would not be a problem. He said "yes, you would be allowed" to pay for the 13 months. He also said "you need at least 5 years of coverage and you must be covered at the time of retirement" [reference to annex omitted].

… From my interactions with [the staff member from the Insurance Service] in 2011, and based on his responses to my questions, I was completely of the understanding that I would separate on retirement, pay an extra premium for 13 months, and then my husband and I would be covered under the regular ASHI rules from when I turned 62.

… In mid-2016, I began preparing for my upcoming retirement. I went to the insurance office in June 2016 to see if there were any administrative steps I should be making for a smooth transition to ASHI. The insurance office representative told me that I could not apply for ASHI until the first of the month during which I would be retiring, which would mean October 2016.

> … On 12 October 2016, I read an email (sent on 11 October 2016) sent to me by [a staff member from the health insurance office (name redacted)] saying that I had been determined ineligible for ASHI [reference to annex omitted]. I wrote back that I was surprised by this, based on what I'd been told in the past, and asked to meet with them. [the staff member from the health insurance office] wrote back that I should come into the office and see whoever was on duty.
>
> … On 14 October 2016, I again went to the insurance office, as directed, and spoke with [the staff member from the health insurance office. At this time I was told that I was ineligible for ASHI. I thought that this must have been a mistake, based on the previous information I'd been given. After the insurance office reviewed the emails from January 2011, their response was that the buy-in option had changed on 1 July 2007 and that I was not eligible.

3. On 24 October 2016, the Applicant filed her request for management evaluation of the impugned decision.

4. On 25 October 2016, the Applicant filed her application for suspension of action of the impugned decision pending management evaluation. On the same date, the application was transmitted to the Respondent instructing him to file a reply by 27 October 2016. On 27 October 2016, the Respondent filed his reply, claiming that the application was not receivable and, in any event, that the decision was not *prima facie* unlawful and the alleged harm not irreparable.

5. On 28 October 2016, the Tribunal directed Counsel for the Respondent to file information on and, if available documentation for (a) the Applicant's employment history with the UN, and (b) the health insurance plans available to the Applicant in accordance with third (and last) sentence of art. 8.2 of ST/2007/3 (After-service health insurance). Later the same date, Counsel for the Respondent provided this information.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

6. Article 2.2 of the Dispute Tribunal's Statute states:

> 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.

7. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "… [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required;

8. Article 13.1 of the Tribunal's Rules of Procedure states:

> The Dispute Tribunal shall order a suspension of action 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.

9. 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 application concerns an administrative decision that may properly be suspended by the Tribunal;

b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;

c. The contested decision has not yet been implemented;

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.

Whether the application concerns an administrative decision that may properly be suspended by the Tribunal

10. The Respondent contends that, when handling an application for suspension of action in accordance with art. 2.2 of the Dispute Tribunal's Statute, its jurisdiction is limited to making orders to suspend the implementation of decisions i.e. to preserve the status quo (*Buff*, Order No. 396 (NBI/2015)). The Applicant is not asking the Dispute Tribunal to maintain the *status quo*, which is that the Applicant is not enrolled in ASHI and an order from the Dispute Tribunal preserving the *status quo* would not change that situation. The Respondent further submits that admission to ASHI is not automatic but it requires affirmative steps, namely an application and a determination of eligibility. The Applicant is requesting the Dispute Tribunal to order the Administration to deem her eligible for ASHI benefits and to allow her to enroll in ASHI. The Respondent concludes that, under its Statute, the Dispute Tribunal therefore does not have the jurisdiction to make an interim order that goes beyond preserving the *status quo*. It does not have the jurisdiction to compel the Administration to find the Applicant eligible and enroll her in ASHI.

11. The Tribunal notes that the Dispute Tribunal in *Buff*, Order No. 396 (NBI/2015) stated as follows:

> … The Tribunal is faced with an unusual Application, namely, an Application seeking to compel the ICTR [i.e., the International Criminal Tribunal for Rwanda] Administration to implement administrative action which ordinarily is the Administration's obligation to perform and an entitlement of the Applicant as its former staff member. Specifically, the Applicant sought an order of the Tribunal to order the ICTR to finalize her separation in order to enable her take up a new position with OHCHR. Does the Dispute Tribunal have the jurisdiction to issue such an order under art. 2.2 of its Statute?

The Dispute Tribunal in *Buff* went on to define the relevant matters to be taken into account as:

a. Is the Applicant entitled to certain administrative procedures in relation to separation from ICTR?

b. Is she dissatisfied with the outcome of those procedures?

This led the Dispute Tribunal in *Buff* to conclude:

> … The answer to both of these questions is in the affirmative. The UNDT therefore has jurisdiction to examine ICTR's omission in failing to implement the administrative procedures necessary for the Applicant's separation from ICTR so that she can take up her appointment in OHCHR.

On the question of *status quo*, the Dispute Tribunal *in Buff* stated that:

> The type of power contained in art. 2.2 of the UNDT Statute closely resembles the equivalent of an injunction in domestic jurisdictions. The main distinction is that art. 2.2 restrains the Respondent from doing a specified act or to maintain the status quo pending a management evaluation of the contested decision. In common law jurisdictions, Courts have the power to issue the prerogative writs of certiorari, mandamus, prohibition and habeas corpus. In the grant of a writ of mandamus, a Court can order or compel a government body, agency or office to perform a statutory duty.

12. It results that, in *Buff*, Order No. 396 (NBI/2015), the relevant Dispute Tribunal found that it had jurisdiction to handle the request for suspension of action in connection with an issue related to a staff member's separation, just as in the present case. Furthermore, in *Buff*, Order No. 396 (NBI/2015), indicating this as more than just a question of maintaining *status quo*, the Dispute Tribunal found that "art. 2.2 [also] restrains the Respondent from doing a specified act … pending a management evaluation of the contested decision". Following the rationale of *Buff*, Order No. 396 (NBI/2015), the present Tribunal should therefore also find that it has jurisdiction to handle the application for suspension of action. In this regard, the Tribunal notes that, while the judgments of the Appeals Tribunal are binding on it (see, for instance, *Igbinedion 2014-UNAT-410)*, the decision of the Dispute Tribunal, at most, have persuasive value.

13. Regarding the Respondent's position of the Tribunal being limited to maintaining a *status quo* in response to an application for suspension of action pending management evaluation, the Tribunal considers that the current situation for the Applicant is that she is a UN staff member until 31 October 2016, after which she retires. For the moment, as a UN staff member, she is therefore entitled to the associated health insurance benefits. This status will change on 1 November 2016 when she retires as she will no longer be a staff member and she will either be entitled to ASHI or not. Accordingly, there is no *status quo* to maintain, as argued by the Respondent, as her employment status and entitlements will inevitably change—if anything, the *status quo* would be that she maintains her entitlements to health insurance due to her employment with the UN.

14. Furthermore, the Tribunal considers that, in the present case, the Administration decision on the Applicant's eligibility to ASHI, which is the first procedural condition in the process of enrolling in the ASHI, represents the refusal to grant the Applicant her alleged right to ASHI, as she was found to be ineligible. From this perspective, also with reference to *Buff*, Order No. 396 (NBI/2015), the Tribunal may therefore examine the Administration's refusal to grant a staff member her alleged right.

15. Consequently, the Tribunal finds that the application concerns an administrative decision that may properly be suspended by the Tribunal and that the first condition is satisfied.

Ongoing management evaluation

16. An application under art. 2.2 of the Dispute Tribunal's Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that she filed a request for management evaluation on 24 October 2016 and this aspect is not contested by the Respondent. Accordingly, the Tribunal notes that the request for management evaluation was initiated within 60 days from the date of notification of the impugned decision on 11 October 2016 and that there is no

evidence on the record that the management evaluation has been completed. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending and that the second condition is fulfilled.

Implementation of the contested decision

17. Following an application for suspension of action pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Tribunal may "suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision". This means that if the contested administrative decision has already been implemented, there no longer is a decision that the Tribunal can suspend.

18. In the online Oxford dictionary (www.oxforddictionaries.com) the word "implementation" is defined as "the process of putting a decision or plan into effect; execution".

19. The Tribunal notes that the impugned decision will take effect on 1 November 2016, as this will be the first day of the Applicant's retirement. The Tribunal therefore finds that the decision has not yet been implemented and that the third condition is fulfilled.

Prima facie *unlawfulness*

20. Section 2.1(a)(ii) of ST/AI/2007/3, which entered in force of 1 July 2007, provides regarding eligibility to ASHI that (emphasis in italics added):

> **Section 2**
>
> **Eligibility for after-service health insurance coverage**
>
> 2.1 Individuals in the following categories are *eligible* to enroll in the after-service health insurance programme:
>
> (a) A … staff member who was recruited *on or after 1 July 2007*, who while a contributing participant in a United Nations contributory health insurance plan … was separated from service, other than by summary dismissal:

> …
>
> (ii) At 55 years of age or later, *provided that he or she had been a participant in a contributory health insurance plan of the United Nations for a minimum of ten years* …

21. The Applicant submits that she was advised on 21 January 2011 that she would be eligible for ASHI by the Health Insurance Office and that she relied on this information.

22. In response, the Respondent contends that sec. 2.1 of ST/AI/2007/3 (After-service health insurance) provides that a staff member, who was recruited on or after 1 July 2007, is only entitled to enroll in ASHI, if they have been a participant in the Organization's health insurance plan for a minimum of ten years. The email from the Health and Life Insurance Section sent to the Applicant on 25 January 2011 was based on a transposition error as, in her email dated 25 January 2011, the Applicant referred to her date of recruitment as "12/3/07". Within the United Nations, this date is understood as 12 March 2007, and a staff member recruited in March 2007 would be eligible for ASHI. As a result of this transposition error, the Respondent submits that the Applicant was incorrectly advised that she would be entitled to enroll in ASHI, and the email did not create an entitlement to ASHI. Finally, the Respondent contends that the rules governing eligibility for ASHI are set out in ST/AI/2007/3 and staff members are responsible for knowing the applicable internal laws of the Organization (*Dzuverovic* 2012-UNAT-375, para. 31, citing *El-Khatib*, 2010-UNAT-029). Furthermore, the Organization has a duty to correct errors (*Cranfield* 2013-UNAT-367, para. 36) and therefore obliged to find the Applicant ineligible for ASHI, which is in accordance with the explicit wording of ST/AI/2007/3.

23. Attached to her application, the Applicant appended the email exchange between her and a Benefits Assistant in Insurance Service, the UN Accounts Division (referred as "the Health Insurance Office" and "the Health and Life Insurance Section" by the Applicant and the Respondent, respectively) from 25 January 2011, which stated in relevant parts:

Email from the Applicant to the Benefits Assistant (at 11:53 a.m.)

> I will only have worked 9 years at age 62, my mandatory retirement age, but I understand that 10 years of service is required in order to receive health insurance coverage at the time of separation/retirement. I was told by [name redacted] in OHRM (now retired) that in a case like this a staff member can pay premiums for one year after retirement and then be covered like all other retirees. Can you confirm this and/or let me know if anything has changed? I couldn't find information on this on the website.

Email from the Benefits Assistant to the Applicant (at 12:43 p.m.)

> This information is correct, however you must have been covered for those nine years you have been employed.

Email from the Applicant to the Benefits Assistant (at 1:06 p.m.) and the Benefits Assistant's subsequent response (at 2:47 p.m.), which was copied directly into the Applicant's previous email (emphasized in italics).

> Thank you so much for the speedy reply, [the Benefits Assistant]. I have been covered since joining on 12/3/07. I will have to retire on 31/10/16, which is about one month shy of nine years. Would I still be allowed to pay in for the 13 months until I reach the official ten years and then resume regular coverage? *Yes you would be allowed.*
>
> One more question: is there a certain point at which you are "vested" in the medical insurance program, as you are with the pension fund? In other words, is there a point at which a staff member would be allowed to separate before mandatory retirement, still pay into the medical program, then receive "retiree" coverage at age 62? *You need at least five years of coverage and you must be covered at the time of retirement.*

24. The Dispute Tribunal's in *Sina* UNDT/2010/060 stated as follow about reliance and legitimate expectations (affirmed by the Appeals Tribunal in *Sina* 2010-UNAT-094):

> A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so.

25. The Tribunal finds that, as per the Applicant's email of 25 January at 1:06 p.m., while her recruitment date of "12/3/07" could be understood as 12 March 2007 as stated by the Respondent, the following narrative, "I will have to retire on 31/10/16, which is about one month shy of nine years. Would I still be allowed to pay in for the 13 months until I reach the official ten years and then resume regular coverage?", leaves the attentive reader with the impression that she actually meant 3 December 2007. The email exchange, read in its entirety, reflected the Applicant's particular case and could therefore give rise to a reasonable and legitimate expectation that, under the given circumstances, she was entitled to ASHI, even if the provided advice was inconsonant with sec. 2.1(a)(ii) of ST/AI/2007/3 (the advice appears to be based only on the date of recruitment provided by the Applicant and reflected the situation for a staff member hired before ST/AI/2007/1 entered into force on 1 July 2007). In this regard, the Tribunal notes that the present case distinguishes itself from *Kazazi* 2015-UNAT-557, where the Appeal Tribunal held that "[i]ncorrect advice by the head of one department cannot bind the hands of another department", in that it appears that the initial advice from 25 January 2011 was given by the same department as that which later rejected the Applicant's request on 11 October 2016.

26. However, sec. 7.4 of ST/AI/2007/3 provides that (emphasis added):

> Staff members *who are close to retirement* or early retirement *should ensure that they are provided with all relevant information concerning the after-service health insurance programme*. Such information is available from the office administering their in-service health insurance coverage.

27. The Tribunal notes that when the Applicant sought the advice which she alleges that she relied on regarding her ASHI entitlements on 25 January 2011, it was almost 6 years before her retirement and today's date. At that time, she was therefore not "close to retirement". Since then it appears that she has not sought any further advice regarding her eligibility to ASHI. In this regard, the Tribunal takes judicial notice that on the website of the UN's health and insurance section is currently

clearly indicated that a staff member in the Applicant's situation would not be entitled to ASHI:

> … For those hired on or after 1 July 2007, the eligibility requirement is 10 years for eligibility and for subsidy. This means that they cannot continue their insurance coverage under ASHI unless they have accumulated 10 years of insurance participation at the time of retirement …

28. As the Applicant has not sought any information on her ASHI eligibility since 25 January 2011, the Tribunal finds that, pursuant to sec. 7.4 of ST/AI/2007/3, the Administration appears to have provided the correct information on the website and this information is accessible to all staff members concerned. This information appears to have provided her with the correct response, notably that she is not be eligible for such entitlement in accordance with sec. 2.1(a)(ii) of ST/AI/2007/3 as she was hired after 1 July 2007.

29. The Applicant states that she became a staff member on 3 December 2007 and this information is confirmed by the documentation filed by the Respondent in relation to the applicant's contractual status. ST/AI/2007/3 entered into force on 1 July 2007, it has not been amended since its adoption and is therefore applicable to the Applicant's contract until her retirement on 31 October 2016.

30. The Applicant did not contest the information included in the contested decision that she enrolled in insurance as of 1 January 2008 and that, on 31 October 2016, she is to be considered as a participant in a contributory health insurance plan of the United Nations for eight years and 10 months. The correspondence from 25 January 2011, which is almost 6 years old, is no longer relevant and therefore does not appear to constitute a procedural or substantive error.

31. It appears that the legal provisions mentioned above were respected and the Tribunal concludes that the Applicant has not established a case of *prima facie* unlawfulness of the decision that she is not eligible for ASHI. Had the Applicant sought any information on her ASHI eligibility since her last inquiry in 25 January

2011, such information would have provided her with the correct response, notably that she would not be eligible for such entitlement in accordance with sec. 2.1(a)(ii) of ST/AI/2007/3 as she was hired after 1 July 2007.

32. Accordingly, the Tribunal finds that one of the cumulative conditions for suspending the contested decision is not fulfilled. It is therefore not necessary for the Tribunal to further examine if the remaining statutory requirements specified in art. 2.2 of its Statute, notably particular urgency and irreparable damage, have been met in the case at hand.

Conclusion

33. In the light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is rejected.

(*Signed*)

Judge Alessandra Greceanu

Dated this 31st day of October 2016