UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2021/065
Judgment No.:	UNDT/2022/122
Date:	11 November 2022
Original:	English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jenny Kim, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision of the Assistant-Secretary-General for Human Resources ("the ASG") not to provide him with an exception under staff rule 12.3(b) in order to grant him an additional one-year extension for him to submit his claim for repatriation grant in accordance with staff rule 3.19(i).

2. The Respondent contends that the application is without merit.

3. For the reasons set out below, the application is rejected on its merits.

Facts

4. On 8 January 2019, the Applicant, who had been employed in New York, was separated from the Organization with the entitlement of a repatriation grant to the destination of his relocation. Such entitlement, however, ceased if no claim was submitted within two years after the date of separation as per staff rule 3.19(i).

5. On 11 August 2020, Applicant requested an exception to the two-year deadline to submit his claim for a repatriation grant, namely for him to do so one year later, on or before 7 January 2022. As background, the Applicant pointed to "risks of travel" associated with the COVID-19 pandemic, referring in particular to his spouse "being treated with an immunosuppressive which aggravates her health risks of travelling".

6. By email of the same date (11 August 2020), the ASG approved the Applicant's request for extension "in view of the circumstances".

7. On 4 August 2021, the Applicant requested another extension of the deadline for him to undertake his relocation travel on or before 7 January 2023, stating "there [were] still significant health risks, in particular for travel and for vulnerable immunosuppressed individuals". To this request, the Applicant appended a letter dated 30 July 2021 from his spouse's medical doctor physician in which she stated that the spouse was "under [her] care for a significant autoimmune disease which require[d]

immunosuppressive treatment" and that "[m]edically, [she had] advised [the spouse] not to travel by plane due to increased risk of infection".

8. On 16 August 2021, the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH") requested the Applicant to submitted information on: (a) "[a]ctual location of the spouse and expected relocation country"; (b) "[a] detailed typewritten medical report including the following information"; (c) "[t]he diagnosis, ICD [an unknown abbreviation] Code and results of explorations/lab tests"; (d) "[t]he ongoing treatments and prescriptions"; and (e) "[t]he justification on why the patient is considered at 'high risk' according to Evidence Based Medicine".

9. By email of 17 August 2021, the Applicant informed DHMOSH of the name of his relocation country. He also appended a letter dated 16 August 2021 from his spouse's medical doctor in which his spouse's condition was described as "immunocompromised" as per the recommendations of the Centers for Disease Control and Prevention ("CDC", the national public health agency of the United States).

10. On 20 August 2021, the "HR [assumedly, human resources] Policy Team emailed the Applicant informing him that his request for an extension had been rejected. In the email, it was stated as follows:

> This is in reference to your request for an additional exception to staff rule 3.19(i), on time limitation for the submission of the claim for repatriation grant though 7 January 2023. Based on the documentation you submitted to [DHMOSH], we regret to inform you, on behalf of [the ASG] that … we are not able to support the deadline … for relocation grant [be extended] again for an additional year.
>
> In order to meet the requirements to claim repatriation grant as per staff rule 3.19(i), please note that your claim for repatriation grant has to be submitted by 7 January 2022, the date approved for the prior exceptional extension.

Consideration

Issues

11. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

12. Accordingly, the basic issues on the merits of the present case can be defined as follows:

a. Did the ASG have the delegated authority as per staff rule 12.3(b) to reject the Applicant's request for an exception the two-year deadline stipulated in staff rule 3.19(i)?

b. In the affirmative, did the ASG lawfully exercise her discretion when doing so?

The ASG's competence to take the contested decision

13. The Applicant submits that "evidence of the decision-maker's delegated authority to take the contested decision, including copies of the authorized sub-delegation table and entry into the portal of the delegation of authority and acceptance thereof by [the ASG], as required by ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules)" demonstrated "discrepancies". The sub-delegation table was issued on 1 March 2021, while the entry into the portal is dated 15 April 2021. A 45-day gap therefore existed "between the authorization and the entry to the portal".

14. The Respondent, in essence, submits that the ASG had "the requisite authority to take the contested decision".

15. The Tribunal notes that it follows from ST/SGB/2019/2 that the Secretary-General has delegated the relevant authority to the Under-Secretary-General for Management Strategy, Policy and Compliance ("the USG"), who in turn, has sub-delegated it to the ASG in accordance with a table of sub-delegation dated 1 March 2021 that the Respondent has submitted in evidence. In a note on "delegation details" valid from 15 April 2021 is stated that, "This sub-delegation of decision-making authority addresses a technical error in the attachment of the sub-delegation of decision-making authority issued on 1st March 2021. It is also effective 1st March 2021". The Tribunal finds that this "technical error" is of no importance to the question of the ASG's proper authority to take the contested decision.

16. Accordingly, the Tribunal concludes that the ASG had proper authority to reject the Applicant's request for an exception under staff rule 12.3(b) to an additional one-year extension of the deadline set out in staff rule 3.19(i).

Was the contested decision a proper exercise of discretionary authority?

Parties' submissions

17. The Applicant's submissions may be summarized as follows:

a. The Respondent "ignored [the] Applicant's spouse underlying health conditions as well as the explicit medical advice from her physician" not to travel. The contested decision "entails exposing Applicant's spouse to unnecessary and high risks in order to submit relocation claim within the arbitrarily limited time frame decided by [the] Respondent". Further, "guidance from CDC confirms that immunocompromised individuals have a weakened immune system and therefore are more likely to get severely ill from COVID-19". CDC states that "immunocompromised individuals may not be protected from COVID-19 even if [they] are full[y] vaccinated". The World Health

Organization ("WHO") also states COVID-19 is "more likely to develop into a serious illness or death in older people (60+years) with underlying medical conditions, including those with conditions that affect their immune system";

b. The Respondent "ignored that the risks of COVID-19, the worst global pandemic in a century, have neither been significantly mitigated nor international travel restrictions have been lifted since August 2020 when [the] Respondent approved [the] Applicant's request for an extension to submit his claim to relocation grant". The "risks to travel for individuals with underlying health conditions and age over 60 years remain high". Similarly, "restrictions on international travel remain", and "[r]isks of international travel to [the] Applicant and his family continue to be serious, in particular to his spouse";

c. The Respondent "ignored relevant facts about COVID-19, including the on-going risks". The "rates of infection continue to be high, more than half a million cases in just one day (13 December 2021), and 269 million accumulated global cases (as of 13 December 2021); more than 6,000 people die daily from COVID (6,398 on 13 December 2021) with and accumulated death toll surpassing 5.3 million and growing daily";

d. At the time of the contested decision, "publicly available information (from WHO, CDC and other reputable scientific and medical sources) demonstrated that the COVID-19 continued to represent high risks, in particular to individuals with weak immune systems as it continued to mutate with some variants spreading more rapidly and some with more severe and deadly consequences". By the relevant time, WHO "had designated Delta (B.1.617.2) as a Variant of Concern ["VOC"]", which is WHO's "highest risk classification for its infection rate and health consequences". Further, "and as was largely feared by the medical and scientific global community another deadly variant emerged". In November 2021, "WHO considered variant (8.1.1.529), Omicron as a VOC";

e. The Respondent "ignored the relevant information from the [United Nations World Tourism] Organization ["WTO"], available at the time of Respondent's decision] that international travel continued severely restricted due to COVID-19". WTO "informs that currently one out of five destinations have their borders completely closed as new surges of COVID-19 impact the restart of international tourism". WTO also "informs that 98% of all destinations have some kind of travel restrictions in place". This "relevant matter about international travel restrictions and disruptions due to COVID-10 was ignored by Respondent as clearly there are still severe health risks in international travel";

f. The contested decision was "illegal, ignored relevant matters and was reckless and exhibited gross disregard for Applicant's and his family's health and safety, breaching Applicant's contractual and human rights. The contested decision "to deny an extension to submit claim on relocation grant, requires [the] Applicant and his family to travel internationally exposing them to serious health risks and possibly even death", which is in breach of staff regulation I.2(c) as "the Administration did not adequately consider Applicant's safety and security";

g. The Respondent failed "to consider the complete provisions" of staff rule 12.3(c), highlighting that the exception "is agreed to be the staff member directly affected". In regard, the Applicant did "not agree with [the] Respondent's decision". In addition, the contested decision "contravenes the [United Nations] System-wide administrative guidance on COVID-19 issued by [the Chief Executives Board] CEB on 19 January 2021 (Administrative Guidelines for Offices on the Novel Coronavirus (COVID-19) pandemic. Framework for the management of staff members in the United Nations Common System Headquarters and Field Duty Stations, "the Administrative Guidelines");

h. The "Respondent is fully aware of health risks of COVID-19 for individuals with underlying conditions, as this is explicitly codified in paragraph 37 of the [United Nations] system wide administrative guidance on the matter", but the contested decision is in breach thereof. When "a staff has an underlying health condition, the staff may remain and work from home", and "paragraph 37 expresses no limitation to the time when staff with underlying health conditions must return to work at the office and commute to work". Rather, "when health risks are sufficiently mitigated, if ever, then the staff would be required to return to work at the office";

i. With reference to *Peglan* 2016-UNDT-059, a "fundamental principle of administrative law is that the exercise of discretion must be consistent and not arbitrary". There is, however, "no consistency" in the contested decision with para. 37 of the Administrative Guidelines until "when COVID-19 no longer exposes Applicant and his family to severe health risks of international travel". The contested decision further contradicts the "published guidance on returning back to work, which established occupancy limitations and allow ample flexibility for telecommuting", which demonstrated that the ASG was "cognizant of the ongoing COVID-19 risks but failed to consider them in its decision";

j. The ASG was "cognizant of COVID-19 continued health risks as well as of restrictions of international travel to protect health, in particular of those more exposed to severe consequences, but chose to ignore the relevant information and the consequences of exposing [the] Applicant and his family to international travel risks". The Respondent claims in "its own COVID-19 response webpage … to be a reliable source of information on COVID-19 … along with the World Health Organization";

k. The contested decision "appears to follow a pattern of gross disregard for Applicant's health, wellbeing and violation of his contractual and human rights". While Applicant was in service, the Respondent "allowed and enabled

series work incidents to occur which harmed Applicant's health, reputation and career and led to his disability and termination of his contract for health reasons". These work incidents were "perpetrated by [United Nations] staff, in [United Nations] premises, using [United Nations] infrastructure and systems", and the "Administration failed to stop, prevent or investigate these harmful work incidents, and failed to provide any protection to Applicant whatsoever, despite Applicant requesting repeatedly such protection";

l. The "failure by the Respondent to protect Applicant's safety and health (and to provide a safe and healthy work environment while in service) directly contravenes [United Nations] Staff Regulations and Rules and evidences Respondent's lack of respect for Applicant's contractual and human rights" with reference to some judgments of the Dispute and Appeals Tribunals. The contested decision further "breaches [the] Applicant's fundamental human right to life, health and security as established by General Assembly Resolution 217A, as the decision forces [the] Applicant, [his] immunocompromised spouse and [his] disabled son to travel before 7 January 2022, when the COVID-19 travel risks are still significant in order to be able to claim and receive [his] repatriation entitlement";

m. There was "a very significant spike in the number of infections in the last quarter of 2021 … representing a significantly higher infection rate and consequently a much higher health risk to travel than when [the ASG] approved the first extension". Therefore, the contested decision is "both capricious and unreasonable as it does follow a clear and consistent approach or pattern, nor is it supported by the facts or the technical evidence submitted by Respondent";

n. DHMOSH "declared that based on the medical condition and the medication the Applicant's spouse is taking there may be some increased risk of infection". DHMOSH also "expressed that the increased risk was 'not sufficient to indicate any significant additional risk of infection or increased likelihood of poor outcome". The CDC, however, have "scientifically

determined that an individual in the age group of the Applicant's spouse is 60 times more likely to die from COVID-19 than individuals aged 18-29". The "already substantial risk of death for individuals in the age group of the Applicant's spouse is further increased if the individual is immunocompromised". DHMOSH's advice "is contrary to the medical recommendation provided by the treating physician of Applicant's spouse that she should not to travel due to health risks". The Respondent "ignored relevant matters during the exercise of his discretionary authority, including the medical evidence provided by the treating physician of Applicant's spouse as well as the Respondent's own evidence that pointed to a significant increase in the infection rate";

o. In "para. 3 of A/BUR/76/1 issued on 14 September 2021 Respondent considered that due to the health risks posed by the global COVID-19 pandemic to the delegates and to the UN personnel, the General Assembly could not conduct its normal sessions in its Headquarters in New York City". The Respondent considered it "too risky for delegates to travel to New York City to attend the General Assembly's 76th session held from September to December 2021, or for [United Nations] personnel to report for duty at the [United Nations] offices for regular [United Nations] meetings. At the same time, "(t)he experts advised the ASG/OHR that the Applicant's spouse could safely travel to Mexico provided she follows mitigation and preventative measures";

p. Further, "in September 2022, more than a year after Respondent's contested decision, the Secretary-General is photographed wearing a face mask during the 77th session of the General Assembly, a clear indication that [the] Respondent still considers the existence health risks due to the global COVID-19 pandemic".

18. The Respondent, in essence, contends that the ASG acted within the scope of her authority when rejecting the Applicant's request for an exception under staff rule

12.3(b) to an additional one-year extension of the deadline stipulated in staff rule 3.19(i).

The Dispute Tribunal's limited judicial review of the Administration's discretionary authority

19. The Tribunal notes that the Appeals Tribunal has consistently held that the Dispute Tribunal's judicial review is limited and often refers thereon to its seminal judgment in *Sanwidi* 2010-UNAT-084. Therein, the Appeals Tribunal defined the scope of this review as it is for the Dispute Tribunal to determine "if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further held that the Dispute Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see para. 40).

20. In *Sanwidi*, the Appeals Tribunal also stressed that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, [nor] is it the role of the Tribunal to substitute its own decision for that of the Secretary-General" (see para. 40, and, similarly, para. 19 of *Benchebbak* 2014-UNAT-438, which specifically refers to staff rule 12.3(b)). The Appeals Tribunal further clarified that "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review", explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see para. 42).

Did the ASG lawfully exercise her discretion when taking the contested decision?

21. The Tribunal notes that under staff rule 3.19(i), the "[e]ntitlement to the repatriation grant shall cease if no claim has been submitted within two years after the effective date of separation". As such, no extension to the two-year deadline is therefore envisaged in staff rule 3.19(i). Under staff rule 12.3(b), the ASG, however,

has the general authority to grant an exception to the Staff Rules, including the deadline set out in staff rule 3.19(i), if three particular conditions spelled out therein are satisfied. This possibility only means that the Applicant has a right to have his request for exception considered by the ASG; not that he has a right to have it granted (in line herewith, see the Appeals Tribunal in *Hastings* 2011-UNAT-109).

22. In the Applicant's second request for an exception to the two-year deadline of 4 August 2021, his main argument is that a relocation travel would expose his spouse to the risk of contracting COVID-19, which due to her health condition could have significant medical consequences for her. To corroborate this, the Applicant submitted two letters from her medical doctor to the ASG. In order to assess the request, the ASG consulted with DHMOSH—the United Nations Secretariat's department responsible for medical matters. DHMOSH, however, found no medical risk in the Applicant's spouse traveling for his relocation, which was spelled out in an email of 20 December 2021 from the Senior Medical Officer/DHMOSH to Respondent's Counsel. Also, no such risk was mentioned in the 20 August 2021 email communicating the contested decision in which the "HR Policy Team" indicated that the ASG had rejected his request for an exception in light of the documentation he had submitted to DHMOSH.

23. Referring to *Sanwidi*, as quoted above, the Tribunal finds that the ASG lawfully acted within the scope of her discretion in rejecting the Applicant's second request for an extension on the basis of DHMOSH's assessment that there was no medical risk in the Applicant's spouse traveling for his relocation, which duly took into consideration the documentation submitted by the Applicant to DHMOSH.

24. The Tribunal finds that the Applicant's references to various other sources than DHMOSH regarding the medical risk of COVID-19 is not important insofar as DHMOSH's opinion was properly sought and, if deemed appropriate, followed by the ASG—even if the ultimate decision-making authority rests with the ASG, it is neither the role nor expertise of the ASG to make medical assessments but that of DHMOSH.

25. In addition, the Tribunal notes that the majority opinion in *Applicant* 2021-UNAT-1133 (overturning *Applicant* UNDT/2020/116/Corr.1) held that the Dispute Tribunal is not competent to review a medical assessment of DHMOSH (see, in particular, para. 58). In this regard, the Tribunal further observes that the Applicant has not questioned the relevancy and/or adequacy of DHMOSH's assessment in the present case in response to the pertinent medical question, and nothing in the casefile suggests that there would be a reason to do so. This was, on the contrary, what the Dispute Tribunal did in *Applicant* UNDT/2020/116/Corr.1 and with which the minority opinion agreed in *Applicant* 2021-UNAT-1133. The Applicant's claim, consequently, cannot find support therein either.

26. The Applicant further contends that the medical risk of his spouse concerning COVID-19 had increased by the time the deadline for his relocation travel expired on 7 January 2022, as compared to when the challenged decision was taken on 20 August 2021.

27. The Tribunal finds that even if the factual circumstances regarding the medical risk of COVID-19 had changed as submitted by the Applicant, he has not established why the ASG should therefore have had a duty to change her 20 August 2021 decision at her own initiative. If so, in the given circumstance, it would only have been reasonable to expect the Applicant to request the ASG to reconsider her previous decision due to a change of factual circumstances. From the casefile, however, does not follow that the Applicant ever requested the ASG for such reconsideration. There is therefore no ground for the Applicant's challenge in this regard.

28. In conclusion, the Tribunal finds that the contested decision was lawful on its merits, and no reason therefore exists for the Tribunal to further examine whether the conditions of staff rule 12.3(b) were satisfied. Even if doing so, the Tribunal find that the Applicant has not established that an exception should have been granted in the given circumstances—all three conditions need to be satisfied and not only the one

regarding the relevant staff member's agreement, which is the only condition to which the Applicant refers in his submissions.

Conclusion

29. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 11th day of November 2022

Entered in the Register on this 11th day of November 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York