UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2018/083
Order No.:	250 (NY/2018)
Date:	20 December 2018
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

SHIKARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Daniel Trup, OSLA

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

Introduction

1. On Monday, 17 December 2018, at 3:24 p.m., the Applicant, a Medical Officer with the Medical Service Division ("MSD") in New York, at the P-4 level, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the Administration's decision refusing to certify his requested sick leave, and as a result, to recover 39 days off his December 2018 salary. The Applicant submits that the salary recovery should be estopped pending the decision of the medical board following the Applicant's request for its establishment to review the Administration's decision. The Applicant further submits that the salary recovery of his December salary in full will cause irreparable harm as he has to pay rent, household and medical expenses, and his child's school fees, and that he lives from month to month on his salary.

2. On the same day (17 December 2018), the application was registered and assigned to the undersigned Judge, and the Registry transmitted the application for suspension of action to the Respondent, requesting him to file a reply by Wednesday, 19 December 2018.

3. On 19 December 2018, the Respondent duly filed a reply contending that the application is not receivable because, *inter alia*, the Applicant has requested the medical board to review the refusal to certify his sick leave and thus no final administrative decision has been taken pending such review, and the Applicant and the Organization have mutually agreed that the salary would be recovered in five equal monthly installments. The Respondent further submits that the decision to recover the Applicant's salary has been implemented in the payroll module, which is now locked for the Applicant's payroll group, and thus cannot be suspended.

4. On the same day (19 December 2018), the Applicant filed a response to the Respondent's reply underlining that the Applicant seeks to challenge the

Administration's decision to prematurely deduct his salary without his sick leave being reviewed pursuant to staff rule 6.2(j). The Applicant submits that there has been no review of the Applicant's medical condition and that the Administration refused the medical documentation submitted by the Applicant on the grounds of delay/time limit, and not on substantive medical grounds. The Applicant contends that nothing in the staff rules or regulations prohibits review of medical materials submitted out of time but before a decision is made on certification. The Applicant also submits that no implementation has actually occurred since he has not been paid his salary and administrative locks should not equate to implementation.

Background

5. The Applicant was absent from work for a total of 59 working days between 1 January 2018 and 31 July 2018, 20 days of which were certified as sick leave by the Administration. The Applicant submits that, due to the nature and severity of his illness, he was unable to undertake the process of notification fully, including the provision of medical certification as required under staff rule 6.2(f).

6. On 3 December 2018, the Applicant submitted a medical report to support his request for the sick leave in question. Since the Applicant works for MSD, these documents were forwarded to the medical service division of the International Atomic Energy Agency, where Dr. ML was identified as a doctor to assess the Applicant's claim.

7. On 6 December 2018, Dr. ML rejected the Applicant's request for certified sick leave during the period of 1 January 2018 to 31 July 2018 on the grounds that he had submitted the medical documentation late.

8. The following day, Dr. ML wrote to an administrative officer in charge of the Applicant's matter. In this email, Dr. ML wrote that he learned that the Applicant may not get any salary in December due to the refusal decision and recommended that salary deductions over several months be considered.

9. On 12 December 2018, the Applicant requested that salary recovery be made in installments so that 20 percent of his salary be deducted every month, stating that "[t]his way [he] can still manage to live every month".

10. On 13 December 2018, the Applicant submitted a request for the establishment of a medical board pursuant to staff rule 6.2(j) to appeal Dr. ML's decision.

11. On 14 December 2018, the Applicant submitted a management evaluation request to challenge the decision of the Administration to refuse his medical certification for sick leave and the decision to recover his full salary prior to the establishment of a medical board.

12. From the documentation attached to the reply, it is evident that on Monday, 17 December 2018, at 11:57 a.m., the Applicant was informed via email that salary recovery would be implemented in five equal monthly installments, and at 1:05 p.m., the Applicant responded, "[t]hank you very much for arranging this". The Tribunal notes that the application for suspension of action was received by the Tribunal on 17 December 2018 only at 3:24 p.m. as a result of a technical glitch in the Court Case Management System, although Applicant's Counsel had attempted the filing prior to that time. On Tuesday, 18 December 2018, the Applicant was advised that the Organization had implemented an installment recovery at 20 percent of his net pay.

Consideration

Legal framework

13. Article 2.2 of the Statute of the Dispute Tribunal provides:

> … 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.

14. 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.

15. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may 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. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

16. Under art. 2.2 of the Statute, a suspension of action order is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of the contested decision.

17. In the instant case, the Respondent has taken the preliminary point that the matter is not receivable because, *inter alia*, the Applicant requested the medical board to review the refusal to certify his sick leave and thus no final administrative decision has been taken, and the Applicant and the Organization have mutually agreed that the salary would be recovered in five equal monthly installments. The Respondent further submits that the decision to recover the Applicant's salary has been implemented in the payroll module, which is now locked for the Applicant's payroll group, and thus cannot be suspended. The Tribunal will therefore consider these preliminary points first before addressing the requirements for sustaining an application for suspension of action pending management evaluation.

Scope of the case and the definition of the impugned administrative decisions

18. The Tribunal does find it peculiar that whilst contending on the one hand that no final administrative decision has been taken regarding certification of the Applicant's sick leave, the Respondent is insisting that recovery deductions are to be made from the salary for the selfsame sick leave. Further, while the Respondent argues that no final administrative decision has been taken, the Respondent also submits that the contested decision has already been implemented. The Tribunal notes that these arguments are not pleaded in the alternative, and are contradictory to each other. It cannot be logically argued that there is no finite or final administrative decision, but also at the same time, that it has been implemented. A decision to make deductions from the Applicant's salary has been taken and the Respondent's point on receivability in this regard fails.

19. As clarified and emphasized by the Applicant in his additional submission, the Applicant seeks to challenge the decision to make deductions from his salary when no final administrative decision on sick leave certification has been taken. Considering that the decision to deduct from his salary will not be reviewed by the medical board established under staff rule 6.2(j), the Tribunal agrees with the Applicant on this issue and finds that this is a separate administrative decision that differs from the decision refusing to certify his requested sick leave and that is subject to judicial review.

20. Further, while the Applicant requested and the Administration agreed that the salary would be recovered in five equal monthly installments, the Tribunal is of the view that it cannot be considered that the Applicant waived his right to challenge the administrative decision as this is not a settlement agreement that parties mutually enter into in order to resolve the entire claim. In any event, the Respondent has conceded that the Applicant's certification challenge will be reconsidered.

Whether the impugned decision has already been implemented

21. The Administration submits that it has implemented the recoveries as mutually agreed in the payroll module which is now locked for the Applicant's payroll group. Any adjustments will be made following the conclusions of the Medical Board regarding the refusal for certification of the Applicant's sick leave. In response, the Applicant argues that there is no effective implementation until the salary is paid.

22. It follows from article 2.2 of the Tribunal Statute that when administrative decision has been implemented, a suspension of action may not be granted (*Gandolfo* Order No. 101 (NY/2014)). However, in cases where the implementation of the decision is of an ongoing nature (see, e.g., *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8 (NY/2013); *Gallieny* Order No. 60 (NY/2014)), the Tribunal may grant a request for a suspension of action.

23. In this case, regardless of whether the recoveries are locked for the Applicant's payroll group for his December salary, the Tribunal notes that the recovery deductions are of an ongoing nature and thus are being actively implemented on a month-to-month basis for five months. In this regard the Respondent's contention on receivability on this ground fails.

Three requirements for the suspension of action

24. As mentioned above, the Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met. The Tribunal will address the irreparable harm and urgency elements first since salary recovery in five monthly installments has an implication for these elements.

25. It follows from the information submitted by the Respondent in his reply, that before filing the present application, the Applicant had requested that his salary be recovered in five monthly installments, and a few hours before the present application was filed on Monday, 17 December 2018, the Organization informed him that his

request was granted. It was subsequently confirmed on the following day, on Tuesday, 18 December 2018, that an installment recovery of 20 percent monthly, and not of the Applicant's full salary, was to be implemented.

26. In the response to the reply, the Applicant states that by this he attempted, as much as possible, to mitigate the effect of the deductions in case he was not successful with regard to the suspension of action. Nevertheless, he maintains that the deductions will still have an adverse effect on his ability to meet his financial costs.

27. However, the Tribunal notes that the Applicant conceded that the monthly installment deductions of 20 percent meant that "[t]his way [he] can still manage to live every month". The Tribunal finds that in this regard the Applicant has negated the aspects of urgency and irreparable harm. As an applicant needs to prove all three elements for the granting of a suspension of action, and as he has negated two of the requirements, the Tribunal need not review the *prima facie* unlawfulness aspect. The application for suspension of action pending management evaluation is therefore not sustainable.

28. The Tribunal notes, however, that the Applicant is still challenging the substantive aspect of the case, that is, an appropriate and final determination regarding the certification of his sick leave, which the Respondent concedes.

29. The Tribunal would like to observe however, that in terms of international labor standards, in particular the Protection of Wages Convention, 1949, wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of a worker and his family. Furthermore, that under the Protection of Wages Recommendation, 1949, that "all necessary measures should be taken to limit deductions from wages to the extent deemed to be necessary to safeguard the maintenance of the worker and his family".

30. As contended by the Applicant, it is apparent that MSD retains a degree of discretion in considering cases where medical certification has been submitted late in

assessing whether the reasons are justifiable in the circumstances. Further, a claimant has the right to provide a full explanation which must be properly considered. It behooves an Organization like the United Nations that such discretion should be exercised not only within the confines of the relevant requirements, but also with a degree of understanding and empathy for any claimant's particular circumstances.

31. The Appeals Tribunal emphasized in *Dahan* 2018-UNAT-861 at para. 26 that "[h]owever, we wish to note that this appeal highlights the troubling issue of the Administration's delays in responding to staff and staff related issues. It is of paramount importance that the Administration addresses staff concerns with promptitude and adheres to the highest standards of care and due diligence".

32. In line therewith, and in light of the peculiar facts and nature of this case, the Tribunal directs that the Respondent shall ensure that the medical board shall promptly consider the Applicant's request which decision must be communicated to the Applicant no later than three months from the release of this order.

Conclusion

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

The application for suspension of action is denied, without prejudice to any further proceedings regarding the Applicant's request for the establishment of the Medical Board or its decision.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of December 2018