



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

RAFII

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed at the New York Registry of the Dispute Tribunal on 10 September 2012, the Applicant, a staff member of the United Nations Assistance Mission in Afghanistan (“UNAMA”), contests two decisions. Firstly, she contests UNAMA’s refusal to grant her a lien on her post to enable her to work in another office on a non-reimbursable loan/temporary duty assignment. UNAMA subsequently reversed this decision shortly after it was made, but the Applicant nevertheless maintains that the initial determination has caused her harm. Secondly, the Applicant contests UNAMA’s decision to calculate her absence from work starting 1 May 2012 against her annual leave instead of her sick leave, and the subsequent decision to place her on special leave without pay commencing 5 June 2012.

2. The Applicant has raised a number of additional claims, which in the Tribunal’s considered view fall outside the scope of this case for reasons provided below at paras. 30–38. However, the Tribunal, in reviewing the present case, considered the relevant factual background as articulated by the parties in their submissions and supporting documents, as well as the arguments raised.

Background

Employment status

3. The Applicant has worked for the Organization since the early 1990s on a number of occasions, on different contracts, including consultancies, although her engagement has not been continuous.

4. On 15 July 2011, she joined UNAMA on a fixed-term assignment as a Political Affairs Officer. The appointment was for one year, until 14 July 2012. It was subsequently extended until 31 December 2012.

Sick leave

5. After having served in UNAMA for approximately five months, the Applicant was placed on sick leave on 12 December 2011. She submits that on that day she was “medically evacuated within the mission area” and placed under medical supervision in Kabul. The Applicant was placed on sick leave with full pay until 21 March 2012, based upon the opinion of medical professionals that it was not advisable for her to work in Afghanistan, though she could work in a more suitable environment. Following the exhaustion of her sick leave entitlement on full pay, she was placed on half pay status combined with half days of annual leave, to keep her on full pay status through to 30 April 2012.

6. By memorandum dated 23 April 2012, the Chief Medical Officer of the Medical Services Division informed the Chief of Mission Support, UNAMA, that “[b]ased on the medical report from [the Applicant’s] attending physician and [Medical Service Division’s] consultant, [she] is fit to work, but not fit for duty in UNAMA or other similar duty stations”. The Respondent submits that this certification meant that the Applicant should no longer be placed on certified sick leave and her absence should be charged against annual leave.

7. From 1 May 2012, the Applicant’s annual leave balance of 24 days was utilized to keep her on full pay status. Upon exhaustion of her annual leave, she was placed on special leave without pay effective 5 June 2012.

8. In July 2012, the Applicant’s appointment with UNAMA was extended until 31 December 2012.

Communications regarding temporary assignment at DESA

9. While on sick leave, the Applicant discussed a temporary position with the Department of Economic and Social Affairs (“DESA”) of the United Nations Secretariat in New York. The possible temporary assignment was with regard to

the United Nations Conference on Sustainable Development (“Rio+20 Conference”), to be held from 20 to 22 June 2012.

10. On 10 April 2012, the Applicant wrote to the Executive Officer, DESA, informing him that she “will be at UNHQ on the afternoon of Thursday, 12 April 2012, to discuss possibilities of working for the Rio+20 Conference”. However, on 11 April 2012, the Executive Officer, DESA, advised the Applicant that UNAMA had informed him that “they do not approve, as a matter of principle, non-reimbursable loans/liens to posts of staff on temporary assignment”. The Applicant was advised that, “[i]n light of this, it will not be able to place you in the Secretariat of Rio+20”.

11. On 17 May 2012, the Applicant received an email from the Field Personnel Division, Department of Field Support, advising her that “the Mission [was] unable to make an exception regarding a lien on [her] post if [she] were to be on assignment to another location”.

12. On 25 May 2012, the Applicant filed a request for management evaluation of “the decision made by [UNAMA] not to release [her] on a temporary basis to work elsewhere, so that [she] can continue to earn a UN salary instead of being placed on administrative leave without pay”.

First suspension of action application

13. On 29 May 2012, the Applicant filed an application for suspension of action of that decision, but while her application was before the Tribunal, she was informed that the decision not to permit her non-reimbursable loan had been set aside by the Respondent. On 31 May 2012, UNAMA informed the Applicant by email that it “agreed to [her] [temporary duty assignment]/non-reimbursable loan to DESA Rio+20 Conference” and that she should complete and return her US visa application as soon as possible, which the Applicant did the following day. On 1 June 2012, the Tribunal rendered *Rafii* UNDT/2012/082, finding that, in view of the reversal of

the contested decision, the application for suspension of action was moot. Accordingly, the application for suspension of action was dismissed.

Further communications regarding the temporary position at DESA

14. However, there were subsequent delays in completing the formalities for the Applicant's temporary assignment with DESA in New York. The Applicant states that initially the Department of Field Support was to process a request for her US visa and subsequently changed its position and claimed it was the responsibility of DESA to do so. The DESA staff who could have granted approval for the G-4 visa had already left for Rio and, upon their return during the last week of June 2012, requested confirmation that the Applicant's UNAMA contract would be renewed beyond 14 July 2012. The Applicant secured this confirmation and contends that all these delays were not of her making. Furthermore, she alleges that she was verbally informed on 23 July 2012 that UNAMA had again decided not to agree to her non-reimbursable loan arrangement, but that subsequently, on 14 August 2012, it was confirmed to her that the information provided to her on 23 July 2012 regarding objections to her loan arrangement was a result of miscommunication.

15. The Respondent submits that the Department of Field Support pursued efforts to find a temporary assignment with the United Nations Supervision Mission in Syria, the Integrated Operational Team at the Department of Peacekeeping Operations, and with the United Nations Integrated Mission in Timor-Leste ("UNMIT"). UNMIT informally agreed to have the Applicant serve in the mission through its liquidation phase. On 15 August 2012, following an enquiry from UNMIT as to whether she would be interested in a temporary assignment ending on 31 October 2012, the Applicant confirmed her availability to work for UNMIT "on a temporary basis once all the necessary formalities for [her] reassignment have been completed".

Second suspension of action application

16. Nevertheless, on 15 August 2012, the Applicant filed a second application for suspension of action of the decision by UNAMA allegedly renegeing on the late-May 2012 undertaking to allow her employment in another office on a non-reimbursable loan, thus frustrating her temporary engagement with DESA.

17. According to the Respondent, the temporary assignment to DESA was no longer feasible as its purpose was to assist with a conference that had already taken place in June 2012. However, the Respondent submitted that the Administration had no objection to the Applicant joining UNMIT on a temporary loan arrangement and successful efforts had been made to find the Applicant a temporary assignment with UNMIT. The Respondent also stated that, contrary to the Applicant's assertions, if she were to join UNMIT, it would not be interpreted as a waiver of her rights.

18. On 17 August 2012, the Respondent informed the Tribunal that "following consultations between UNMIT and the Field Personnel Division of the Department of Field Support, UNMIT agreed to offer a temporary assignment to [the Applicant] through 31 October 2012 to provide assistance to the mission through its liquidation phase. UNMIT has agreed to pay for [the Applicant's] services through 31 October 2012". The Respondent submitted that, following the Applicant's confirmation of her availability, an offer of appointment was being prepared by UNMIT and would be issued to her shortly.

19. On 21 August 2012, the Applicant filed a submission informing the Tribunal that she would take the temporary appointment with UNMIT in order "to fulfil [her] legal obligation to mitigate damages". She confirmed that she would not be pursuing the second application for suspension of action but would preserve her right to pursue other remedies.

20. In *Rafii* UNDT/2012/127, rendered on 21 August 2012, the Tribunal found that by the time the second application for suspension of action was received and

before the hearing of 17 August 2012, the Applicant had already confirmed her availability to take up an alternative temporary assignment with UNMIT, to which there was no objection by the Respondent. Accordingly, in view of the Applicant's submission of 21 August 2012 that she was no longer pursuing the application for suspension of action, and the issues in that case being moot, the Tribunal dismissed the Applicant's second application for suspension of action.

Temporary assignment with UNMIT

21. On 24 August 2012, the Applicant signed an offer of appointment with UNMIT. She took up her temporary appointment with UNMIT in September 2012.

Procedural matters

Motion for expedited consideration

22. The Applicant requests that the present case be considered on an expedited basis. The Respondent objects to the Applicant's request, submitting that consideration of this case on an expedited basis would place the Applicant at an unfair advantage over other applicants who have been waiting to be heard.

23. In view of the particular circumstances of this case, the Tribunal has decided to grant the Applicant's request. Considering the already voluminous amount of work created by the present application in the last few months and by the two related suspension of action applications, with the facts still fresh in the minds of the parties, the Tribunal considers that it is in the interests of a fair and expeditious disposal of the case, as well as in the interests of judicial economy, to deal with the matter promptly. This request, however, is granted on an exceptional basis on the particular facts and circumstances of this case. Applications for suspension of action should never be seen as an easy way to fast track cases or a way in which parties may jump the queue.

Consideration on the papers

24. Having reviewed the papers and being of the view that this case could be decided on the papers, by Order No. 225 (NY/2012), the Tribunal directed the parties to file any final submissions by 15 November 2012, indicating also whether they wished to have a hearing. The parties' final submissions were duly filed, with neither party requesting a hearing.

Motion to redact the Applicant's name

25. The Applicant has requested that her name be redacted from any rulings made in this case, on the grounds that "the present case may refer to her personal medical information in greater detail as it is being decided on the merits" and that the "use of personal and confidential information pertaining to her medical history and condition may be prejudicial to her, as it could adversely affect her professional career advancement and employment opportunities with prospective employers". In the alternative, the Applicant requests that any references to her medical condition and history be minimized to the greatest extent possible.

26. The Respondent objects to the motion, submitting that the Applicant has failed to provide sufficient grounds in support of her request, and that in any event, based on the issues arising in this case, it is not necessary to refer in any detail to the Applicant's medical information.

27. The Tribunal has already issued a number of rulings identifying the Applicant by name, and two judgments on suspension of action have been publicly available for several months. Notably, no requests for anonymity were made in the two suspensions of action cases, which concern similar issues and circumstances.

28. Even though motions for anonymity or confidentiality must be decided on a case-by-case basis, the granting of same without sufficient reason has the potential to not only invite requests of this kind in every matter, but to negate a key element of

the new system of administration of justice—its transparency (see also *Finniss* 2012-UNAT-210 referring to the public nature of internal system of justice). It is essentially a question of weighing the public interest against the private interest. The present Judgment does not deal with the Applicant's medical history or condition in any detail, or with any sensitive or confidential matters. Therefore, this case is not of such a nature as to outweigh the guiding principle of transparency in judicial proceedings and published rulings of the Tribunal.

29. Having considered the grounds furnished by the Applicant and the Respondent's objections, the Tribunal finds that the Applicant has not established sound and valid reasons for the redaction of her name (see also *Yisma* Order No. 63 (NY/2011), dated 1 March 2011), and the motion for anonymity is rejected.

Scope of the case

30. As stated above, the Tribunal finds that this case is limited to two issues, namely: (i) the lawfulness of UNAMA's initial refusal to allow her to work elsewhere whilst maintaining a lien on her post and whether this refusal resulted in harm to the Applicant, and (ii) the calculation of her absence from work starting 1 May 2012 against her annual leave instead of her sick leave, and the subsequent decision to place her on special leave without pay starting 5 June 2012.

Alleged abolition of the Applicant's UNAMA post

31. As stated above, the Applicant raised a number of other claims in addition to the two initial claims, thus necessitating that the Tribunal identify the scope of this case. In the first of these claims under para. 3(b) of sec. IX of the application, the Applicant requests the rescission of the alleged decision to abolish her UNAMA post. As the Applicant has not requested the prerequisite management evaluation of this alleged individual cause of action, the matter is not properly before the Dispute Tribunal (see art. 8.1 of the Tribunal's Statute and *Planas* 2010-UNAT-049).

Airfare from Ottawa to Dubai

32. On 12 September 2012, the Applicant filed a motion for leave to submit additional documents “to appraise the Tribunal of the continuing difficulties she has been experiencing with [the] Respondent, especially with regard to arranging her official travel to [UNMIT]”. The Applicant submitted email communications concerning official travel arrangements related to her temporary assignment with UNMIT, stating that she was expected to pay for a portion of the air ticket from her home in Canada to UNMIT.

33. On 14 October and 6 November 2012, the Applicant filed further motions to file additional documents “pertaining to her request for a management evaluation of the decision to deny her official travel entitlement from Ottawa to Dubai, when she was en route to commence a temporary assignment with [UNMIT]”. Specifically, the Applicant included in her request for management evaluation, dated 21 September 2012, the decision that she would be responsible for the payment of her airfare to Dubai. The Applicant did not clarify what relief she sought with respect to her claims, however, she requested the Tribunal “to consider this matter in conjunction with her previous submissions for this case”.

34. The Respondent submits that the Applicant’s travel arrangements and any decisions pertaining to them are outside the scope of the present case.

35. By her filings of 12 September, 14 October, and 6 November 2012 concerning travel arrangements related to UNMIT, the Applicant in effect sought to introduce new claims regarding separate administrative decisions. The application in the present case was filed on 10 September 2012, prior to the issue of the airfare arising. Accordingly, the alleged decision requiring the Applicant to pay for the airfare cannot be part of the present case. Applications are not intended to have a snowball effect, and, after filing an initial application, applicants cannot keep adding additional matters to the same case as they arise. This would be a back-door way of

bringing a substantively new cause of action even prior to the management evaluation and without the filing of a formal application on the merits. Each appeal shall be subject to the steps prescribed by the Statute, Rules of Procedure, and the Staff Rules.

36. Therefore, the Tribunal finds that the Applicant's claim concerning official travel arrangements for her temporary assignment with UNMIT is not properly before the Tribunal in this case. The Applicant cannot bypass the mandatory statutory filing requirements, and these claims are not properly before the Dispute Tribunal.

37. Based on the information provided by the Applicant, she filed her request for management evaluation on 21 September 2012. The Administration had 45 calendar days (see staff rule 11.2(d)), or until Monday, 5 November 2012, to complete the management evaluation. The Applicant thereafter has 90 days, or until Monday, 3 February 2013, to file a separate application with regard to the issue of airfare.

Post-UNMIT reassignment

38. In her submission filed on 15 November 2012, the Applicant also stated that she had not been informed whether she would remain with UNMIT "throughout the mission liquidation process (ending 30 April 2013)". Any claims with respect to the Applicant's assignment at UNMIT and the ending thereof are matters separate from the administrative decisions contested in this case. Should the Applicant wish to contest them at the appropriate time, she must first request management evaluation and then a separate application with the Tribunal with respect to each contested decision.

Consideration

Lien on a non-reimbursable loan/temporary duty assignment

Lawfulness of the contested decision

39. With respect to the present application, the Tribunal finds no reason to depart from its findings in the judgments on suspension of action that the initial decision of UNAMA to disallow the Applicant's temporary assignment outside of UNAMA with a lien on her post was rescinded on 31 May 2012. The decision to grant a lien on a non-reimbursable loan/temporary duty assignment was finally made to the Applicant's satisfaction, as the Tribunal established in both *Rafii* UNDT/2012/082 and *Rafii* UNDT/2012/127.

40. The Tribunal finds that, in any event, the Applicant has failed to demonstrate that the initial decision not to allow her temporary duty assignment on lien was unlawful. The Respondent has filed and served a memorandum of the Officer-in-Charge of the Field Personnel Division of the Department of Field Support to all Directors of Missions Support, dated 28 August 2008, which explains the Organization's procedures for temporary duty assignments for mission staff. The policy is further elaborated in the Standard Operating Procedure of the Department of Field Support, dated 16 April 2008. Both the memorandum and the Standard Operating Procedure explain that a temporary duty assignment is generally a temporary loan of a staff member from one mission to another or from Headquarters to a field mission for a period not exceeding three months. During the temporary duty assignment period, staff members will remain against their post in the parent mission and will continue receiving salary and allowances at the parent mission. One of the purposes of a temporary duty assignment is "to provide the receiving mission with highly experienced and qualified staff to meet urgent requirements during start-up, expansion, downsizing and/or liquidation, or to

augment the mission for the duration of a special operation”. The temporary duty arrangement requires the agreement of both the receiving and releasing mission.

41. The Applicant has failed to persuade the Tribunal that in her particular case there is any legal basis to question the propriety of the execution of the temporary duty assignment policy in place at the Department of Field Support. This policy permits temporary duty assignments between field missions or *from* the Headquarters *to* a field mission. The purpose of this is to provide the receiving field missions with support to meet urgent requirements. In contrast to the established policy, the Applicant’s initial request would have involved a temporary duty assignment *from* a field mission (UNAMA) *to* Headquarters (DESA). Furthermore, while the policy requires an agreement between the releasing and receiving offices, no such agreement was in place between UNAMA and DESA.

Claims for compensation

42. The Applicant has also argued that UNAMA’s decision to grant her lien was delayed, which resulted in her inability to secure the position at DESA. In the Tribunal’s considered view, even aside from the contested decision being lawful, the Applicant has failed to establish sufficient basis to claim damages. The Tribunal finds that a number of necessary procedures were required to secure a possible temporary assignment with DESA, and the circumstances in this case do not lead to the conclusion that the Applicant suffered pecuniary or non-pecuniary harm as a result of the Respondent’s conduct.

43. It should be pointed out that the Applicant was not precluded at any time from applying for and taking up other positions. Rather, she wanted to find alternative employment while maintaining a link to her post in UNAMA, to which UNAMA initially objected in line with the policy of the Department of Field Support, but decided shortly thereafter to grant her an exception. The Administration

thereafter extended the Applicant's contract and took steps to find a temporary assignment for her at an acceptable duty station.

Summary of findings with regard to the issue of lien on a non-reimbursable loan/temporary duty assignment

44. Therefore, the Tribunal finds, firstly, that the initial decision to refuse a lien on a non-reimbursable loan/temporary duty assignment was rescinded; secondly, that the Applicant has failed to demonstrate that the contested decisions relating to the issue of lien and non-reimbursable loan/temporary duty assignment were unlawful; and, thirdly, that the Applicant has failed to establish sufficient grounds for an award of compensation. Accordingly, the Tribunal finds that the Applicant's claims with regard to the issue of lien and non-reimbursable loan/temporary duty assignment are without merit.

Placement on special leave without pay effective 5 June 2012

45. The Respondent submits that the Applicant exhausted her sick leave with full pay on 21 March 2012. To keep the Applicant on full pay status, she was placed on sick leave with half pay and half annual leave, from 22 March through 30 April 2012, in line with ST/AI/2005/3 (Sick leave). The Respondent submits that "[the Medical Services Division] cleared the Applicant to return to duty effective 30 April [2012]", which is why her absence from 1 May 2012 was charged fully against her annual leave. The Applicant exhausted her annual leave on 4 June 2012 and, from 5 June 2012 onward, she was placed on special leave without pay.

46. The Tribunal finds that the Respondent is mistaken in stating that the Medical Services Division "cleared the Applicant to return to duty effective 30 April [2012]", which resulted in the Applicant's absence from 1 May 2012 being charged fully against her annual leave. In fact, the memorandum of 23 April 2012 from the Chief Medical Officer, Medical Services Division, to the Chief of Mission Support, UNAMA, stated that the Applicant was "fit for work, but *not* fit for duty in UNAMA

or other similar duty stations” (emphasis added). Thus, as far as the Applicant’s post and work in UNAMA were concerned, she was not fit for duty. Pursuant to staff rule 6.2(a) (Sick leave), “[s]taff members who are unable to perform *their duties* by reason of illness or injury or *whose attendance at work* is prevented by public health requirements *will be granted sick leave*” (emphasis added). Accordingly, having been declared unfit for work in UNAMA by memorandum dated 23 April 2012, the Applicant qualified for sick leave under staff rule 6.2.

47. Further, staff rule 6.2(b)(ii) further states:

A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to three months on full salary and three months on half salary in any period of twelve consecutive months;

48. Section 3 of ST/AI/2005/3 (Sick leave) provides:

Section 3

Relationship of sick leave to other entitlements under the 100 and 200 series

Exhaustion of sick leave entitlement

3.1 When the entitlement to sick leave has been exhausted, further certified sick leave shall be charged to annual leave. When the entitlements to sick leave and annual leave have been exhausted, the staff member shall be placed on special leave without pay.

...

Combination of sick leave on half pay with annual leave or half-time duty

3.3 Each day of sick leave at half pay may be combined with one-half day’s annual leave, provided the staff member previously agrees to such arrangement. In such case, both a whole day’s sick leave on half pay and a half-day’s annual leave shall be charged for each working day involved.

...

Accrual of annual leave during sick leave

3.6 In accordance with staff rules 105.1(a) and 205.1(a), a staff member shall accrue annual leave:

...

(b) While absent from work under an agreed arrangement whereby a half-day of annual leave is combined with a full day of sick leave at half pay.

49. Accordingly, provisions of staff rule 6.2(b) applied, and the Applicant should have been placed on sick leave on half salary and half annual leave, pursuant to staff rule 6.2(b)(ii) and sec. 3 of ST/AI/2005/3, for a period of up to three months. (The Tribunal finds on the circumstances in this case that in all likelihood the Applicant would have agreed to such an arrangement under sec. 3.3 of ST/AI/2005/3.) Had proper procedures been applied, the Applicant's placement on half pay sick leave in combination with half days of annual leave, as during the period of 22 March to 30 April 2012, would have continued for up to three months, until the exhaustion of her annual leave. It should be noted that, during this period, she would have also continued to accumulate annual leave pursuant to sec. 3.6(b) of ST/AI/2005/3.

50. The Tribunal finds that the decisions to count the Applicant's absence from work starting 1 May 2012 against her annual leave and the subsequent placement on special leave without pay starting 5 June 2012 are unlawful and stand to be rescinded, with appropriate adjustments to be made to restore the Applicant's situation.

Conclusion

51. The decisions to calculate the Applicant's absence from work starting 1 May 2012 against her annual leave instead of her sick leave, and the subsequent decision to place her on special leave without pay commencing 5 June 2012, are rescinded.

52. The Respondent shall make appropriate adjustments, including any related payments and adjustments to benefits and entitlements, to reflect the placement of the Applicant on three months of sick leave on half pay combined with half days of annual leave commencing 22 March 2012, bearing in mind sec. 3.6(b) of ST/AI/2005/3.

(Signed)

Judge Ebrahim-Carstens

Dated this 24th day of December 2012

Entered in the Register on this 24th day of December 2012

(Signed)

Hafida Lahiouel, Registrar, New York