



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/096

Judgment No.: UNDT/2022/004

Date: 17 January 2022

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RASCHDORF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Notice: This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal

Introduction

1. The Applicant is a former Political Affairs Officer at the P-4 level, working with the United Nations Assistance Mission for Iraq (“UNAMI”).¹

2. By an application filed on 24 November 2020, the Applicant contests three decisions: (i) the administrative decision to not renew her fixed-term appointment (“FTA”) beyond 31 May 2019; (ii) the 1 September 2020 decision of the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”) to not recommend her for a disability pension to the United Nations Staff Pension Committee (“UNSPC”) and to the Advisory Board on Compensation Claims (“ABCC”); and (iii) the 5 November 2020 decision of the ABCC to reject her claim for compensation on the ground that her claim was time-barred.²

3. The Respondent filed a reply on 30 December 2020 in which it was argued that the claims relating to the non-renewal decision and the ABCC decision are not receivable *ratione materiae* because the Applicant never requested management evaluation of the two decisions. The only reviewable claim is the DHMOSH decision, which was legal, rational and procedurally correct.

Facts

4. The Applicant’s initial appointment with the Organization was on 1 April 2004.³ The Applicant’s appointment was renewed successfully until she separated from the service of the Organization on 31 May 2019.⁴

Facts surrounding the non-renewal decision

5. During her tenure with UNAMI, the Applicant suffered ill health and she was

¹ Application, section I.

² Application, section V.

³ Reply, annex R/1.

⁴ Application, annex IB; Reply, annex R/1.

placed on sick leave for a long period of time.⁵

6. On 2 April 2019, the Applicant's doctor submitted a medical report to DHMOSH, among others, recommending the Applicant for a disability benefit.⁶

7. On 10 April 2019, the Applicant exhausted her sick leave entitlements and was, accordingly, placed on sick leave without pay ("SLWOP") for the period of 11 April to 31 May 2019.⁷

8. On 16 April 2019, DHMOSH informed the Applicant that based on the medical reports provided by her treating doctor on 2 April 2019, her condition did not meet the criteria for DHMOSH to recommend her case to the Pension Fund for disability benefits.⁸

9. On 27 May 2019 and on 30 May 2019, Mr. Harish Joshi, the Chief Mission Support, UNAMI, informed the Applicant, that since she had exhausted her sick leave entitlements, her FTA would not be further extended beyond its expiration on 31 May 2019.⁹ (First contested decision).

Facts of the DHMOSH decision to not recommend the Applicant for disability benefits

10. On 12 June 2019, the Applicant submitted other medical reports to DHMOSH for its further consideration and recommendation for disability benefits. On 26 June 2019, DHMOSH informed the Applicant that the medical advice it had communicated to her on 16 April 2019 still stood because the documents she submitted still did not meet the requirements to be recommended for disability to the Pension Fund.¹⁰

11. Upon recommendation of DHMOSH, between July-November 2019, the Applicant engaged an Independent Medical Practitioner ("IMP") to review her case in

⁵ Application, section VII, Application, annex 7.

⁶ Reply, annex R/2, p.2.

⁷ Reply, annex R/2, p.1.

⁸ Application, annex 2A, p.5.

⁹ Application, annex IB.

¹⁰ Application, annex 2A, p.3.

accordance with section 1.1 of the ST/AI/2019/1 (*Resolution of disputes relating to medical determination*).¹¹ The IMP examined the Applicant on 15 November 2019 and submitted his report to DHMOSH on 6 August 2020.¹²

12. Based on the findings of the IMP, on 1 September 2020 the Applicant requested the DHMOSH to recommend her case to UNSPC with immediate effect. In her view, the IMP assessment clearly contradicted DHMOSH's previous assessments.¹³ On the same day, DHMOSH replied to the Applicant and informed her that "based on our medical review, the report from the independent medical practitioner Dr. O'Connor confirms our previous determination that you do not qualify for referral for consideration of disability benefit because you are fit to work in selected duty stations, i.e, not incapacitated for further service".¹⁴ (Second contested decision).

13. On 14 September 2020, DHMOSH reiterated to the Applicant its earlier communication and stressed that in accordance with the governing rules and regulations of the Organization and the Pension Fund, she was not considered to be incapacitated for further service in the Organization. Further, that since the process under ST/AI/2019/1 had concluded, the DHMOSH had no further role in the matter. Any further administrative matters should be referred to the UNAMI Human Resources office.¹⁵

Facts of the ABCC decision

14. On 28 October 2020, the Applicant submitted to ABCC a claim for compensation under Appendix D of the Staff Rules.¹⁶ On 5 and 12 November 2020, the ABCC informed the Applicant that the submission of the claim was past the

¹¹ Application, section VII, paras 11-13.

¹² Ibid., para. 16.

¹³ Application, annex 2A, p. 2.

¹⁴ Ibid.

¹⁵ Ibid, p.1.

¹⁶ Application annex 7, p.4

deadline set out in art. 2.1 of Appendix D and thus the claim was time-barred and non-receivable.¹⁷ (Third contested decision).

Receivability

The Respondent's submissions on receivability

15. The Respondent contends that the non-renewal decision and the ABCC decision are not receivable *ratione materiae*. The Applicant was required to request management evaluation of the two decisions, but she did not do so. Therefore, her claims relating to those two decisions are not receivable *ratione materiae*.

The Applicant's submissions on receivability

16. With regard to the ABCC decision, the Applicant submits that the application is receivable in line with section 7 of ST/AI/2019/1. It reads, "In accordance with staff rule 11.2(b), staff members wishing to formally contest an administrative decision taken pursuant to advice obtained from an independent medical practitioner are not required to request a management evaluation before filing an application to the United Nations Dispute Tribunal". Therefore, contrary to the Respondent's argument, the application is receivable by the Tribunal without seeking management evaluation for a procedural correction.

17. For the non-renewal decision, the Applicant contends that the DHMOSH decision was not legal, rational and procedurally correct and that alone is sufficient to make her application receivable.

Considerations

18. The question before the Tribunal is whether or not the Applicant sought management evaluation of the non-renewal and the ABCC decisions, so as to make her claims relating to the two decisions receivable before the Tribunal. For this

¹⁷ Ibid, p. 2.

determination, it is necessary to establish, based on the evidence on file, whether she was required to request management evaluation and if yes, whether she did so.

The non-renewal decision and the ABCC decision are not receivable ratione materiae

19. Staff rule 11.2(a) requires a staff member who wishes to formally contest an administrative decision to first submit a request for management evaluation of the administrative decision alleged to be in non-compliance with the terms of appointment or contract of employment of the staff member. Article 8(1)(c) of the UNDT Statute similarly provides that an application shall be receivable if the applicant has previously submitted the contested administrative decision for management evaluation. Requesting management evaluation is a mandatory first step in the appeal process and without a request for management evaluation, an application before the UNDT is not receivable *ratione materiae*.

20. Staff rule 11.2 provides:

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

21. The only exceptions are where the contested administrative decision has been taken pursuant to advice from a technical body or to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2. Neither exception applies to the non-renewal or the ABCC decision. The Applicant was required to request management

evaluation of those decisions, but acknowledges that she has not done so. Therefore, her claims relating to those decisions are not receivable *ratione materiae*.

MERITS

Standard of review

22. When judging the validity of the Administration's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Dispute Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and examine whether the decision is absurd or perverse.¹⁸ It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Administration.¹⁹ Before a case can be recommended to the UNSPC for a disability pension, Art. 33(a) of the UNJSPF Regulations requires proof of incapacitation.

23. Article 33(a) of the UNJSPF provides:

“...a disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration”.

24. Incapacitation is a purely medical issue that can only be proven by medical evidence. The Appeals Tribunal in *Karseboom*²⁰ held that the Dispute Tribunal is not competent to make medical findings, and that, if there is any procedural flaw relating to a medical issue, the Dispute Tribunal must remand the case to a competent medical body.

¹⁸ *Karseboom* 2015-UNAT-601, paras. 38-47.

¹⁹ *Anshasi* 2017-UNAT-790, para. 26; *Muwambi* 2017-UNAT-780, para. 28.

²⁰ *Karseboom* 2015-UNAT-601, paras. 38-47.

The contested decision was lawful

25. DHMOSH did not recommend the Applicant for a disability pension benefit because the Applicant was not incapacitated for further service in a member organization reasonably compatible with her abilities as required by article 33(a) of the UNJSPF Regulations.

26. The IMP endorsed the previous recommendations of the Applicant's treating physician who had found that she was unfit to return to field operations, but fit to work in duty stations with a moderate climate, such as Geneva, Vienna or New York.²¹ Those duty stations are classified as H duty stations.²² DHMOSH's decision was, therefore, consistent with the IMP's and the treating physician's findings.²³

27. On 30 April 2019, the Dr. Stefania Ascitti of DHMOSH wrote to the Applicant as follows:

Dear [Applicant],

I refer you to my prior communication. You do not qualify for referral for consideration of disability benefit because while you may not be fit to work in some duty stations, you are fit to work in others. Therefore, in accordance with the governing rules and regulations of the Organization and the Pension Fund you are not considered to be incapacitated for further service in a member organization.

As the process under ST/AI/2019/1 has concluded, DHMOSH has no further role. Any further queries should be directed to UNAMI HR.²⁴

28. In another email, also sent on 30 April 2019, Dr. Ascitti further stated:

"...The medical report should be as detailed as possible, including all symptoms, tests, therapy, and prognosis. As for fitness to work, this should be determined from your doctor not just for Iraq, but your doctor should clarify if you are deemed fit to work in specific locations. For example you could not be fit to work in Iraq, but you may be fit to work in a HQ duty

²¹ Application, annexes 6A and 6C.

²² See ST/IC/2017/7 (Classification of duty stations and special entitlements for staff members serving at designated duty stations).

²³ Application, annex 2A.

²⁴ Ibid.

station, like Geneva or New York. The report must clearly state what you can and cannot do, where, and with which limitations. If you are fit to work elsewhere than Iraq, the organization can try to reassign you to a different duty station, an action that is beyond medical and it is managed by HR (ex-FPD).²⁵

29. On 1 September 2020, Dr. Ascitti further wrote to the Applicant as follows:

Dear [Applicant],

Referral for consideration for a disability benefit requires a medical determination that the individual is, for reasons of health, incapacitated for further service in accordance with Staff Regulation 9.3(a)(iii) and article 33 (a) of the Regulations of the United Nations Joint Staff Pension Fund (“A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration.”)

Based on our medical review, the report from the independent medical practitioner Dr. O'Connor confirms our previous determination that you do not qualify for referral for consideration of disability benefit because you are fit to work in selected duty stations, i.e., not incapacitated for further service.²⁶

30. On 14 September 2020, Dr. Ascitti wrote:

Dear [Applicant],

I refer you to my prior communication. You do not qualify for referral for consideration of disability benefit because while you may not be fit to work in some duty stations, you are fit to work in others. Therefore, in accordance with the governing rules and regulations of the Organization and the Pension Fund you are not considered to be incapacitated for further service in a member organization.

As the process under ST/AI/2019/1 has concluded, DHMOSH has no further role. Any further queries should be directed to UNAMI HR.

31. The Applicant has not demonstrated that DHMOSH committed any procedural errors in arriving at its decision. Accordingly, the Application is without merit. It is denied.

²⁵ Ibid.

²⁶ Ibid.

32. The Applicant is not entitled to the relief she requests. The DHMOSH decision was legal, rational, and procedurally correct. The Applicant has produced no evidence of harm as required by art. 10(b)(5) of the Dispute Tribunal's Statute. The Applicant has been medically cleared to work at H and A duty stations in positions for which she is qualified. She has not demonstrated any efforts to apply for other jobs in H, A, or any non-field duty stations.

JUDGMENT

33. The application is rejected in all respects.

(Signed)

Judge Alexander W. Hunter, Jr.
Dated this 17th day of January 2022

Entered in the Register on this 17th day of January 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi