UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/070
Judgment No.: UNDT/2021/001
Date: 8 January 2021
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

COCA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, UNOG

Note: The number of this Judgment has been corrected on the cover page due to a typographical error. The correct Judgment number is UNDT/2021/001. The date and the content of the order remain identical.

Introduction

1. On 19 July 2018, the Applicant, a former Programme Management Officer, United Nations Conference on Trade and Development ("UNCTAD"), filed an application contesting the calculation of her sick leave entitlements and the related decision to terminate her appointment for medical reasons.

2. On 20 August 2018, the Respondent filed his reply in which he submits that the contested decision was lawful. The Respondent further submits that the Administration properly calculated the Applicant's sick leave entitlements and that the procedure to terminate her appointment for health reasons was properly followed.

3. For the reasons stated below, the application is denied.

Facts

4. The Applicant joined the Organization on 12 January 2015 on a temporary appointment. Her temporary appointment was renewed several times.

5. On 31 January 2016, her temporary appointment expired and was not renewed. She was separated on 31 January 2016.

6. The Applicant was re-employed under a fixed-term appointment on 1 February 2016.

7. Her annual leave accrued during her temporary appointment was paid in March 2016.

8. Her fixed-term appointment was renewed for an additional year on 1 February 2017.

9. In July 2017, the Applicant went on sick leave.

10. On 26 October 2017, the Applicant was informed by the Human Resources Management Service ("HRMS/UNOG") that she had "exhausted [her] entitlement to sick leave with full pay on 10 October 2017 (65 days over a 12- month period)". The Applicant accepted to combine her sick leave on half-pay with her annual leave. On the same day, the Medical Service was informed of the matter.

11. On 16 January 2018, the Applicant exhausted all her sick leave entitlements with full pay and half pay, and she was informed that her case would be referred for disability if she remained further incapacitated to return to work.

12. On 17 January 2018, she was placed on special leave with half pay pending a disability decision, pursuant to section 4 of the ST/AI/1999/16 (Termination for health reasons) and section 3 of ST/AI/2005/3 (Sick leave).

13. On 27 February 2018, HRMS/UNOG referred the Applicant's case to the United Nations Joint Staff Pension Committee ("UNSPC").

14. On 18 April 2018, the UNSPC determined that the Applicant was incapacitated for further service and was entitled for a disability benefit under Article 33 of the Regulations of the UNJSPF. The Applicant was informed of this decision by letter dated 23 April 2018.

15. By letter dated 26 April 2018, the Applicant had been notified that her appointment is terminated for health reasons effective 26 April 2018.

Consideration

16. The issue in this case is whether the Applicant's sick leave entitlement of three months on full salary and three months on half salary was calculated properly. The Applicant essentially claims that the Respondent miscalculated her duration of service with the Organization, and therefore failed to grant her the appropriate sick leave entitlement and unlawfully terminated her appointment for medical reasons.

Legal framework

17. Staff rule 6.2(b) provides the scheme concerning "maximum entitlement" related to calculation of sick leave for the different types of appointments as follows:

> (i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;
>
> (ii) 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 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;
>
> (iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

18. Section 3 of ST/AI/1999/16 on termination for health reasons states that "when a staff member has used all his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer [...]".

Discussion

19. The legal framework set out above states that a staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment. In this regard, the Tribunal notes that the Applicant was employed under a temporary appointment for the period 12 January 2015 to 31 January 2016. Following a separation from service, the Applicant was re-employed under a fixed-term appointment on 1 February 2016 until 26 April 2018.

20. The Applicant claims that she had completed more than three years of continuous service as she was employed from 12 January 2015 to 26 April 2018 without a break in service. The Applicant relies on her Personnel Action Forms which state to "Special Separation [without] break". She further states that once she assumed the fixed-term

appointment, she was retrospectively granted a relocation grant travel for her initial temporary appointment from Buenos Aires to Geneva. The Applicant argues that this is an indication that her service was intended to be continuous. The Applicant therefore argues that she is eligible for a higher rate of sick leave provided by staff rule 6.2 (iii) (nine months on full salary and nine months on half salary), rather than the sick leave granted to her of three months on full salary and three months on half salary.

21. The Respondent, on the other hand, states the Applicant had not completed three years of continuous service. The Respondent states that the period of her service on the temporary appointment could not count towards the calculation of the three years of continuous service as she was reemployed on the fixed-term appointment on 1 February 2016 under staff rule 4.17. The Respondent submits that the Personnel Action Form, processed as "Special Separation [without] break", does not indicate that the Applicant's service was continuous between her temporary and her fixed-term appointment as such personal actions are issued only for technical reasons in Umoja (the United Nations online management system) to allow for the processing of a new contract on the day after the separation. The Respondent states that pursuant to staff rule 4.17 the Applicant's service could not be considered as continuous between the prior and new appointment. She, therefore, did not meet the requirement of completion of three years of continuous service.

22. The Tribunal notes that staff rule 4.17 (Re-employment) provides in its relevant part that (emphasis added):

> (a) A former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18.
>
> (b) The terms of the new appointment shall be fully applicable without regard to any period of former service. *When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments*.

23. The related staff rule 4.18 on reinstatement provides:

> (a) A former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within 12 months of separation from service may be reinstated if the Secretary-General considers that such reinstatement would be in the interest of the Organization.

24. It follows that staff rule 4.17 would prevent the Applicant from claiming that she had completed more than three years of continuous service based on her previous service under the temporary appointment if she had been "re-employed" on the fixed-term contract.

25. The Tribunal finds that the factual circumstances surrounding the Applicant's transition from the temporary appointment to the fixed-term appointment demonstrate that the Applicant was "re-employed" on 1 February 2016. The Organization did not treat her as being continuously employed and it proceeded with an actual separation from service and dealt with the effects that it entails.

26. In that regard, the Applicant's temporary appointment expired before she was granted a fixed-term appointment. Therefore, given that her temporary appointment expired, and pursuant to staff rule 9.1 (iii), the Applicant was separated from service. Following her separation on 31 January 2016, the Applicant was granted a new appointment on 1 February 2016. The Applicant accepted a letter of appointment to this effect. In accordance with the formalities of separation of service, the Applicant was paid her annual leave accrued during her temporary appointment in March 2016.

27. Accordingly, pursuant to staff rule 4.17(a), her re-employment on a fixed-term contract constituted a new appointment, which commenced on 1 February 2016. Pursuant to staff rule 4.17(b), the "terms of such new appointment" were fully applicable regardless of her period of former service, which could not be considered as continuous."

28. Based on the above, the continuity of service between the Applicant's two appointments was broken. Thus, given that the Applicant served under a temporary

appointment for one year and, after separation, was re-employed under a fixed-term appointment for two years, she could only be granted the maximum entitlement under staff rule 6.2(b)(ii), *i.e.* to three months with full pay and three months on half pay over a 12-month period.

29. The Tribunal, therefore, finds that the Applicant did not meet the requirement of staff rule 6.2(b)(iii) to be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years. Accordingly, the Applicant's sick leave entitlements were properly calculated as per staff rule 6.2(b)(ii).

30. Once the Applicant exhausted all her sick leave entitlements with three months with full pay and three months on half pay, it was lawful for the Administration to refer the Applicant's case to the UNSPC. Following UNSPC's 18 April 2018 determination that the Applicant was incapacitated for further service and was entitled for a disability benefit, it was lawful for the Administration to terminate the Applicant's appointment for health reasons.

31. On a final note, the Applicant claims that the granting of a fixed-term appointment to the Applicant immediately following her temporary appointment was in contravention of the rules which require a specific break between the two forms of contract. The Applicant points out that she took no such break and argues that the Administration may not choose to deviate from its own rules for reasons of operational expedience and then rely on those same rules to deny rights that accrue from their prior deviation. The Tribunal notes that the legality of the Applicant's contract is not properly before the Tribunal as she did not challenge the 1 February 2016 decision to grant her a fixed-term appointment. Furthermore, having accepted the fixed-term contract and received its related benefits, the Applicant's argument is rather tenuous.

Conclusion

32. In light of the foregoing, the application is dismissed.

(Signed)
Judge Joelle Adda
Dated this 8th day of January 2021

Entered in the Register on this 8th day of January 2021

(Signed)
Nerea Suero Fontecha, Registrar, New York