UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2017/014
	Judgment No.:	UNDT/2018/105
	Date:	19 October 2018
	Original:	English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

KORTES

v.

Introduction

1. On 13 February 2017, the Applicant, a former United Nations staff member, filed an application in which she contests the decision to find her ineligible for After-Service Health Insurance ("ASHI"). The Applicant is seeking eligibility for ASHI, based on the condition that she pays the premiums for the 13 months needed for her to reach the 10-year requirement, or, as an alternative, reasonable financial compensation for the difference in health care costs that she will have to pay on behalf of herself and her spouse as long as they are living, for a similar standard of care. In addition, the Applicant requests compensation for moral harm.

2. The Respondent contends that the contested decision is lawful as the Applicant did not meet the eligibility criteria for ASHI under sec. 2.1(a) of ST/AI/2007/3 (After-service health insurance), and requests the dismissal of the application.

Factual and procedural background

3. The Tribunal notes the following facts as presented by the Applicant and uncontested by the Respondent.

4. The Applicant

16. On 15 March 2017, the Respondent filed his reply.

17. By Order No. 46 (NY/2017) dated 17 March 2017, the Tribunal instructed the parties to attend a Case Management Discussion ("CMD") on 28 March 2017 to discuss the further proceedings.

18. At the 28 March 2017 CMD, upon the Tribunal's inquiry, the parties stated that they had no objection for the present case to be decided by the same Judge who also issued an order on an application for suspension of action regarding the same decision as that at issue in the present case. The parties informed the Tribunal, *inter alia*, of their intentions regarding submitting additional evidence. The Tribunal considered that the Applicant's testimony would be relevant for her alleged moral damages. The Tribunal further directed the parties to agree on a date for the hearing. By Order No. 65 (NY/2017) issued on 30 March 2017, the Tribunal ordered that:

> … By 5:00 p.m. on 18 April 2017, the Respondent is to file:
>
> a. A written explanation/clarification from Mr. WS regarding which the provisions he based his advice to the Applicant on 25 January 2011 in relation to her health insurance coverage; and
>
> b. Information on whether there are any staff members in a situation similar to that of the Applicant, meaning employed after 1 July 2007 and having less than 10 years of continuous service at the date of separation, but who are receiving ASHI after their separation from service;
>
> … By 5:00 p.m. on 3 May 2017, the Applicant is to file her co

21. On 10 May 2017, the parties filed the jointly signed submission pursuant to Order No. 65 (NY/2017).

22. On 4 August 2017, by Order No. 156 (NY/2017), the Tribunal instructed the parties to participate in a half-day hearing at the Tribunal's court room scheduled for 14 September 2017.

23. On 15 August 2017, the parties were informed via email that, due to administrative reasons, the hearing was rescheduled for 22 September 2017.

24. On 22 September 2017 the Tribunal conducted the scheduled hearing, at which the Applicant participated in person and assisted by her Counsel, Mr. Simon Thomas, who participated remotely via skype. The Respondent was represented by Mr. Alister Cumming, who was present in person in the court room in New York.

25. Before the Applicant commenced her testimony, the Applicant's Counsel informed the Tribunal that the Applicant had additional documentation in support of the submissions already made in her application, consisting of statements related to

27. At the request of the Tribunal, the Applicant provided the Respondent's Counsel with copies of the additional statements to be added to the record for his review. The Respondent's Counsel reviewed the statements and indicated that he would have no additional evidence to adduce in relation to these documents.

28. After the parties presented their oral closing submissions, the Tribunal identified from their arguments that a comparative document in relation to the alleged financial loss suffered by the Applicant as a result of the contested decision appeared to be relevant for the case, and ordered the Applicant to file said document by 6 October 2017.

29. The Tribunal informed the parties that a transcript of the hearing will be made available to the parties, in principle by 13 October 2017, subject to its availability. The Tribunal further instructed the parties to file their written closing submissions by 3 November 2017, based only on the evidence on the record, including the additional written documentation indicated in Order No. 221 (NY/2017) and in accordance with

coverage. The Applicant cannot overstate the importance of keeping this coverage, particularly with the decreasing availability of affordable health insurance in the United States in the current climate.

c. The Applicant remained employed with the Organization to her detriment. She would have found alternate employment outside the United Nations where she could have had health insurance coverage if the Applicant knew in 2011 that she would not be eligible for ASHI. The Applicant is well qualified (including at the time for various Professional level posts), having a master's degree in social work, but she stayed working in a General Service level post during her time with the United Nations. She stayed with the United Nations at a lower level than what she is qualified for in order to provide for a standard of post-retirement care for her husband and herself, including health care. Her chances to find alternate employment at that time would have been very high, but that now they are substantially decreased because of her age.

The Administration is estopped from correcting the incorrect decision

d. The Respondent cannot 0 0 1 2792 red92 r45-2(e)29 512 792 rq0.vaila

alternative to rescission of a contested decision in cases of employment, promotion or termination.

i. Furthermore, the Applicant has a duty to mitigate her losses (*Dube* 2016-UNAT-674, *Appleton* 2013-UNAT-347). She has failed to demonstrate that she has made reasonable efforts to obtain other health insurance, either through employment or on the commercial market, in order to provide her with health care coverage after her separation from service.

Consideration

Receivability framework

Receivability ratione personae

36. The application is filed by a former United Nations staff member. It is therefore receivable *ratione personae*.

Receivability ratione materiae

37. It is uncontested that the decision constitutes an appealable administrative decision under art. 2.1(a) of the Statue of the Tribunal and the application is therefore receivable.

38. The Tribunal further notes that the Applicant timely filed a request for management evaluation on 24 October 2016, which

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

[…]

Now, therefore, the General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

[…]

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

[…]

Article 25

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability,

(i) family benefit.

[…]

Article 7

1. Members for which this Convention is in force shall, upon terms being agreed between the Members concerned in accordance with Article 8, endeavour to participate in schemes for the maintenance of the acquired rights and rights in course of acquisition under their legislation of the nationals of Members for which the Convention is in force, for all branches of social security in respect of which the Members concerned have accepted the obligations of the Convention.

2. Such schemes Tf510.55(ll0000012 0 61298.05 17.90p)4(2 0 Tinq)]is Convention.

Article 7

1. The schemes for the maintenance of rights in course of acquisition referred to in Article 6 of this Convention shall provide for the adding together, to the extent necessary, of periods of insurance, employment, occupational activity or residence, as the case may be, completed under the legislation of the Members concerned for the purposes of

(a) participation in voluntary insurance or optional continued insurance, where appropriate;

(b) acquisition, maintenance or recovery of rights and, as the case may be, calculation of benefits.

2. Periods completed concurrently under the legislation of two or more Members shall be reckoned only once.

3. The Members concerned shall, where necessary, determine by mutual agreement special arrangements for adding together periods which are different in nature and periods qualifying for right to benefits under special schemes.

4. Where a person has completed periods un

have been covered under such an insurance scheme at the time of the staff member's separation from service or death. A child born within 300 days of the staff member's separation from service or death is eligible for coverage, provided that the other eligibility requirements are met.

3. Coverage under the after-service health insurance programme is available to persons in the following categories:

(a)

period and is enrolled within thirty days of the effective date of the dependent relationship.

47. Staff Rule 6.6 on medical insurance

(b) Joint contributions by the United Nations and the after-service health insurance participants, as indicated in paragraph 3.1 (a) above, shall be computed in accordance with the established contribution and subsidy scales for the particular health insurance plan concerned. Contributions shall be calculated on the basis of the higher of the following two rates:

(i) The total of all the periodic benefits payable on the staff member's account under the Regulations of UNJSPF or under appendix D to the Staff Rules, or both, including all cost-of-living increases provided thereon, whether or not part of such benefits has been commuted to a lump sum or reduced by the exercise of any other permissible option, including early retirement; or

(ii) The theoretical periodic benefit that would have been payable on the staff member's account under the Regulations of UNJSPF had the staff member completed 25 years of contributory service.

3.2 The cost of participating in a United Nations after-service health insurance plan for staff recruited **before 1 July 2007** shall be governed by the following conditions:

(a) The cost of participation under the provisions of 2.1(b)(i) shall be borne on the basis of joint contributions by the United Nations and the participants concerned;

(b) The cost of participation under the provisions of 2.1(b)(ii) shall be borne on the basis of joint contributions by the United Nations and the participants concerned provided that the former staff member had participated in a contributory health insurance plan of the United Nations for a total period of contributory participation of at least 10 years.

(c) The cost of participation under the provisions of 2.1(b)(ii) for former staff not meeting the conditions in 3.2(b) above shall be borne in full by the participants concerned. When the concerned participants' combined active service and after-service participation totals 10 years, the cost will be borne jointly by the United Nations and the participants concerned;

Consideration

50. Universal legal conventions/treaties establishing the fundamental principles of international human rights law, such as the ones mentioned above, constitute the legal foundation of and are directly applicable to and by all organizations and entities founded/created after their adoption by the General Assembly, at the international, regional and national level, in order for them to promote, protect and monitor the implementation of fundamental human rights, including the United Nations—the leading promoter of human rights around the world.

51. The Tribunal considers, in light of the mandatory provision of staff regulation 1.1(c) and jurisprudence established by the Dispute Tribunal in *Villamoran* UNDT/2011/126 (confirmed by the Appeals Tribunal in *Villamoran* 2011-UNAT-160 and *Korotina* UNDT/2012/178 (not appealed)) that at the top of the hierarchy of the Organization's internal legislation is the Charter of the United, which was signed on 26 June 1945 and entered into force on 24 October 1945, together with other universal conventions/treaties, including but not limited to the Universal Declaration of Human Rights adopted by the General Assembly on 10 December 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the General Assembly on 16 December 1966 and entered into force respectively on 3 January 1976 and 23 March 1976, followed by the Staff Regulations adopted by the General Assembly and Staff Rules adopted by the Secretary-General and other relevant resolutions and decisions adopted by the General Assembly, Secretary-General's bulletins and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

52. Further, the Tribunal considers that, from the mandatory provision of staff regulation 1.1(c), it results that the Secretary-General is mandated by the General Assembly to adopt Staff Rules which must follow the principles established in the United Nations Charter, in the Staff Regulations and in other relevant resolutions and

decisions adopted by the General Assembly with the purpose of implementing them, and the Secretary-General must ("shall") exercise his mandate ensuring that the rights and obligations of the staff members as set out in these texts are fully respected.

53.

service health insurance (current retirees, active employees currently eligible to retire, active employees not eligible to retire), minimum contributory period and other eligibility requirements for after-

completely eliminate the participant's right to buy-in up to 10 years of contributory participation for staff members recruited on or after 1 July 2007, and ST/AI/2007/3 exceeded the provisions of General Assembly Resolution 61/264 by denying the right to buy-in for staff members recruited on or after 1 July 2007.

64. The Administration erred when, instead of implementing General Assembly Resolution 61/264, which expressly referred only to the after-service health care insurance for staff members recruited on or after 1 July 2007, through a separate new document, it created a new administrative instruction applicable both to staff members recruited before 1 July 2007 and to staff members recruited on or after 1 July 2007.

65. The Administration decided to insert in the new ST/AI/2007/3 the old provisions of ST/AI/394 applicable to staff members recruited before 1 July 2007, which had the effect of creating a parallel system whereby staff members recruited before 1 July 2007 retained the right to buy-in after five years of participation, provided that the staff member had participated in a contributory health insurance plan of the United Nations for a total period of contributory participation of at least 10 years (sec. 3.2(b) ST/AI/2007/3), while the staff members recruited after 1 July 2007 have no such right. The provisions of sec. 2.1 ST/AI/2007/3 are discriminatory against staff members recruited on or after 1 July 2007, who, unlike staff members recruited before 1 July 2007, cannot voluntarily buy-in extra period of contributory participation after more than five years of participation to fulfill the minimum 10 years of participation required for eligibility to ASHI. The only criterion for distinguishing the health care rights under ST/AI/2007/3 is the date of employment.

66. The Tribunal further considers that the right to medical/health care, which includes the right to medical insurance during and after service, is a fundamental human right and cannot be denied and/or limited/restricted by any reason, like for example the date of employment of the staff member, especially in systems based on voluntary enrolment of and contributions by staff members. In this regard, the

Tribunal notes that eligibility for ASHI is based on a voluntary system and joint contributions by staff members pursuant to sec. 4 of ST/AI/2007/3, whiTm7/

Applicant entered into service on 3 Decem

five years, is itself sufficient to find that the Administration should be estopped from correcting the decision, taking into consideration that the Applicant relied on the information provided by the Administration to her detriment.

76. Moreover, no consideration was given to a correct and non-discriminatory protection of her right to after-service medical/health care, which is a fundamental human right. including to the aspect that it was a right in course of acquisition when she reached the mandatory retirement age.

77. The Tribunal sees no reason for the discriminatory system to exist since it is the right of a staff member not to be discriminated based on her or her employment date. Furthermore, the Tribunal considers that no liabilities will incur to the Organization if the staff members employed on or after 1 July 2017 were equally afforded the right to buy-in extra years, up to 10 years, of participation in a contributory health insurance plan in order to be eligible to enroll in ASHI. As indicated by the Respondent in his closing statement, sec. 3.2(c) of ST/AI/2007/3 requires staff members recruited before 1 July 2007 with less than 10 years participation in the Organization's contributory plan

after-service participation totals 10 years. Therefore, any staff member employed on or after 1 July 2007 who will exercise his or her right to buy in up to 10 years of participation will cover the contributions for the remaining period up to 10 years both for the Organization and for himself or herself and the Organization will bear no unjustified costs related to buying-in extra years of participation in a contributory health insurance plan up to the required 10 years.

78. The Tribunal considers that the denial of the Applicant's right to cover, from her own pocket, the buy-in for the remaining period up to 10 years, in order to enroll in ASHI, resulted not only in a discriminatory and unfair denial of her fundamental right to after-service medical care, but also of her spouse's derivate right for after-service health insurance coverage. In this sense, the Tribunal notes that, according to

sec. 2.3 of ST/AI/2007/3, "at the time of enrolment for after-service health insurance coverage the eligible subscriber may elect coverage for himself or herself and may also elect to include coverage for his or her spouse". Therefore, the Applicant's spouse who appears to have been enrolled in the same contributory health insurance plan as the Applicant for at least five years, was also to be included in the after-service health insurance coverage at the time of the Applicant's separation.

79. Furthermore, the Tribunal notes that the provisions of sec. 8 of ST/AI/2007/3 (Transfer from one health insurance plan to another) appear to create a disproportionate burden on members of the United States based health plans, without giving proper consideration to adding the relevant periods of residence, as required by the mandatory provisions of art. 7 of the Maintenance of Social Security Rights Convention, 1982 in relation to the relevant periods of residence: "The schemes for the maintenance of rights in course of acquisition referred to in Article 6 of this Convention shall provide for the adding together, to the extent necessary, of periods of insurance, employment, occupational activity or residence, as the case may be (a) participation in voluntary insurance or optional continued insurance, where appropriate […]".

80. The non-United States citizen staff members have an option that allows them to transit to another more appropriate health plan in their new country of residence. Such a right is denied to the after-service participants who reside in the United States, who may transfer from one plan to another, but in doing so may be made subject to the additional condition that there must be two years' coverage under any such plan before a change can be made. The Tribunal trusts that the Organization will also revisit the provisions of sec. 8 and make the necessary amendments to ensure that there is equal treatment of all staff members.

81. In light of the above, the unlawful contested decision is to be rescinded.

82. The Respondent is to allow the Applicant to pay the health insurance contribution equivalent to 13 months up to 10 years, and consequently to consider the Applicant eligible to enroll for ASHI coverage retroactively from the date of separation from the Organization pursuant to art. 2.3 of ST/AI/2007/3. The ASHI plan is to be considered effective on the date when the Applicant will voluntarily complete her additional contributions required to fulfil the 10 years of participation.

83. Taking into consideration that the contested decision relates to a separation from service due to retirement, which, pursuant to staff rules 9.5 and 9.6(b), is not a termination, the Tribu

exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

85. The Tribunal considers that art. 10.5 of its Statute includes two types of legal remedies:

a. Article 10.5(a) refers to rescission of the contested decision and/or specific performance and to a compensation that the Respondent may elect to pay as an alternative to rescinding the decision and/or to the specific performance as ordered by the Tribunal. The compensation, which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission of the contested decision and/or the specific performance ordered and payment of the compensation as established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression "[t]he Dispute Tribunal shall … determine an amount of compensation"; and

b.

applicant", namely four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

88. When the Tribunal considers an appeal against an administrative decision, the Tribunal can decide to:

a. Confirm the decision; or

b. Rescind unlawful decision and set an amount of alternative compensation; or

c. Rescind the decision, and, in disciplinary cases, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the law, the applied unlawful sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10.5(b).

89. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

90. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same

95. The Applicant also explained that she and her husband are both United States citizens, both of retirement age or close thereto, and both without any other reasonable prospect of obtaining employment that would give them access to affordable health care. She further informed the Tribunal that in the United States particularly, due to the high cost of health care and regulatory uncertainty, this news was unexpected and devastating. The Applicant further testified that, as a consequence of the contested decision, she and her dependant husband have had to entirely re-think their post-retirement life plans at a point when it is almost impossible for the Applicant to find a solution, other than being permitted to enroll in ASHI.

96. Moreover, the Applicant stated that, despite receiving attractive offers from other companies in 2011, she did not accept them because she wanted to enroll in ASHI and benefit nroll in

Observations

101. The Tribunal is of the view that, in order for the Organization to be able to fulfill its obligation relating to the fundamental right to medical/health care under the relevant applicable provisions of the universal international conventions (cited in para. 66 above), the Organization is expected to approve clear staff rules in relation to a staff members' right