



Case No.: UNDT/NY/2009/114

Judgment No. UNDT/2010/082

Date: 6 May 2010

Introduction

1. The applicant contests the decision not to extend her fixed-term contract. In September 2005, the applicant joined the newly formed Counter-Terrorism Committee Executive Directorate (CTED) of the United Nations. Between July 2006 and January 2007 the applicant was admitted to four different hospitals for treatment (including alcohol-related detoxification) and, in January 2007, she was medically evacuated to her home country and subsequently placed on special leave without pay. On 1 August 2007, the applicant was informed that her contract would not be extended beyond its expiration date of

joined CTED on a two-year fixed-term contract as a P-4 Legal Officer in New York. The applicant, a civil servant from her national government ministry, was granted special leave without pay from her ministry for the duration of the contract with CTED. The applicant was deployed in one of three clusters within the office.

5. Between October 2005 and June 2006 the applicant underwent what she describes as three major surgeries, the first of which was a nose fracture following an accident in her apartment. Following an ankle fracture in April 2006 in her home country, her surgeon recommended that she remain there for approximately six weeks to allow the fracture to heal. By the

Despite her undoubted good will and experience, we cannot count on [the applicant] to meet deadlines, participate in joint projects, attend meetings of the Committee and the subcommittees or conduct negotiations with the Permanent Missions of Member States.

I am convinced that [the applicant] has a medical problem and that we would be remiss if we failed to seek guidance on this matter from the United Nations Medical Service.

8.

12. On 8 November 2006, CTED referred the case to the Director of the UN Medical Services Division to determine whether the staff member should be considered for disability benefits since at that point in time she had exhausted her sick leave entitlements on full pay and needed to be placed on sick leave at half pay combined with annual leave to maintain her on full pay status.

13. On 10 November 2006, the CTED Director sent a letter to the Director of the UN Medical Services Division "in response ST/AI/372" (administrative instruction on employee assistance in cases of alcohol/substance abuse) stating that the applicant was reportedly in a hospital in a "serious condition" and formally referring the case to the Medical Services Division to inform them of the matter and to request that appropriate action be taken.

14. The applicant was hospitalised again on 1 January 2007. The Deputy Director of the Medical Services Division authorised her sick leave until 25 January 2007. Between July 2006 and January 2007, the applicant was admitted to four different New York hospitals for alcohol detoxification.

15. On 8 January 2007, the Head of Legal and Consular Affairs of the applicant's Consulate in New York sent an email to the applicant's supervisor, summarising the situation as follows:

This is to follow up on the results of our discussion this afternoon with [the applicant], that she is finally willing to travel to [her home country] for a therapy by the end of this week (while her employment with UN-CTC will not be terminated within the next 30 days, starting next weekend). In view of the expert opinion of Dr. [TS], MD . . . that she must urgently seek treatment [in her home country], that she must travel in the company of one medical staff, begin an in-patient therapy immediately and that her unsupervised discharge from hospital would foreseeably result in a relapse and lead to her death within one month: I suppose that these imperative medical necessities ought to be covered by the UN as present employer of [the applicant] and by the medical insurance she has. Would you please verify this matter and let me know the outcome as soon as possible?

16. On 9 January 2007, the applicant's supervisor sent an email to the Deputy Director, Medical Services Division, requesting him to authorise under ST/AI/2000/10 (Medical evacuation), on an exceptional basis, a medical evacuation for the applicant from New York to her home country with a medical escort. The email stated:

CTED would be prepared to pay for [the applicant's] ticket . . . and a ticket for her medical escort, includi

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On 27 July 2007, CTED convened a meeting with [the Deputy Director of Medical Services Division] and . . . OHRM. During the meeting, [the Deputy Director of Medical Services Division] confirmed that [the applicant] has not provided any medical information to him nor had he granted authorization for the release of [the applicant] from her treating doctors in [the applicant's home country] and USA to return to the United States. Although [the applicant] . . . mentioned [to the Deputy Director of Medical Services Division] that she continues to receive out-patient treatment . . . [the applicant] did not provide any information to affirm that claim.

. . .

Since all reasonable efforts have been made to assist the staff member, CTED is not prepared to extend [the applicant's] fixed-term appointment beyond the end of her contract on 2 September 2007. Due to exigencies of service, CTED needs to fill the post right away from an active roster of Candidates approved by the Board.

24. In a letter dated 1 August 2007, CTED informed the applicant that her contract would expire on 2 September 2007. The letter stated:

[T]he Counter-Terrorism Committee Executive Directorate will not be in a position to extend your fixed term appointment beyond 2 September 2007.

This memorandum will serve as official notice so that you have time to pursue other opportunities.

25. On 17 August 2007, the supervisor informed the applicant that the UN payroll system generated a salary payment to her in the amount of USD18,273.51 covering the period of 24 April to 30 June 2007 (while she was on special leave without pay) and asked for this money to be returned. This was followed by a series of communications between March 2008 and 2009 to the applicant on the same subject matter from the UN Chief, Payroll Operations Unit.

26. The applicant's contract expired on 2 September 2007. On 1 October 2007, the applicant submitted a request for review of the decision not to extend her appointment. Although the applicant's request for review contained a lengthy discussion questioning various issues, including her medical evacuation in January 2007, her placement on special leave without pay, and the withholding of her final

separation payments, the applicant describes the subject matter of her request for review as follows:

In accordance with the provision of Staff Rule 111.2(a) I am requesting a review of the administrative decision conveyed to me on

return to New York on 13 April 2007, she was again confined in a hospital in a repressive framework under medical orders. After her release from hospital she was denied permission to use her computer for purposes that did not strictly relate to her official duties in the office and was unaware of her rights in general. She only found her way to the Panel of Counsel's office in July 2007 when she learnt of the availability of legal remedies. Further, her claims with respect to the medical evacuation were raised in her request for administrative review and the appeal to the JAB, and responded to and canvassed in both the Administration's response and the JAB report. In any event, the applicant requests the Tribunal to lift the time limitations barring her claim on the medical evacuation under art 8.3 of the Statute.

- c. The instrument of medical evacuation was misused by the Administration to suspend the applicant from her post until the expiration of her contract and, ~~fact~~, CTED never intended to allow the applicant to return to her post after the medical evacuation.
- d. Under staff regulation 5.2, special leave without pay is to be authorised by the Secretary-General only in ~~excep~~ exceptional cases. These conditions were not met in the ~~app~~ applicant's case. Further, the applicant should not have been put on ~~special~~ special leave because she had not used her full entitlement to three months of full sick leave and three months of half pay sick leave during ~~each~~ each year of her two-year contract.
- e. The decision not to extend her appointment beyond 2 September 2007 was improper as it was made by ~~refere~~ reference to extraneous factors. The supervisor inserted misleading and false passages about the applicant's health into her e-PAS for the ~~pe~~ period of 2005–2006 and threatened her with “severe consequences” ~~if~~ if she ~~cn3 Tc 0g~~(prsnuo30.0206igno30.025 rTJ -

31. The applicant seeks: (i) compensation for the violations of her due process rights, (ii) payment of the full amount of the repatriation grant due to her, (iii) the full pension benefits and due payments without deductions, (iv) investigation of the various violations of her rights which occurred while she worked for CTED before the decision to medically evacuate her and (v) appropriate compensation for moral suffering she endured as well as for the professional prejudice inflicted on her.

Respondent's submissions

32. The respondent's position may be summarised as follows:

- a. The claim in relation to the applicant's medical evacuation is not receivable since it was never raised as a claim in her request for administrative review and in her case before the Joint Appeals Board. The claim in relation to the decision to place the applicant on special

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34. Under the former system of internal justice, as well as under the system in place since 1 July 2009, requests for administrative review and management evaluation are mandatory first steps in the appeal process and cannot be waived (*Crichlow* UNDT/2009/028, *Vangelova* UNDT/2009/049, *Costa* UNDT/2009/051,

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applicant's claims concerning the medical evacuation and special leave were the

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the active involvement of her superiors, her Consulate and her mother. Further, this decision was reasonable and made in her interests based on sincere and serious concerns about her well-b

44. In considering cases of incapacity due to ill health, particularly in the light of prolonged or persistent absences from work by an employee, an employer is entitled to look at not only the employee's condition but also the operational requirements of the Organisation. In order to determine whether an employee is medically fit an employer needs to make a considerate assessment, in consultation with the employee and the medical practitioner, of what the illness is, the seriousness of the illness and its prognosis. This necessarily implies a certain degree of information sharing. See, as an example, *Sebonego v Newspaper Editorial and Management Services (Pty) Limited* [1999] Botswana Law Reports (BLR) 1210, as published in the Use of International Law by Domestic Courts, Compendium of Court Decisions, International Labour Organization, July 2006. *Sebonego* was a case of dismissal on the grounds of ill health; however, the discussion in *Sebonego* appears to me, on first principles, to be also applicable to cases of non-renewal).

45. In this case the staff member was unable to render services for which she was employed for a considerable time. She failed to apprise the respondent with information confirming her fitness for duty. Thus, in the light of information available to the respondent, a decision was made not to renew her contract on 27 July 2007. I find there were no extraneous factors or improper motives in the decision not to extend the applicant's appointment.

46. The applicant also claims that the decision not to renew her appointment beyond 2 September 2007 was influenced by her e-PAS report for 2005–2006, which, according to the applicant, was unfair, ill-motivated, and misleading. I do not think that the applicant has established that the contested decision was, indeed, somehow influenced by the e-PAS report. The report was generally positive and described the applicant's performance as "[f]ully successful". In any case, it is not disputed that the applicant did not rebut her e-PAS report pursuant to ST/AI/2002/3, as would have been appropriate if she disagreed with anything stated in it. The applicant signed her e-PAS report for 2005–2006 on 4 May 2006, and submissions with respect to that report are now well out of time.

47. I have also considered the applicant's claim that the decisions on leave and evacuation somehow influenced the decision not to extend her contract. To accept the applicant's claims that there was a link between the three decisions and that they show a pattern of unfair treatment I would have to find that there was a system-wide effort involving her supervisors, colleagues, doctors in the Medical Services Division, doctors in several private hospitals, and the officials in her Consulate in New York, extending over a significant period of time, to separate the applicant from service with the Organisation. The evidence proffered by the applicant is insufficient to support her claims, and I find that the reasons provided by the Administration for not extending the applicant's contract, as explained above, were reasonable, proper and justified.

48. For the reasons stated above, I find that the decision not to renew the applicant's appointment was lawful and that the applicant's claim in this respect must fail.

Financial claims

49. According to the applicant, the Organisation unlawfully refuses to process the final payments due to her as a result of her separation, including the repatriation grant. The respondent submitted that the applicant has no further entitlements and that the Organisation cannot set off the amounts owed to it against the applicant's pension entitlements. According to the respondent the applicant owes USD17,841.13 for the period of 24 April to 30 June 2007, when she was on special leave without pay.

50. The applicant has failed to articulate which separation payments are still being withheld and it appears that the parties disagree whether the applicant was entitled to a repatriation grant. (I note that it appears undisputed that the applicant's pension entitlements, if any, cannot be affected by the Organisation's claim.) The Tribunal does not need to decide whether the applicant is entitled to a repatriation grant; this issue is not before the Tribunal.

51. As regards the applicant's claim that her sick leave entitlements were improperly calculated, I am of the view that the respondent's computation was correct. The applicant asserts that she was entitled to three months of sick leave on full salary and three months on half salary during each calendar year of her two-year contract. The applicant alleges that from 5 September 2005 to 6 September 2006, she took 70 days of certified sick leave and 21 days of uncertified sick leave and (ii) between 7 September 2006 and 7 January 2007 took 73 days of certified sick leave and no uncertified sick leave. According to the applicant, "neither in the first year nor in the second year of her appointment [she] exhausted her entitlement to receive 3 months of sick leave at full pay". However, former staff rule 106.2 provided that the calculation of sick leave days should be based on "period of *twelve consecutive months*" (emphasis added), not calendar years. Between September 2005 and January 2007, the applicant took 143 days of certified sick leave and 21 days of uncertified sick leave.

