
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/090

Judgment No.: UNDT/2020/140

Date: 7 August 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HASSAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:

Background

1. In a revised application dated 24 September 2019, the Applicant, a staff member of the United Nations Population Fund (“UNFPA”), is contesting UNFPA’s decisions: (a) to pay her daily subsistence award (“DSA”) for 23 – 29 November 2016 only, although she took several trips to Nairobi, Kenya, from Hargeisa, Somalia, for medical reasons between November 2016 and March 2017; and (b)

Applicant

23. The Respondent claimed that the applicable maximum DSA is 45 days according to UNDP's MET policy but this is not consistent with the office practice since a colleague's dependent was evacuated the same year and he and the evacuee were paid a DSA of 115 days. Denial of her entitlement or misinterpreting policy is unlawful and is a violation of her rights.

24. She has submitted to the Tribunal the MSD's initial MEDEVAC approval and follow-ups approved by the United Nations doctor in Nairobi who was handling the case and also a rejected referral from MSD. She travelled to Germany at her own cost when the doctor informed her that her health situation was deteriorating and that she needed surgery which could not be undertaken.

the Country Office level were not based on policy and constituted an organizational risk.

27. On the basis of the response from Dr. Mbai, the Country Office authorized a round trip ticket, as the insurance should cover medical costs. The Applicant, however, did not receive DSA and other entitlements. Dr. Mbai appeared to have agreed to the informal arrangement which is not based on the policy.

28. Despite all the challenges as a woman serving in a high risk and non-family duty station where there is no family support and the trauma of losing friends and work mates on a continuous basis, she never expected the Organization to put her through stress and trauma for her entitlements when she is battling with health worries.

Remedies

29. The Applicant prays the Tribunal to award her the following remedies:

- a. to order payment of USD48,000 as compensation for the financial losses caused by the contested decision representing costs incurred (applicable DSA) when evacuated to Nairobi, follow-ups and referral;
- b. to order payment of USD50,000 as compensation for the moral damage that she has suffered; and
- c. any other relief that the Tribunal considers just, fair and necessary.

Respondent

Decision regarding payment of DSA

30. Between November 2016 and April 2017, the Applicant took multiple trips for medical reasons to Nairobi, Kenya, from Somalia. The Applicant never received approval MET for any of the trips in accordance with the UNDP Medical Evacuation Policy and related procedures, which UNFPA applies *mutatis mutandis*.

31. For MET not exceeding 45 days, the approving authority is the Head of Office, i.e. the UNFPA Representative in Somalia. For MET beyond 45 days, the approving authority is the MSD. The Applicant did not receive MET approval from the approving authority; to the contrary, the then Head of Office informed the Applicant multiple times that her trips were not considered MET. Therefore, the Applicant was not entitled to any DSA.

32. Despite the foregoing, in June 2018, the Organization paid the Applicant one week's DSA. The reason for the payment was out of fairness to the Applicant, including the fact that the Organization had informed the Applicant, albeit incorrectly, that the Applicant's first trip and first follow-up trip would be treated as MET.

Decision regarding certified sick leave

33. Between 23 November 2016 and 12 February 2017 and between 10 March 2017 and 29 April 2017, the Applicant was absent from duty. The Applicant had not followed the procedures set out in the Staff Regulations and Rules or the UNDP Sick Leave Policy in order to request and receive approval for certified sick leave.

Reversal of the Contested Decisions

34. In November 2019, the MSD reversed its original position. Namely, they approved certified sick leave for 26 November 2016 – 13 February 2017 and 12 March – 30 April 2017. MSD also approved as MET the Applicant's first trip to Nairobi, Kenya between 23 November 2016 – 10 January 2017 and first follow-up trip between 5 February – 16 February 2017, totaling 59 days of MET. The Organization subsequently paid the Applicant USD11,440 as DSA, bringing the total amount paid to the Applicant to 45 days' DSA.

35. On 15 March 2020, the Organization decided to pay the Applicant an additional USD4,368 equivalent to 14 days' DSA. Therefore, the total amount of DSA paid and will be paid to the Applicant comprise 59 days' DSA, the number of days that the MSD approved as MET in November 2019.

Applicant failed to abide by the requirements set forth in staff rule 6.2 and the UNDP Sick Leave Policy. The Applicant's requests for more than one week's DSA had been rejected because the Applicant had failed to receive MET approval in accordance with the requirements set forth in the UNDP MET Policy and procedures.

42. The Applicant has failed to provide any evidence that the Organization acted in bad faith or out of improper motive when making the Contested Decisions. To the contrary, evidence shows that the Organization made efforts to assist the Applicant by directly appealing to the MSD on several occasions. Rather, it was the Applicant's own failure to comply with the relevant regulatory framework that led to the Contested Decisions. As a staff member, the Applicant is presumed to know the regulations, rules, policies and procedures that apply to her, and ignorance is not an excuse. The Applicant cannot plead ignorance and blame the Organization for the decisions that resulted from her own omissions.

43. Official acts enjoy a presumption of regularity unless the Applicant proves otherwise. Here, the Applicant failed to produce any evidence that the Contested Decisions were made unlawfully, so the presumption that the Contested Decisions were regularly made stands. The Respondent submits that the Contested Decisions were lawful at the time that they were made.

No basis exists to award the Applicant compensation

44. The Applicant claims that she should be compensated for her financial losses which she alleges are equivalent to the DSA she did not receive. The Applicant further claims that she should receive compensation for moral damages. It is the Applicant who bears the burden of proof but has not provided any evidence that would support her claims for compensation for her financial losses or moral damages. Therefore, the Applicant's claims for compensation fail.

Considerations

45. The issues arising for consideration in this case are: whether the Applicant's claims have been rendered moot; and whether the Applicant is entitled to the reliefs sought including moral damages.

46. The starting point in determining a staff member's appeal challenging an administrative decision is the presumption that official functions have been regularly performed. Once management satisfies this initial requirement, the burden shifts to the Applicant to show through clear and convincing evidence that the Administration acted irregularly.

Whether the Applicant's claims have been rendered moot

47. In her request for management evaluation and in her application, the Applicant contests

paragraph (c) above requires approval in accordance with conditions established by the Secretary-General. When those conditions are not met, the absence shall be treated as unauthorized in accordance with staff rule 5.1 (e) (ii).

Staff rule 6.2(f)

Staff members shall inform their supervisors as soon as possible of absences due to illness o

52. An administrative decision was interpreted in former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V as:

...unilateral decision taken by administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

53. UNAT has reaffirmed this interpretation in its subsequent decisions and therefore it is binding authority on this Tribunal to consider when faced with an application challenging an administrative decision especially where the Respondent argues that the application is moot.

54. The Respondent has shown and the Applicant has not disputed through clear and convincing evidence that all relevant regulations, rules, administrative issuances and policies were complied with in considering the Applicant's medical entitlements. There is no administrative decision carrying direct legal consequences on the Applicant's terms of appointment or contract of appointment to adjudicate on, since subsequent to filing the application on 24 September 2018, the Applicant's claim was fully satisfied in November 2019.

55. The Respondent having rescinded its decision not to pay the Applicant's entitlements, the application is rendered moot. The Tribunal will not consider the reliefs sought because unlawfulness has not been proved.

Exercise of Management Discretion to pay DSA beyond 45 days

56. The Applicant was not represented. During the CMD and

DSA for 59 days representing all authorized medical entitlements. The Applicant has not, even after much probing from the Tribunal, produced any authorized medical entitlements which remain unpaid.

Judgment

57. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 7th day of August 2020

Entered in the Register on this 7th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi