



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI009/036
Judgment No.: UNDT/2009/058
Date: 30 October 2009
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Jean-Pelé Fomété

TADONKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**IN THE MATTER OF INTERPRETATION OF AN
ORDER ISSUED ON 1 SEPTEMBER 2009**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, ALU/OHRM.

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

THE UNITED NATIONS DISPUTE TRIBUNAL (“Tribunal”),
SITTING in the person of Judge Vinod Boolell,

PROCEDURE

1. By order issued on 1 September 2009, the Tribunal granted the Applicant’s request for suspension of action on the basis of Articles 13 and 14 of the Tribunal’s Rules of Procedure and ordered:

- (a) “The suspension of the Respondent’s decision not to renew the employment at any time from the date of the Order issuance pending the final determination of the substantive appeals of the Applicant”;
- (b) That “The Respondent [pays] and shall pay to the Applicant half his salary from the date of the Order until the final determination of the case. On the ground of Article 14 of the Tribunal’s Rules of Procedure”.

2. Both Parties requested interpretation of the above order within the framework of Article 30 of the Rules of Procedure:

- i) On 9 September 2009 the Applicant submitted a “Motion for a Request for Clarification of the Tribunal’s Order”;
- ii) On 1 October 2009 the Respondent submitted a “Request for Interpretation of Order”.

3. In accordance with the above Article, parties were given respectively the opportunity to reply within 30 calendar days. It is in the Registry’s records that:

- i) The Applicant submitted his comments to the Respondent’s request for interpretation on 7 October 2009 followed by an addendum dated 9 October 2009;

- ii) The Respondent submitted his comments to the Applicant's motion for clarification dated 10 October 2009.

PARTIES' ARGUMENTS

4. In his 9 September 2009 "Motion for a Request for Clarification of the Tribunal's Order", the Applicant seeks clarification as to whether:

- (a) The Order is effective until the final ruling of the Tribunal on the case.
- (b) The Respondent is in violation with the decision to terminate his contract effective 3 November despite the fact that the Applicant contested at the hearing both the termination of his contract effective 3 September and the one expiring on 3 November 2009.
- (c) On the issue of interim relief, it is the Applicant's understanding that the Tribunal ordered to pay the Applicant half salary, including the half portion of the Applicant's salary that was "unlawfully withheld" for the months of June, July and August.

5. In his 1 October 2009 "Request for Interpretation of Order" the Counsel for the Respondent applies for an interpretation of the meaning of Paragraph 15.1 and Paragraph 15.3 of the Order:

- (a) On Paragraph 15.1 the Respondent seeks the Tribunal's confirmation that pursuant to Article 13.1 of the Rules of Procedure which is based on 2(2) of the UNDT Statute, the Tribunal may order a suspension of action "during the pendency of the management evaluation". Applied to this case, the decision not to renew the employment of the Applicant would be only during the pendency of the management evaluation, i.e. no later than 4 October 2009.

(b) On Paragraph 15.3, the Respondent states that Article 14.1 of the Rules of Procedure which is based on Article 10(2) of the Tribunal's Statute does not apply to the present case as the Applicant has only filed a request for suspension of action on the ground of Article 13 of the Rules of Procedure.

(c) In light of the foregoing, it is the Respondent's understanding that the interim relief amounting to the payment of half salary ordered in paragraph 15.3 would be only operative during the pendency of the management evaluation.

APPLICABLE LAW

6. The Requirement of a Management Evaluation in a Suspension of Action Application

6.1 Under the former Staff Rules, applicable before 1 July 2009¹, (now superseded and replaced by Staff Rule 11.2),

A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

6.2 Rule 11.2 of the new Staff Rules² provides that:

A staff member wishing to formally contest an administrative decision alleging non compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a),

¹ Article 111.2.(a) ST/SGB/1999/5 Consolidated Text 1 January 2001 and ST/SGB/2002/1,1 January 2002 ST/SGB/2009/6, 27 May 2009.

² ST/SGB/2009/6, 27 May 2009.

shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

6.3 The provisions of Article 2.2 of the UNDT Statute state that,

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

6.4 Article 13(1) of the UNDT Rules of Procedure provides that,

The Dispute Tribunal shall make an order on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

6.5 Article 13.1 of the Rules of Procedure read together with Article 2.2 of the Statute of the Tribunal clearly state that an application may be filed for suspension of action of a disputed administrative decision that is the subject of an ongoing management evaluation. Staff Rule 111.2 required a staff member to first request a review of the contested decision. The underlying philosophy of these provisions is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff member the opportunity to request a suspension of the impugned decision pending an evaluation by management while retaining the option to file an appeal with the

Dispute Tribunal irrespective of the outcome of the management evaluation as provided by Rule 11.4 of the current Staff Rules³:

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

7. The Duration of the Suspension

7.1 The order issued by the Tribunal under Article 2.2 of the Statute of the Tribunal and Article 13.1 of the Rules of Procedure is in the nature an interim order one of the aims of which is to prevent any change in the status quo until the issues in the case are determined on their merits.

7.2 The order is a judicial order and can only be amended, modified or terminated by a judicial decision and not by an administrative decision.

8. The Management Evaluation Unit and the suspension order

8.1 Establishment of the Management Evaluation Unit

8.1.1 The newly created Management Evaluation Unit (MEU) has been established pursuant to General Assembly Resolution 62/228 and is located in the Office of the Under-Secretary-General of the Department of Management.

8.2 Purpose of the Management Evaluation Unit

³ ST/SGB/2009/7, 16 June 2009 as reissued in October 2009.

8.2.1 The purpose of management evaluation is to *give management a chance to correct an improper decision, or provide acceptable remedies in cases where the decision has been flawed, thereby reducing the number of cases that proceed to formal litigation*⁴.

In light of its purpose, the Management Evaluation Unit's functions include:

- i) Reviewing contested administrative decisions to assess whether such decisions were made in accordance with the Organization's applicable policies, rules and procedures;
- ii) Proposing appropriate remedies to the Under-Secretary-General for Management in case of improper administrative decision(s) and, as appropriate, proposing alternative means of settling disputes between staff members and the Administration;
- iii) Making recommendations to the Under-Secretary-General for Management regarding any trends discerned in respect of the decision-making authority of managers;
- iv) Assisting the Under-Secretary-General for Management to strengthen managerial accountability by ensuring managers' compliance with their responsibilities while respecting the Organization's Rules and Regulations and ethical standards⁵.

9. The Management Evaluation Unit and the powers exercisable by the Tribunal

⁴ *A Guide to Resolving Disputes, Administration of Justice at the United Nations*, New York, 2009, p. 4.

⁵ See A/RES/62/228 on Administration of justice at the United Nations, paragraph E.

9.1 That the Tribunal is a judicial body cannot be disputed. In this connection the observations of The European Court of Human Rights are pertinent. A tribunal *is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner*” (see the *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, p. 29, § 64). It must also satisfy a series of other conditions, including the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards⁶.

9.2 It is highly commendable and indeed fair that when a staff member is contesting a disputed administrative decision, avenues should exist for management to have an opportunity to correct any improper decision. It is equally commendable that in the process of a management evaluation the alternative resort to mediation should be possible as provided by Rule 11.2 (d) of the current Rules.

9.3 What would be objectionable, however, as being in breach of the independence of the Tribunal and the well established rule on separation of powers between the executive, the judiciary and the legislature is that the Management Evaluation Unit which is located in the Office of the Under-Secretary-General of the Department of Management and consisting of staff attached to this office is given the power to dictate to the Tribunal how long an interim order should remain in force and thus interfere in the discretion of a judicial body or even indirectly reverse the judicial decision.

9.4 If the Statute and the Rules are interpreted to mean that the duration of a suspension can only last while the management evaluation is pending, it would mean that a judicial order would be put to an end by an administrative decision. That would be against the philosophy embodied in paragraph 2 of the Preamble to Resolution 62/253 on the Administration of Justice⁷ where the General Assembly reaffirmed its decision⁸ to

⁶ Case of Coëme and others v. Belgium, (Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) Judgment 22 June 2000.

⁷ General Assembly Resolution 63/253.

⁸ General Assembly Resolution 61/261 Paragraph 4.

establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.

9.5 The relevant rules of international law and the principles of the rule of law are embodied in a number of international instruments. One may refer to Article 10 of the Universal Declaration of Human Rights states that,

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations...”; Article 6.1 of the European Convention on Human Rights that provides “...in the determination of his civil rights and obligations or of any civil charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...” and to Article 14 of the International Covenant on Civil and Political Rights that provides “[a]ll persons are equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent, independent impartial tribunal...

The Redesign Panel established by the General Assembly⁹ pointed out the weaknesses of the internal justice prevailing before the new system came into operation on 1 July 2009 and strongly criticized it in its report presented to the General Assembly¹⁰,

...the United Nations internal justice system is outmoded, dysfunctional and ineffective and that it lacks independence...

⁹ General Assembly Resolution A/Res/59/283.


¹⁰ Redesign Panel Report, A/RES/61/205, 28 July 2006.

Effective Reform of the United Nations cannot happen without an efficient, independent and well resourced internal justice system that will safeguard the rights of staff members and ensure the effective accountability of managers and staff members.

9.6 It is therefore the Tribunal's considered view that the length of the suspension is to be decided by the Tribunal depending on the nature and circumstances of the case and this discretion of the Tribunal cannot and should not be subject to any form of control by the administration.

10. Conclusion on the duration of the suspension

10.1 The decision ordered on 1 September 2009 that the suspension of the contested decision to terminate the employment of the Applicant on 3 September 2009 would remain in force until the final determination of the appeal should be read as it appears and that the Applicant should be paid half his salary from the date of the order.



Judge Vinod Boolell

Dated this 30th day of October 2009

Entered in the Register on this 30th day of October 2009



Jean-Pelé Fomété, Registrar, UNDT, Nairobi