



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/137

Judgment
No. 76

Date: 17 November 2009

Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MIYAZAKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON SUSPENSION OF
ACTION**

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Stephen Margetts, ALU

Introduction

1. The applicant filed an application with the New York Registry of the United Nations Dispute Tribunal on 7 November 2009 seeking to contest a decision not to allow her a formal rebuttal process in relation to a short-term staff performance report dated 22 June 2009 which made adverse findings in relation to her performance. Further to this application, the applicant filed a “Motion for Temporary Relief”, sought pursuant to Article 10.2 of the Statute of the Tribunal and Article 14.1 of the Rules of Procedure, which the Tribunal considered filed on 10 November 2009. This “Motion for Temporary Relief” sought removal of the Report from the applicant’s Official Status File (“File”) pending the Tribunal’s determination of the substantive proceeding. As a preliminary matter, I note that in her request for review of 8 September 2009 the applicant also queried the administrative decision dated 9 July 2009 to withdraw her offer of appointment, but that this issue was not raised before me as it appeared to have been settled between the parties prior to the commencement of the present application.

Facts

2. On 25 November 2008, the applicant joined the United Nations as a Finance Officer with the Peacekeeping Financing Division (“PFD”). On 1 April 2009 she transferred to PFD as a Budget Officer for the United Nations Stabilization Mission in Haiti (“MINUSTAH”). The applicant stated, which was not contested, that she concluded her service in this position on 2 July 2009.

3. On 22 June 2009, the Section Chief and Director of PFD both signed a Form P.10-E Report on Short-Term Staff (“the Report”) evaluating the applicant’s performance. Amongst other things, the Report had a box checked noting the applicant’s proficiency in general as “below average”, with another checked in relation to whether the staff member would be considered for re-employment, as “No,

not at all". The Report was placed on the applicant's File the following day on 23 June 2009, as discussed below.

4. The parties do not agree as to the date that a copy of the Report was shown or made available to the applicant. The applicant states that she was not shown the Report until 2 July 2009, the final day of her appointment and that she did not receive a copy of it at all. The respondent on the other hand states that on 23 June 2009 the Assistant to the Section Chief copied the Report and provided a copy to the applicant, thereafter delivering a copy to the Executive Office to be placed on the applicant's File with a third copy being delivered to the Section Chief for placement on the PFD file.

5. There is further factual disagreement as to the events immediately subsequent to the finalization of the Report. The respondent contends (citing the Assistant to the Section Chief's statement) that on 24 June 2009 the applicant unsuccessfully sought to make contact by telephone with the Director on whose behalf the Assistant to the Section Chief took the telephone call, which the applicant denies. The respondent further contends (again via the Assistant to the Section Chief) that immediately after this telephone call the applicant attended the Assistant to the Section Chief's desk in person to request her to provide to the Director a Report on Short-Term Staff dated 13 March 2009 which had been prepared and signed by the applicant's former supervisor ("March 2009 Report") and which was more favorable to the applicant. The applicant appears to deny this as well, although she does appear to admit that at some stage the Director was provided a copy of the March 2009 Report. I note that both parties provided statements attesting to their version of events. The applicant's, dated 13 November 2009, was unsigned, although I note was accompanied by an email purporting to be from the applicant outlining reasons for this. The respondent provided a statement dated 11 November 2009 and signed by the Assistant to the Section Chief in support of its contention of factual events.

6. The parties agree that the applicant sent the Director (copying the Assistant to the Section Chief) an email on 26 June 2009 seeking to schedule a "5 minutes

meeting on 2 June when you are back from missions”, although they are at odds as to the significance of this email. Subsequent to this email, it appears to be common ground that on 2 July 2009 the applicant met with the Director and discussed, among other things, the Report and whether or not the Director would sign the March 2009 Report, as she had not previously done so at the time of its preparation. On 16 July 2009 the Director provided the Executive Office of the Department of Management with the March 2009 Report.

7. On 20 August 2009, the applicant wrote to the Controller, in relation to her performance reports. On the same date she also wrote to the Assistant Secretary-General, seeking to rebut the Report. In relation to her email to the Assistant Secretary-General, on 24 August 2009, the applicant received, on behalf of the Assistant Secretary-General, an email which stated that “there are currently no formal rebuttal procedures on short-term reports. However, we will ensure that your comments are placed in your official status file so that they can be viewed together with all of your reports on file”.

8. On 8 September 2009, the applicant requested the Secretary-General to reconsider the decision communicated to the applicant on 24 August 2009, advising the applicant that she was not entitled to a rebuttal procedure in relation to the Report.

9. On 14 October 2009, the applicant received the Secretary-General’s decision on her request for management evaluation, endorsing the findings and recommendation of the Management Evaluation Unit. In relation to Report, the Management Evaluation Unit found that the offer to place the applicant’s comments in her File constituted “a reasonable remedy in view of the current lack of rebuttal provisions for performance reports of short-term staff”. Subsequently, on 6 November 2009, the applicant filed an application with the Dispute Tribunal and subsequent thereto a Motion for Temporary Relief.

Analysis

10. Article 10.2 of the Statute of the United Nations Dispute Tribunal provides that:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

11. The first of the three criteria required by this article is that the contested decision “appears prima facie to be unlawful”. The combination of the words “appears” and “prima facie” indicate that the threshold required to be met by the apparent unlawfulness is commensurate to that which has been required in different national jurisdictions for similar applications. That is, in the context of an application for interim relief pending the outcome of the substantive application, what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt.

12. The parties agreed that the provisions of ST/AI/292 of 15 July 1982 apply to the present case, notably paragraph 2, which states relevantly that “[adverse] material may not be included in the personnel file, unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon”. There was no dispute that adverse material had been placed on the applicant’s File.

13. The respondent contends, inter alia, that paragraph 2 of ST/AI/292 was complied with, as on 23 June 2009 the Assistant to the Section Chief provided the applicant with a copy of the Report, prior to delivering a copy for placement on the applicant’s File on the same day. As stated above, the applicant does not agree with

this version of events, contending that she was not shown the Report until 2 July 2009, the last day of her appointment, and that she was never given a copy of it.

14. The sequence presumed by the usage of the words “unless” and “thereby” in paragraph 2 of ST/AI/292 will only be satisfied if the placement of adverse material on a staff member’s file occurs after they have been given an opportunity to make comments on the material. To be in any way meaningful within the spirit of paragraph 2 of ST/AI/292 and as considerations of due process dictate, this “opportunity” must be more than a mere technical satisfaction of procedure.

15. Taking the respondent’s version of events, on 23 June 2009 the Section Chief arranged for three copies of the Report to be made. Almost contemporaneously with the delivery of one of these to the applicant, one was placed on her File. Even accepting this disputed account of the facts, it is hard to find that an opportunity as contemplated by paragraph 2 of ST/AI/292 was provided to the applicant.

16. Accordingly, even if I were to accept the respondent’s version of events for present purposes, I do not believe that the applicant was provided with a meaningful opportunity to make comments on the adverse material prior to it being placed on her File. I consider this to constitute a failure to comply with ST/AI/292 and therefore that the applicant has met the threshold to establish prima facie unlawfulness for the purposes of the request for a suspension of action. I indicated at the hearing that I considered the other prerequisites in article 10.2 of the Statute met and the respondent did not contest this.

Conclusion

17. The application for a suspension of action is granted and the Report shall be removed from the applicant’s file pending the outcome of the substantive proceeding.

18. I also note that on 8 July 2009, the Section Chief wrote to the Assistant Secretary-General, advising inter alia that the Report reflected “non-performance”

and the recommendation that “[the applicant] was not worthy of re-employment”. During the hearing of the matter, the applicant objected to the placement of this communication on her File. Counsel for the respondent, evincing surprise that this email was on the applicant’s File, undertook on the respondent’s behalf that this email would immediately be removed from the applicant’s File and accordingly I so ordered.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 17th day of November 2009

Entered in the Register on this 17th day of November 2009

(Signed)

Hafida Lahiouel, Registrar, New York