UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/058
Judgment No.: UNDT/2011/133
Date: 22 July 2011
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

DOUGHERTY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. On 6 July 2011, after close of business, the Applicant, who is the Officer-in-Charge ("OIC") of the Technology Services Support ("TSS"), Financial Information Operations Service ("FIOS"), Office of Programme Planning, Budget and Accounts ("OPPBA"), Department of Management ("DM"), submitted an application for suspension of action of the administrative decision not to renew his fixed-term contract which was due to expire on 9 July 2011. The Applicant was made aware of the decision on 10 May 2011 by an email from his supervisor, the Director, FIOS. By letter dated 9 June 2011, the Executive Officer, DM, confirmed that the Applicant's fixed-term contract would not be extended beyond 9 July 2011.

2. On 7 July 2011, the New York Registry of the Dispute Tribunal transmitted the application to the Respondent and directed the Respondent to file his reply by 12 p.m. on Friday, 8 July 2011.

3. On 7 July 2011, the Dispute Tribunal received an email from Counsel for the Applicant, copied to the Respondent, informing the Tribunal that the Applicant had also been in contact with the Management Evaluation Unit ("MEU") and had informally asked the MEU to extend his contract. To this email, Counsel for the Applicant attached a memorandum from the Assistant Secretary-General for Human Resources Management, dated 17 June 2011, regarding "Temporary Appointments and United Nations Contractual Reform – Transitional Measures – Expiration of transitional fixed-term appointment" and a document entitled, "Interim Guidelines for implementation of transitional measures for the United Nations contractual reform for currently serving staff members *other than* those serving in United Nations peacekeeping and political missions (effective 1 July 2009)" (emphasis in original) ("the Interim Guidelines").

4. According to Counsel for the Applicant's above email, the two attachments were provided to the Tribunal in the event the MEU was "unable to extend the applicant's contract because of the terms of his appointment", the informal request having been made to the MEU to extend the Applicant's contract beyond 9 July 2011 "so as to forestall the outright rejection of his [suspension of action] application to the [Dispute Tribunal] for irreceivability". Counsel for the Applicant further submitted that "[i]t is not clear whether the MEU will be able to secure such an arrangement for our client".

5. On 8 July 2011, the Dispute Tribunal held a hearing on the application for suspension of action. The Applicant appeared before the Tribunal together with his Counsel; Counsel for the Respondent was also present at the hearing. At the hearing, the Applicant gave oral evidence under affirmation. No additional witnesses were called by either party. In view of the imminent implementation of the contested administrative decision, I informed the parties that I would issue an order on the application later that same day.

6. By Order No. 173 (NY/2011) of 8 July 2011, the Tribunal held that the Applicant had failed to satisfy the requirements for an application for suspension of action and that the application was therefore rejected, with a reasoned judgment to follow in due course. The present document is the reasoned judgment on the matter.

Facts

7. The following paragraphs contain the main relevant facts, as presented by the Applicant. As explained in more detail below, the Respondent did not contest these facts, stating that he had had "insufficient time to make meaningful submissions".

8. On 22 September 2009, the Applicant was appointed OIC of TSS, one of three Services in FIOS, in addition to his other tasks.

9. The Applicant claims that, on 5 January 2011, his supervisor, the Director, told him that he was "happy" with the job he was doing in TSS and that, when the Applicant expressed concern about his contract expiring in July 2011, his supervisor said, "no worries, you are good well into next year (2012)".

10. On 18 February 2011, the Director told the Applicant that there had been two candidates for a six-month temporary vacancy announcement ("TVA") for an Information Systems Assistant for TSS and that the Applicant should give him a recommendation on who should be selected for the position. The Applicant recommended interviews to ensure fairness and transparency, but the Director said that they were not required for a TVA.

11. On 21 February 2011, having reviewed the two candidatures for the position, the Applicant determined which candidate should be appointed to the six-month temporary vacancy.

12. On 23 February 2011, the Director requested that the Applicant meet with another colleague so that they could jointly provide input as to who would be the best applicant for the position. Both the Applicant and his colleague agreed on the same candidate as the Applicant had determined on 21 February 2011 and they informed the Director of this. The Applicant notes in his application that the Director "did not appear happy with our recommendation, but did not object".

13. On 27 February 2011, the Applicant received an email from the Director, essentially providing some advice and coaching as to how to better carry out a selection process. The Applicant claims that from this point his Director's "attitude toward [him] changed drastically. [The Applicant] felt for the next several weeks that [he] was working in a hostile environment".

14. The Applicant claims that, starting 28 February 2011, he had various conversations with colleagues who expressed "shock and dismay" that he had not recommended the unsuccessful candidate for the Information Systems Assistant

position because she and the Director had been close for years. The Applicant describes the unsuccessful candidate as "emotional and crying" on the telephone to him, and "demanding to know why she didn't get the position". In this same period, the successful candidate for the position said that he no longer wanted the job as he was "caught in the middle" between the unsuccessful candidate and the Director.

15. On 22 March 2011, the Director gave a presentation in which he stated that the Applicant would continue to be OIC for TSS for the foreseeable future.

16. On 10 May 2011, the Applicant received an email from the Director, stating as follows:

> As you know the new provisions for temporary contracts effective 1 July dictate that after 2 years, [temporary] staff must take a 3 month break in service. Your anniversary is 9 July 2011. At the same time, I must advertise the position which I have extended you against … . You will recall that I have extended you an extra year after the abolition of the post you were recruited to fill … at the end of June 2010.
>
> I will be advertising the position in Inspira and certainly you would be welcome to apply for it. However, at present I am only able to extend you until July 9.

17. The Applicant claims that, on 18 May 2011, he spoke to the Director about the non-renewal of his contract and that he was told that there was nothing the Director could do about it under the human resources rules. The Applicant questioned why other staff members in FIOS who were in the same contractual situation were being extended. The Director informed him that those staff members could be extended after or before their two years had expired because they were being funded by different budgets. The Director then suggested that the Applicant apply for a three-month TVA position for the job which he had been performing.

18. On 6 June 2011, the Applicant was informed by the Executive Office, DM, that any extension of his contract under a temporary appointment was ultimately up to his supervisor.

19. On 10 June 2011, the Applicant received a letter from the Executive Officer, DM, informing him in writing that his contract would not be extended beyond 9 July 2011.

20. On 13 June 2011, the Applicant wrote to the Executive Office, DM, disputing the decision not to extend his contract and asking to be converted to a temporary appointment. The letter highlighted his eight years of service with the Organization and concluded:

> I kindly request the confirmation for a Temporary Appointment contract extension after a 3-day break in service, starting July 13, 2011. If this is not possible (and for some reason I am being treated differently than other Fixed Term staff) then I kindly request a new contract to be signed as soon as possible with a starting date of October 9, 2011, three months after my current termination date of July 9, 2011.

21. On 15 June 2011, the Applicant had a follow-up meeting with the Executive Officer, DM, who told him that she would respond formally to his letter, which she had not yet done. She also said that there could be no extensions after a two-year period without a one-month break in service, and that there were no exceptions to the rule.

22. On 28 June 2011, the Director announced in an email to all applicants that he had cancelled the three-month TVA for the position the Applicant was then holding because the permanent Inspira position was going to be filled shortly.

23. On 6 July 2011, the Director informed the Applicant by email that he needed to announce to the staff that the Applicant would not be in the office as of the week after, and that they should therefore report to the Director. On 7 July 2011, the Director held a meeting with the staff to advise them accordingly.

Applicant's submissions

24. The Applicant's principal contentions may be summarised as follows:

Prima facie *unlawfulness*

a. The Director is discriminating and seeking retribution against him because the Applicant did not recommend the promotion of the Director's favoured candidate for the Information Systems Assistant position;

b. The Applicant is not being treated fairly, particularly as other staff members have seen their contracts extended by the Director and as there is a continued need for OIC of TSS and funding in place, both evidenced by the Inspira posting;

c. The Director is discriminating against the Applicant because the former accidentally signed off on a USD50,000 payment to a vendor that should not have been made. The Applicant was a project manager for that vendor and when the project was transferred to FIOS, the Director essentially blamed the Applicant for bringing this failing project under his control as head of FIOS;

d. The Respondent's assertion that there is no basis for the Applicant's continued appointment under the Interim Guidelines is untrue;

e. The reasons the Applicant was given for the non-renewal of his contract were factually flawed and cannot serve as a proper basis to support the impugned decision;

Urgency

f. The matter is urgent due to the impending expiration of the Applicant's contract on 9 July 2011;

Irreparable harm

g. The decision would cause irreparable harm because the Applicant would lose his job and current livelihood;

h. The unlawful abrogation of a staff member's appointment and the premature termination of his career prospects cannot be recompensed financially because one cannot realistically determine how long that staff member would have remained in service.

Respondent's submissions

25. The Respondent's principal contentions may be summarised as follows:

a. The application should be rejected as the Applicant has not pursued his claim with due diligence. The Applicant has been on notice for the last two years that his contract could not be subject to a further renewal beyond 9 July 2011 as a result of transitional measures in place in connection with the implementation of a contractual reform mandated by the General Assembly. Furthermore, the Applicant has been fully aware of the decision over the last two months, particularly through the email of 10 May 2011 and the letter of 10 June 2011, and yet "waited until the eleventh hour to file";

b. The Applicant's unwarranted delay in pursuing his claim has caused the Respondent to have insufficient time to make meaningful submissions, impacting negatively on Counsel for the Respondent's ability to represent the Secretary-General in the current proceedings and thus prejudicing the Respondent.

Consideration

26. This is an application for a suspension of action pending management evaluation. This manner of application is in the nature of urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Judge within five days of the service of the application on the Respondent (see art. 13.3 of the Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal. Therefore parties approaching the Tribunal must do so on genuine urgency basis and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. The proceedings are not meant to turn into a full hearing. The application must not be frivolous or an abuse of process, or else an applicant may well be mulcted in costs.

27. In accordance with art. 2.2 of its Statute, the Tribunal will now consider whether the application is of particular urgency, whether the contested administrative decision appears *prima facie* to be unlawful, and whether the implementation of the decision would cause the Applicant irreparable harm. The Tribunal can suspend the contested decision only if all three of these requirements of art. 2.2 of its Statute have been met.

Particular urgency

28. At the hearing, Counsel for the Respondent took the preliminary point that the Applicant had not pursued his request for suspension of action with due diligence and that it was therefore not receivable. Counsel argued that the Applicant did not act diligently as he had known from the outset for two years that his contract would not be renewed. This argument is clearly not sustainable as the Applicant was only informed of the administrative decision not to renew his contract on 10 May 2011.

29. Further, Counsel for the Respondent stated that, even before one applies the three requirements for a suspension of action, one must consider whether the

Applicant has allowed the Respondent time to reply to the application in accordance with *Woinowsky-Krieger* Order No. 59 (GVA/2010) and *Suliqi* UNDT/2011/120**.**

30. In *Woinowsky-Krieger*, the Tribunal expressed a general right of response to claims:

> 17. When handling an application, it is an essential duty of the judge to give the other party an opportunity to respond to the claims. The rule *audi alteram partem* is not only part of the common law concept of natural justice; it is also a general principle of procedural law. In general, a fair judgment cannot be rendered without having heard facts and arguments from both sides. It follows from this general rule that an applicant also has the obligation to enable the Tribunal to give the other party the possibility to reply within a reasonable period of time. If the applicant does not comply with this obligation, he has to bear the consequences from the fact that a full and fair assessment of the application is not possible because of the applicant's own delay.

31. Because of the very nature of the relief sought by way of urgency, the law and practice pertaining to urgent interdicts is by and large common in many traditions, with the overriding factor often being one of a "balance of convenience". Some jurisdictions provide for applications on notice, as well as those that are heard and granted *ex parte* in the appropriate circumstances. The latter form of urgent interdict is normally granted as a *rule nisi*, with a return date at which the opposing party may appear and show cause why the order should be discharged or not made final. In other words, no absolute or final order can be made without the opposing party being heard (in compliance with the *audi alteram partem* rule), but in the appropriate situation an applicant may obtain a temporary *ex parte* order which is subject to confirmation or discharge at the return date for the order. Whilst the dictum of *audi alteram partem* is a general principle therefore, there are many traditions which allow applications where the opposing party may face an order made without his intervention, but subject to his right to do so on the return date, or to anticipate the return date and file his opposition also on an urgency basis.

32. Due to the nature of urgent applications, both parties and the Tribunal are under pressure of time in such situations. It is not unusual, in many traditions, for counsel to be called into court at short notice to appear before a judge on the same day where circumstances and justice so require. In terms of the Tribunal's rules, an application for suspension of action should be considered within five days of service upon the Respondent. However, in some cases, a suspension of action cannot be granted where the contested decision has already been implemented. This may of course occur while time is allowed for the filing of papers, making it impossible for the Tribunal to grant relief which, after all, is only interim in nature. This gives rise to an absurdity where the relief is clearly warranted. As a result, the Tribunal has to deal with these matters as best as it can on a case-by-case basis depending on the particular circumstances and facts of each case, but the urgency should not be self-created.

33. A plea that requires a court or tribunal to decide a threshold question which is not related to the merits of an applicant's case is sometimes known as a dilatory plea (others being pleas in abatement, please in suspension, etc.). The due diligence plea to my mind is purely dilatory in nature. The test for an application for suspension of action is that there is urgency which is not self-created. The Applicant in this case was first informed of the decision not to renew his contract by email on 10 May 2011, reiterated by letter dated 9 June 2011 and received on 10 June 2011. He waited several weeks before he launched this application on 6 July 2011. His explanation for the delay is that he spoke many times with the Director and with the Ombudsman's office, although there was no formal mediation. When all that failed, the Applicant went to the MEU to ask it to suspend the action, after which he realised that he should have made his application to the Dispute Tribunal. There then followed a long weekend, which had put him "in a difficult situation".

34. The Tribunal finds it instructive that the email from Counsel for the Applicant, dated 7 July 2011, anticipates "the outright rejection of his [suspension of

action] application to the [Dispute Tribunal] for irreceivability". In addition, whilst the Tribunal commends the Applicant's attempts to informally resolve his situation, the Applicant has failed to provide the Tribunal with a satisfactory explanation as to why the delay in filing his application to the Dispute Tribunal should not be attributable to him.

35. The Dispute Tribunal held in *Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), and *Yisma* Order No. 64 (NY/2011), that the requirement of particular urgency will not be satisfied if the urgency was created by the applicant. The Tribunal has also held in *Sahel* UNDT/2011/023 and *Patterson* UNDT/2011/091 that informal attempts at settlement and mediation do not absolve an applicant from acting timeously in complying with deadlines.

36. Both *Sahel* and *Patterson* emphasise that ongoing informal discussions do not provide a valid excuse for an applicant for not complying with deadlines. Likewise, the Tribunal finds that, in the instant case, the Applicant's discussions with the Director and the Office of the Ombudsman are not a valid excuse for his failing to act timeously in filing his application for suspension of action and thereby causing an avoidable urgency.

37. In the circumstances, the Tribunal finds that the urgency is therefore self-created. The Tribunal finds that the Applicant has failed to meet the test of particular urgency with regard to his application.

38. Having failed to meet one of the three conditions required under art. 2.2 of the Statute, the Applicant has thus failed to satisfy the test for a suspension of action. For this reason, the Tribunal will not consider whether the implementation of the contested administrative decision would cause the Applicant irreparable damage. Likewise, no determination will be made as to the *prima facie* unlawfulness of the decision.

39. Therefore, as regards the Applicant's assertions that his post is still available and vacant, that he is being discriminated and retaliated against and that he will suffer irreparable harm, this does not preclude the Applicant from filing an application under art. 2.1 of the Statute in due course. The Tribunal would then be in a position to assess the lawfulness of the contested administrative decision.

Conclusion

40. For the foregoing reasons, the application for suspension of action is rejected.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 22nd day of July 2011

Entered in the Register on this 22nd day of July 2011

(*Signed*)

Santiago Villalpando, Registrar, New York