



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

KANANURA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. This is an application for a suspension of action under art. 2.2 of the Statute of the Dispute Tribunal, which makes provision for rules to be enacted giving the Tribunal power to suspend the implementation of an administrative decision. Article 13 of the Rules of Procedure of the Dispute Tribunal gives effect to this provision of the Statute.

2. The Applicant contests the decision not to extend her temporary appointment beyond 18 October 2011. It appears from the documents before the Tribunal that the Respondent's reason for the decision was that such an extension would exceed the maximum period the Applicant could be employed on a temporary appointment, as set out in ST/AI/2010/4 (Administration of temporary appointments) of 27 April 2010 and the relevant staff rules.

Consideration

3. Article 2.2 of the Statute of the Tribunal provides:

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 [emphasis added].

4. Article 13 of the Rules of Procedure provides:

Suspension of action during a management evaluation

1. The Dispute Tribunal shall order a suspension of action 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* [emphasis added].

2. The Registrar shall transmit the application to the respondent.

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

5. It is clear from the text of the Rules of Procedure that the Tribunal is under a duty to transmit a copy of the suspension of action application to the respondent and to issue a decision within five days.

6. There is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for there to be a respondent's response before the applicant's request is decided.

7. Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for temporarily suspending, in appropriate cases, an administrative decision, which may have been wrongly made, so as to give the Management Evaluation Unit sufficient time to consider the matter and to advise management. The process itself should not become unduly complex, time-consuming and costly for the United Nations or its staff members.

8. These applications may be decided on an *ex parte* basis or they may, at the discretion of the judge, require a response from the respondent and, in some cases, a hearing. However, whatever procedure is used, it should not, as the Tribunal has pointed out in *Applicant* UNDT/2011/158 at para. 8(e), be regarded, or used, as a dress rehearsal for a determination of the merits, should a substantive application be made subsequently.

9. *Applicant* UNDT/2011/158 identifies some of the essential components governing an application for a suspension of action.

10. It should be noted that there are three essential requirements under art. 2.2 of the Statute:

- a. That the decision *appears* to be prima facie unlawful (emphasis added);
- b. That the matter is of particular urgency; and
- c. That implementation of the decision would cause irreparable damage.

11. Clearly, whilst the Tribunal is required to make findings on urgency and irreparable damage, the Statute recognises that a finding of unlawfulness will require a more rigorous examination and would be incompatible with the consideration of applications for interim relief pending a final determination of the issue. Accordingly, the Tribunal is to express an opinion as to whether the decision appears *prima facie* to be unlawful. Clearly, this is not to be regarded as expressing a concluded finding on the law. That would be decided after a consideration of the substantive merits of the claim with full argument and submissions from both parties, normally following a hearing.

12. Speed is of the essence in considering an application for a suspension of action. The decision should, in most cases, be in summary form. The Tribunal is not required to provide, and the parties should not expect to be provided with, an elaborately reasoned judgment either on the facts or the law. To do so would defeat the underlying purpose of a speedy and cost-effective mechanism. Moreover, the time, effort and costs thereby saved by all those involved with the formal system of internal justice could be utilised to enhance the disposal of other cases.

Prima facie unlawfulness

13. The Applicant states that she had two separate periods of employment.

a. A P-3 level position at the Office of Human Resource Management (“OHRM”) from 6 October 2009 to 30 June 2010. The employment ended with her receipt of all appropriate terminal benefits with no continuing employment relationship with the United Nations.

b. The second period of employment was at the P-4 level at the Department of Field Service (“DFS”) with effect from 15 July 2010.

14. ST/AI/2010/4 of 27 April 2010 is the administrative instruction governing temporary appointments. Section 15.2 provides:

Under no circumstances shall the continuous period on a temporary appointment exceed 729 days.

15. It appears to the Tribunal that, on the facts, as pleaded in the application for suspension of action and the analysis of the legal principles advanced by her representative, Mr. Danquah, she has satisfied the test that the decision *appears* prima facie to be unlawful. Whether that would be the conclusion after the substantive issues are fully examined and argued remains for determination if the suspension of action application is followed by a substantive claim.

16. The issues which require full argument at a substantive hearing include the following:

- a. What is the proper construction of Section 15.2 of ST/AI/2010/4 as to a continuous period of employment not exceeding 729 days?
- b. Did the break in service from 30 June 2010, when the first period of employment ended and 15 July 2010 when the second period began, constitute a break in continuity within the meaning of ST/AI/2010/4?
- c. Is there an apparent confusion between section 2.5(b), which refers to “cumulative length of service” and section 15.2 which refers to a continuous period of employment not exceeding 729 days?

- d. Is the Applicant properly subject to the conditions in section 14.1 in that she had successive temporary appointments within 364 days or exceptionally, within 729 days?

Urgency

17. The decision is due to take effect on 18 October 2011 which leaves five days from today's date for the Applicant to obtain temporary employment for a period of three months.

18. A stay in the implementation of the decision, albeit for the limited period of an additional 25 calendar days, until the management evaluation is due on 7 November 2011, will serve the purpose of allowing sufficient time for the Respondent to carry out a proper review at the stage of management evaluation, whilst at the same time affording the Applicant additional time to seek alternative employment, should she fail in her application for management evaluation of the contested decision.

Irreparable damage

19. Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money.

Conclusion

20. The application for suspension of action succeeds.

21. The Respondent is ordered to suspend the implementation of the contested decision pending management evaluation.

(Signed)

Judge Goolam Meeran

Dated this 13th day of October 2011

Entered in the Register on this 13th day of October 2011

(Signed)

Hafida Lahiouel, Registrar, New York