UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/094
Judgment No.: UNDT/2011/212
Date: 15 December 2011
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

EVANGELISTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. On 8 December 2011, the Applicant, an Evaluation Officer with the Office of Internal Oversight Services ("OIOS"), submitted an application for suspension of action, pending management evaluation, of the decision to require her to take a break in service after the expiration of her current contract on 31 December 2011 and prior to a new temporary appointment.

2. The Applicant requested management evaluation of the contested decision by letter dated 24 November 2011.

3. On Friday, 9 December 2011, following receipt of the present application, the New York Registry of the United Nations Dispute Tribunal transmitted it to the Respondent. The Respondent duly filed his reply, as directed, by 1 p.m. on Tuesday, 13 December 2011, and the Tribunal proceeded to decide the matter on the papers before it.

4. Article 13.3 (Suspension of action during a management evaluation) of the Tribunal's Rules of Procedure provides that the Tribunal "shall consider an application for interim measures within five working days of the service of the application on the respondent". As the present application was served on the Respondent on 9 December 2011, the time for consideration of the present application will expire at the close of business on Friday, 16 December 2011.

Background

5. The following background information is based on the parties' written submissions and the record.

6. The Applicant was employed on a temporary appointment in the United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP") from 4 September 2009 to 28 February 2010.

7. On 24 March 2010, approximately three weeks after the expiration of her contract with ESCAP, the Applicant was employed on another temporary contract, this time with OIOS in New York. This appointment was for a period of three months, starting 23 March 2010 and expiring on 22 June 2010.

8. On 27 April 2010, the Under-Secretary-General for Management promulgated ST/AI/2010/4 (Administration of temporary appointments). Section 17 of the administrative instruction provided that the instruction shall enter info force on the date of issuance. Section 14.1 of the instruction stated:

> Upon reaching the limit of service under one or under several successive temporary appointments within a period of 364 days as set out under section 2 above or, exceptionally, 729 days under section 15 below, the staff member shall be required to have a break in service of a minimum of three months before being eligible for appointment to a new temporary position in the same duty station within entities that apply the United Nations Staff Regulations and Rules, and shall be required to have a break in service of a minimum of 31 days if the new appointment is in a different duty station within entities that apply the United Nations Staff Regulations and Rules.

9. On 3 June 2010, the Applicant signed a letter of appointment, again with OIOS. This appointment was also temporary and was set to expire on 31 August 2010.

10. The Applicant signed her next letter of appointment with OIOS on 17 August 2010. The appointment was temporary, from 1 September 2010 to 31 May 2011. According to the Respondent, this appointment constituted an exceptional extension of the Applicant's period of service beyond the 364-day limit, which limit would otherwise have been reached on 24 September 2010.

11. On 24 May 2011, the Applicant signed a letter of appointment with OIOS for a period of two months (1 June to 31 July 2011).

12. On 17 August 2011, the Applicant signed a letter of appointment with OIOS for the period of 1 August to 31 December 2011. According to the Respondent, this

renewal was made in error as the 729-day limit ran out on 24 September 2011 and the Applicant should not have been renewed beyond that date. When the Administration realised the error in October 2011, it decided to honour the extension of her contract until 31 December 2011. The Respondent submits that, pursuant to the requirements of the relevant administrative instructions, the Applicant must separate on 31 December 2011 and take a break in service of at least three months before she can be reappointed at the same duty station.

13. The Applicant submits that, on 25 October 2011, she "received correspondence that OHRM [i.e., Office of Human Resources Management] had determined that the end of service date on [her] temporary appointment should be 24 September 2011" and that she "had been erroneously extended to 31 Dec[ember] 2011 and could not be extended past 31 December 2011". On the same day, 25 October 2011, the Applicant discussed the matter with both her supervisor and the Executive Office, OIOS. The Applicant submits that the Executive Office "agreed to follow-up with OHRM on the matter".

14. At the end of October 2011, the Under-Secretary-General for Management promulgated ST/AI/2010/4/Rev.1 (Revised administrative instruction on administration of temporary appointments), which reiterated the requirement of a period of ineligibility for reappointment on a temporary contract for staff members who have reached the limit of 729 days of service on successive temporary appointments (see secs. 2.7, 5.5).

15. The Applicant submits that, on 15 November 2011, she discussed the matter again with her supervisor and with the Executive Office of OIOS. The Executive Office agreed to bring up the matter again with OHRM at a more senior level.

16. On 16 November 2011, the Executive Office of OIOS sent an email to OHRM to inquire whether the break in service requirement applied to the Applicant as it was introduced after she joined OIOS in March 2010.

17. By email of 18 November 2011, OHRM confirmed to the Executive Office of OIOS that the break in service requirement applied to the Applicant. This email was subsequently forwarded to the Applicant.

18. On 23 November 2011, the Applicant received her separation papers.

Applicant's submissions

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

Prima facie *unlawfulness*

a. The Applicant seeks guidance on whether she should be required to take a break in service after 31 December 2011 or after 21 March 2012. She maintains that it should be after the latter date as her appointment at ESCAP should not be included in the calculation;

b. Staff rule 4.12 does not contain any break in service requirements. ST/AI/2010/4 was "effective on the date of issuance", i.e., 27 April 2010, after the Applicant joined OIOS on 23 March 2010. The break in service requirement, introduced by ST/AI/2010/4, cannot be applied retroactively;

c. Had the Applicant been aware of the requirement in February or March 2010, she would have extended her break of 22 days between ESCAP and OIOS by nine days to reach the 31-day break in service between duty stations, as required by sec. 14 of ST/AI/2010/4;

Urgency

d. The Applicant's separation papers were issued on 23 November 2011, indicating that her last day of service would be 31 December 2011. The Management Evaluation Unit provides a decision in 30 days, thus the decision will be available after 25 December 2011. Given that the deadline for

response to her request for management evaluation falls on holiday season, "it is highly likely that the decision will be delivered late". Thus, the Applicant believes that this warrants a suspension of action until a decision has been issued on her request for management evaluation;

Irreparable damage

e. The Applicant's contract will end on 31 December 2011. Implementation of the contested decision will likely result in a new recruitment process, "which would require much time and effort on behalf of the Organization and be very inefficient".

Respondent's submissions

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

Prima facie *unlawfulness*

a. Staff rule 4.12 provides that "a temporary appointment shall be granted for a period of less than one year" and "may be extended for up to one year only" in specific circumstances. Under the provisions of ST/AI/2010/4 and ST/AI/2010/4/Rev.1, the Applicant's temporary appointment may not be extended beyond 729 days. The time of the Applicant's temporary employment with ESCAP should be counted toward the 729-day limit;

b. The Applicant entered into four continuous temporary appointments since the promulgation of ST/AI/2010/4. The Applicant's letters of appointment provided that the terms of appointment were "subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments that may be made from time to time to such Staff Regulations and such Staff Rules". It is the Applicant's responsibility to keep abreast of any changes to the Staff Rules;

c. The Applicant does not, and cannot, argue that the doctrine of acquired rights precludes the incorporation of ST/AI/2010/4 into her appointment. The Applicant's current terms of appointment, effective 1 August 2011, were entered approximately 15 months after the issuance of ST/AI/2010/4. Further, only fundamental or essential conditions of employment may give rise to acquired rights. The possibility of entering into a further appointment is not a fundamental condition of a temporary appointment;

Urgency

d. There is no action to be taken during the pendency of the management evaluation. The Applicant's appointment is due to expire six days after the due date for the management evaluation response. Therefore, the management evaluation will be addressed prior to the expiry of the Applicant's appointment on 31 December 2011. There is no reason to believe that the management evaluation will be delivered late. After 25 December 2011, the management evaluation response will no longer be pending. Accordingly, the outer limit for any order for suspension of action is 25 December 2011. Should the time limit not be complied with, the Applicant will be entitled to file an application on the merits under art. 2.1 of the Tribunal's Statute;

e. The Applicant was informed in September 2010 that her appointment of 1 September 2010 was made on an exceptional basis. The contested decision of 25 October 2011 is merely a reiteration of this earlier decision of September 2010;

f. The Applicant was aware of the contested decision on 25 October 2011, however, she filed her request for management evaluation on 25 November 2011 and her application for suspension of action on 8 December 2011. Therefore, any urgency in this case was self-created;

Irreparable damage

g. The Applicant acknowledges that, even if her appointment with ESCAP is not counted toward the 729-day limit, she will be required to take a break in service after 21 March 2012. Accordingly, it cannot be argued that the expiry of her appointment on 31 December 2011 will cause her irreparable damage. Further, the Applicant has had ample time to make alternative arrangements.

Consideration

21. This is an application for a suspension of action pending management evaluation. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five days of the service of the application on the Respondent. Such applications disrupt the normal day-to-day business of the Tribunal and the parties' schedules. 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. An application may well stand or fall on its founding papers.

22. Due to the nature of urgent applications, the parties and the Tribunal are under pressure of time in such situations. The Tribunal has to deal with these matters as best as it can, depending on the particular circumstances and facts of each case.

23. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the pendency of 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 Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Preliminary observation

24. The deadline for completion of the management evaluation in this case expires on Sunday, 25 December 2011; therefore, the following day being a holiday, management evaluation is due to be communicated to the Applicant by close of business Tuesday, 27 December 2011. The Respondent submits, in effect, that the Tribunal is not capable of suspending the contested decision under the present application, as the Applicant's appointment is due to expire several days after the due date for the management evaluation response.

25. Under art. 2.2 of the Tribunal's Statute, suspension of action may be ordered "during the pendency of the management evaluation". Staff rule 11.2(d) provides that the outcome of the management evaluation "shall be communicated in writing to the staff member within thirty calendar days of receipt of the request for management evaluation if the staff member is stationed in New York". One of the questions raised in the present case is whether, in the event suspension of action is ordered pending management evaluation and the Administration fails to communicate the outcome of management evaluation by the 30-day deadline and instead communicates it with some delay, the suspension ordered by the Tribunal would automatically lapse with the expiration of the 30-day period or continue until the outcome of management evaluation is communicated to the Applicant. The Tribunal does not find it necessary to consider this issue in view of its findings below.

Irreparable damage

26. It is generally accepted that mere financial loss is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage.

27. For an application to be successful, there must be at least an averment of irreparable harm to the Applicant, which the present application does not contain. The

reasons proffered by the Applicant—that a new recruitment exercise "would require much time and effort on behalf of the Organization and be very inefficient"—do not constitute grounds for a finding of irreparable damage to the Applicant. The Tribunal finds that the Applicant has failed to articulate to the Tribunal on the papers filed that the implementation of the contested decision would cause her any harm at all or any harm that could not be compensated by an appropriate award of damages in the event the Applicant decides to file an application on the merits under art. 2.1 of the Tribunal's Statute.

28. Accordingly, the Tribunal finds that the Applicant has failed to demonstrate that the implementation of the contested decision would cause her irreparable damage, and the present application stands to be dismissed.

29. As one of the three conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal does not need to determine whether the remaining two conditions—particular urgency and *prima facie* unlawfulness—have been satisfied. However, in the circumstances of this case, the Tribunal finds it appropriate to include its observations regarding the Applicant's claims regarding the urgent nature of this case.

Urgency

30. Even if the Applicant were able to establish that the implementation of the contested decision would cause her irreparable damage, the Tribunal finds that the present application does not satisfy the requirement of particular urgency.

31. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency

will not be satisfied if the urgency was created or caused by the applicant (*Jitsamruay* UNDT/2011/206).

32. The Applicant acknowledges that she first became aware of the decision on 25 October 2011, when she "received correspondence that OHRM had determined that the end of service date on [her] temporary appointment should be 24 September 2011". She discussed it on the same day with her supervisors and the Executive Office of OIOS. This prompted further exchange between the Executive Office and OHRM. On 18 November 2011, OHRM sent an email to the Executive Office, which the Applicant described in her application as "confirm[ing] the [contested] decision".

33. In view of the circumstances in this case, the Tribunal finds that the Applicant was informed of the decision on 25 October 2011, at the latest. Based on the Applicant's own application, on that day she not only discussed the decision with her supervisors, but was also provided with the correspondence from OHRM on that issue. The Tribunal finds that the communications that followed between the Executive Office and OHRM were prompted by the Applicant and were, in effect, attempts to have the issue clarified and, if possible, reconsidered. However, the final decision was reached on 25 October 2011.

34. The present application was filed on 8 December 2011, more than six weeks after 25 October 2011. In the circumstances of this case, the Tribunal finds that the Applicant cannot seek its assistance as a matter of urgency in this case when she has had knowledge of the decision for more than six weeks. Any urgency in this case is, accordingly, of the Applicant's own making.

35. As the Applicant failed to satisfy the requirements of irreparable damage and particular urgency, the Tribunal does not find it necessary to consider whether the contested decision is *prima facie* unlawful.

Conclusion

36. The present application for suspension of action is rejected.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 15th day of December 2011

Entered in the Register on this 15th day of December 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York