



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/084

Judgment No.: UNDT/2012/153

Date: 17 October 2012

Original: English

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ABO-ESABIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. On 9 October 2012 the Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application for suspension of action, pending management evaluation, on the decision of 27 June 2012 to discontinue his post with effect from 1 January 2013.

Facts

2. The Applicant joined UNHCR in 2009. He is currently employed as an Assistant Field Officer in Najaf, Iraq, under a fixed-term appointment.

3. By memorandum dated 27 June 2012 from the UNHCR Representative in Iraq, the Applicant was informed that his post would be discontinued with effect from 1 January 2013, in line with the operational requirements of the Iraq operation in 2013.

4. On 29 August 2012, the United Nations High Commissioner for Refugees (“High Commissioner”) promulgated the internal memorandum IOM/079-FOM/80/2012 (Special measures for reduction in international professional workforce as a result of the 2013 Annual Programme Review), which introduces new measures to reduce costs. Annex 1 to IOM/079-FOM/80/2012 provides with specific regard to locally recruited staff that comparative review procedures will be conducted in various field locations where posts will be abolished. It also states that indefinite appointments of staff members whose posts are slated for discontinuation and who have been on full pay status but without an assignment for nine or more consecutive months will be subject to termination unless these staff members are selected for any vacant post advertised in or before September 2012.

5. On 9 October 2012, the Applicant filed the application which forms the subject of the present judgment.

6. By Order No. 152 (GVA/2012) issued on 11 October 2012, the Tribunal instructed the Applicant to file a copy of his request for management evaluation,

and, on the same day, the Applicant submitted the requested document, which was dated 1 October 2012. As directed by the Tribunal, the Respondent filed his reply on 16 October 2012.

Parties' contentions

7. The Applicant's contentions are:

Prima facie unlawfulness

a. IOM/079-FOM/80/2012 was not submitted to the Joint Advisory Committee for its review and recommendations, as required by inter-office memorandum IOM/FOM No. 014/1990 (Joint Advisory Committee) issued on 15 February 1990;

b. The Secretary-General did not delegate authority to the High Commissioner to take the contested decision. Further, it is unclear whether the High Commissioner sought his comments or consulted him prior to promulgating IOM/079-FOM/80/2012, although the latter relates to basic regulations;

c. The contested decision infringes his rights under staff regulation 9.3(a) and staff rule 9.6(e). IOM/079-FOM/80/2012 unilaterally defines the terms "available post" and "suitable post" in a sense that is contrary to the overall meaning of staff rule 9.6(e);

d. The contested decision violates his acquired rights;

e. It also infringes the principle of non-retroactivity as his termination will be based on two selection exercises that occurred in the past;

Urgency

f. If the Applicant is not successful in the September 2012 selection exercise, he will likely be separated from service;

Irreparable damage

g. In view of the blatant irregularities in the decision-making process leading to the contested decision, the damage suffered by the Applicant far exceeds any harm to his future employment, and monetary compensation alone would not do justice to him;

h. The contested decision did not take into consideration that two of his relatives are suffering from serious health conditions, that he is taking care of a large family, that he did not take any break since October 2009, that he had important responsibilities, that the security situation in Iraq is very difficult and that his performance has been satisfactory.

8. The Respondent's contentions are:

Admissibility

a. The Applicant's request for management evaluation was not submitted to UNHCR, which only became aware of it in the course of the proceedings before the Tribunal. The submission filed by the Applicant on 11 October 2012 cannot be considered as a valid request for management evaluation, and there is therefore no basis for the Tribunal to suspend the implementation of the contested decision pending management evaluation;

b. Even if the submission of 11 October were to be considered as a valid request for management evaluation, the application would still be irreceivable as the Applicant was notified of the contested decision on 27 June 2012 and he submitted his request for management evaluation only on 1 October 2012, that is, well after the 60-day time limit stipulated in staff rule 11.2(c);

Prima facie unlawfulness

c. The discontinuation of the Applicant's post was lawful as the procedures set out in inter-office memorandum IOM/FOM No. 027/2009

(Procedural Guidelines for Changes in Status of Positions) were followed and he was duly notified six months in advance of the discontinuation;

Urgency

d. The Applicant's post will be discontinued effective 1 January 2013, more than two months from the date on which the application was filed;

e. The Applicant was notified of the contested decision on 27 June 2012. If, in fact, there was an element of urgency, the Applicant would have submitted his application earlier;

Irreparable damage

f. The contested decision does not affect the Applicant's contract or employment status. He is not separated from UNHCR and remains eligible to apply for vacant posts as an internal candidate. There is therefore every chance that he will be appointed to another post;

g. The suspension of the contested decision is not the only way to ensure that the Applicant's rights are observed.

Consideration

9. In accordance with article 2.2 of the Tribunal's Statute, the Tribunal may order suspension of action, during the pendency of the management evaluation, on a contested administrative decision where the application for suspension of action is of particular urgency, the contested decision appears *prima facie* to be unlawful, and its implementation would cause the applicant irreparable harm.

10. Staff rule 11.2(c) provides:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal

resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

11. As per the Tribunal's case law, it results from article 2.2 of the Statute read in conjunction with staff rule 11.2(c) that a request for suspension of action during the pendency of the management evaluation may only be receivable if the request for management evaluation has been submitted in due time (*Fetahu* UNDT/2011/118, *Tetova* UNDT/2011/119, *Suliqi* UNDT/2011/120).

12. In this case, the Applicant was notified of the decision to discontinue his post on 27 June 2012. Under staff rule 11.2(c), he had until 27 August 2012 to submit a request for management evaluation of this decision. Therefore, even assuming that his request for management evaluation was duly submitted to the High Commissioner, it would still be late and his application is therefore irreceivable.

Conclusion

13. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 17th day of October 2012

Entered in the Register on this 17th day of October 2012

(Signed)

René M. Vargas M., Registrar, Geneva