



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/074
Order No.: 28 (GVA/2010)
Date: 10 March 2010
Original: English

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

CALVANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
François Lorient

Counsel for Respondent:
Susan Maddox, ALU, UN Secretariat

Introduction

1. On 4 March 2010, the Applicant filed with the United Nations Dispute Tribunal (UNDT) an application requesting the Tribunal to suspend the decision of 1 March 2010 to extend his placement on administrative leave with full pay pursuant to provisional staff rule 10.4.

Facts

2. Effective 1 July 2007, the Applicant was appointed by the Secretary-General as Director (L-7) of the United Nations Interregional Crime and Justice Research Institute (UNICRI) under a one-year project personnel appointment (200 series of the former Staff Rules), which was extended for another year from 1 July to 30 June 2009, then for three months effective 1 July 2009. As of 1 October 2009, the Applicant's appointment was converted to a fixed-term appointment under the new, provisional Staff Rules, at the D-2 level, and extended for nine months. His current fixed-term appointment is therefore due to expire on 30 June 2010.

3. On 2 December 2009, the United Nations Office of Internal Oversight Services (OIOS) issued an audit report entitled *Comprehensive audit of [UNICRI] – Poor governance and non-compliance with United Nations regulations and rules tainted significant areas of UNICRI's activities*. The audit report was addressed to the Under-Secretary-General for Management (USG/DM), the Chef de Cabinet of the Secretary-General, the Executive Director of the United Nations Office on Drugs and Crime and the Applicant.

4. By letter dated 7 December 2009, the USG/DM informed the Applicant that “given the nature and gravity of the findings and [the Applicant's] responsibility as the most senior official of UNICRI, [he was] placed on administrative leave without pay pursuant to provisional staff rule 10.4 (a)”, “for an initial period of three months, or until such time as the investigation is completed, and a decision is taken on whether or not to pursue the matter further, whichever is earlier”.

5. By email dated 8 December 2009, the Applicant wrote to the Secretary-General to request a management evaluation of the decision to place him on administrative leave without pay. By email dated 9 December 2009, Counsel for Applicant filed an application requesting the Tribunal to suspend the decision to place the Applicant on administrative leave without pay.

6. On 18 December 2009, while the Tribunal rejected the Applicant's request for suspension of action on the decision to place him on administrative leave, it ordered that the decision to deprive the Applicant of his salaries during his placement on administrative leave pursuant to provisional staff rule 10.4 be suspended until the management evaluation had been completed.

7. By letter dated 1 March 2010, the USG/DM informed the Applicant that his placement on administrative leave with full pay was extended "for an additional period of three months, or until such time as the investigation is completed ...whichever is earlier".

8. On 3 March 2010, the Applicant submitted a request for management evaluation of the decision of 1 March 2010 to the Secretary-General. The Applicant submitted the present request for suspension of action of the decision of 1 March 2010 to the UNDT on 4 March 2010.

9. On the same date, the Tribunal requested the Respondent to submit a reply to the application for suspension of action by Monday, 8 March 2010. Also on 4 March 2010, the Tribunal issued an order on disclosure of information with respect to the ongoing investigation to the OIOS (Order No. 21 (GVA/2010)). By letter dated 5 March 2010, the parties were further requested to inform the Tribunal if they were engaged in a formal mediation procedure with respect to the Applicant's administrative leave.

10. By letter of 5 March 2010, the Chief, Management Evaluation Unit (MEU) informed the Applicant that since the request of 3 March 2010 was "duplicative of his 7 December 2009 request for management evaluation, which is currently before the MEU for consideration", "the MEU considers that [the Applicant's] 1 (sic) March 2010 request for management evaluation [was] not

receivable”. By email dated 6 March 2010 to the Chief, MEU, the Applicant questioned the conclusions contained in the latter’s letter of 5 March 2010.

11. On 8 March 2010, the Respondent submitted a motion to dismiss proceedings and to vacate order No. 21 (GVA/2010), arguing that since the letter of 5 March 2010 from the Chief, MEU completed the management evaluation, the Tribunal has no competence to hear and pass judgment on the application.

12. The Tribunal issued another order on disclosure of information on 9 March 2010 to OIOS, requesting OIOS the Under-Secretary-General for Internal Oversight Services to submit the information requested in Order No. 21 (GVA/2010) by no later than 9 March 2010. The Tribunal recalled that any staff member, irrespective of his or her position within the Organisation, who refuses to comply with an order issued by the Tribunal, can be held personally responsible for this non-compliance.

13. On 10 March 2010, the Respondent submitted a note from the Under-Secretary-General for Internal Oversight Services on Order No. 21 (GVA/2010) to the Tribunal. In her note, the Under-Secretary-General informed the Tribunal that “an authorized investigation implicating the conduct of ... [the Applicant], has commenced” and that “[i]t should be noted that the average investigation time is expected to be approximately six months ...”. The Applicant submitted his response to the Respondent’s submission of 10 March 2010 on the same day, expressing his discontent with the administration’s reaction on the Tribunal’s orders.

Considerations

14. The Applicant requests the Tribunal to suspend the implementation of the decision of 1 March 2010 to extend his placement on administrative leave with full pay pursuant to provisional staff rule 10.4.

15. As the Tribunal has held previously, it can release two different types of interim measures which are related to the stages of the procedure and have to be strictly separated (see UNDT/2009/071 *Corcoran* (2009)).

16. Article 2, paragraph 2, of the Tribunal’s statute provides that:

“The Dispute Tribunal shall be competent to hear and pass judgement 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...”

17. Article 13, paragraph 1, of the UNDT RoP stipulates that:

“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 ...”

18. It results from the foregoing that an order under article 2, paragraph 2, of the Tribunal’s statute and article 13, paragraph 1, of the UNDT RoP can only be released during the pendency of the management evaluation. The pendency of management evaluation comes to an end once the Secretary-General’s response, reflecting the outcome of the management evaluation, is communicated in writing to the staff member (see provisional staff rule 11.2 (d)). In the present case, the Chief, MEU, informed the Applicant by letter dated 5 March 2010 that the MEU considers that his request for management evaluation of 3 March 2010 was not receivable. Even if the irreceivability issue raised by the Respondent, according to which the decision to extend the administrative leave of the Applicant does not constitute a new decision, is completely unfounded, the letter of 5 March 2010 can only be understood as a rejection of the Applicant’s request for management evaluation of 3 March 2010. Hence, the requirement under article 2, paragraph 2 of the UNDT statute and article 13, paragraph 1, of the UNDT RoP, that the management evaluation shall be pending, is no longer fulfilled and the application for suspension of action is not receivable under these provisions.

19. The administration has to be reminded that if the Tribunal issues an order requesting the administration to provide certain information, it is the duty of the administration to comply with the order without delay. It is not within the prerogative of the administration to discuss the relevance of the requested

information for the resolution of the dispute, an assessment which is within the exclusive competence of this Tribunal.

20. At the same time, according to article 10, paragraph 2, of the Tribunal's statute and article 14, paragraph 1, of the UNDT RoP, the Tribunal may, under the circumstances specified therein, at any time during the proceedings order an interim measure, including an order to suspend the implementation of the contested administrative decision. It is an indispensable prerequisite of an interim measure under article 10, paragraph 2, of the UNDT statute and article 14, paragraph 1, of the UNDT RoP that judicial proceedings have already been started, in other words that the case be already pending before this Tribunal. In the present case, the Applicant did not yet submit an application against the decision of 1 March 2010 under article 8 of the UNDT RoP. Therefore, the request for suspension of action is not receivable under article 10, paragraph 2, of the UNDT statute and article 14, paragraph 1, of the UNDT RoP either.

21. The Applicant is of course free to resubmit a request for suspension of action under article 10, paragraph 2, of the UNDT statute and article 14, paragraph 1, of the UNDT RoP, once he submitted an application against the decision of 1 March 2010 under article 8 of the UNDT RoP, if he considers this to be useful to safeguard his rights.

22. Finally, even though the Applicant, quite rightly, is entitled to express his astonishment as to the bad faith shown by the administration with respect to the execution of the Tribunal's orders, it falls exclusively on the Tribunal to assess the conclusions to be drawn from such behaviour. In this respect, it seems useful to remind the administration of paragraph 1 of article 9 of the UNDT statutes, which provides "The Dispute Tribunal may order production of documents or such other evidence it deems necessary" and of article 18, paragraph 2, of the UNDT RoP which states "The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings".

Conclusion

23. For the reasons stated above, it is DECIDED that

The application for suspension of action is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 10th day of March 2010

Entered in the Register on this 10th day of March 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva