



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

WOINOWSKY-KRIEGER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for applicant:
Miguel A. Longone

Counsel for respondent:

Introduction

1. On Friday, 28 May 2010, at 5.43 p.m., the United Nations Dispute Tribunal (UNDT) received the first batch of a series of annexes related to an application for suspension of action filed on behalf of the applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (ICTY). At 6.57 p.m. that day, the Tribunal received the application for suspension of action.

2. The applicant requested the Tribunal to suspend the decision not to extend his fixed-term appointment, which was due to expire on Monday, 31 May 2010.

Facts

3. The applicant entered the service of ICTY in 1995 on a fixed-term appointment (100 series of the former Staff Rules), which was continuously renewed. At the time of this application, he was serving as an intelligence analyst in the Office of the Prosecutor, at the P-3 level. His last fixed-term appointment was due to expire on 31 May 2010.

4. In mid-December 2009, the applicant was informed that his post would be abolished and that his contract would not be extended beyond 1 or 30 June 2010 (date unclear from the material received).

5. By memorandum dated 18 January 2010, the Deputy Prosecutor and the Chief of Trial Division provided the applicant, at the latter's request, with additional information as to the operational needs justifying the abolition of his post in the Trial Division and the extension of his contract up until 1 June 2010 only.

6. By memorandum dated 10 March 2010, entitled "Inclusion of ICTY Staff at the 30-day Mark", the Officer-in-Charge, Human Resources Section, ICTY, informed the applicant that, among other things, his post would be abolished effective Monday, 31 May 2010.

7. On 13 May 2010, the applicant wrote to the Secretary-General to request a management evaluation of:

- a. the decision not to extend his fixed-term appointment beyond 31 May 2010;
- b. the decision “by the UNICTY HR Section not to respond to [his] inquiries concerning the extension of [his] fixed-term appointment until the completion of the review process and final decisions taken on [his] conversion to a permanent appointment”.

At the same time, he requested the Secretary-General to suspend the implementation of the contested decision pending completion of the management evaluation, pursuant to provisional staff rule 11.3 (b) (ii).

8. By letter dated 18 May 2010, received by the applicant on Thursday, 20 May 2010, copied to, among others, the ICTY Registrar and the ICTY Chief of Administration, the Under-Secretary-General for Management informed the applicant of the Secretary-General’s decision to reject his request for a suspension of action, on the grounds that the contested decision was not *prima facie* unlawful. The Administration’s contentions can be summarized as follows:

- a. In accordance with relevant rules and jurisprudence, a fixed-term appointment carries no expectancy of renewal and expires automatically on the date indicated in the letter of appointment;
- b. ICTY is currently abolishing posts in the context of its downsizing. The applicant’s post was selected for abolition based on the Organization’s operational requirements. There is no *prima facie* impropriety in that decision;
- c. The former UN Administrative Tribunal recognized the wide discretionary powers of the Administration regarding reorganization decisions and held that the burden of proving improper motivation of such a decision rests with the person making the allegation;

- d. The mere fact that the applicant is eligible to be considered for a permanent appointment does not vitiate the contested decision and is not sufficient to establish its *prima facie* illegality.

9. On Friday, 28 May 2010, at 5.43 p.m., the Registry received from the applicant's counsel the first batch of a series of annexes related to an application for suspension of action. At 6.16 p.m., the Registry asked counsel for the applicant to send without delay the application for suspension, but noted that it was past working hours in Geneva and that the Registry would only be able to transmit it to the respondent on Monday, 31 May 2010. At 6.57 p.m., the Registry received the application for suspension of action.

10. On Monday, 31 May 2010, the presiding Judge reviewed the application for suspension of action concerning the decision not to extend the applicant's appointment, which was due to expire on the same day. Monday, 31 May 2010 was a holiday at Headquarters in New York.

Applicant's contentions

11. The contested decision appears to be *prima facie* unlawful:
 - a. The contested decision violates the applicant's acquired right to be considered for conversion to a permanent appointment;
 - b. The contested decision violated "the overriding pre-established criteria for transparent downsizing".
12. The case is of particular urgency since the applicant's appointment expires on 31 May 2010.
13. Irreparable damage will be caused to the applicant if the contested decision is not suspended because:
 - a. He will lose his acquired right to be considered for conversion to a permanent appointment;
 - b. Money cannot fully compensate the harm caused to the applicant and his family.

Considerations

14. The applicant requests the Tribunal to suspend the implementation of the decision not to extend his fixed-term appointment beyond 31 May 2010.

15. The application was filed after the applicant wrote to the Management Evaluation Unit of the UN Secretariat to request a management evaluation of the contested decision. At the date of issuance of this order, the time limit for the Secretary-General's response to the request for management evaluation was still running and no such response had been made to the applicant. Thus, the application for suspension of action must be examined in the light of article 2, paragraph 2, of the Tribunal's statute, which 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...”

16. It follows from the wording of the last condition quoted above - the implementation “would” cause irreparable damage – that the contested administrative decision should not have already been implemented at the time of the Tribunal's decision. In the case at hand, the contested decision will become effective at midnight since the applicant's contract expires on 31 May 2010. Therefore, the Tribunal has to decide today on the application.

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. Normally, such an application cannot be successful. This is the situation in the case at hand.

18. The applicant had been informed about the intention to abolish his post in December 2009. He received additional, detailed information in a memorandum dated 18 January 2010. This was followed by a memorandum dated 10 March 2010 informing him that his post would be abolished effective 31 May 2010. His request for a management evaluation was not filed before 13 May 2010, some two weeks before the expiration of his current appointment. The request for suspension of action addressed to the Secretary-General, which was combined with the request for a management evaluation, was rejected by letter dated 18 May 2010. According to the applicant, the decision was sent to him on 20 May 2010 after close of business.

19. The Tribunal notes that the applicant let pass more than one full week before filing his application for suspension of action with the Tribunal. Having received the application on Friday, 28 May 2010 after close of business, the Tribunal could not take any steps on that day. Monday, 31 May 2010 being a holiday at Headquarters in New York, no reply could be sought from counsel for the respondent, namely the Administrative Law Section at the UN Secretariat, before the end of the day, when the applicant's contract was due to expire. The Tribunal could have exceptionally sought a reply from ICTY, but given that it needed to issue an order on the application by the end of the day, it could not have given ICTY sufficient time to prepare a meaningful reply.

20. Asked about the reasons for his late application, the applicant's counsel referred to efforts at informal resolution with the help of the Office of the Ombudsman. Although this approach is appreciated, it may not serve as a justification for not filing an application with the Tribunal in a timely manner. On the contrary, as the issues of the conflict between the parties have been well known for nearly half a year, the applicant should have been able to file his application with the Tribunal as soon as he learned that the Secretary-General had rejected his request for suspension of action.

21. For the reasons stated above, it is DECIDED that:

The application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 31st day of May 2010

Entered in the Register on this 31st day of May 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva