UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2010/120
Order No.:	93 (GVA/2010)
Date:	31 December 2010
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

LORAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. By email dated 30 December 2010, the Applicant filed with the United Nations Dispute Tribunal an application requesting it to suspend, during the pendency of the management evaluation, the implementation of the decision to terminate her indefinite appointment effective 1 January 2011.

Facts

2. The Applicant joined the United Nations High Commissioner for Refugees ("UNHCR") in September 1999 and in January 2000, like all UNHCR staff members at the time, she was granted an indefinite appointment under rule 104.12(c) of the then applicable Staff Rules. She works in the Brussels office as a Senior Secretary, at level G-5.

3. By letters dated 18 March 2010 and 28 May 2010 (not available to the Tribunal), the Applicant was informed, respectively, of the reorganization of her unit and of the abolition of the post she occupied effective 30 November 2010.

4. According to the Applicant (no supporting documents provided), she wrote several emails to enquire about training opportunities and the possibility to be placed in a different position "owing to the privileges of her indefinite appointment", but she never received any response.

5. In October 2010, the Regional Appointments, Postings and Promotions Committee ("Regional APPC") was tasked with performing the functions of a Comparative Review Panel ("CRP"). The CRP, which was comprised of six members, thus undertook a comparative review of the Applicant with three staff members on similar positions holding fixed-term appointments, two at level G-5 like the Applicant and one at level G-6.

6. On 20 October 2010, the CRP concluded that, compared to the other three staff members, it could not "recommend that [the Applicant] be retained for any of the positions determined to be similar at the Brussels duty station", because of her poor English skills and other professional and behavioural weaknesses as

highlighted on several occasions over the years by different supervisors in her performance appraisal reports.

7. The case was then submitted to the Appointments, Postings and Promotions Committee at Headquarters ("Headquarters APPC") for review. The Headquarters APPC, which is composed of six members, held four meetings between 19 November and 9 December 2010 to review the case. On 9 December 2010, the APPC concluded that it "could not find any reason not to retain [the Applicant] against one of the [two] available G-5 positions". It therefore recommended that the Applicant and another staff member "be retained against the two available G-5 positions".

8. The conclusion of the CRP and APPC were then submitted for decision to the Assistant High Commissioner for Protection. She substituted the UNHCR Representative in Brussels to avoid any conflict of interest. On 23 December 2010, the Assistant High Commissioner concluded that the procedure followed by the Headquarters APPC was fundamentally flawed because:

> [The APPC] applied arbitrary scales to a point's matrix, which had the effect of not sufficiently discussing and reaching a consensus of the elements in the rating scale. Some of the elements in the rating matrix (such as language ability, years of service and integrity) were not applied consistently and in some cases incorrectly. In regard to a comparative review of performance, which was dealt with separately from the point's matrix, the APPC, in my opinion, applied a flawed approach in only comparing the first performance appraisal of [the Applicant] with the other two staff members. The procedure expects that the overall performance of the staff members be compared and not a partial record of performance.

The Assistant High Commissioner therefore decided to endorse the CRP recommendation not to retain the Applicant in service. On the same day, the Director of the Division of Human Resources Management ("DHRM") endorsed the Assistant High Commissioner's decision.

9. By letter dated 29 December 2010, the Applicant was informed that following the comparative review, it had been determined that "her services could [not] appropriately be utilised on another post" and that her indefinite appointment would therefore be terminated effective 1 January 2011.

10. By email dated 30 December 2010, 11.32 a.m., copied to the Director of DHRM and to the Staff Council, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision to terminate her indefinite appointment.

11. Around midday that day, the Applicant filed with the Tribunal an application requesting it to suspend, during the pendency of the management evaluation, the implementation of the decision to terminate her appointment.

12. Shortly thereafter, the application was transmitted to the Respondent, who submitted his reply on the same day at 5 p.m., as instructed by the Tribunal.

Parties' contentions

13. The Applicant's contentions are:

a. The contested decision is unlawful because the Regional APPC in Belgium has no authority to recommend termination of a staff member other than on the ground of unsatisfactory service. In her case, her performance appraisal ratings have always been satisfactory. Furthermore, in the case of reduction of staff, a comparative review should have been conducted and her indefinite status obliged UNHCR to give her priority over staff on fixed-term or temporary appointments;

b. The case is of particular urgency because she was only given a two-working day notice to contest the decision and because she will lose "the privileges of her indefinite appointment". Furthermore, she is a single mother and the loss of medical coverage resulting from her separation will put her in a difficult situation;

c. Irreparable damage will be caused because if her appointment is terminated, she will lose the privileges of her indefinite status, including priority consideration, medical insurance, and salary. Additionally, since UNHCR is no longer issuing indefinite appointments, the damage will be irreparable.

14. The Respondent's contentions are:

a. The Applicant was alerted to the reorganisation of the office on 18 March and 28 May 2010 and was therefore fully aware that a comparative review would take place;

b. The comparative review was conducted in accordance with the procedures set out in IOM/19/1997-FOM/24/1997 of 18 March 1997 and the Applicant was given fair consideration in the process;

c. Contrary to the Applicant's claim, in a comparative review, the fact that she holds an indefinite appointment is only to be taken into account after due regard has been given to competence, integrity and length of service;

d. The Brussels office took action to ensure that the Applicant would continue to receive adequate medical coverage;

e. The Applicant has not provided sufficient evidence in support of her request for suspension of action, which should therefore be rejected.

Considerations

15. The Applicant requests suspension of action, during the pendency of the management evaluation, on the decision to terminate her indefinite appointment effective 1 January 2011.

16. Article 2.2 of the Tribunal's Statute specifies the three statutory prerequisites for suspending implementation of an administrative decision, namely prima facie unlawfulness, irreparable damage and urgency.

Prima facie unlawfulness

17. Taking the first of the three prerequisites, the Tribunal must determine whether "the decision appears prima facie to be unlawful".

18. The Tribunal recently stated in *Corna* Order No. 80 (GVA/2010) of 16 December 2010:

> 28. As the Tribunal held in *Buckley* UNDT/2009/064 and *Miyazaki* UNDT/2009/076, the combination of the words "appears" and "prima facie" shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. This was echoed in *Corcoran* UNDT/2009/071, in which the Tribunal held that "since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that prima facie [unlawfulness] in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision". In *Utkina* UNDT/2009/096, the Tribunal also stated that as long as the Applicant can demonstrate that the decision was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith, the test for prima facie unlawfulness will be satisfied.

19. It is a well-recognized principle that the Administration is bound by its own rules. There are, however, in the present case reasonable doubts as to whether the comparative review process was conducted in accordance with established procedures.

20. First, both IOM/19/97-FOM/24/97 of 18 March 1997 (Redeployment, Retrenchment and Voluntary Separation) and the "Guidelines for the Implementation of Comparative Review Process for General Service Staff" issued on 23 November 2007 stipulate that members of the CRP "should not be currently serving on … the APPC". In the present case, however, it was the Regional APPC which acted as CRP.

21. Second, IOM/19/97-FOM/24/97 (see Attachment 1 of Annex 1, paragraph 2(a)) —which has not been formally repealed to date—and the above-mentioned Guidelines (see "Composition and Quorum of the Panel", paragraph 1(a)) provide that the CRP must be composed, respectively, of eight and six members. In the Applicant's case, the Guidelines seem to have been followed rather than the IOM-FOM since the CRP which examined her case was composed of six members only. Based on the information available before it, it is unclear to the Tribunal how the Guidelines could be given precedence over the IOM-FOM, since the latter appears to be superior to the former in the hierarchy of norms.

22. Third, paragraph 7 of the Guidelines stipulate that "[i]n the event that no suitable posts can be identified, the Panel may compare the concerned staff to posts graded at one level lower than their personal grade…". While the use of "may" seems to indicate that the Panel is not obliged to do so, there are no explanations in the minutes of the CRP as to why the Panel did not deem it pertinent to compare the Applicant with staff members at a lower grade.

23. Finally, it is unclear from the documentation provided which process was followed and what the legal basis was to give decision-making authority in this case to the Assistant High Commissioner for Protection.

24. Without prejudice to the legitimacy of the decision as far as the substantive case is concerned, the above-mentioned potential procedural irregularities are sufficient to give rise to reasonable doubts about the lawfulness of the contested decision. The Tribunal therefore considers that the prerequisite of prima facie unlawfulness is satisfied.

Irreparable damage

25. With regard to irreparable damage, the Tribunal recently held in *Corna* Order No. 80 (GVA/2010) of 16 December 2010:

> 39. The requirement of irreparable damage has been addressed in several judgments of the Tribunal, the general rule being that no damage is irreparable if it can be fully compensated by a monetary award (see *Fradin de Bellabre* UNDT/2009/004, *Tadonki* UNDT/2009/016 and *Utkina* UNDT/2009/096). Such a rule, however, is not unqualified.
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> 40. In *Fradin de Bellabre* UNDT/2009/004, the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. In *Tadonki* UNDT/2009/016, the Tribunal further elaborated on the general rule noting that:
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> > But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the

> Respondent's action or activities will lead to irreparable damage.
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> 41. In *Corcoran* UNDT/2009/071, the Tribunal also held that:
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> > Irreparable damage may already be at hand where … unemployment after a very long time of service would result from the implementation of the contested decision (cf. UNDT/2009/007 *Rees*, UNDT/2009/016 *Tadonki*, UNDT/2009/008 *Osman*). In the applicant's case … being unemployed at her age after a period of 14 years within the Organization would also be a serious harm, that could not simply be compensated by an award of damages.

26. The Tribunal also subsequently held in *Tranchant* Order No. 91 (GVA/2010) of 22 December 2010:

> 40. The Tribunal considers that the fact, for a staff member, to be deprived of employment with a notice of one month only constitutes irreparable moral harm, that could not simply be compensated by an award of damages.

27. In the present case, the Applicant was only given a two-day notice of the termination of her indefinite appointment, after more than eleven years of service. Furthermore, even if she succeeds in finding alternative employment with the United Nations, she may never regain the job security that an indefinite appointment—a type of appointment that no longer exists—gave her. The Tribunal considers that this is not a damage it would be able to repair with an award of appropriate compensation, should the Applicant win her substantive case.

Urgency

28. The prerequisite for urgency is also satisfied since the termination of the Applicant's appointment will become effective on 1 January 2011, that is, one day after the issuance of this order. Of course this circumstance alone is not sufficient. As the Tribunal held in *Applicant* Order No. 164 (NY/2010), urgency must not be self-created. In the present case, however, the Tribunal finds that the Applicant could not have been more diligent in filing her request for suspension of action and that the urgency was created by the Respondent himself, who gave her a two-working day notice only of the decision to terminate her indefinite appointment.

Conclusion

29. In view of the foregoing, the Tribunal ORDERS the suspension, during the pendency of the management evaluation, of the decision to terminate the Applicant's indefinite appointment effective 1 January 2011.

(*Signed*)

Judge Thomas Laker

Dated this 31st day of December 2010

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

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva