



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

MASYLKANOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES AND ON CASE
MANAGEMENT**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 11 July 2012 with the New York Registry of the Tribunal, the Applicant, who worked until 5 March 2012 as a Political Officer under a temporary appointment with the United Nations Assistance Mission in Afghanistan (“UNAMA”), contests the “[n]on-extension of [her] contract as a result of [the] Administration’s failure to respond to [her] complaint of harassment”.

Background

2. The Applicant entered service at UNAMA in March 2011 under a six-month temporary appointment, subsequently renewed for five months and 28 days.

3. On 15 November 2011, the Applicant filed a complaint against her supervisor for harassment and abuse of authority with the Conduct and discipline Office, UNAMA. A fact-finding investigation was launched upon her complaint.

4. The Applicant’s temporary appointment with UNAMA expired on 5 March 2012 and was not renewed.

5. The Respondent filed his reply to the above-mentioned application on 13 August 2012.

6. Following directions issued by the Tribunal through Orders No. 351 (NY/2013), 270 (NY/2013), 9 (NY/2012), 10 (NY/2012) 24 (NY/2014), and 67 (NY/2014), a series of documents were disclosed by the parties and two case management hearings were held.

7. By Order No. 81 (NY/2014) on change of venue, dated 21 April 2014, the case was transferred from the New York to the Geneva Registry of the Tribunal.

8. On 2 May 2014, the Applicant filed a motion requesting the Tribunal, *inter alia*, to order, as temporary relief, “the removal of ALL adversary [sic] materials from ALL personnel files pending the final outcome of the case”. In her motion, the Applicant submits that she “has been denied access to her personnel file where

her supervisor with the complicity of UNAMA Administration have placed adversary material, which is false and inaccurate”. She alleges that this has resulted in in the Applicant not being recruited for any of the 90 posts that she has applied to since her separation, despite her being on the roster of pre-approved candidates.

9. Pursuant to Order No. 62 (GVA/2014), the Respondent provided comments on the Applicant’s 2 May 2014 motion on 5 May 2014. Specifically, the Respondent avers that the motion is irreceivable because, on the one hand, interim measures may only be ordered to address a decision that is the subject of an ongoing proceeding and, on the other hand, a non-renewal decision may not be the subject of interim measures. He further holds that the motion is without merit on three grounds: the Applicant has not been denied access to her Official Status File (“OSF”); there is no connection between any selection decision and any material allegedly placed in her OSF; and the Applicant cannot establish prima facie unlawfulness, urgency and irreparable harm.

10. On 6 May 2014, the Applicant submitted a motion for leave to respond to the Respondent’s response. The Tribunal considered that this last submission was not required and, accordingly, did not take it into account in rendering this Order.

Consideration

11. Article 10.2 of the Tribunal’s Statute sets out the scope of the Tribunal’s prerogatives to order interim measures after the filing of an application before it:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

12. Similarly, article 14.1 of the Tribunal’s Rules of Procedure reads:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the

contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

13. In light of the cited provisions, the Respondent's view that the motion is irreceivable is incorrect. First, these provisions give wide latitude to the Tribunal in determining the nature of the relief to be awarded. In contrast to the provisions on suspension of action pending management evaluation (see article 2.2 of the Tribunal's Statute and article 13 of the Tribunal's Rules of Procedure), they do not restrict the kind of interim measures to addressing strictly the contested decision. The wording used (i.e., "[t]his ... may include") leaves no doubt that suspension of action is not the only modality of relief envisaged. Second, the exception established for cases of "appointment, promotion or termination" applies exclusively to ordering the suspension of the implementation of the contested decision. The case at hand concerns a non-renewal decision, which according to the Appeals Tribunal case law (*Benchebbak* 2012-UNAT-256) constitutes a case of appointment, promotion or termination. However, the Applicant clearly does not move for suspension as an interim measure, hence the said exception is not applicable.

14. Regarding its merits, the Tribunal takes note that the motion for temporary relief is eminently vague, including on the crucial point of what is that the Applicant is requesting for specifically. She asks generally for "ALL adversary material" to be removed from "ALL personnel files". No further explanation is given as to which "personnel files" she refers to or which sort of documents she considers as adversary. She does not cite specific documents, nor does she clarify if she relies for that purpose on the notion of "adverse material" within the meaning of administrative instruction ST/AI/292 (Filing of Adverse Material in Personnel Records). Although such vagueness may be unavoidable, given that her contention is, precisely, that she has not had a chance to see her Official Status File, it is impossible for the Tribunal to render an order which would raise doubts about its precise contents and scope.

15. In the circumstances just described, the Tribunal is not in a position to make a determination of whether the three cumulative conditions for interim measures, to wit, prima facie unlawfulness, urgency and irreparable damage, are fulfilled, and of the extent of the measures requested. Therefore, the motion for interim measures must fail.

16. In any event, as a matter of law, every staff member is entitled to examine his or her OSF once a year, as per section 2 of administrative instruction ST/AI/108 (Annual Inspection of Official Status File). The Respondent has recalled such right and made it clear that he has no objection thereto in the Applicant's case.

17. It follows from the above, that the Applicant has to be given access to her OSF promptly under the same conditions prescribed in ST/AI/108. The Tribunal is giving this direction as a matter of case management, hence, pursuant to Article 19 of its Rules of Procedure, that reads:

Case management

The dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any directions which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

IT IS ORDERED THAT:

18. The motion for interim measures is rejected.

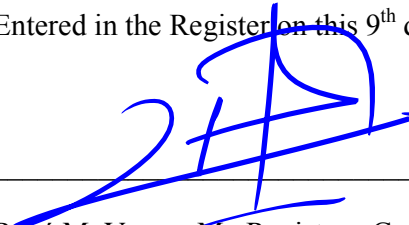
19. The Respondent make all administrative arrangements to give the Applicant access to her OSF so that she review it under the same conditions set forth in administrative instruction ST/AI/108.



Judge Thomas Laker

Dated this 9th day of May 2014

Entered in the Register on this 9th day of May 2014



René M. Vargas M., Registrar, Geneva