UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/067
Order No.: 75 (NBI/2010)
Date: 7 May 2010
Original: English

Before: Judge Vinod Boolell (Presiding)
Judge Nkemdilim Izuako
Judge Goolam Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KASMANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON A MOTION FOR SUSPENSION OF ACTION

Counsel for applicant:
Katya Melluish

Counsel for respondent:
ALS/OHRM
Joerg Weich, OHRM/UNON

Facts

1. On the morning of 16 October 2009, the UNDT Registry received an application for suspension of action in respect of the administrative decision which was to be effected that afternoon. The Applicant's motion for suspension of action was also copied to the Respondent. Separately, the Applicant filed *ex parte* submissions of evidence in support of his application. The Tribunal granted the applicant's motion and ordered an interim suspension of the decision of 15 October 2009 "until further notice".

2. The exigencies of the circumstances at the time made it necessary for the Tribunal to rule on the Applicant's motion before hearing the Respondent. It was a matter of hours between the receipt and registration of the application by the Tribunal and the end of the working day in Nairobi at which time the Applicant was to be separated. The urgency was compounded by the fact that at the time, the Respondent was still being represented by Counsel from the Administrative Law Unit in New York. On 21 October 2009, the Respondent filed its Reply to the Application for Suspension of Action.

3. On 30 October 2009, the Applicant filed an Application for Interpretation, asking the Tribunal what it meant by "until further notice" given that the Applicant's contract was due to expire on 3 November 2009. The Respondent's Reply to this Application for Interpretation was filed on 2 November 2009.

4. On 3 November 2009, the Tribunal rendered his reasoned decision on the Application for Suspension of Action filed on 15 October 2009 and Application for Interpretation filed on 30 October 2009 (2009/63). The Tribunal granted the Applicant's Motion for Suspension of Action and ordered the suspension of the Respondent's decision not to renew the Applicant's appointment until the substantive application is heard and determined. In light of the Tribunal's reasoning, the Application for Interpretation was also held to be moot.

5. Also on 3 November 2009, the President of the Tribunal, mindful of the importance and complexity of the case, issued an order constituting a panel of three judges in accordance with Article 10(9) of the Statute and Article 5(2) of the Rules of Procedure.

6. On 16 December 2009, the Respondent filed an appeal against the UNDT decision of 3 November 2009 (2009/63). The Respondent's appeal brief was served on the Applicant for a response on 18 December 2009. The Appeal is registered in UNAT's records as UNAT Case No 2009–015.

7. The substantive application was heard in February 2010; 5 witnesses, including the Applicant, were heard over the course of three hearing days, following which the matter was adjourned for judgement.

8. The United Nations Appeals Tribunal (UNAT) decided on the appeal on 30 March 2010.

9. The present application, filed on 29 April 2010, relates to the Respondent's action in respect of the Applicant following receipt of the appeal judgment. The Respondent was asked to respond to the Motion for Suspension of Action by close of business on 29 April 2010. 30 April 2010 being a public holiday for the United Nations in Nairobi, the suspension of action application was set down for hearing on 3 May 2010 which was also the date on which the Applicant's contract was set to expire. The Applicant was, however, served with a notice of separation on 29 April 2010, but after the application for suspension of action was filed and served on the Respondent.

Deliberations

The Appeal Judgement

10. Under the Statute and the Rules of Procedure, an Applicant must satisfy the court on *all* limbs of the cumulative test laid out in Article 2(2) and Rules 13 and/or 14 before obtaining as an

order to suspend an administrative decision. It is by no means an easy test to meet. The Tribunal has previously held that an application for suspension

> will only succeed where the Applicant is able to establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene, and that unless it so intervenes at that stage, the Respondent's action or decision would irreparably alter the status quo. Of course, the onus of establishing a case for a suspension of action order lies on the Applicant.[1]

11. The threshold to be met being what it is, suspension is obviously not an order which a court will be minded to grant lightly. An appeal against such an order would clearly impede the smooth progress of a case, and is hardly conducive to the efficient and expeditious conduct of proceedings. The wisdom of the stipulation in Article 2(2) of the Statute, and Articles 13 and 14 of the Rules prohibiting an appeal against an order for suspension of action is therefore easily understood. As the Appeals Tribunal stated in *Tadonki*, "one goal of our new system is timely judgments. This Court holds that generally, only appeals against final judgments will be receivable. Otherwise, cases could seldom proceed if either party was dissatisfied with a procedural ruling."[2]

12. In the instant case, therefore, that an appeal against an interim order (2009/63) has been received and decided upon by the Appeals Tribunal, on a case which has been heard and adjourned for judgement, places the Dispute Tribunal in most difficult situation.

13. The Appeals Tribunal's reading of the Rules in effect means that a judicial finding of *prima facie* unlawfulness may be reversed, or in any case come to nought, by a decision of the Management Evaluation Unit of the Department of Management of the Secretariat. It is difficult to see why a court must be seised of an application to suspend when its decision can, in anything from 30 to 45 days, be reversed by a decision of the administration endorsing its own impugned decision. The framers of the new system and drafters of the Statute could not have intended for

[1] *Omondi v Secretary General of the United Nations*, UNDT/NBI/O/2010/017, 11 February 2010.
[2] *Tadonki v Secretary General of the United Nations*, UNAT Case No. 2009-006, at para. 8.

the new system to be one in which the Secretary General's review of his own decision would result in a preceding judicial order, on the same set of facts, being rendered empty and therefore useless. If the sanctity of the judicial process and all that it entails is to mean anything at all, such a reading of the Statute and Rules must not be correct.

Procedural Defects

14. The Applicant in the instant case received a copy of the appeals judgment on 28 April 2010. The Tribunal notes that the judgment was delivered to the Applicant in French, notwithstanding the provision of Article 10(8) of the Statute of the Appeal Tribunal which requires that copy of the judgement be sent to the Applicant "in the language in which the appeal was submitted unless he or she requests a copy in another official language of the United Nations." The Applicant's brief was submitted in English.

15. The Tribunal notes with dismay that on receipt of the appeals judgement in French, the Respondent proceeded to issue the Applicant with a notice of separation effective immediately. That this was done on the advice of counsel, and with full knowledge of the fact that a motion for suspension had been filed and the matter set down for hearing, is significant for the contempt it shows of these proceedings and is most regrettable. The manner in which the Applicant's separation was effected, in its chronology, very clearly and deliberately undermines the authority of the Tribunal and smacks of bad faith. It is with grave concern that the Tribunal feels compelled to note that the conduct of the Respondent does not bode well for a "decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process."[3]

16. The Tribunal is faced with a further difficulty in respect of this case. The Respondent's submissions in response to the Applicant's motion for suspension of action canvasses arguments in respect of the receivability of the motion and the effect of 2009/63 being annulled. As this case is currently proceeding before a three-judge panel, it is imperative that *all* Judges on the Bench be in a position to understand the import and ambit of the UNAT Judgement which

[3] A/RES/63/253, 17 March 2009.

annulled the Order. Two out of the three Judges comprising the Bench are not in a position to read the UNAT Judgement issued in French.

17. While the Applicant has not argued the instant motion on the basis of Article 10(8), it is clear to the Tribunal from the submissions of the Parties that a notice was sent to the Applicant on 29 April 2010 informing him of his immediate separation from service on the basis of a judgment he does not understand. For its part, a majority of the Bench in this case finds itself in the curious position of not being able to understand the submissions being relied on by counsel for the Respondent. That Counsel for the Applicant has not made reference to the reasoning of the Appeals Tribunal is therefore hardly surprising.

Conclusion

18. In simply stating that the UNDT has "exceeded its authority", and therefore annulling 2009/63, the appeals judgement appears to support the Respondent's submission that there is no contract between the Applicant and the organisation, as the only basis for his continued employment with the organisation is the impugned (and now annulled) UNDT Order. The Respondent takes the argument further and contends that as separation is immediate, not only has the applicant no standing before the UNDT as he is not a staff member, but also cannot bring an application to suspend as the decision has already been implemented!

19. The appeal judgment is also silent on the intended effect(s) of the ordered annulment. Given that the first instance findings on the test for suspension of action have not been impugned, it is for the Dispute Tribunal to strike a balance between the effect of an annulled order on the contract of employment and the need to ensure that the court's interim findings on the facts, particularly on *prima facie* unlawfulness, are not undermined. In so doing, the court must ensure that the interest of the Parties and justice are paramount in its considerations and that the orders it makes reflect as much.

20. While the Tribunal has previously held that an employer should not simply be able to pay its way out of its errant or egregious conduct, and continues to hold that view, the appellate ruling in the instant matter unfortunately leaves the court with little choice.

21. On the facts of the present case, the Tribunal cannot be seen to be forcing a contractual relationship between an employer and an employee. This principle does not, in any way, diminish the fact that the Tribunal has made preliminary findings of wrongful conduct on the part of the employer. In the circumstance that those findings are found to be proven to the appropriate standard on the basis of the evidence tendered at the substantive hearing, the remedy for the employee can only take the form of compensation for the injuries that have been caused to him.

This Application therefore **cannot be entertained**.

Judge Boolell

Dated this 7th day of May 2010

Entered in the Register on this 7th day of May 2010

Jean-Pelé Fomété, Registrar, UNDT, Nairobi