



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/71
Order No.: 243 (NBI/2013)
Date: 31 October 2013
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

LAURENTI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

The Application and Procedural History

1. The Applicant in the present case holds a permanent appointment at the D1 level. He currently serves as Director of the Programme Planning and Technical Cooperation Division (PPTCD), in the Economic and Social Commission for Western Asia (ESCWA).

2. On 24 October 2013, the Applicant filed an Application for Suspension of Action with the United Nations Dispute Tribunal (UNDT) in Nairobi seeking a suspension of the decision by the Executive Secretary of ESCWA to designate the Deputy Executive Secretary of ESCWA (Deputy ES), as the head of the UN Evaluation Group (UNEG) Unit and the Strategic Direction and Partnership Section (SDPS) and to remove evaluation functions from PPTCD (impugned decision).

3. The impugned decision was communicated to the Applicant on 14 October 2013.

4. The Applicant sought management evaluation of the impugned decision on 23 October 2013.

5. The Respondent filed his Reply to the Application on 28 October 2013. The Tribunal served the Respondent's Reply on the Applicant on the same day and directed that any submissions in response to the Reply must be filed on the same day. The Applicant filed his submissions in response to the Respondent's Reply later that day.

Submissions

6. The Applicant contends that evaluation was an integral function of his division, and that UNEG comprises directors of divisions who oversee evaluation in

programme planning. The function was removed from his supervision and transferred to a section that was previously part of the Division he directed.

7. The Applicant submits that the organisational change cannot be explained “without reference to the prior reporting irregularities, which then progressed into formal allegations of nepotism, conflict of interest, collusion, mismanagement of funds and misconduct [...]and a pattern of retaliatory conduct” which was reported to the Ethics Office and the Office of Internal Oversight Services.

8. The Applicant contends that his Application for suspension of actions meets the test set out in Rule 13 of the UNDT Rules of Procedure, in that the organisational change is unlawful as it was motivated by extraneous factors; it is urgent, in that although the decision was communicated to him on 13 October 2013, its exact date of implementation is unclear and will in any case be on an on-going basis; and that it stands to cause irreparable harm to his reputation as Director in charge of programme planning and technical cooperation.

9. The Respondent submits that the Application for suspension of action must be dismissed as the Applicant is seeking to challenge a decision which has already been implemented. The Respondent also contends that the impugned decision is not *prima facie* unlawful, urgent or likely to cause the Applicant irreparable harm.

10. The Respondent argues that the Applicant never challenged the ES’s decision to change the reporting lines of SDPS, which became effective on 20 June 2013. The ES’s decision to designate the Deputy ES as ESCWA’s “UNEG Head” was in accordance with his new responsibility for the evaluation functions. The impugned decision has been implemented and this implementation was communicated to the UNEG Chair on 17 October 2013.

11. The Applicant submits that the Respondent’s submissions on Receivability must be dismissed as the no implementation date was stated in the communication

announcing the decision to the Applicant. Further, the implementation of the decision must be seen as part of an on-going policy directive on functions of a continuing nature.

12. The Applicant informs the Tribunal that as at 29 October 2013, the PPTCD was still being asked to participate and provide current information on evaluation, which is inconsistent with the Respondent's submissions on receivability.

Deliberations

13. Applications for suspension of action are governed by article 2 of the Statute of the United Nations Dispute Tribunal ("the Tribunal") and article 13 of the Tribunal's Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. prima facie unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted. Under art. 13.3 of the UNDT Rules, the Tribunal has five working days from the service of an application on the respondent to consider an application for interim measures.

14. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

15. Before entering into a discussion on whether the Applicant has met the test for the injunctive relief that is sought, the Tribunal must determine whether or not the impugned decision has been implemented.

16. In the circumstances of the present case, the Tribunal finds the situation to be opaque at best. Whereas the Respondent claims that the impugned decision was

implemented when SDPS was removed from the Applicant's Division, which move the Applicant did not challenge, it is also clear from the record that an organisational change such as the one complained of must logically be part of an ongoing process. How else would one explain the act of seeking the participation of PPTCD in an evaluation exercise?

17. It is difficult for the court to provide effective and meaningful injunctive relief on a process which has already commenced. Stopping a process which has already begun could potentially result in more harm than good. The court would be seen as meddling in the substantive functions of an office and adversely affect the work of many staff members. In other words, granting an injunction at this stage of the process would affect more than just the Applicant.

18. Be that as it may, there is also enough on record to persuade the Tribunal that the impugned decision, whether that of 20 June 2013, or when it was communicated to the Applicant in October, smacks, at least *prima facie*, of an unlawful act tainted by extraneous factors.

19. The Tribunal therefore finds itself in the uncomfortable situation of having to allow a *prima facie* unlawful act to stand simply because its implementation has commenced.

20. It appears to the Tribunal that the circumstances described by the Parties, which transpires at the highest levels of ESCWA, can potentially deteriorate (if it has not already) to create an unhealthy working environment.

21. On the one hand, the Applicant has alleged that the decision of the administration to remove certain responsibilities from his Division is retaliatory. The sooner the Ethics Office makes a determination on the complaints, the better it will be for the Organisation and collaterally to individuals concerned.

22. On the other hand, by removing responsibilities from the Applicant the Respondent has cast a shadow over the Applicant and his Division and created the appearance of the Applicant no longer being the appropriate person to fulfill the tasks assigned to him.

23. The Tribunal is persuaded that there is enough on the record to suggest *prima facie* unlawful conduct on the part of the Respondent. But the lack of clarity surrounding the implementation of the impugned decision limits what the Tribunal can do. As previously observed, an unlawful act will subsist because of the limitations on the court's powers for a grant of injunction. The difficulties arising from this limitation is obvious and needs little explanation.

24. In light of these observations, the Tribunal strongly believes that while Management Evaluation carries out its review of the Applicant's request, the parties should engage in meaningful consultations towards having this matter resolved. In the interest of efficient use of the Tribunal's resources and the expeditious conduct of these (and potentially future) proceedings, the Tribunal pursuant to Articles 10 (3) of the Statute and 15(1) of the Rules of Procedure, strongly urges the Parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

25. It, of course, remains open to the Applicant to have this matter litigated on the merits should mediation be unsuccessful.

26. The Application for Suspension of Action is **DISMISSED**.

(Signed)

Judge Vinod Boolell

Dated this 31st day of October 2013

Entered in the Register on this 31st day of October 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi