



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Lance Bartholomeusz, UNHCR

Louis Lapicerella, UNHCR

Introduction

1. The Applicant is a former staff of the office of the United Nations High Commissioner for Refugees (UNHCR). He was separated from service on 31 March 2016.

2. On 9 March 2018, he filed an application with the United Nations Dispute Tribunal (the Tribunal) requesting the suspension of the decision “to insert adverse material into [his] online personnel file”.

Facts

3. In October 2016, the Applicant directed requests for information to the former Director of the Division of Human Resources Management (DHRM) at UNHCR. He inquired about his application for a Senior Legal Officer Position as well as his final emoluments.

4. By email dated 11 October 2016 to, *inter alia*, the Deputy Director of DHRM, the Senior Principal Secretary, DHRM, followed up on the Applicant’s request. In her email, she noted that “[the former Director of DHRM] ha[d] moreover enquired if the name of the former staff member could be ‘flagged’ to say ‘consult’ as Mr. Ross will have internal status to apply for positions still...”¹.

5. On the same day, the Deputy Director of DHRM, replied that “[he was] going to ask [the Associate Personnel Administration Officer] to include the consult per/ex notation in the last row of the MSRP”².

6. A note was included in the Applicant’s record in the MSRP which reads “Consult PER/EX or the Chief of PAPS before any possible rehire. Action recorded as per the request from Lorenzo Pasquali, the Deputy Director of DHRM via email on 11 October 2016”.

¹ According to the Respondent, the Applicant may still apply for internally advertised international UNHCR vacancies for a period of two years following his separation from service, that is, until 31 March 2018.

² The MSRP is the Respondent’s human resources management system.

7. Upon the Applicant's request, on 17 November 2017, the Respondent provided him access to a scanned copy of his complete Official Status File.
8. On 21 February 2018, the Applicant wrote to the current Director of DHRM to request the deletion of "records illegally entered into MSRP".
9. On 27 February 2018, the current Director of DHRM replied to the Applicant indicating, *inter alia*, that the Respondent's Principal Legal Adviser would reply to his query.
10. On 28 February 2018, the Respondent's Principal Legal Adviser answered the Applicant by explaining the purpose of the "consult PER/EX" notation and noting the Agency's view that there was no valid reason to accede to the Applicant's request for deletion.
11. On 2 March 2018, the Applicant filed a request for management evaluation contesting the Respondent's alleged decision to "insert adverse material into [his] online personnel file to hinder [him] from getting reemployed by UNHCR".
12. On 9 March 2018, the Applicant filed the present application with the Tribunal.
13. On 13 March 2018, the Respondent filed his response to the application.
14. On the same day, the Applicant filed a rejoinder.
15. On 14 March 2018, a hearing took place in which the Applicant and Counsel for the Respondent participated.

Parties' contentions

16. The Applicant's primary contentions may be summarized as follows:

Receivability

a. The application is receivable *ratione personae*. There is a strong nexus between the Applicant's former employment with UNHCR and the administrative decision under consideration. The core issues flow from his previous employment with UNHCR.

b. The application is receivable *ratione materiae*. The contested decision produces continuing legal effects and as such, cannot be considered as having been implemented.

Prima facie unlawfulness

c. Adverse material was inserted into the Applicant's online personnel file without showing it to him before doing so, this action violates ST/AI/292 and constitutes abuse of authority and harassment as defined in ST/SGB/2008/5. The adverse material was inserted into the Applicant's personnel file in retaliation and to bar the Applicant from getting re-employed by UNHCR in the future.

Urgency

d. The adverse material in his online personnel file *de facto* bars the Applicant from receiving full and fair consideration in any selection process for positions in UNHCR. He is still an internal candidate for positions in UNHCR until the end of March 2018 and can apply for externally advertised positions afterwards. Unless the adverse material is removed, his right to full and fair consideration in any selection process will continue to be violated.

Irreparable damage

e. His reputation and his career prospects are harmed to the utmost by the adverse material in his personnel file.

Respondent's contentions

17. The Respondent's primary contentions may be summarized as follows:

Receivability

a. The application is not receivable *ratione personae*. The annotation was included in the MRPS system more than 6 months after the Applicant's separation from service. There was no "administrative decision that is alleged to be in non-compliance with the terms of the appointment or the contract of employment" as required by Article 2.1(a) of the UNDT Statute because there was no applicable appointment or contract at the time of the alleged act or decision.

b. The application is not receivable *ratione materiae*. Since the annotation was added to the MRSP system on 11 October 2016, it has already been implemented and as such, it cannot be subject to an order for suspension of action.

Prima facie unlawfulness

c. The "consult PER/EX" is a tool the Organization used to ensure that it could respond to the Applicant's various requests in a coordinated and meaningful manner. It does not prevent the reemployment of a former staff member such as the Applicant. No rules prohibit the Organization from including a mention or note requiring a coordinated response in a staff member's personnel records. Even if ST/AI/292 were applicable to UNHCR *de jure*, there was no adverse material filed.

Urgency

d. There is no urgency in the present case. Since the Applicant's right to apply for internally advertised vacancies within UNHCR will expire on 30 March 2018 – 2 years from his separation from service – the life expectancy of an order for suspension of action is not likely to exceed 15 days for applications as an internal candidate.

Irreparable damage

e. The Applicant does not identify how the contested decision causes any type of irreparable harm to his career prospects. The Applicant has no current applications with UNHCR.

Considerations

Receivability

18. Pursuant to art. 2.1 of its Statute, the Dispute Tribunal is competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of its Statute against the Secretary General “to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.” The term “contract” and “terms of appointment” include “all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance”.

19. Art. 3.1(b) of the Tribunal’s Statute provides that an application may be filed by any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

20. Art. 2.1(a) of the Tribunal’s Statute does not provide that the terms of appointment or the contract of employment must be current or still in existence at the time of the contested decision, as the Respondent claims. This reasoning is in line with art. 3.1(b) of the Statute in which the jurisdiction of the Tribunal is open to former staff members.

21. Having said the above, the Tribunal finds that while the “consult PER/EX” annotation was added to the MSRP system on 11 October 2016, it produces continuing legal effects during the whole period of its existence and as such, cannot be considered as having been fully implemented. Therefore, a decision to add a note on the MSRP file of a staff member can be suspended at any time under art. 2.2 of the Tribunal’s Statute.

22. Accordingly, since the request for management evaluation is still pending and the “consult PER/EX” annotation effects are still ongoing in the present case, the Tribunal finds that the application is receivable.

Merits

23. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Dispute Tribunal may suspend the implementation of an administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. These are cumulative conditions. Therefore, the impugned decision can be suspended only if all three requirements are met (e.g., *Hepworth UNDT/2009/003*).

Prima facie unlawfulness

24. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Hepworth UNDT/2009/003*; *Corcoran UNDT/2009/071*; *Corna* Order No. 90 (GVA/2010); *Berger UNDT/2011/134*; *Chattopadhyay UNDT/2011/198*; *Wang UNDT/2012/080*; *Wu* Order No. 188 (GVA/2013)).

25. The content of the annotation which states "Consult PER/EX or the Chief of PAPS before any possible rehire" breaches ST/AI/292 (Filing of adverse material in personnel records). While the Respondent argues that ST/AI/292 is not applicable to UNHCR, it is not in doubt that the content of the annotation constitutes adverse material. Indeed, the Respondent does not contest that the annotation was added to the Applicant's profile in the MSRP system without being shown to the Applicant.

26. Furthermore, while the Respondent argues that no rules prohibit the Organization from including in a staff member's personnel records a mention or note requiring a coordinated response, the Tribunal finds that the content of the "Consult PER/EX" annotation in the instant case clearly goes beyond the issue of a coordinated response and smacks of prejudice.

27. At the hearing, the Respondent's counsel admitted that there was no basis in law for the insertion of this kind of annotation in the staff member's MSRP

files. Although he submitted that such annotations are made by UNHCR as a matter of practice, counsel could not provide any information on when the alleged practice to include annotations in the staff member's MSRP files was adopted or any statistics to show that such a practice existed.

28. Based on the evidence before it, the Tribunal finds that the contested decision is *prima facie* unlawful.

Urgency

29. It is the Tribunal's view that the fact that the "consult PER/EX" annotation produces continuing legal effects during the whole period of its existence suffices to establish the element of urgency. Furthermore, the Tribunal notes that the Applicant is still an internal candidate for positions in UNHCR until the end of March 2018 and can still apply as an external candidate afterwards. This application is urgent.

Irreparable damage

30. As the Tribunal held in *Moise* Order No. 208 (NY/2014), "[i]t is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage".

31. The Tribunal finds that the "consult PER/EX" annotation in the MRSP Applicant's file inevitably has a negative impact on the Applicant's reputation and harms his career prospects in UNHCR in a way that cannot be repaired or adequately compensated in monetary terms.

Conclusion and Order

32. In view of the foregoing, the application for suspension of action succeeds. The Application is granted.

33. The Respondent shall **immediately** remove the adverse material complained of by the Applicant which was inserted into the said Applicant's online personnel file, pending the result of management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 16th day of March 2018

Entered in the Register on this 16th day of March 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi