



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

JAEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:

Nicholas Christonikos

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Notice: This Order has been corrected in accordance with the Rules of Procedure of the Dispute Tribunal.

Introduction

1. On 13 January 2011 the Applicant, a staff member of the International Civil Service Commission (“ICSC”), submitted an application for suspension of action of the administrative decision not to continue her special post allowance (“SPA”) for the month of January 2011 and thereafter. The Applicant asserted that this decision would go into effect on 17 January 2011 as she had been informed by the Accounts Division in the Office of Programme Planning, Budget and Accounts (“OPPBA”) of the United Nations Secretariat that her salary would be paid without the SPA unless a personnel action form extending the SPA was processed on or before 17 January 2011.

2. The Respondent filed his reply on 14 January 2011. On 17 January 2011 the Dispute Tribunal held a hearing on the application for suspension of action. The Applicant appeared before the Tribunal with her Counsel. At the hearing, the Applicant gave oral evidence under affirmation in order to clarify certain aspects of her application and Counsel for the Respondent was given the opportunity to cross-examine her. The Tribunal issued Order No. 13 (NY/2011) on 17 January 2011, by which it granted the requested suspension of action of the contested decision during the pendency of the management evaluation, directing the Respondent to “ensure that appropriate and immediate administrative arrangements are made to implement [Order No. 13 (NY/2011)]”. The Order further stated that a reasoned order would follow in due course. The present Order contains those reasons.

Facts

3. On 11 December 2000 the Applicant joined the ICSC as a general service-level Administrative Assistant in the Office of the Executive Secretary. She was granted an SPA to the P-2 level from 2001 through December 2003, and then was promoted to the P-2 level as an Administrative Officer on a fixed-term contract

limited to service with the ICSC. Since 2004 the Applicant has been on a series of fixed-term appointments at the P-2 level.

4. The Applicant's most recent letter of appointment was dated 3 November 2009 and was signed by her and by the Executive Secretary of the ICSC for the Assistant Secretary-General of the Office of Human Resources Management ("OHRM"), on behalf of the Secretary-General. This letter of appointment stated, *inter alia* (emphasis in original):

You are hereby offered a **FIXED-TERM APPOINTMENT** in the Secretariat of the United Nations, in accordance with the terms and conditions specified below, and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may be made from time to time to such Staff Regulations and such Staff Rules. ...

1. Assignment

Functional Title: Administrative Officer

Department/Office/Mission: 15icsc oexsec03

Category: Professional

Level: P-2/12

...

Effective Date of Appointment: 1 January 2010

...

3. Tenure of Appointment

This appointment is for a fixed-term of 2 years from the effective date of appointment shown above. It therefore expires without prior notice on the 31st day of December 2011.

...

5. Special Conditions

Please note that, in accordance with staff regulation 1.2(c), staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In this context, all staff members are required to move periodically to new positions, organizational units, duty stations or occupational groups in accordance with established rules and procedures.

5. Starting 1 January 2004 the Applicant has been receiving SPA to the P-3 level. For the period of 1 January 2004 to 31 December 2007 the SPA was granted by OHRM pursuant to requests from the ICSC. For the period of 1 January 2008 to 31 December 2009, it was granted by the ICSC. For the period of 1 January to 31 December 2010, the decision to grant the SPA was again made by OHRM. The Applicant submitted that this decision was made “under two-year delegation of authority back to OHRM (first of two year[s] ...)”. With respect to this most recent decision, the Tribunal was provided with a copy of an email, dated 10 November 2009, from an OHRM Human Resources Officer to the Executive Secretary of the ICSC. This email was sent in response to the Executive Secretary’s request to OHRM, dated 3 November 2009—the same date the Applicant’s letter of appointment was signed—to extend the Applicant’s SPA. This email stated:

Reference is made to your memorandum dated 3 November 2009 to [OHRM] on the above-mentioned subject.

Given the uniqueness of ICSC, and since there are no other staff members who can perform these functions in ICSC, OHRM agrees to your request to extend the SPA of Ms. Jaen through 31 December 2010.

Kindly issue the relevant personnel action.

6. In mid-November 2010 the Applicant had a conversation with the Executive Secretary of the ICSC about her SPA. The Applicant testified at the hearing that during that conversation she was told by the Executive Secretary that the prior decisions to grant her SPA were “illegal” and that it “undermined the General Assembly”. According to the Applicant, she asked the Executive Secretary to inform her of the final decision concerning her SPA in writing. However, despite several follow-up requests, she received no further information, let alone a written response. The Applicant further testified that, around the time of the events in question, one of the ICSC senior managers informed her that he had had a conversation with the Vice-Chairman of the ICSC about her SPA issue and that “it looked promising”. This testimony was not contradicted by any oral or written evidence.

7. On 7 January 2011 the Applicant received an email from an official in the OPPBA Accounts Division, sent in response to her email enquiry of the same date. The email sent to the Applicant stated:

After checking the system, yes indeed the SPA to the P-3 expired on 31 December 2010, therefore for the month of January 2011 you will be paid at the original level which is P-2-12 unless the SPA is extended and for this to happen this month the PA [personnel action] should be done and approved before the cut-off date which is on Mon[day] 17 Jan[uary] 2011.

8. On 7 January 2011 the Applicant requested management evaluation of the contested decision and, on 13 January 2011, filed her application for suspension of action with the Dispute Tribunal.

Applicable law

9. With respect to the Respondent's submissions concerning receivability of the present application, the applicable law is set out below.

10. The Statute of the ICSC, adopted by the General Assembly on 18 December 1975, states:

Article 6

1. The Commission shall be responsible as a body to the General Assembly. Its members shall perform their functions in full independence and with impartiality; they shall not seek or receive instructions from any Government, or from any secretariat or staff association of an organization in the United Nations common system.

...

Article 8

1. The Chairman shall direct the work of the Commission and its staff.

2. If the Chairman is unable to act, the Vice-Chairman shall act as Chairman.

...

Article 20

1. The Commission shall have a staff as provided in the budget approved by the General Assembly.
2. The staff, selected in accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, shall be appointed by the Secretary-General after consultation with the Chairman of the Commission and, as regards senior staff, with the Administrative Committee on Co-ordination. All staff shall be appointed after appropriate selection procedures. In carrying out their duties, they shall be responsible to the Chairman and shall be removable only after consultation with him or her.
3. Subject to paragraph 2 above, the staff of the Commission shall be regarded for administrative purposes as officials of the United Nations, which shall provide the necessary administrative facilities for them.

...

Article 21

1. The Secretary-General shall provide such office and conference facilities as the Commission may require.
2. The budget of the Commission shall be included in the regular budget of the United Nations. The budget estimates shall be established by the Secretary-General after consultation with the Administrative Committee on Co-ordination, on the basis of proposals by the Commission. ...

11. Annex II to ST/AI/234/Rev.1 (Administration of the staff regulations and staff rules) states, *inter alia*:

Matters within the authority of the Assistant Secretary-General for Human Resources Management

Rule 103.11(b) Granting of special post allowance ... including special post allowance to the D-2 level.

12. Section 6 of ST/AI/1999/1 (Delegation of authority in the administration of the Staff Rules) states:

Delegation of authority to approve special post allowance

With respect to the administration of staff rule 103.11, heads of departments or offices have the authority to approve payment of a special post allowance for all categories of staff up to the D-2 level.

13. Article 2 of the Statute of the Dispute Tribunal states:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “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;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

...

14. Article 3 of the Statute of the Dispute Tribunal states:

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

...

2. A request for a suspension of action under article 2, paragraph 2, of the present statute may be filed by an individual, as provided for in paragraph 1 of the present article.

Applicant's submissions

15. The Applicant's principal contentions, contained in her written and oral submissions, may be summarised as follows:

a. The implied decision not to continue the payment of the SPA appears *prima facie* to be unlawful. The Applicant has been in receipt of the SPA for the last seven years, her contractual situation has not changed, and she continues to perform higher level functions. None of the bases for the discontinuance of SPA, articulated in sec. 8.1 of ST/AI/1999/17 (Special post allowance), apply to her case. The contested decision is also contrary to the principle of equal pay for equal work.

a. The Applicant's case is of particular urgency. The Applicant was informed on 7 January 2011 that the contested decision would go into effect on 17 January 2011 at the latest. She filed a timeous request for management evaluation and a timeous application with the Dispute Tribunal.

b. The implementation of the contested decision would cause the Applicant irreparable damage. She would suffer a pay cut of approximately USD1,500 a month and would not be able to meet her financial obligations, including her social security taxes and mortgage. There is a real possibility that the Applicant would default on her financial obligations, which will, in turn, affect her credit rating. Further, without the interim relief sought, the Applicant's dignity and reputation would be damaged.

Respondent's submissions

16. The Respondent limited his reply filed on 14 January 2011 solely to the issue of receivability of the application, submitting that the present application was not receivable because the Applicant identified the Chairman of the ICSC as the decision-maker in this case. The Respondent further explained that the ICSC "is independent of the United Nations Secretariat" and that art. 6 of the ICSC Statute prohibits the

ICSC from taking instructions from an organisation participating in the common system. The Respondent provided the Tribunal with a copy of a document, approved by the ICSC in August 1989, entitled “Personnel Arrangements for ICSC Secretariat Staff, which explained the procedures for the selection and appointment of the ICSC staff. The Respondent did not make and did not seek to make any written submissions with respect to whether the Applicant met the requirements of *prima facie* unlawfulness, urgency, and irreparable damage.

17. At the hearing, however, Counsel for the Respondent made oral submissions regarding both the receivability of the present application and the Applicant’s substantive claims. These oral submissions may be summarised as follows:

a. The application is not receivable because there is no contestable administrative decision. Although the Applicant may raise an appeal against a decision by the Secretary-General not to grant the SPA, the present case concerns a “non-recommendation”, or the absence of a recommendation, by the ICSC to the Secretary-General to grant the SPA. Whether or not the ICSC will make such recommendation is outside of the Respondent’s control. Thus, the decision that the Applicant seeks to contest is not yet a final administrative decision.

b. The Applicant can request the Secretary-General to grant her an exception to the Staff Rules. As there was no request for an exception, there has been no decision to either grant or deny it.

c. The Applicant has not met the conditions for the granting of a suspension of action. The contested decision is not *prima facie* unlawful as there is no vacant P-3 post against which an SPA can be granted. The urgency requirement is also not satisfied in the present case because the Applicant should have been aware from *Jaen* UNDT/2010/165 that she cannot get an SPA to the P-3 level. Further, the Applicant had discussions concerning this issue with the ICSC in late 2010. The requirement of irreparable harm is also

not satisfied because any loss to the Applicant can be compensated financially.

Consideration

Receivability

18. The Respondent submitted in his written reply that “the ICSC is independent of the United Nations Secretariat” and that art. 6 of the ICSC Statute “prohibits the ICSC from taking instructions from an organization participating in the common system”. This, however, is not what art. 6 of the ICSC Statute states. Its actual language is as follows: “[M]embers [of the ICSC] shall perform their functions in full independence and with impartiality; they shall not seek or receive instructions from any Government, or from any secretariat or staff association of an organization in the United Nations common system”. As the Dispute Tribunal stated in *Jaen* UNDT/2010/165, “[a]rticle 6 of the ICSC Statute concerns the independence and impartiality of the *members* of the ICSC in performing their functions” (emphasis added). Although the Chairman of the ICSC directs its work and its staff (ICSC Statute, art. 8), it is clear from arts. 20 and 21 of the ICSC Statute, as well as paras. 4, 5, 8, 13, and 19 of the Personnel Arrangements for ICSC Secretariat Staff, that the ICSC staff members are part of the United Nations Secretariat. They are appointed by the Secretary-General and their terms of appointment are subject to the Staff Regulations and Rules of the United Nations.

19. Pursuant to art. 3 of the Dispute Tribunal’s Statute, recourse to it is open to “[a]ny staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes”. It is indisputable that the Applicant is a staff member of the United Nations Secretariat, as her letter of appointment clearly sets out. Therefore, she can appeal any administrative decision that is alleged to be in non-compliance with the terms of appointment or her contract of employment. The right to appeal administrative decisions before this Tribunal

forms part of her employment contract by virtue of the Staff Regulations (Article XI) and Staff Rules (Chapter XI), which are incorporated in her letter of appointment. Therefore, the Tribunal is competent to adjudicate the present matter.

20. The Tribunal is not persuaded by the Respondent's submission that no administrative decision has been made in the present case. As was submitted by both parties in the course of the proceedings, the ICSC was only capable of making a recommendation to the Secretary-General for his final decision on the issue. As stated in Order No. 13 (NY/2011), the Respondent in this case—as in all other cases before the Tribunal—is the Secretary-General. The contested decision in the present case is the implied decision not to approve the Applicant's SPA for the month of January 2011 and thereafter. Even if the Tribunal were to accept the Respondent's submission that no decision has yet been issued, failure to take a decision also constitutes a challengeable administrative decision, as the United Nations Appeals Tribunal stated in *Tabari* 2010-UNAT-030. Either way, there was an administrative decision within the meaning of art. 2 of the Statute.

21. The Applicant submitted at the hearing that the comments she received from the Executive Secretary of the ICSC in November 2010 did not constitute a final decision on the matter. Based on her uncontested oral evidence given, as well as on her contemporaneous communications regarding the matter, the Tribunal finds that, in the circumstances of this case, 7 January 2011 is the date on which the implied decision was notified to the Applicant (on that date the OPPBA Accounts Division sent an email to the Applicant indicating that, unless a personnel action form was issued by 17 January 2011, no further SPA would be processed). Accordingly, no issues arise with the timing of the present application.

22. The Respondent's submission that the Applicant should have requested an exception to the Staff Rules and that the resultant decision would be an administrative decision subject to appeal is not relevant to the present matter. This case is about the implied administrative decision discussed above, not a future decision that the Secretary-General may or may not take in response to the Applicant's request (if she

chooses to make one) for an exception. Further, the possibility of the Applicant requesting an exception does not render the decision not receivable before the Tribunal.

23. Accordingly, having found the application receivable, the Tribunal proceeded to consider whether the contested administrative decision appeared *prima facie* to be unlawful, whether the application was of particular urgency, and whether its implementation would cause the Applicant irreparable damage. The Tribunal can suspend the contested decision only if all of these three requirements have been met. Under art. 2.2 of the Statute, the Tribunal may order suspension of action during the pendency of the management evaluation only (*Corcoran* UNDT/2009/071).

Prima facie unlawfulness

24. Given the interim nature of the relief the Tribunal may grant when ordering a suspension of action, an applicant must demonstrate that the decision appears *prima facie* to be unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (see, e.g., *Buckley* UNDT/2009/064, *Corcoran*, *Utkina* UNDT/2009/096).

25. Counsel for the Respondent submitted at the hearing that the contested decision was lawful because there was no vacant P-3 level post to justify the payment of the SPA. He further submitted that the contested decision resulted from *Jaen* UNDT/2010/165, which was rendered on 17 September 2010 in relation to a separate case involving the same parties—Case No. UNDT/NY/2009/098. In that case the Applicant contested the decision not to reclassify the P-2 post encumbered by her to the P-3 level, and the Tribunal ruled in favour of the Respondent.

26. With respect to the Respondent's submission concerning *Jaen* UNDT/2010/165, the Tribunal notes that that judgment concerned only the issue of reclassification of the P-2 post encumbered by the Applicant and did not address her SPA, which is governed by separate legal instruments and is a separate legal issue that was not at all the subject matter of Case No. UNDT/NY/2009/098.

27. From the submissions of the parties and the evidence before the Tribunal, it appears that the implementation of the contested decision would result in the Applicant continuing to perform the same P-3 level functions she has been performing since 1 January 2004, but without the SPA, contrary to the principle of equal pay for work of equal value.

28. No documentary or oral evidence has been provided by the Respondent explaining how the decision to discontinue the Applicant's SPA was reached, the reasons therefor, or the procedures followed. It is unclear who was involved in the decision-making process and whether these individuals acted pursuant to a properly delegated authority and in a proper manner. No evidence has been provided explaining how the Applicant's current situation is different from that of the last seven years, and why seemingly identical situations are treated differently. It is also unclear whether, since 1 January 2004, the SPA was paid against a vacant P-3 level post or whether it was somehow processed in the absence of such post. If it was paid in the absence of a vacant post for such an extensive period of time, then a number of additional questions arise, including with respect to any prior exceptions to the Staff Rules granted to the Applicant and any reasonable expectation that may have been created as a result of the Organisation's long-standing practice with respect to the Applicant's actual terms of employment, particularly considering the timing of her letters of appointment and the decisions to grant her SPA. The Respondent's submissions shed no light on any of these issues.

29. In light of the documentary and oral evidence provided by the Applicant, and in view of the issues identified above, the Tribunal found that the contested decision appeared *prima facie* to be unlawful.

Urgency

30. The Applicant was notified on 7 January 2011 that the contested decision would go into effect unless action was taken by 5:00 p.m. on 17 January 2011. She filed her request for management evaluation on the same day, and submitted her application for suspension of action on 13 January 2011, two working days before 17 January 2011. Her application was therefore clearly of an urgent nature, which explains why the Tribunal heard the application and issued Order No. 13 (NY/2011) on the same day, with a reasoned order to follow later. The Applicant acted diligently in pursuing this matter, and the urgent nature of her application was due to the actions of the ICSC and OHRM, who failed to respond to her written correspondence and failed to provide her with relevant information in a timely manner. For these reasons, the requirement of particular urgency was found to be satisfied.

Irreparable damage

31. The requirement of irreparable damage has been discussed in several rulings of the Tribunal. It is generally accepted that mere financial loss is not enough to satisfy this requirement (*Fradin de Bellabre* UNDT/2009/004, *Utkina*). The Tribunal has found in a number of cases that harm to professional reputation and career prospects, or harm to health, or sudden loss of employment may constitute irreparable damage (see, e.g., *Corcoran, Calvani* UNDT/2009/092).

32. In each case, the Tribunal has to look at the particular factual circumstances. In many instances—but not all—the Tribunal will be able to compensate the harm to professional reputation and career prospects should an applicant pursue a substantive appeal and should the Tribunal decide in his or her favour. Indeed, art. 10.5 of the Tribunal's Statute allows compensation for non-pecuniary loss, and such compensation has been awarded by both the Dispute Tribunal and the Appeals Tribunal. However, the Dispute Tribunal's ability to remedy a loss is not absolute. There are certain types of damages of a non-pecuniary nature that fall under the category of irreparable. In my view, such damages may stem from breach of a right

that is so valuable that it cannot be expressed in mere financial terms. Fundamental human rights, for instance, fall under this category—in large part, their true value for individuals is in being able to actually exercise them, and not simply to receive subsequent compensation for their breach. Such rights may stem, for instance, from the principle of equal pay for work of equal value—referred to in art. 23.2 of the Universal Declaration of Human Rights and art. 7 of the International Covenant on Economic, Social and Cultural Rights—which, as the Appeals Tribunal stated in *Tabari* 2010-UNAT-030, applies to United Nations staff (see also the useful discussion in *Muthuswami et al.* 2010-UNAT-034, para. 30, and *Chen* UNDT/2010/068, paras. 39–45). Accordingly, if the only way for the Tribunal to ensure that certain rights are truly respected is to grant interim relief, then the requirement of irreparable damage will be satisfied (see also *Fradin de Bellabre*). The Tribunal's determination in this respect, of course, will depend on the particular circumstances of each case.

33. The Respondent submitted in his reply that, should the Applicant prevail in her substantive application, she could be fully compensated by a monetary award, and, accordingly, no suspension of action order should be granted. The Tribunal is persuaded that, if the decision were to be implemented, it would carry financial implications for the Applicant. If this were the only possible harm in this case, the Tribunal would not grant the interim relief. However, the harm in this case is not limited to mere financial loss, as explained below.

34. Firstly, the Tribunal is satisfied that the Applicant's inability to pay, at least for a certain period of time, her social security taxes and mortgage payments due to the sudden and steep reduction of her salary by approximately USD1,500 a month would have an effect on her that would extend beyond mere financial implications and, in her particular circumstances, would affect her personal well-being and financial reputation.

35. Secondly, the contemporaneous emotional effect of the implementation of the contested decision on the Applicant and its effect on her working conditions are of

such a nature as to justify a finding of irreparable damage (see *Corcoran, Calvani*). Further, the Applicant would have to endure the emotional distress of having to comply with an administrative decision that affects her fundamental rights and with respect to the lawfulness of which there is doubt at this stage of the proceedings. The negative emotional effect caused by the implementation of the decision would be exacerbated by the fact that it would entail performing the same work she has been doing for the last seven years, in the same office and with the same colleagues and supervisors, while getting paid significantly less money. Therefore, for all the above reasons, the Tribunal found that the implementation of the contested decision would cause the Applicant irreparable damage.

Observation

36. Further, there is one additional matter which the Tribunal shall address. The Respondent's submissions with respect to the receivability of the present application were, in significant respect, contrary to the submissions made in a separate case involving the same parties (Case No. UNDT/NY/2009/098, referred to above). The United Nations Appeals Tribunal held in *Wu* 2010-UNAT-042 that the Respondent's submissions in two cases before the Appeals Tribunal—*Wu* and *Ardisson* 2010-UNAT-052—were “completely contradictory”. The Appeals Tribunal stated, *inter alia*:

It is not expected of the United Nations to raise such contradictory pleas. The United Nations should act as an ideal litigant and display a clear and consistent stand on all important issues. It is the ordinary litigants who take inconsistent and devious pleas because individual litigants have their self-interest in mind. They usually deviate from the truth and the correct interpretation of the law. The United Nations should be above reproach on this count.

37. The parties are reminded of the Appeals Tribunal's pronouncement in *Wu*.

Conclusion

38. For the reasons articulated above, the Tribunal granted, by Order No. 13 (NY/2011), the application for suspension of action during the pendency of the management evaluation.

39. The Tribunal recognises that this relief is of an interim nature only, subject to any further proceedings that may take place in relation to this case.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of February 2011