



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

YISMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
TEMPORARY RELIEF**

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Thomas Elftmann, UNDP

Notice: This Order has been formatted for publication purposes.

Introduction

1. On 11 February 2011 the Applicant, a staff member of the Multi-Donor Trust Fund Office of the United Nations Development Programme (“UNDP”), filed an application contesting the disciplinary measure of separation from service with notice and termination indemnity.

2. The contested decision was based on the findings of an investigation conducted during December 2009 and January 2010 by the Office of Audit and Investigations of UNDP, which established, *inter alia*, that the Applicant had submitted falsified information to the New York City Housing Development Corporation (“HDC”). The contested decision was communicated to the Applicant by a letter dated 1 December 2010 and received by the Applicant on 5 December 2010. The Applicant seeks rescission of the contested decision and reinstatement to her original post with full restoration of her employment benefits.

3. On 11 February 2011 the Applicant also filed a separate motion entitled “Motion for Confidentiality and Request for Expedited Hearing”. This motion contained two requests: (i) that the matter be heard on an expedited basis; and (ii) that any hearings be closed to the public and her name be omitted from any rulings.

4. By Order No. 43 (NY/2011), the Dispute Tribunal indicated to the parties that, in view of the Applicant’s request for an expedited hearing, and considering the expected implementation date of the contested decision (which, at that time, was understood to be 1 March 2011), the Applicant may file an application for temporary relief under art. 14 of the Rules of Procedure. The Tribunal further stated that “any issues with respect to the receivability or merit of any such application would be for the Tribunal to determine”.

5. In a submission filed on 18 February 2011 pursuant to Order No. 43 (NY/2011), the Respondent stated that the Applicant will be separated from service on 9 March 2011.

6. On 22 February 2011 the Applicant filed and served an application seeking the Tribunal to grant temporary relief until it renders a final judgment in her case. The relief was requested in either of the following two forms: (i) suspension of action of the administrative decision to separate the Applicant; or (ii) payment of salary entitlements while the matter is being decided by the Tribunal. The Respondent filed a reply to this application on 25 February 2011.

7. On 1 March 2011 the Tribunal held a hearing on the application for temporary relief.

Brief facts

8. The Applicant is employed on a fixed-term contract as a general service-level staff member.

9. On 1 November 2009, the Applicant and a close relative submitted a rental application to the HDC for a two-bedroom apartment located in a new housing complex in New York City. In the Applicant's case, to be eligible for an HDC-financed apartment, she and her close relative were required to show a combined income not exceeding USD134,400.

10. The HDC detected irregularities in the Applicant's rental application form and, on 9 December 2009, contacted the Office of Human Resources, Bureau of Management, UNDP. On 10 December 2009 the Office of Human Resources referred the matter to the Office of Audit and Investigations ("OAI") for investigation.

11. The Applicant was notified of a formal investigation of the matter on 11 December 2009. The Applicant withdrew her application with HDC on 14 December 2009.

12. The OAI issued its investigation report in January 2010, finding that the Applicant had (i) misrepresented her annual salary and working hours in the HDC application form and (ii) forged the letter purportedly written by the Personal

Assistant to the Chief and Director, Executive Office, UNDP, in order to qualify for renting a subsidised apartment to which she was otherwise not entitled.

13. By a letter dated 26 May 2010 the Applicant was charged with misconduct. She replied to it on 28 June 2010, taking full responsibility for her “grievous mistake” and requesting UNDP to take into account a number of mitigating circumstances.

14. By a letter dated 1 December 2010 the Associate Administrator of UNDP imposed on the Applicant the disciplinary measure of separation from service with three months’ notice and two weeks’ termination indemnity, pursuant to Staff Rule 10.2(a)(viii). In this letter, the Associate Administrator referred to, *inter alia*, the mitigating circumstances offered by the Applicant, but found that the Applicant’s misconduct warranted the disciplinary measure of separation from service, with a three months’ notice period and two weeks’ termination indemnity.

Applicant’s submissions

15. The Applicant’s principal contentions may be summarised as follows.

a. The application for temporary relief is receivable. Notwithstanding any limitations in art. 10.2 of the Statute, the Tribunal has “inherent jurisdiction to judicially review cases where the existing rules do not conform to basic fundamental principles of law, in this case, principles of equity”.

b. The Applicant’s case is of particular urgency as she will be separated on 9 March 2011.

c. The contested decision appears *prima facie* unlawful. In determining the legality of a sanction, all facts and circumstances, including any mitigating factors, have to be considered. Although reference is made to the mitigating circumstances in UNDP’s letter dated 1 December 2010, there is no indication or evidence that UNDP made any efforts to contact the Applicant’s current supervisor or other colleagues or sought other information which would form

the basis for the decision to separate the Applicant from service. The disciplinary measure was irregular and defective because not all essential facts, including mitigating factors, were fully and fairly canvassed and considered by the Administration.

d. The requirement of irreparable damage is satisfied. Without proper financial support, the Applicant will be unable to sustain an existence in New York. Her personal and professional life will also suffer, precluding her from securing alternative employment. The Applicant will be unable to pay for rent, groceries, social security taxes, physician appointments, and medication. She is currently consulting a specialist and requires continued medical advice and treatment. If she loses her job with the Organisation she will be at serious risk of being without health insurance.

Respondent's submissions

16. The Respondent's primary contentions may be summarised as follows:

a. The application for temporary relief is only partly receivable. Article 10.2 of the Statute excludes possibility of temporary relief in the form of a suspension of action in cases of termination. However, art. 10.2 of the Statute permits temporary relief in the form of a payment in the amount of the Applicant's current salary, as requested by the Applicant in the alternative. Therefore, the application for temporary relief is receivable with respect to the Applicant's request for a payment of salary entitlements while the matter is being decided by the Tribunal.

b. However, the contested decision was not *prima facie* unlawful. The disciplinary measure imposed was proportionate to the misconduct. The Applicant brought all mitigating circumstances referred to in her application to the attention of the Respondent in her response to the charge letter. The Respondent was cognisant of all of these facts and took these and further

relevant circumstances, including aggravating and mitigating factors, into account before taking the contested decision.

c. Misrepresentation or forgery with a fraudulent intent, committed by a staff member in connection with his status as an international civil servant, go to the UN core values of integrity and represent acts of dishonesty that call for separation from service or dismissal. The Applicant's misconduct affected the reputation and image of the United Nations.

17. The Respondent made no written submissions with respect to whether the requirements of particular urgency and irreparable damage were satisfied. However, at the hearing Counsel for the Respondent submitted that, although the matter was urgent, the requirement of irreparable harm was not satisfied.

Consideration

18. The Tribunal will first consider the Applicant's request for suspension of action of the administrative decision to separate her from service. Although art. 10.2 of the Statute permits the Tribunal to suspend implementation of contested administrative decisions during the proceedings, it specifically excludes the possibility of such suspension in cases of appointment, promotion, and termination. As the Applicant's separation from service is a disciplinary measure under staff rule 10.2(a)(viii), the Applicant's case is that of termination within the meaning of art. 10.2 of the Statute (see also staff rules 9.6(a) and (c)). Accordingly, the Tribunal finds that art. 10.2 of the Statute does not permit it to grant this type of temporary relief in the present case.

19. The Tribunal will now turn to the Applicant's request for temporary relief in the form of "salary payment entitlements" until the Tribunal renders a final judgment in this case. The Respondent submitted that the Applicant's request for this relief is receivable and the Tribunal is competent to grant the relief requested. Even if this is

the case, however, the Tribunal finds that the Applicant's request for this type of interim relief stands to be dismissed for the reasons explained below.

20. Pursuant to art. 10.2 of its Statute, the Tribunal may order an interim measure only if all three requirements contained in art. 10.2 of the Statute—namely, *prima facie* unlawfulness, irreparable damage and particular urgency—have been met. In other words, if the application does not satisfy any one of these requirements, it must necessarily fail.

21. Notwithstanding that Counsel for the Respondent did not argue against the urgency of the present application, the Tribunal finds that the requirement of particular urgency has not been satisfied. As the Dispute Tribunal held in *Applicant* Order No. 164 (NY/2010) and *Corna* Order No. 90 (GVA/2010), the requirement of particular urgency will not be satisfied if the urgency was caused by the applicant. In this case, the Applicant was notified of the contested decision on 5 December 2010. She was provided with a notice period of three months. Nevertheless, the Applicant chose to submit her application contesting the decision to separate her from service only on 11 February 2011, failing to identify in her application the date when she would be separated. Her request for temporary relief was not filed until 22 February 2011, approximately two weeks before the date of her separation. No explanations as to why the delay creating the urgency in this case should not be attributable to the Applicant were provided to the Tribunal in her application filed on 11 February 2011 or in her application for temporary relief. The urgency, if any, is therefore self-created.

22. As the Applicant's claim with respect to the alternative temporary relief in the form of "salary payment entitlements" does not satisfy the requirement of urgency, it follows that it stands to be denied. Accordingly, the Tribunal does not need to examine in detail the requirements of irreparable damage and *prima facie* unlawfulness.

Conclusion

23. The application for temporary relief is denied.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of March 2011