



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

EL-KOMY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Lennox S. Hinds

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 20 March 2013, the Applicant, a staff member in the Arabic Translation Service (“ATS”), Department for General Assembly and Conference Management (“DGACM”), filed an application for suspension of action of the decision to separate him from service following the decision not to grant him a permanent appointment upon the completion of his probationary employment period. The Applicant contends that this decision is illegal and in breach of his rights as he has met the qualifications and requirements for a permanent appointment since 25 June 2011.

Background

2. On 25 June 2009, the Applicant joined ATS on a two-year probationary appointment. The Applicant’s letter of appointment stated that “[a]t the end of the probationary service [he] will either be granted a Permanent/Regular Appointment, or [the] present appointment will be terminated”.

3. On 24 June 2011, the Applicant’s probationary period of employment was extended for an additional period of one year. On 7 September 2011, the Applicant requested management evaluation of the decision to extend his probationary period of appointment until 24 June 2012 and not to recommend him for conversion to permanent appointment. On 27 January 2012, the Applicant submitted an application before this Tribunal contesting DGACM’s decision to extend his probationary appointment. This case was assigned Case No. UNDT/NY/2012/003.

4. On 21 June 2012, the central review committee (“CRC”) received a request from DGACM that the Applicant’s probationary period be extended for an additional year on an exceptional basis. The Applicant’s probationary period was extended until 31 August 2012 pending the completion of the CRC’s review prior to which the CRC denied the request.

5. Starting on 31 August 2012, the Applicant's contract was further extended on a month-to-month basis pending the completion of informal dispute resolution discussions undertaken in Case No. UNDT/NY/2012/003. On 20 November 2012, the Tribunal was informed of the failure of the informal dispute resolution proceedings in Case No. UNDT/NY/2012/003.

6. Following the failed completion of the informal resolution dispute process, a rebuttal panel was convened from 7 to 21 February 2013 to review the Applicant's 28 June 2012 request to rebut his electronic performance appraisal (e-PAS) for the period of 1 April 2011 to 31 March 2012. The panel concluded that the overall evaluation of "Partially meets performance expectations" should be retained.

7. On 27 February 2013, the CRC, which had received a 4 December 2012 submission from DGACM requesting that the Applicant be separated from service, and taking into account the findings of the rebuttal panel, determined that the conditions for a separation of the Applicant were met.

8. On 28 February 2013, the Applicant received a letter from the Executive Office, DGACM, informing him of "the decision to not grant [him] a permanent appointment and to separate [him] from service" upon the expiration of his current contract on 31 March 2013.

9. On 28 February 2013, the Applicant requested management evaluation and a suspension of action of the decision to separate from service on that same day, namely 28 February 2013. Due to the initial representation that the Applicant's separation from service was to occur on such short notice, the Management Evaluation Unit ("MEU") "decided to grant [his] request for suspension of action" and requested that the Applicant's appointment be extended until 31 March 2013.

10. On 19 March 2013, the MEU informed the Applicant that considering that the decision to separate him from service, notified to him on 28 February 2013, actually always reflected that his separation was to take place on 31 March 2013, his 28 February 2013 request for management evaluation and suspension of action "was

not based in fact” and was therefore not receivable. Nevertheless, the MEU noted that on 18 March 2013 the Applicant had filed a new request for management evaluation and suspension of action of the 28 February 2013 decision and this latest request would be reviewed in due course.

11. On 20 March 2013, the Applicant filed an application with the Tribunal for suspension of action pending management evaluation of the contested decision. The Respondent filed a reply on 22 March 2013.

Consideration

12. In accordance with art. 2.2 of its Statute, the Tribunal has to consider whether the impugned decision appears to be *prima facie* unlawful, whether the matter is of particular urgency, and whether its implementation will cause the Applicant irreparable harm. The Tribunal must find that all three of these requirements have been met in order to suspend the action, meaning the implementation of the decision, in question.

Prima facie unlawfulness

13. For the *prima facie* unlawfulness test to be satisfied, it is enough for the 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 obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011) and *Villamorán* UNDT/2011/126).

14. The CRC based part of its recommendation that the Applicant be separated from service on the fact that at the end of his initial probationary appointment on 24 June 2011 “his performance was deemed less than satisfactory”. However, from the documents before the Tribunal, it would appear that the Applicant’s e-PAS rating for the period June 2009 to March 2010 reflected that his performance was “fully successful” and that his next e-PAS rating for March 2010 through November 2010

concluded that he “Successfully meets performance expectation”. Finally, following the completion of the rebuttal of his next e-PAS report, his overall performance rating for the period 1 December 2010 to 28 February 2011 be raised from “Partially meets performance expectation” to “Successfully meets performance expectations”.

15. The recently completed rebuttal of the Applicant’s e-PAS report for the cycle March 2011 to March 2012 resulted in the determination that the Applicant’s appraisal of “Partially meets performance expectations” should be retained. However, it does not appear that his continued performance since the end of that cycle resulted in the creation of a new e-PAS report or was taken into account with regard as to whether or not to offer him a permanent appointment. Similarly, it is unclear as to the basis on which the CRC considered that the Applicant’s 2011 “performance was deemed less than satisfactory”.

16. This element of the statutory test is satisfied.

Urgency

17. The Applicant was informed of the contested decision on 28 February 2013. He submitted a request for management evaluation and suspension of action of that decision with the MEU on that same day. The Applicant’s initial request for management evaluation was deemed not receivable by the MEU on 19 March 2013 on a technicality, namely that the Applicant indicated that his date of separation was 28 February 2013 rather than 31 March 2013.

18. Nevertheless, on 18 March 2013 the Applicant filed a new request with the MEU, to which this suspension of action is related, for management evaluation and suspension of action of the decision “to not grant the Requestor a permanent appointment and to separate the Requestor from service”. Given the timeline of the Applicant’s actions in the present matter, the Tribunal considers that he presented his request in a timely manner and did not sit on his rights.

19. The Tribunal finds that this is not a case of self-created urgency and the requirement of particular urgency is satisfied, especially considering that the separation from service is scheduled to occur on 31 March 2013 and that MEU has yet to respond to the Applicant's request for a suspension of action of the contested decision before it.

Irreparable damage

20. The Applicant is facing the prospect of being subject to a decision that would have a devastating impact on his family as well as his prospects of employment within the United Nations.

21. Loss of employment within the United Nations should not be seen merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. The damage to one's career opportunities and the consequential effect on one's life chances from a loss of employment within the United Nations cannot realistically be adequately compensated financially.

22. Based on the aforementioned, and as stated in *Adundo et al.* UNDT/2012/077, when the lawfulness of an administrative decision is not only highly questionable but would also have an extensive detrimental effect on the Applicant's contractual situation, the Tribunal can but only find that the contested decision would result in the creation of an irreparable harm for the Applicant.

23. The Tribunal finds that the requirement of irreparable damage is satisfied.

Conclusion

24. The present application has all met the conditions for a suspension of action.

Order

25. The Tribunal orders the suspension, during the pendency of the management evaluation, of the decision by DGACM to separate the Applicant from service on 31 March 2013.

(Signed)

Judge Alessandra Greceanu

Dated this 26th day of March 2013