UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2013/033
Order No.:	118 (NY/2013)
Date:	29 April 2013
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

EL-KOMY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON INTERIM MEASURES

Counsel for Applicant:
Lenox S. Hinds

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

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

Introduction

1. On 24 April 2013, at 4:55 p.m., the Applicant, an Arabic translator with the Department for General Assembly and Conference Management ("DGACM") at the P-3 level, filed an application in which he contested "[t]he decision to separate him from service following the decision not to grant him a permanent appointment upon the completion of his probationary employment period".

2. On the same date, the Registry acknowledged receipt of the application and served it on the Respondent, requesting him to file and serve his reply by 5:00 p.m. 28 May 2013.

3. Subsequently, on the same date, the Applicant filed a motion for an expedited hearing on the merits prior to the close of business on 30 April 2013 contending, *inter alia*, that:

> [The Applicant's] case is extremely urgent because if the contested decision is not rescinded within the next 6 days, the Applicant will be separated from service on the basis of what the Dispute Tribunal has found to be *prima facie* unlawful decision that will cause him irreparable harm. The Applicant is not in a position to have the contested decision suspended pending the outcome of his proceedings because his case regards an appointment decision. His only choice to protect himself from irreparable damage is to request that his case be heard on the merits and decided upon before his separation takes effect at COB on 30 April 2013.

4. The Applicant contends that he is not jumping the queue by requesting an expedited hearing, as in January 2012 he had filed an application concerning the underlying issue in his case regarding the propriety of the extension of his probationary appointment instead of conversion to a permanent appointment status (Case No. UNDT/NY/2012/003).

5. The Applicant contends that he is unable to seek interim relief under art. 10.2 of the Tribunal's Statute as the contested decision concerns his appointment to

a permanent position, which the Applicant believes falls under the exclusionary clause of art. 10.2 (which states that "temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination").

6. In response to the motion for an expedited hearing on the merits, the Tribunal issued Order No. 117 (NY/2013), dated 25 April 2013, instructing the Respondent to file and serve his comments, if any, by 3:00 p.m., 26 April 2013.

7. In the Respondent's response to the motion for an expedited hearing on the merits, he submits, in essence, that:

a. The Respondent is entitled to a period of 30 days to file his reply and that he will need it to properly prepare this reply;

b. There is no legal basis for holding an expedited hearing prior to the Respondent filing his reply;

c. The interests of justice mandate that both parties to a dispute are afforded their respective due process rights before the Tribunal adjudicates the case and that many, if not all, of the Applicant's legal and factual assertions will be in dispute between the parties;

d. An expedited hearing cannot provide the Applicant with the relief he requests, i.e., a judgment on 30 April 2013 granting him a permanent appointment effective 25 June 2011; and

e. Once the Respondent has been afforded a meaningful opportunity to review the application and to prepare his reply, he will be in a better position to comment on whether the matter should be heard on an expedited basis.

Background

8. On 25 June 2009, the Applicant joined DGACM on a two-year probationary appointment. His 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".

9. Two years later, on 24 June 2011, his probationary appointment was extended for an additional period of one year. The Applicant subsequently appealed this decision before the Tribunal by application of 27 January 2012 (Case No. UNDT/NY/2012/003).

10. 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.

11. 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.

12. Following the failed 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 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.

13. 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.

14. By letter dated 28 February 2013, the Applicant was notified that he would be separated from service on 31 March 2013. The Applicant filed a request for management evaluation and for a suspension of action of the 28 February 2013 decision, with the Management Evaluation Unit ("MEU") on the same day. In his request for management evaluation, however, it appears that the Applicant erroneously indicated that he was contesting the decision not to renew him beyond 28 February 2013, and not 31 March 2013. In view of the urgency and "out of caution", the MEU granted the suspension of action on 28 February 2013.

15. On 18 March 2013, the Applicant filed a new request for management evaluation of the decision of 28 February 2013 to separate following the expiration of his contract on 31 March 2013.

16. After initially granting the suspension of action on 28 February 2013, the MEU then retracted the suspension on 19 March 2013 and informed the Applicant that it was now seized of his 18 March 2013 request for review of the decision to separate him on 31 March 2013.

17. He filed a separate request for management evaluation pertaining to this separation decision. On 20 March 2013, he filed with the Tribunal an application for suspension of action, pending management evaluation, of the decision to separate him (registered as Case No. UNDT/NY/2013/016). The suspension of action was granted by Judge Greceanu on 26 March 2013 (Order No. 76 (NY/2013)).

18. Following the Tribunal's Order No. 76 (NY/2013), on 27 March 2013, the Administration extended the Applicant's probationary appointment until 30 April 2013.

19. On 27 March 2013, the MEU acknowledged receipt of the Applicant's 18 March 2013 request for management evaluation, noting that the 30-day period within which the evaluation was to be completed was 17 April 2013. It indicated that it would review his request and, where possible, identify options for informal resolution, and contact the relevant parties, if appropriate. It also indicated that if there was any delay in completing the management evaluation, the MEU would contact the Applicant to so advise.

20. On 18 April 2013, the MEU informed the Applicant and his Counsel that there had been a slight delay in the issuance of the management evaluation, and that every effort was being made to finalise the evaluation process "in the coming days and prior to the end of April".

21. On the understanding that the MEU was considering recommending informal resolution of the matter, the Applicant contends that, in good faith, he waited for the MEU's decision. When by close of business on 22 April 2013, the MEU had still not issued its decision or contacted the parties, Counsel for the Applicant wrote to the MEU, stating that time being of the essence, to protect his interests, the Applicant would be forced to seek judicial intervention if no decision was issued within the next 24 hours.

22. On the next morning on 23 April 2013, Counsel for the Applicant informed the Respondent that due to the fact that the Applicant's appointment was set to expire on 30 April 2013, and that the MEU had still not issued a decision, the Applicant would be forced to seek judicial intervention if the Administration did not extend his appointment within the next 24 hours.

23. On 24 April 2013 at 4:55 p.m., having received no decision from the MEU or response from the Administration, the Applicant filed an application before the Tribunal.

24. At 6:02 p.m. on 24 April 2013, the MEU issued its response to the Applicant's request for management evaluation, upholding the Administration's decision to separate the Applicant from service.

25. The Applicant then filed, on 25 April 2013, the present motion, which is now before me since the Judge previously presiding over the Applicant's previous application for suspension of action is unavailable over the next two weeks.

Consideration

The holding of an expedited hearing on the merits

26. The parties' submissions may effectively be summarised as follows. While the Applicant requests that the Tribunal renders a judgment on the merits before 30 April 2013 not to lose the objective of his application, namely for him to maintain his employment with the United Nations, the Respondent contends that, as a matter of law, he has the right to file his reply within 30 days and that, in this specific case, he would need these 30 days to prepare this reply.

27. The Tribunal recognises, and has sympathy with, the submissions presented by both parties. Considering the Applicant's particular circumstances, including personal medical issues, which is a matter of record that need not be set out herein, the Tribunal may consider the present case on an expedited basis. However, in light of the circumstances of this case, including the Respondent's concerns, the Tribunal will not do so prior to 30 April 2013. To accommodate both parties, and due to the particular circumstances of this case, the Tribunal will consider ordering an appropriate interim measure until a judgment fully adjudicating the matter is rendered or any further order is issued as deemed appropriate by the Tribunal.

The Dispute Tribunal's autonomous authority to grant temporary relief to a party during the proceedings

28. The Tribunal finds that the Applicant's view that he is unable to make application for interim relief under art. 10.2 of the Statute of the Dispute Tribunal as the contested decision concerns his appointment to a permanent position, is misguided for reasons stated below. The Tribunal also finds that the Applicant has evinced every intention to file such application but for this miscomprehension. In the circumstances, the Tribunal shall consider whether interim relief may, and should, be granted to him.

Interim measures under art. 10.2 of the Statute

29. Regarding the Tribunal's power to grant temporary relief during the proceedings of a case before it, art. 10.2 of the Statute of the Dispute Tribunal states:

> At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

30. Regarding interpretation of legal provisions, such as art. 10.2 of the Statute, the Appeal Tribunal stated in *Scott* 2012-UNAT-225 (emphasis added):

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to *the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation.* Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical

> opinion the interpreter may have to the contrary, or else the interpreter would become the author.

31. A plain reading of art. 10.2 of the Statute is that the Dispute Tribunal may at any time during the proceedings order an interim measure to provide temporary relief to either party, including the Respondent. A literal, plain and common reading of art. 10.2 is that the Tribunal has the power, *suo motu*, to order any temporary relief, which it may find appropriate, from the time an applicant has filed her or his application and until the Tribunal fully, finally and entirely disposes of the case.

Difference between art. 2.2 and 10.2 of the Statute

32. A plain reading of arts. 2.2 and 10.2 of the Statute demonstrates that, for the Tribunal to order an interim measure under art. 10.2 of the Statute, it is not required that such interim measure is preceded by a request or an application by either party.

33. While art. 2.2 of the Statute states that the Tribunal is competent to suspend, during the pendency of management evaluation, the implementation of a contested decision "on an application filed by an individual", art. 10.2 of the Statute explicitly states that the Tribunal "may order an interim measure … to provide relief to either party" without any express requirement that an application or request is made by either of the parties. Thus, an interim relief order under art. 10.2 of the Statute need not be predicated upon a request or an application from a party.

34. Article 2.2 of the Statute is elaborated on in art. 13 of the Rules of Procedure, whereas art. 10.2 of the Statute is addressed in art. 14 of the Rules. The wording of arts. 13 and 14 of the Rules is consistent with the relevant provisions of the Statute. It should be noted that references to "application" in art. 14.2, 14.3, and 14.4 are obviously meant to apply to situations in which such an application or request is filed by either of the parties, and these provisions are subordinate to art. 10.2 of

the Statute, which envisages that interim measures may be granted either on an application or *suo motu*.

35. In addition, comparing art. 10.2 of the Statute with other articles of the Statute (see, e.g., arts. 2.1, 2.2, 10.1 of the Statute) and numerous articles of the Rules of Procedure referring to applications and requests filed by the parties, by not stating that a prior request or an application is required for the granting of an interim measure under art. 10.2 of the Statute, the drafters of the Statute clearly indicated that such request or application is *not* a precondition for the Tribunal to grant such temporary relief.

36. Therefore, the Tribunal finds that it has the authority to order interim measures under art. 10.2 of its Statute *suo motu*, without an application from either party in an appropriate case.

The Applicant's motion as a request for an interim measure

37. In addition and separate from the above, the Tribunal finds that it is clear from the Applicant's motion for an expedited hearing on the merits that his request is based on his misunderstanding of art. 10.2 of the Statute that he may not make a request for such interim measure in this case because it concerns "an appointment decision". His motion can only be read thus: had his case not concerned "an appointment decision", he would have requested such interim measure.

38. The decision contested in the present case is that of 28 February 2013, by which the Applicant was informed that he would be "separated from service upon expiration of [his] appointment on 31 March 2013", which separation upon expiration was postponed by Order No. 76 (NY/2013) and which is the subject of the present order. This is the decision that is before the Tribunal in this case.

39. The Tribunal finds that the Applicant's interpretation of what an "appointment decision" means under art. 10.2 of the Statute is misguided. Article

10.2 of the Statute provides that "temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination". In the Tribunal's considered view, art. 10.2 should not be interpreted too broadly as if it was meant to cover all decisions somehow related to appointment, promotion, and termination matters (*Rockcliffe* UNDT/2012/121, *Adundo et al.* UNDT/2012/077). The Tribunal finds that the clause should be interpreted as applying primarily to decisions not to appoint or promote a staff member or to terminate her or his appointment. The matter presently before the Tribunal is that of the Applicant's imminent separation. As noted in *Adundo et al.* UNDT/2012/077, "[s]eparation as a result of ... expiration of appointment ... shall not be regarded as a termination within the meaning of the Staff Rules" (staff rule 9.6(b)). Termination is defined in the Staff Rules as "separation … initiated by the Secretary-General", i.e., forced ending of the contract by the Secretary-General prior to its expiration (staff rule 9.6(a)). It is clear that separation upon expiration of an appointment is not covered by art. 10.2 of the Statute as it is not a form of termination (see also *Benchebbak* Order No. 142 (NBI/2011). The Applicant's forthcoming separation can therefore not be regarded a termination as it is the direct result of the expiration of his appointment with the United Nations.

40. Therefore, the Tribunal finds that the exclusionary provision of art. 10.2 of the Statute does not apply to the present case and the Tribunal has the power to order appropriate interim relief in the form of suspension of action. Thus, even if the Tribunal did not have the power to order interim relief *suo motu* under art. 10.2 of the Statute, it would have been compelled to exercise its statutory power under art. 10.2 in view of the Applicant's clear intention when filing the present motion.

Consideration of whether the requirement for an interim measures in the form of suspension of action have been met

41. The Tribunal finds it appropriate to exercise its authority under art. 10.2 of the Statute and consider whether the conditions for an interim measure in the form of

suspension of separation from service have been made. This determination is made in the interests of justice and in view of the particular circumstances, including: the Respondent's request that a period of 30 days is required to prepare a meaningful reply to the Applicant's request for an expedited hearing; delays by the MEU; indications to the Applicant that informal resolution may be considered; the Applicant's misguided understanding of art. 10.2 of the Statute; and the fact that due to the time constraints it would not be possible for him to file a motion for interim measures and for the Tribunal to subsequently consider it.

42. In order to do so, pursuant to art. 10.2 of the Statute, the Tribunal will therefore consider whether the contested administrative decision appears *prima facie* to be unlawful, whether the case is of particular urgency, and whether implementation of the contested decision would cause irreparable damage.

Prima facie *unlawfulness*

43. In Order No. 76 (NY/2013), the Dispute Tribunal made a finding of *prima facie* unlawfulness of the decision to separate the Applicant on 31 March 2013 and ordered its suspension during the pendency of the management evaluation.

44. Having examined the papers presently before it, the Tribunal finds that the documents before the Tribunal do not warrant a change in the conclusion previously made by the Tribunal in Order No. 76 (NY/2013) that the separation is *prima facie* unlawful. The Tribunal finds that, for reasons stated in Order No. 76 (NY/2013), the requirement of *prima facie* unlawfulness is satisfied.

Particular urgency

45. The Applicant's current appointment expires on 30 April 2013 and his separation from service is therefore imminent. The urgency in this case has not been created by the Applicant. The MEU delayed in rendering its decision until six days before the expiration of the Applicant's appointment extension, and

the Administration refused to extend his appointment further. The Tribunal is satisfied, on the facts as presented by the Applicant, that this is not a case of self-created urgency. This urgency is not caused by the Applicant's own makings and is therefore not self-inflicted (see also *Dougherty* UNDT/2011/058, *Jitsamruay* UNDT/2011/206, *Evangelista* UNDT/2011/212). Accordingly, the Tribunal finds that the present case is particularly urgent.

Irreparable damage

46. If the Applicant's contract is not extended he will lose his employment with the United Nations. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013)). As the Tribunal stated in *Kananura* UNDT/2011/176,

> Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.

47. The Tribunal finds that the reasons articulated in *Kananura* are applicable to the present case. The Tribunal further notes that the finding of irreparable damage is further exacerbated by the Applicant's medical situation, which, in all likelihood, would be negatively affected in the event of separation and the resultant loss of medical insurance.

48. The Tribunal therefore finds that the Applicant would suffer irreparable damage if the decision to separate him is effectuated.

IT IS ORDERED THAT:

49. The Respondent shall suspend the implementation of the decision to separate the Applicant from the date of this Order pending the final determination of the substantive merits of the application or until such further Order as may be deemed appropriate by the Tribunal.

50. The Tribunal will determine whether the present case is to be considered on an expedited basis following receipt of the Respondent's reply and any further submissions.

51. The parties are entreated to explore informal resolution of this matter in the interim.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 29th day of April 2013