UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/088
Order No.: 130 (NY/2013)
Date: 22 May 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ENAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1. On 20 May 2013, the Applicant, a staff member of the Department of General Assembly and Conference Management ("DGACM"), filed an application for suspension of action, pending completion of management evaluation, of the decisions to:

a. relocate staff members of several sections of DGACM to the Albano building, located at 305 East 46th Street;

b. relocate staff members already in the Albano building elsewhere within the building; and

c. deny staff members located in the Albano building the right to return to the renovated Secretariat building.

2. The Applicant states that he was informed of the contested decisions on 4 and 16 April 2013. He submits, *inter alia*, that the contested decisions are unlawful because they violate several General Assembly resolutions and are also in breach of "the right of staff members to work in a suitable, safe and favourable environment" and contradict the prior "clear understanding that DGACM staff [would] return to their offices in the Secretariat Building upon its renovation". He also claims that the contested decisions are discriminatory as DGACM staff members are placed in working conditions inferior to the conditions of other staff members in New York. The Applicant states that he will suffer irreparable harm as a result of the implementation of the contested decision "in the form of risks to safety, security, health and life". The Applicant also states that his case is particularly urgent because the decisions will be implemented by the end of May 2013.

3. The Respondent submits that the Applicant's claims are not receivable and are without merit as they have no impact on him or his working conditions. With

respect to receivability, the Respondent states that the Applicant has been located in the Albano building since 2009 and is not scheduled to move. He does not have standing to bring claims on behalf of other staff members. With respect to the merits, the Respondent states that the Albano building complies with local laws and safety and security standards. The Respondent further submits that the Applicant does not have a right to return to the Secretariat and no promises were made at any point in time to him or other staff members in the Albano building that they would be moved to the Secretariat building. The Respondent further submits that the application is not urgent as the Applicant has been in the Albano building since 2009. He was made aware of the decisions he seeks to contest on 4 or 16 April 2013, but waited until 20 May 2013 to file his application, thus making any urgency in this case self-created. The Respondent further submits that the Applicant would not suffer irreparable harm. He has occupied the Albano building for approximately four years without incident and no evidence has been presented by him demonstrating any risk to health and safety for occupants of the Albano building.

4. The application was transmitted to the Respondent on Monday, 20 May 2013, the same day it was received by the Registry. The Respondent's reply was duly filed on 21 May 2013. The Tribunal has five working days from the service of the application on the Respondent—or until 5 p.m. on Tuesday, 28 May 2013 (given that Monday, 27 May 2013, is a holiday)—to complete its consideration of the present application.

Background

5. The factual background below is based on the parties' submissions and the record before the Tribunal. (See also *Gatti et al.* Order No. 126 (NY/2013), dated 7 May 2013.)

6. The Capital Master Plan ("CMP") is a large-scale, long-term renovation of the United Nations Headquarters Complex in New York, mandated by the General Assembly. The construction phase of the project commenced in 2008. CMP required the relocation of a significant number of staff from the Headquarters Complex to other buildings, including rental space, such as the Albano building.

7. The Albano building has been renovated at a cost of USD24 million to bring the working conditions up to "the required standard". Despite the renovations, a number of issues with the Albano building remain (see *Gatti et al.*).

8. The Applicant was relocated to the Albano building in July 2009. He submits that, at the time of his move, it was envisaged that the relocation would be temporary and it was "the clear understanding that DGACM staff members [would] return to their offices in the Secretariat Building upon its renovation". The Applicant states that, on 29 July 2009, the Secretary-General visited the Albano building, "where he assured DGACM staff members that the move was temporary and that [they] would eventually relocate to the Secretariat building once renovation of the Secretariat was complete". The Respondent disputes this assertion, stating that no such promises were made or could have been made in 2009.

9. On 13 December 2012, the Acting Head of DGACM sent an email to all DGACM staff stating that the Albano building was no longer considered "swing space" (i.e., a temporary location occupied before moving to a permanent site) and DGACM staff would occupy it for the foreseeable future.

10. In the following months (December 2012–April 2013), staff-management consultations were held regarding the move to the Albano building. (For a detailed summary of the minutes of these consultations, see *Gatti et al.*).

11. The Applicant submits that, on 4 and 16 April 2013, senior management of DGACM informed its staff of the contested decisions (i.e., the decisions to relocate

DGACM staff members to the Albano building; to relocate staff already in the Albano building elsewhere within the building; and to deny DGACM staff the right to return to the renovated Secretariat building).

12. In late April 2013, staff-management consultations broke down. Around that time, staff members working in the Albano building and staff members designated to move into it held a general meeting and adopted a resolution strongly objecting to the scheduled relocation to the Albano building.

13. Between 26 April and 2 May 2013, the Tribunal received fifty applications seeking suspension of relocation to the Albano Building. The Respondent submits that, immediately following the Tribunal's Order rejecting the applications (see *Gatti et al.*), the relocation was implemented and is now complete. The Applicant appears to submit that at least some part of the relocation process is still ongoing and will be completed by the end of May 2013.

14. On 16 May 2013, the Applicant, who was not among the applicants in *Gatti et al.*, submitted his request for management evaluation of the contested decision.

Consideration

15. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the pendency of 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 Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

16. The application presently before the Tribunal is an application for suspension of action pending management evaluation. It seeks extraordinary discretionary relief, which is generally not appealable and which is intended to preserve the *status quo*

pending management evaluation. It is not meant to make a final determination on the substantive claims. Applications for interim relief disrupt the normal day-to-day business of the Tribunal and divert the Tribunal's attention from considering other cases filed under standard application procedures, some of which are long outstanding. Therefore, parties approaching the Tribunal must do so on genuine urgency basis which is not self-created, and with sufficient information for the Tribunal to, preferably, decide the matter on the papers before it. In view of the urgent nature of urgent applications, the Tribunal has to deal with them as best as it can, depending on the particular circumstances and facts of each case. An application may well stand or fall on its founding papers.

Receivability

Applicant's standing to file the present application

17. Whilst the Respondent acknowledges that the Applicant has standing to contest the Administration's compliance with his right to a safe and secure workplace (see *Gatti et al.*, paras. 60–65), he asserts that the Applicant may only contest decisions that impact on him personally. The Respondent submits that the Applicant is not affected by the relocation as he will remain in the same work station he has been occupying since 2009. Therefore, his application is not receivable.

18. For the purposes of art. 2.2 of the Statute, it is not sufficient for an applicant to merely state that there was an administrative decision that she or he disagrees with. As the Tribunal held in a number of cases, to have standing before the Tribunal, the applicant must show that the contested administrative decision affects her or his legal rights (*Jaen* UNDT/2010/165, *Nyakossi* UNDT/2011/101, *Warintarawat* UNDT/2011/053). The decision to contest an administrative decision

alleged to be in non-compliance with the terms of appointment or the contract of employment is an individual right and it is for each staff member to make.

19. It is a term of the Applicant's contract of employment that the Organization must exercise reasonable care to ensure the safety, health, and security of its staff members (*Gatti et al.*). The Applicant alleges that relocation of additional staff members to the Albano building would "exacerbate the existing problems in the Albano building", thus worsening his conditions of service and breaching his rights. He also submits that he was among the staff members promised to be moved back into the Secretariat building. He alleges, in effect, that this promise created at the very least some legitimate expectation and that it was breached by the Respondent.

20. Accordingly, the Tribunal finds that to the extent the Applicant seeks to make any claims on behalf of other staff members, such claims are not receivable. However, with respect to the claims made by the Applicant in relation to his legal rights, the application satisfies the statutory requirements and is receivable.

Implementation status of the relocation process

21. The Respondent states that the relocation of staff to the Albano building has been implemented and therefore is not capable of being suspended. The Applicant appears to suggest that the relocation would be fully finalized only by 30 May 2013. No evidence has been provided by either party in support of their respective claims regarding the implementation status of the relocation process.

22. If indeed the relocation process is finalized, there is nothing for the Tribunal to suspend. However, it may very well be, based on the papers filed, that some parts of the relocation process are still ongoing. In the circumstances and due to the lack of evidence regarding the exact status of the relocation process, the Tribunal finds it appropriate to proceed with the consideration of the present application.

Prima facie *unlawfulness*

23. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decisions are unlawful. For instance, it would be sufficient for him to present a fairly arguable case that the contested decisions were influenced by some improper considerations, were procedurally or substantively defective, or were contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamoran* UNDT/2011/126).

General Assembly resolutions

24. The Applicant submits that in a number of resolutions "the General Assembly has reiterated the nature of swing space as temporary office accommodation during the period of CMP, pending renovation of the Secretariat Building at which point the staff members temporarily displaced to swing space would return to the Secretariat Building". The Applicant refers the Tribunal to resolutions 63/270 (adopted on 7 April 2009), 64/228 (adopted on 22 December 2009), 65/269 (adopted on 4 April 2011), 66/258 (adopted on 9 April 2012), and 67/246 (adopted on 24 December 2012). The Applicant submits that the General Assembly has reserved to itself the authority to make any changes to CMP. The Applicant submits that "[s]ince management has not procured express approval of the General Assembly before making the contested decisions, these decisions would therefore be *ultra vires*".

25. The Respondent submits that the Administration has acted lawfully in managing the office space available to it. The Respondent submits that the Administration is obliged to accommodate its workforce taking into account a range of financial, logistical, and organizational issues. The decision to relocate the Applicants was made in furtherance of a mandate by the General Assembly, which requested the Secretary-General in para. 19 of sec. V of its resolution 67/246,

adopted on 24 December 2012, to "enhance efforts to manage the costs pertaining to swing spaces with a view to optimizing the rental contracts". The Respondent submits that, in line with this resolution, a decision was taken in 2012 to retain the Albano building as part of the Organization's portfolio of rental properties.

26. Although the Applicant referred the Tribunal to a number of General Assembly resolutions, the Tribunal has not been alerted to any provisions that clearly state that it is impermissible for the Respondent to continue to utilize the Albano building. In fact, para. 18 of sec. V of resolution 67/246 reflects the General Assembly's awareness that the Secretariat "intends to keep two swing space leases [including the Albano building] after the completion of [CMP], which will result in an additional burden on the regular budget". While the General Assembly noted budgetary implications of keeping two swing space leases, it was clearly made aware of such plans and did not say that they were not permitted. The Assembly's resolution 67/246 specifically relied on the Report of the Advisory Committee on Administrative and Budgetary Questions of 25 October 2012 (A/67/548, "Capital master plan"), which states at para. 40(a) that "the Secretariat considers the building to be part of its midterm space planning and management strategy" and that the lease will continue until its expiration in July 2017. The Assembly's resolution also referred to the Secretary-General's Tenth annual progress report on the implementation of the capital master plan (A/67/350), dated 5 September 2012, which states at para. 18 that the lease on the Albano building would be retained until July 2017, "at which time it will either be extended or terminated as part of the medium-term office requirements strategy".

Alleged promise of return to the Secretariat building

27. The Applicant submits that, during the Secretary-General's visit to the Albano building on 29 July 2009, staff members of DGACM were promised that they would be moved back into the Secretariat building. He states that staff members

moved out of the Secretariat building "based on those promises that they [would] be relocated to the [Secretariat building] once the CMP is completed" and that management should "honor its promises to DGACM staff members regarding their right to return to the Secretariat building".

28. The Respondent submits that no decision was taken in 2009 that the Applicant or any other DGACM staff members would return to the Secretariat building upon completion of its renovation. According to the Respondent, it was unknown in mid-2009 which work units would be located in which premises. The Respondent further states that the Applicant has offered no evidence showing that any promises of this nature were made to him or other staff members.

29. To the extent the decision not to move the Applicant back to the Secretariat building is at all capable of being suspended, the Tribunal makes the following findings. The only document proffered in support of the Applicant's assertion of a promise made by the Secretary-General is an article on iSeek (UN's internal website) dated 30 July 2009 describing the Secretary-General's visit to the Albano building on 29 July 2009. The article, however, contains no references to any undertaking by the Secretary-General to move all or any of the staff members located in the Albano building into the Secretariat building. The Respondent denies that such a promise was made or could have been made. The Tribunal has no evidence presently before it to substantiate the Applicant's averment in his application that a legally binding undertaking was made by the Secretary-General that created a right on the part of the Applicant to be stationed in the Secretariat building. It is of course a separate issue whether any promises or undertaking by the Secretary-General, if indeed made, would be capable of giving rise to any right or expectation in this case.

Working conditions

30. The Applicant submits that the working conditions of staff located in the Albano building are negatively affected by a number of serious issues that

management has failed to resolve. He states that "the conditions would become even worse as a result of the decisions" made on 4 and 16 April 2013 to bring additional staff into the building and to deny staff members of DGACM temporarily accommodated in the Albano building the right to return to the renovated Secretariat building. The Applicant further states that staff surveys conducted in April 2013 show that the Albano building does not meet the requirements stipulated in para. 34 of General Assembly resolution 62/87, adopted on 10 December 2007, which emphasized to the Secretary-General the importance of ensuring that "the swing space meets the highest standards for the safety, security, health and well-being of the staff of the United Nations". The Applicant states that "with a high rate of staff members falling ill, [experiencing] breathing difficulties, developing allergies and water quality issues, the whole building's environmental health should have been thoroughly assessed, however, [m]anagement has failed to properly investigate and resolve these issues". The Applicant further submits that the Albano building lacks many amenities available in other buildings used by the United Nations, such as cafeteria and medical services.

31. The Respondent submits that the Albano building is compliant with the relevant local regulations and standards. The Respondent submits that the relocation to the Albano building was required by several considerations, including the need to: optimize space density; consolidate related units that are presently scattered across different locations under one roof; allow the relocation of other offices and avoid penalties for failure to vacate them; and minimize the use of rental space and related expenses. The Respondent submits that the Albano building was among two swing spaces that were always considered as "long-term opportunities", which is why the Organization invested over USD24 million in the renovation of the Albano building. The Respondent acknowledges the ongoing issues concerning the Albano building but states that management has been

addressing them and will continue to address them as they arise in consultation with the staff.

32. With regard to the Applicant's claim that many of the work stations in the Albano building lack natural light, the Respondent states that the Applicant's work station has access to natural light. Furthermore, 88 per cent of incoming staff will have access to natural light, 11 per cent will have partial access to natural light, and only 1 per cent will have no access to natural light. The Respondent states that, in any event, there is no requirement that workspaces have access to natural light.

33. The Respondent further submits that, with respect to the Applicant's complaints that the Albano building has no cafeteria or medical service, there is no provision in his terms of appointment that provides for a cafeteria and medical services to be located in the premises in which he works. The Respondent submits that all staff, including the Applicant, may have their meals, if they wish, at the Secretariat building, which is located a short walk from the Albano building. The same applies to medical services.

34. It is apparent to the Tribunal that there are a number of issues with the working conditions in the Albano building, as is in fact acknowledged by management. There is also a sense of dissatisfaction of staff presently located there with the quality of their work conditions. However, the Tribunal is not persuaded on the papers filed that the Applicant has demonstrated that the implementation of the contested decisions—provided that they are not yet fully implemented—would have such effect on his working conditions as to render the decisions *prima facie* unlawful.

35. In particular, the Respondent's submission that the building complies with the relevant local codes and regulations—the same submission made by the Respondent in *Gatti et al.*—stands unrebutted. The Applicant has not proffered any evidence to contradict the Respondent's submission, which finds support in

the relevant documents, including the minutes of the staff-management consultations, that tests have been carried out showing the building's compliance with the relevant codes and regulations (see *Gatti et al.*). Similarly, although the application refers to "sick leave and medical reports", none of these documents have been provided to the Tribunal by the Applicant.

36. The Tribunal also finds that the Applicant has not provided any evidence in support of his averment made in the application that the relocation of additional staff into the Albano building or the movement of staff within the Albano building would actually result in a breach of *his* rights.

Alleged discrimination

37. The Applicant states that he is entitled to decent working conditions and to a working environment equal to the one he had before moving to the Albano building and equal to that of other colleagues in New York. He submits that the contested decisions amount to disparate treatment and discrimination among staff members in the same duty station, by placing DGACM staff members, including him, in the Albano building, which is substandard to the Secretariat building.

38. The Respondent submits that the Applicant's claims of discrimination against DGACM staff are without merit and that the relocation was due to organizational and budgetary reasons.

39. The Tribunal is not persuaded, on the documents filed, that the Applicant's allegations of discriminatory treatment satisfy the requirement of *prima facie* unlawfulness. There is insufficient evidence before the Tribunal at this stage that the contested decisions improperly targeted DGACM staff members, including the Applicant, were motivated by improper reasons, or were otherwise unlawful.

Conclusion with respect to the prima facie unlawfulness

40. The Tribunal finds that the Applicant has not satisfied the requirement of *prima facie* unlawfulness of the contested decision.

Urgency

41. Although the findings above are sufficient to dismiss the present application, the Tribunal finds it appropriate to state the following regarding the requirement of particular urgency.

42. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamoran* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

43. The Applicant states in his application that he was informed of the contested decisions on 4 and 16 April 2013. The present application was filed on 20 May 2013, or more than one month after the notification of the contested decisions to the Applicant.

44. The Applicant did not provide any explanation for not filing the present application with the Tribunal earlier. In the circumstances of this case, the Tribunal finds that the Applicant cannot seek its assistance as a matter of urgency in this case when he has had knowledge of the decision for more than one month.

45. It may further be argued that, since the Applicant has been stationed in the Albano building since July 2009, he was notified that he would remain there as early as 13 December 2012, when the Acting Head of DGACM sent an email to all DGACM staff informing them that the Albano building was no longer considered swing space and that DGACM staff would occupy it for the foreseeable future.

46. In any event, taking any of the three dates—13 December 2012, 4 April 2013, or 16 April 2013—as the date of notification of the contested decision to the Applicant, any urgency in this case is of the Applicant's own making. Therefore, the requirement of particular urgency is not satisfied.

47. In view of the Tribunal's findings with respect to the requirements of *prima facie* unlawfulness and particular urgency, the Tribunal need not determine whether the remaining condition—irreparable damage—has been satisfied.

Order

48. The present application for suspension of action is rejected.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 22nd day of May 2013