



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/007
Order No.: 36 (NY/2014)
Date: 21 February 2014
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

TAVORA-JAINCHILL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
George Irving

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

Introduction

1. On 12 February 2014, the Applicant, a Forest Affairs Officer, Secretariat of the United Nations Forum on Forests, Department of Economic and Social Affairs, United Nations Secretariat, filed an application for suspension of action pending management evaluation of the “refusal to provide her, as an elected official from the United Nation Staff Union (“UNSU”), with facilities including intranet access via iSeek (UN’s intranet portal) while according such facilities to persons who are not properly designated UNSU officials.

2. The application was transmitted to the Respondent on 13 February 2014 and the Respondent duly filed his reply on 18 February 2014. The Respondent submitted that the request for management evaluation having been completed on 17 February 2014, and thus no longer being pending, the application for suspension of action was not receivable.

Consideration

3. Pursuant to art. 2.2 of its Statute, the Dispute Tribunal

shall be competent to hear and pass judgment 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 subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particularly 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.

4. Article 13.1 of the Tribunal’s Rules of Procedure states that

The Dispute Tribunal shall order a suspension of action 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.

5. The Tribunal considers that for an application for suspension of action to be successful, it must satisfy the following cumulative conditions:

- a. The application is receivable because it concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The contested decision has not yet been implemented;
- c. The Applicant has submitted a request for management evaluation of the contested decision, which evaluation is currently pending;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable damage.

Receivability

6. The Tribunal notes that in accordance with art. 2.2 of its Statute, it is only competent to hear and pass judgment on an application to suspend, during the pendency of management evaluation, the implementation of a contested administrative decision if it is alleged to be in non-compliance with the Applicant's terms of appointment or the contract of employment. The contract and terms of appointment include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance.

7. The Applicant indicated that the contested decision in the present case is the Respondent's refusal to provide her, as an elected official of the UNSU, with certain facilities, including intranet access via iSeek, while according such facilities to persons who are not properly designated UNSU officials.

8. The Applicant stated that, on 5 February 2014 she “sent a request to iSeek personnel to publish a disclaimer urging the staff to ignore the unauthorized message of the former polling officers” and that on the following day the team leader for iSeek advised her “that she was unable to fulfill her request for posting an official communication on behalf of the Staff Union, that the decision did not rest with her and that she was awaiting guidance from authorities she did not identify”. On 11 February 2014, the Applicant requested the publication of an Executive Board Bulletin announcing the new polling officers. There has been no posting on iSeek.

9. On 17 February 2014, the Management Evaluation Unit (“MEU”) responded to the Applicant’s request for management evaluation, stating that

there is no evidence in [her request for management evaluation] that a decision has actually been taken on [her] request. The Official later replied ... that she was awaiting a response on her request for guidance ... the failure of the Administration to definitely respond within the time-frame prescribed by a requesting staff member does not constitute a decision, and in particular not within the time-frame of events here. The Official did not deny [her] request, nor as she advised [her], did she have the authority to do so. She merely advised [her] that [her] request was being considered.

The MEU concluded that the Applicant’s request for management evaluation was premature and not receivable.

10. The MEU further observed that insofar as her request concerned a decision related to the UNSU elections, that the Arbitration Committee of the Staff Union is the sole body able to consider and rule on matters concerning the dispute arising out of the Staff Union elections.

11. Regarding the receivability of the application, the Tribunal notes that, in accordance with iSeek’s Guidelines, its basic purpose is to provide timely, relevant and coherent messages/information to staff members (see arts. 1 and 2). The iSeek team has editorial discretion in making decisions regarding the posting of content to iSeek. As required, it may consult the iSeek Editorial Board. The Editorial Board meets regularly, in person or virtually, to consider policy issues related to iSeek, and

as needed to provide guidance on urgent and complex issues brought to its attention by the iSeek team. It aims to make decisions within 24 hours or as soon as possible. Further recourse about the actions of and editorial decisions taken by the iSeek team may be brought to the attention of the Editorial Board (see arts. 22 to 25). It results that the official from iSeek team exercised her right to seek guidance.

12. Staff Associations/Committees post material on their respective websites and may submit official communications, such as bulletins, to the iSeek team for consideration (see art. 12(c)). All staff members with iSeek editor accounts may post announcements. The iSeek team may post announcements at the request of organizational units or on *ad hoc* basis. iSeek should not be used to further any individual interest.

13. The Applicant did not wait to receive an official response to her request from the iSeek team and, as stated by the MEU, her request for management evaluation was filed prematurely. The MEU further observed that, insofar as her request concerned a decision related to the UNSU elections, the Arbitration Committee of the Staff Union is the sole body able to consider and rule on matters concerning dispute arising out of the Staff Union elections.

14. This application for suspension of action is based on Administrative Instruction ST/AI/293, dated 15 July 1982, which addresses the facilities that are to be provided to staff representatives, and staff rule 8.1, which defines the staff representative bodies and staff representatives.

15. ST/AI/293 (Facilities to be provided to staff representatives) states:

13. Staff members duly designated or elected by the Staff Council, Staff Committee or corresponding staff representative body to perform representational functions may be accorded such facilities as may be required to perform those functions under arrangements to be determined in accordance with the procedures set out in chapter VIII of the Staff Rules.

14. Disagreements concerning the implementation of the above provisions shall be discussed and resolved in accordance with the procedures set out in chapter VIII of the Staff Rules.

16. According to art. 8.2.3 of the UNSU Statute and Regulations, the Arbitration Committee shall receive, consider and rule upon matters related to violations of the UNSU Statute and Regulations.

17. In her 5 February 2014 request, addressed to the iSeek team, the Applicant stated that

For a while we have been avoiding sending you communications for publication on iSeek since we didn't want to contribute to the confusion of the staff-at-large. However, we have to change this policy since on the Staff's corner there is a Call for Nominations to the Arbitration Committee issued by the recalled polling officers.

...

Please ignore all messages from the recalled polling officers

Until the Administration recognizes the legal recall of the polling officers and take away the e-mail address "Polling officers-UNSU", as requested by the Unit Chairperson on 9 December 2013, every time an e-mail message is sent or a note is published on iSeek by the recalled polling officers we will request that a clarifying communication with the above title is published on iSeek.

18. It is clear to the Tribunal that the Applicant's requests to the iSeek team to publish UNSU related announcements are directly related to the December 2013 UNSU elections. In the present case, the Applicant is seeking a judicial decision to confirm her personal views on matters which can only be decided by the Arbitration Committee. Seeing that the Tribunal has no jurisdiction on such matters, the application is not receivable.

Pending management evaluation

19. The request for management evaluation having been completed on 17 February 2014, it is no longer pending. It follows from art. 2.2 of the Statute of Tribunal and art. 13 of its Rules of Procedure that the suspension of a challenged

decision may only be ordered when the management evaluation of that decision is ongoing (*Igbinedion* 2011-UNAT-159 and *Benchebbak* 2012-UNAT-256).

20. The Tribunal therefore considers that two of the cumulative conditions required for the purpose of suspending an administrative decision pending management evaluation, namely that the application (1) concerns an administrative decision and (2) that management evaluation be pending, are not fulfilled. It is therefore not necessary for the Tribunal to further examine the remaining requirements, namely the *prima facie* unlawfulness, urgency and the irreparable damage caused by the decision.

Observations

21. The Tribunal observes that, on 5 February 2014, an applicant who stated that he was the newly-elected President of UNSU filed a suspension of action requesting that the Tribunal suspend during the pendency of management evaluation the decision not to afford him time release to perform certain UNSU-related duties and not to afford him access to the Staff Union facilities. His application was registered under Case No. UNDT/NY/2014/006. In his application he indicated that the Arbitration Committee had written to the Under-Secretary-General for the Department of Management that the UNSU elections were conducted via a valid process and he filed a copy of the 27 January 2014 email sent by the former members of the Arbitration Committee. Due to the management evaluation request having been completed on 7 February 2014, prior to the issuance of the Tribunal's order on the application for suspension of action, the request for suspension of action in Case No. UNDT/NY/2014/006 was rejected by Order No. 32 (NY/2014) dated 10 February 2014.

22. On 12 February 2014, the present application for suspension of action was filed by the Applicant, who also sustains that she is an UNSU official. The Applicant does not mention her position or the functions and the name of the other staff members to whom she alleges iSeek has provided facilities. .

23. It is only in her email 6 February 2014, whereby she requested that the iSeek team publish the 5 February 2014 document titled “Executive Board Bulletin UNSU”, that she signed her email as the President of UNSU.

24. The Tribunal observes that the Applicant is raising issues directly related to the UNSU elections, and her claims are in direct contradiction with those of the applicant in Case No. UNDT/NY/2014/006. It appears that two persons currently claim to be President of UNSU. Such matters and disputes fall under the jurisdiction of the Arbitration Committee and not of this Tribunal. Further, any decision regarding the facilities to be afforded to UNSU staff representatives, even in the form of temporary relief such as a suspension of action, would result in the Tribunal adjudicating on a contested electoral issue over which it does not have jurisdiction.

25. The Tribunal also notes that, on 10 February 2014, it issued *Lane* Order No. 31 (NY/2014) on a motion for interim measures, addressing a request from another staff member seeking an order directing

the Respondent to abide by the decision of the Unit Chairpersons under section 6.17 of the Regulation of the UNSU, recalling the Polling Officers of the 44th Staff Council, and to therefore suspend further action with regard to the provision of official email and other facilities to the Polling officers who had been recalled. The Applicant specifically requests the Tribunal to order the respondent to cease all further action in support of efforts by the former polling officers to conduct further elections of any kind.

26. That motion for interim measures was rejected and the Dispute Tribunal underlined that

19. The purpose of an *interdict pendente lite* or interim measure, is not to grant final, but only temporary relief, pending the outcome of substantive proceedings. For the Tribunal to grant the interim measures requested by the Applicant, if indeed it is competent or has jurisdiction to do so in the instant case, would be to rule on the propriety of the recall of the Polling Officers. Consequently, if the interim measure were to be granted, the Tribunal would not only be adjudicating that the recall of Polling Officers was proper, but that as a result the contested election process was invalid, thus effectively

disposing of the substantive case. This would be an unfortunate outcome, particularly in this instance, where there are other interested parties who may be adversely affected by the Order and where it is unclear whether the internal statutory mechanisms have been exhausted.

Conclusion

In light of the foregoing the Tribunal ORDERS:

27. The application for suspension of action is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 21st day of February 2014