UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/055
Order No.: 262 (NY/2014)
Date: 9 September 2014
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

CARLTON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON

SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN
Hyojin Bae, ALS/OHRM, UN

Introduction

1. The Applicant, a Human Resources Assistant at the G-6/Step 11 level in the Strategic Planning and Staffing Division ("SPSD"), the Office of Human Resources Management ("OHRM"), Department of Management ("DM"), filed an application on late Friday, 29 August 2014, for suspension of action pending completion of management evaluation pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure, of the decision to implement a Flexible Workspace Pilot ("FWP") for SPSD. Under the FWP, the working environment would be rearranged so that individual staff members will no longer have a specifically assigned desk or workspace at the work place.

2. Monday, 1 September 2014, being an official UN holiday, the application was transmitted to the Respondent on Tuesday, 2 September 2014, and the Respondent's reply was duly filed by 3.00 p.m. on Thursday, 4 September 2014, as directed by the Tribunal. The Tribunal has five working days to render a decision from the date of service of the application on the Respondent, i.e. until 5 p.m., Tuesday, 9 September 2014.

3. In the application, the Applicant states that she was informed of the contested decision on 15 August 2014 verbally during a town hall meeting and in writing via an email sent by a Senior Human Resources Officer, SPSD, and that she was not part of the initial briefing given to staff on this matter on 18 July 2014.

4. The Applicant submits, *inter alia*, that the contested decision is unlawful as it would result in a breach of her right to a proper working environment and to be treated equally in relation to other staff members who are not participating in the FWP. She further contends that the decision results in a change in her conditions of service and that pursuant to staff regulation 8.1, the staff representatives should have been consulted.

5. The Respondent submits that the Applicant has failed to meet the conditions required under art. 2.2 of the Tribunal's Statute for the granting of a suspension of action as, *inter alia*, staff members and representatives were engaged in the FWP process; the damage is not irreparable; and the requirement of urgency is not met given that the Management Evaluation Unit's ("MEU") response is due before any potential impact of the contested decision on the Applicant is to occur.

Relevant background

6. Applications for interim relief, including those for suspension of a contested decision pending management evaluation, have to be considered within a very short period of time. Parties approaching the Tribunal for such relief must do so on a genuine urgency basis and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. In view of the urgent nature of such applications, the Tribunal has to deal with them as best as it can depending on the particular circumstances and facts of each case. The application may therefore well stand or fall on its founding papers. In this instance, the paucity of material facts in her application is in part supplemented by the Applicant's annexure of the detailed submission she made to the MEU. The following background facts appear from the record, with much of the details of the consultations being provided by the Respondent.

7. On 15 April 2014, the Office of Central Support Services presented OHRM with the FWP concept. Following this presentation, meetings were held in May and June 2014 "at the senior management level, at which it was decided that SPSD would participate in the pilot project". The Respondent contends that no decision has been taken on the long-term future of the FWP, and that the results of the pilot project will be assessed and included in the business case for flexible working.

8. On 7 July 2014, the Chiefs of SPSD met to discuss the FWP. This was followed by a meeting with SPSD's staff on 8 July 2014 during which Facilities

Management Service ("FMS") in DM gave a presentation and answered questions regarding FWP. It is not indicated whether the Applicant participated in this meeting.

9. On 18 July 2014, a briefing was held by the Office of Information and Communications Technology ("OICT") for the purpose of conveying to the staff members further information regarding the inner workings of the upcoming plan, including web access to the necessary information to enable staff to perform their functions. The Applicant was not present in the office that day and did not attend the meeting.

10. On 15 August 2014, SPSD staff members, including the Applicant, were provided with additional information at a town hall meeting, followed by a question and answer session regarding the moving schedule, renovation schedule, IT requirements and the booking system for reservation of workspaces. Following this meeting, staff members received an email from a Senior Human Resources Officer, SPSD, advising that DM was ready to "kick-start the FWP pilot for SPSD on the 18th floor and followed by the 19th floor, scheduled to begin on 05 September 2014" (the Applicant is an occupant of the 19th floor). The email further stated that, with regard to staff members on the 18th floor: (a) FMS would send a working group to initiate the move on 26-27 August 2014; (b) a crate would be provided to each concerned staff member on 29 August 2014 to pack their belongings; (c) FMS would move all the division files on 3 September 2014; and (d) the move would take place on 5 September 2014. The email further stated that the renovation work on the 18th floor was expected to be completed by 15 October 2014. Finally, the email noted that, "staff on the 19th floor, unless otherwise notified, will remain in the 19th Floor office until mid-October, when renovation work will begin on that floor. Detailed schedule for packing and moving will be provided at a later date".

11. On 19 August 2014, the Applicant, following a request from her supervisor, was invited to attend a meeting the following day with the supervisor and two consultants involved in the FWP. In his reply, the Respondent notes that, prior to this

meeting, the Director of SPSD had a meeting in July with one of the OHRM staff representatives and that, aside from the Applicant, nine other staff members, including staff representatives, were "interviewed" in August 2014.

Consideration

12. Article 2.2 of its Statute provides that the Tribunal 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 decision only if all three requirements of art. 2.2 of its Statute have been met. This extraordinary discretionary relief is generally not appealable and is intended to preserve the *status quo* pending management evaluation. It is not meant to make a final determination on the substantive claim.

13. The Applicant contends that that she is being unlawfully stripped of her normal working conditions under the guise of a pilot project with no end date. She maintains that this variation of her working conditions has, *inter alia*: not been the subject of consultation as required under staff regulation 8.1; is not in compliance with United Nations' guidelines nor those of the host country; would result in inadequate, overcrowded, nonergonomic and unassigned workstations; and is likely to result in productivity loss, reduced morale, and stress of staff members. She further contends that the implementation of the decision will result in the permanent removal of current assigned workspaces, causing irreparable harm by negatively affecting her ability to carry out her assigned functions.

14. The Respondent contends, *inter alia*, that the Applicant has failed to show that the decision was improperly motivated implemented or otherwise unreasonable, and submits that there has been extensive consultation with staff, including the Applicant, following which the Administration has broad discretion to reorganise its work or

business. Furthermore, the Respondent submits that there is no urgency as the pilot project will not begin on the 19th floor until after mid-October 2014, by which time the requested management evaluation will be completed.

Receivability

Applicant's standing to file the present application

15. In terms of art. 2 of its Statute, the Tribunal is competent to hear and pass judgment on an application appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1). Article 2.2 provides that the Tribunal is competent to hear and pass judgment on an application seeking to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision, provided that the conditions specified in art. 2.2 have been met.

16. The Respondent has quite correctly not taken the point that there is no challengeable administrative decision. The general principle of the duty on the part of the Organization to exercise reasonable care to ensure the safety, health, and security of its staff members as an express or implied term of their contracts of employment is well established (*Gatti et al*. Order. No. 126 (NY/2013) dated 7 May 2013). However, the Applicant alluded on several occasions to the rights of staff members in general, and to the potential harm she foresaw resulting from the pilot project in regard to safety, health and performance of staff.

17. 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 has 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.

18. 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 her own legal rights, the application satisfies the statutory requirements and is receivable.

Implementation

19. The Tribunal notes that if the decision to conduct the FWP project was to be considered as having already been implemented, there would be nothing for it to suspend. However, neither party has provided the Tribunal with sufficient information that would enable it to clearly identify when the contested was or is to be considered implemented.

20. Identifying the date on which the decision to conduct the FWP is to be considered implemented is very different from, for example, a decision to separate a staff member from the service. In cases such as the present one, where staff members have to be relocated to enable the completion of the project as a whole, the Tribunal may well consider that the FWP process has been fully engaged once key processes of the project have been completed, i.e., the 3 September 2014 moving of files from the division to enable the impending construction to start. Similarly, one may well consider that the contested decision would not be implemented until the date on which the FWP project actually starts, namely once the new working spaces have been provided to staff members around mid-October 2014.

21. In the circumstances and due to the lack of information regarding the exact status of the FWP process, the Tribunal will proceed with the consideration of the present application for suspension of action in terms of art. 2.2 of its Statute and art. 13 of its Rules of Procedure.

Prima facie *unlawfulness*

Applicable law

22. Staff regulation 8.1(a) provides that,

> The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies.

23. Staff regulation 1.2 (c) provides that while staff members are subject to assignment by the Secretary-General to any of the activities or offices of the United Nations, "in exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them."

24. In Judgment No. 1125, *Mwangi* (2003), the former Administrative Tribunal emphasized the importance it attaches to the duty of care by the Respondent, stating,

> [E]ven [if] such obligation [were] not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well-being.

25. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient 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) dated 1 February 2011; *Villamoran* UNDT/2011/126). The Applicants' primary contentions with regard to the *prima facie* unlawfulness aspect

of the case is that the Management has failed to carry out consultations with staff prior to deciding to implement the pilot which results in a change in her conditions of service.

26. The Respondent argues that the Applicant has failed to show that the FWP is unsafe or unhealthy, and has produced information only on the required standards for fixed, and not flexible, workplace environments, and submits that there has been extensive consultation with staff, including with the Applicant, following which the Administration has broad discretion to reorganise its work or business.

Consultation

27. An employer is entitled to reorganize the work or business to meet the needs and objectives set at a particular time (*Gehr* UNDT/2011/142). The Administration has broad (but not unfettered) discretion in organizing its offices and departments, including with respect to their location and layout. This, however, has to be in compliance with the general principle of the Organization's duty to exercise reasonable care to ensure the safety, health, and security of its staff. In exercising its discretion in this regard, the Administration must follow fair, reasonable, and equitable procedures, including a meaningful consultation process.

28. Consultations must be carried out in good faith and should generally occur before a final decision has been made so that staff members concerned have a proper opportunity to be heard (*Chattopadhyay* UNDT/2011/198). Among the goals of the consultation process is ensuring that staff members have a say in the process, that they receive proper notice, and that their interests and views are taken into consideration (*Allen* UNDT/2010/009; *Adundo et al.* UNDT/2012/118; *Bauzá Mercére* UNDT/2013/011). However, staff members must keep in mind that consultations are not the same as negotiations. When carrying out consultations, it is not necessary for the Administration to secure consent or agreement of the consulted parties to satisfy the requirement of consultation (*Rees* UNDT/2011/156; *Gehr* UNDT/2011/142; *Adundo et al.* UNDT/2012/118). It may well be that some of the

issues raised in this case may be matters for negotiation, but the Tribunal has insufficient information in this regard. In any event, the role of the Tribunal in matters of collective bargaining is very limited and formal litigation should be resorted to only when staff members consider that their contractual rights have been violated.

29. By the Respondent's own admission in the reply, meetings were held in May and June 2014 "*at the senior management level, at which it was decided* that SPSD would participate in the pilot project" (emphasis added). This decision ostensibly was made without consultation with the staff members or staff representatives.

30. The Applicant states that she was informed of the contested decision on 15 August 2014, although it appears that she did not participate in two prior information sessions on the subject that were held on 8 and 18 July 2014. She filed her application on 29 August 2014 when staff members on the 18th floor received the packing crates for their intended move on 5 September 2014.

31. Although it was decided at a "senior management level" that SPSD would participate in the pilot project, and it appears consultations only took place thereafter, the Respondent states that the required level of consultations for the pilot was undertaken, and that there will be ongoing feedback during the pilot. The Tribunal can only assume this to be the case, as no other applications have been filed, and staff members from the 18th floor have already reported for duty at a new work location. Furthermore, a pilot project is by definition a small scale preliminary study conducted in order to evaluate feasibility, time, cost, adverse effects and events before implementation of a full-scale project. Any change in the working conditions thereafter would require meaningful consultation before becoming permanent. The Tribunal is not persuaded that there was such failure in the consultation process by management as to result in the *prima facie* unlawfulness of the contested decision, and in view of the obligation of the Organization to exercise reasonable care to ensure the safety, health, and security of staff members, management will have to continue

to engage staff in a constructive consultation and the assessment process throughout the pilot.

Conditions of work under the FWP

32. The Tribunal notes with concern that, aside from the email of 15 August 2014, neither party has provided it with any supporting evidence regarding the authority or legal basis under which this project was launched, key dates relevant to the implementation and duration of the pilot project, how many staff members are participating in the FWP or whether participation in FWP is compulsory, although the Applicant states it is mandatory. Nor is there any information indicating clearly if the project is finite and irreversible, or simply a pilot or test run.

33. The Applicant bears the burden of showing that the contested decision is *prima facie* unlawful. Other than some general comments regarding the *potential* hazards to health and safety that could arise from the new workplace/workstation plans, the Applicant has not specified the violation of any relevant administrative issuance, bulletin, resolution or other legal requirement, including any City or host country regulations and standards. Whilst the Applicant may have genuine concerns regarding the new pilot, the Tribunal cannot speculate on the potential impact and effects of the new flexible workspace plans. The purpose of a ”pilot” project, if indeed the Administration is acting in good faith, is to test the feasibility of the project taking into account health and safety standards, amongst others. Should the pilot results prove unsatisfactory, presumably the final plan will not be implemented. The Applicant has therefore failed to meet the statutory burden of proving non-compliance with the terms of her appointment or contract of employment (*Obino* 2014-UNAT-405, para. 19).

Conclusion on *prima facie* unlawfulness

34. On the papers before it, the Tribunal finds therefore that the Applicant has failed to discharge her burden in making out a *prima facie* case that the decision was

unlawful as procedurally defective or influenced by some improper considerations, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith. The Tribunal finds that the Applicant has not satisfied the requirement of *prima facie* unlawfulness of the contested decision.

35. As one of the conditions required for temporary relief under article 2.2 of the Statute has clearly not been met, and that the urgency in this case is most likely self-created, the Tribunal need not determine whether the remaining condition-irreparable harm-has been satisfied.

Conclusion

36. The application for suspension of action is dismissed.

(*Signed*)

Judge Memooda Ebrahim-Carstens

Dated this 9th day of September 2014