



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON

**SUSPENSION OF ACTION DURING
THE PENDENCY OF THE
TRIBUNAL'S DELIBERATION OF
MOTION FOR INTERIM MEASURES**

AND

REQUEST FOR ANONYMITY

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
ALS/OHRM

Introduction

1. On 31 March 2017, the Applicant, a former staff member with the United Nations, filed an application contesting, “The decision of the Administration to unilaterally amend Article X of the Staff Rules and Regulations covering Disciplinary Measures and then threaten to notify [the Applicant’s] new employer, of an incomplete disciplinary investigation”. As a remedy, the Applicant requests “that the Administration’s decision to threaten to contact his new employer [...] to disclose contents of an outstanding investigation be rescinded”. As part of his application, the Applicant further requests to have “his name anonymised in any orders or final judgment”.

2. Together with his application, the Applicant also filed a motion for interim measures pursuant to art. 10.2 of Dispute Tribunal’s Statute and art. 14 of its Rules of Procedure, requesting that the contested decision be suspended during the proceedings before the Dispute Tribunal. Referring to arts. 19 and 36.1 of the Dispute Tribunal’s Rules of Procedure and the Appeals Tribunal’s judgment in *Villamoran* UNAT/2011/160, the Applicant further requested the Tribunal to order the contested decision to be suspended during the pendency of the Tribunal’s deliberation of his motion for interim measures, contending that:

... In this case, the Administration has indicated its intention to inform the Applicant’s current employer of an unresolved disciplinary process, quite possibly without any prior warning, which course of action will have cause irreparable harm, and has no lawful basis. The matter is urgent in that, whilst the Administration has granted the Applicant two weeks to comment on the threat, that deadline if not passed already is imminent. This renders the possible implementation of the decision imminent also.

... Given the imbalance of power between the Parties, and weighing the negative consequences to the Applicant of implementation of the decision, the risk of frustration of any

Article 14 Order of the Tribunal is great. Therefore, Applicant respectfully requests that this Tribunal order an interim suspension of the contested decision pending the Article 14 suspension of action proceedings.

Background

1. The following outline of facts is based on the application and the motion for interim measures and is corroborated by the documentation on record.
2. The Applicant was a staff member with the United Nations until he resigned from his position to assume a job with an employer outside of the United Nations common system, notably the new employer, in February 2017.
3. On 21 March 2017, the Applicant received an e-letter, dated 2 March 2017, from the Chief of the Disciplinary Unit, Administrative Law Section, Office of Human Resources Management, Department of Management (“the Chief”). In this letter, referring to a letter dated 2 February 2017 from the Chief of the Human Resources Policy Section, Office of Human Resources Management to the Applicant, the Chief wrote him that “you were issued allegations of misconduct and were provided with a copy of the documentation referred in this matter”. Of relevance, the Chief also stated that:

Effective [...] February 2017, you resigned from service with the Organization. Given that this matter had not been resolved at the time of your separation, the attached note will be placed on your Official Status File [reference to annex omitted]. In accordance with ST/AI/292 (Filing of adverse material in personnel records), a copy of which is also enclosed, you are hereby requested to provide, within two weeks of receiving this letter, any comments you might wish to make in relation to the note.

In addition, it is proposed that the matter will be referred to [the new employer] for their consideration. Please also provide, within two weeks of receiving this letter, any comments you wish to be taken into consideration regarding the proposal to refer the matter to [the new employer].

You may refer to the documentation, previously provided to you, to assist you in providing comments on the note to be placed on your Official Status File. Please note that a copy of the documentation provided to you will not be placed on your Official Status File; only the note will be placed on your file.

Please be advised that, after the two-week period, the note will be placed on your Official Status File, together with any comments provided. No other documents relating to this matter will be placed on your Official Status File.

If a decision is made to refer this matter to [the new employer], you will be informed.

Request for anonymity

3. In support for his request for anonymity, the Applicant submits that:

... Since it has been the Tribunal’s practice to summarise factual backgrounds of a case in final orders/judgements, a publicly available order/judgment referring to alleged involvement in actions deemed to amount to misconduct would unfairly and unnecessarily prejudice [the Applicant’s] personal and professional reputation.

... The permanence of an order/judgment with a recitation of the facts being available and accessible on the Office of Administration of Justice website or the world-wide web is a further consideration and raises issues concerning the right to privacy of [the Applicant] and his family.

... Publishing the full details would achieve the same result that the Administration intends to do by notifying [the new employer] of the allegations.

... By granting the request for anonymising any final order/judgment, the Tribunal will be acting in accordance with earlier precedent [*Applicant* 2013/UNDT/120].

4. The Tribunal notes that art. 11 of its Statute states that “the judgments of the Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal”. Unlike in many domestic courts, generally the case record and filings made before the Dispute Tribunal are not available to the

public. The only public documents are judgments and orders that are published on the Tribunal's website. The parties and their counsel are expected to maintain the confidentiality of all written pleadings and documentation relating to the case by ensuring that they are not disclosed to third parties.

5. The granting of anonymity by international tribunals dealing with international civil servants has been the subject of some debate and divergent practices among various tribunals. Some of the concerns expressed regarding the redaction of applicants' names were that:

[i]ncreased granting of anonymity will inevitably encourage those with grudges to bring meritless claims and specious accusations under cover of anonymity, wasting Tribunal resources and risking injustice at no reputational cost to the concealed applicant. Increased anonymity will also counter productively foster the impression that resort to the tribunal is a dangerous or shameful act. This is an easily avoidable trap. The commendable healthiness and greater sense of dignity is found in the traditional, openly adversarial system where named applicants know the stakes and conduct themselves in the case accordingly.¹

6. In the United Nations context, both the Dispute Tribunal and the Appeals Tribunal in their published rulings generally identify the applicants bringing cases before them. The Dispute Tribunal has previously stated that, even though motions for confidentiality must be decided on a case-by-case basis, the granting of same without sufficient reason has the potential to not only invite requests of this kind in every matter, but to negate a key element of the new system of administration of justice—its transparency (*Yisma* Order No. 63 (NY/2011), as also referred to by the Respondent; *Abubakr* UNDT/2011/219; *Rafii* UNDT/2012/205). Transparency is a key element of the new system of justice, but it is an element that must be balanced against the necessity to do justice in individual cases, including by granting certain

¹ Peter C. Hansen, *The World Bank Administrative Tribunal's External Sources of Law: The Next Chapter (2006–2010) (Part II)*, 11 *The Law and Practice of International Courts and Tribunals*, 449, 479 (2012).

measures of confidentiality in respect of a party's identity where it is found to be justified for privacy, security or other compelling reasons. It is essentially a question of weighing the public interest against the private interest. The Tribunal's default position is that of transparency, unless the Tribunal determines that a competing interest outweighs it.

7. As the Dispute Tribunal stated in *Abubakr*, unless there are unusual or exceptional circumstances, particularly arising from the evidence presented at a hearing before the Tribunal, motions for confidentiality and redaction should be discouraged. For instance, in *Oummih* UNDT/2013/045, the Tribunal found that an applicant's name should be redacted only in exceptional circumstances showing valid reasons to grant special treatment to the applicant as compared to other staff members filing applications. The Tribunal further found in *Oummih* that "a case of conflict between a staff member and her supervisor [...] can in no way be considered exceptional" as to justify a redaction of the applicant's name.

8. The Tribunal finds that the facts in this case are clearly distinguishable from the cases cited by the Respondent. The disciplinary process in this case is incomplete and the Applicant's alleged misconduct remains unproven. The Applicant has left the employment of the Organization, and is now gainfully employed elsewhere. In terms of ST/IC/2016/26 (Practice of the Secretary-General in disciplinary matters and cases of criminal behavior, 1 July 2015 to 30 June 2016): not every case indicating possible misconduct results in disciplinary or other measures being taken; when a review by the Office of Human Resources Management reveals that there is insufficient evidence to pursue a matter as a disciplinary case, or when a staff member provides a satisfactory explanation and response to the formal allegations of misconduct, the case is closed. In terms of sec. 15 of the aforesaid ST/IC/2016/26, if a staff member separates from the Organization before an investigation or the disciplinary process is concluded, in the vast majority of cases, the file is closed but a record is made and

placed in the former staff member's official status file so that the matter "can be further considered if and when the staff member rejoins the Organization".

9. In other words, the staff member must be presumed innocent until proved otherwise. The aim of an application of this nature is simply preservation of the *status quo*, this matter is not at the merits stage, and the Tribunal is not in possession of all the facts. There will no doubt be facts in dispute if the matter proceeds further. The Tribunal finds that the inclusion of the Applicant's name, and the publication of detailed identifying facts in any published rulings of the Tribunal, is and would be in breach of his fundamental rights to the presumption of innocence until proven guilty, the right to privacy and job security, particularly in view of the incomplete disciplinary process.

10. Considering that the present case concerns a pending disciplinary process and the particular circumstances of the case, the Tribunal will grant the Applicant's request for anonymity and has made the relevant redactions in the present Order.

Request for suspension of action during the pendency of the Tribunal's deliberation of the motion for interim measures

11. Article 10.2 of the Dispute Tribunal's Statute states:

2. 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

12. In line herewith, art. 14 of the Rules of Procedure of the Dispute Tribunal provides that:

1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief 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.

2. The Registrar shall transmit the application to the respondent.

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

13. In *Villamoran*, the Appeals Tribunal upheld this Tribunal's *Villamoran* Order No. 171 (NY/2011) by which the implementation of the contested decision were suspended until the Tribunal had rendered its decision on an application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure. The Appeals Tribunal, *inter alia*, found that:

43. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

14. This Tribunal finds that the principle of *Villamoran* applies *mutatis mutandis* to an application for interim measures pursuant to art. 10.2 of Dispute Tribunal's Statute and art. 14 of its Rules of Procedure. The Tribunal further finds that the present case does not appear to concern a matter regarding appointment, promotion or termination in accordance with art. 14.1, second sentence, of its Rules of Procedure.

15. When reading the e-letter dated 2 March, it is not clear when (or on what conditions) the Respondent would refer “the matter [...] to [the new employer] for their consideration”, particularly in the absence of a response from the Applicant. However, the two weeks response time granted to the Applicant expires soon, and should the Respondent refer the matter imminently and before the Tribunal’s order on the Applicant’s motion for interim measures is issued, in accordance with *Villamoran*, the motion for interim measures would be rendered “meaningless” and its objective be lost and this would be “through no fault or delay on the part of [the Applicant]”.

16. In accordance with arts. 19 and 36.1 of the Dispute Tribunal’ Rules of Procedure,

IT IS ORDERED THAT:

17. The implementation of the contested and alleged decision shall be suspended until the Tribunal has rendered its decision on the Applicant’s motion for interim measures in accordance with the art. 10.2 of Dispute Tribunal’s Statute and art. 14 of its Rules of Procedure.

18. The request for anonymity is granted.

(Signed)

Judge Ebrahim-Carstens

Dated this 3rd day of April 2017