



Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

ZÁRATE HIDALGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Rosangela Adamo, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On 28 July 2017, the Applicant, an Administrative Assistant at the G-6 level with the United Nations Mission in Colombia (“UNMC”), filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend the decision, pending management evaluation, to terminate her fixed-term appointment. The Applicant alleges that the decision was based on erroneous information from the United Nations Office on Drugs and Crime (“UNODC”) regarding the termination of her service contract with the latter Organization in 2013.

2. On 28 July 2017, the Registry acknowledged receipt of the application and, as directed by the assigned Judge, instructed the Respondent to file a reply no later than 2 August 2017 at 9:30 a.m.

3. On 1 August 2017, at 6:17 p.m., the Respondent filed the reply, submitting that the Applicant has failed to establish that any of the three necessary requirements for the granting of a suspension of action are present.

4. By email of 3 August 2017 to the Registry, the Applicant filed her comments to the Respondent’s reply.

Background

5. It is common cause that before joining UNMC, the Applicant previously worked for UNODC under a service contract from July 2012 to July 2013. By letter of 30 July 2013, the UNODC terminated the Applicant’s service contract with this Organization, effective 1 August 2013. As reason for the termination, the UNODC stated that (official translation from Spanish):

...

Said termination is pursuant to your failure to comply with [the Applicant’s service] contract, in particular the provisions of paragraph 16, entitled “Standards of Conduct”, and the standards, handbooks, procedures, principles and values of the United Nations which you

agreed to adhere to upon signing the service contract. You also contravened rule 101.2 of the Financial Regulations and Rules of the United Nations, which states that: “All United Nations staff are obligated to comply with the Financial Regulations and Rules and with administrative instructions issued in connection with those Regulations and Rules. Any staff member who contravenes the Financial Regulations and Rules or corresponding administrative instructions may be held personally accountable and financially liable for his or her actions”, and may be subject to disciplinary measures, including but not limited to contract termination.

...

6. Effective from 12 September 2016, the Applicant was employed as a staff member with the UNMC in her current position on a one-year fixed-term contract. In the Applicant’s letter of appointment was, *inter alia*, stated as follows

This appointment is offered on the basis, *inter alia*, of your certification of the accuracy of the information provided by you on the personal history profile. By accepting this appointment, you accordingly confirm and certify that all information relevant to your fitness and suitability to meet the highest standards of efficiency, competence and integrity and your ability to perform your functions, which you provided when applying for the position or thereafter in accordance with the offer you accepted, remains true and complete as at the date of your acceptance of this appointment.

7. According to the Applicant, in October 2016, the UNODC contacted the UNMC to report that the Applicant had previously worked with this Organization as a contractor and that she “had concealed information on [her Personal History Profile, “PHP”]”. The Respondent submits that it was during the reference verification process with UNODC that this information was discovered. It is admitted by the Applicant that she did not disclose her previous relationship with UNODC upon her entry into service with UNMC.

8. By interoffice memorandum dated 26 January 2017, the Director of Field Personnel Division in the Department of Field Services requested the Assistant Secretary-General of the Office of Human Resources Services in the Department of Management to terminate the Applicant’s fixed-term appointment under staff rule 9.6(c)(v) for “facts anterior to the appointment of the staff member and relevant to

her suitability that have come to light after her appointment to [the United Nations]”. As background for this request, the Director referred to the UNODC’s termination of her service contract in 2013. The Director further stated that, in a meeting concerning her previous employment with UNODC with UNMC officials on 9 November 2016, (although mistakenly noted by the Director as 11 November 2016.), the Applicant had stated that, “she had worked for UNODC and that she had omitted UNODC from her employment history as she had been denied two prior job offers with FAO and UNICEF during the reference verification process”.

9. In her application, the Applicant confirms this information, stating that, at the 9 November 2016 meeting, she had explained the reasons for which she had not indicated her service with the UNODC in her PHP. She explains that in the “years that followed [her termination from the UNODC] [it was] difficult [for her] to get a job because UNODC gave bad references about [her], which [was] why [she] was forced to remove that work experience from [her] curriculum, otherwise presently would be out of work”. The information is further confirmed in the above mentioned meeting note, which was signed by the Applicant together with the participating UNMC officials, and also confirmed in the Applicant’s 5 April 2017 comments to the allegations against her (see more below).

10. By interoffice memorandum dated 9 March 2017, the Chief of Human Resources Policy Services in the Office of Human Resources Services requested the Applicant to provide her comments to the circumstances surrounding the termination of her appointment with the UNODC in 2013 and her omission to mention her previous employment with the UNODC in her PHP when applying for the position with UNMC. In this regard, the Chief stated that:

Had it been known to the United Nations at the time of your appointment that you had been terminated for cause by UNODC from a service contract, this fact would have precluded your appointment with the United Nations as you would have been deemed unsuitable for recruitment.

11. By letter dated 5 April 2017, the Applicant provided her comments to the Chief of Human Resources Policy Services' interoffice memorandum dated 9 March 2017 in which she, *inter alia*, stated that:

[...] seeing that I was ruining my life because I lost many Job opportunities to leave it in my curriculum I decided to remove it, because in human talent they said the worst of me and I did not obtain work, ruined me and so I decided to remove it to be able to get ahead, to obtain work in a more stable, TMK was an option. Alternating that I had for services contract not very well paid but it was my support while I managed to emerge, I take this paragraph to offer my most sincere excuses to the United Nations for having omitted the UNODC labor reference, I know that it fails to the norm by omitting information. And I am very sorry but if it had not been so in the past and now I would not have been able to work again, as you say in your memo; They would not have hired me, without even giving me the opportunity to explain what happened, so thank you for this moment because at last I can do it.

12. By letter dated 28 June 2017, received on 5 July 2017, from the Acting Assistant Secretary-General of the Office of Human Resources, the Applicant was informed that her appointment with UNMC was terminated. As background for the termination decision, the Acting Assistant Secretary-General stated that:

...

The Acting Under-Secretary-General for Management has reviewed the matter, including your comments, and has decided that, had it been known at the time of your appointment that your service contract with UNODC had been terminated for cause ... this fact would have precluded your appointment with the United Nations ... [T]he Acting Under-Secretary-General for Management noted that you did not challenge the decision to terminate your service contract despite the fact that you had been made aware of the details of the basis of your contract's termination, and you were entitled to contest the termination under the terms of the contract. Accordingly, the Acting Under-Secretary-General has decided to terminate your appointment with UNMC pursuant to Staff Regulation 9.3(a)(v) and Staff Rule 9.6(c)(v).

13. The Acting Assistant Secretary-General further informed the Applicant that:

...

The termination of your appointment is an administrative decision that falls within the discretionary power of the Secretary-General and the delegated authority of the Acting Under-Secretary-General for Management and is not disciplinary in nature. The termination of your appointment will be effective 30 days after receipt of this notice.

Consideration

Legal framework

14. Article 2.2 of the Statute of the Dispute Tribunal provides:

... The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

15. Article 13.1 of the Tribunal's Rules of Procedure states:

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.

16. In accordance with art. 2.2 of the Dispute Tribunal's Statute, 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 case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

17. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits.

18. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, but also bearing in mind that the matter is not at the merits stage at this point of the proceedings. In this instance, both parties filed lengthy submissions and substantial documentation, with as many as 167 pages of annexes in Spanish (80 pages by the Applicant and 87 pages by the Respondent), which were immediately dispatched to the United Nations translation unit. As it transpired, the translation unit was understandably unable to meet such a short deadline, and the Tribunal proceeded as best as it could on the documentation before it; having had the basic necessary documentation translated. The Tribunal would like to highlight that there has been no miscarriage of justice in this instance as almost all of these documents relate to the Applicant's service contract relationship with UNODC, as evident from the date on the documents. These documents relate to matters of the past and are not relevant to the administrative decision currently before it, and of which the Applicant is seeking suspension.

19. Aside from the three requirements of *prima facie* unlawfulness, urgency and irreparable harm, it also follows from the language of art. 2.2 of the Tribunal's Statute and art. 13.1 of the Rules of Procedure that the suspension of a challenged decision may only be ordered when management evaluation of that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159; *Benchebbak* 2012-UNAT-256). As stated in *Onana* 2010-UNAT-008 (affirmed in *Kasmani* 2010-UNAT-011; *Benchebbak* 2012-UNAT-256), the Dispute Tribunal may under no

circumstances order the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed. In this particular instance, the management evaluation is still pending.

Prima facie unlawfulness

20. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an 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); *Villamorán* UNDT/2011/126).

21. Regarding the *prima facie* unlawfulness, the Applicant submits that UNMC's decision to terminate her appointment was substantively defective as it was based on erroneous information provided by UNODC. The Applicant further contends that the decision was procedurally defective as neither UNODC nor UNMC offered her an opportunity to defend herself and be heard. In response, in essence, the Respondent submits that the termination decision was lawful and in full compliance with staff regulation 9.3(a)(v) and staff rule 9.6(c)(v) on which this decision was based.

22. Staff regulation 9.3(a)(v) and staff rule 9.6(c)(v) provide that:

Regulation 9.3

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

...

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

...

Rule 9.6
Termination
Reasons for termination

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

...

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;

...

23. It is clear from the UNMC's termination letter dated 28 June 2017 that the Applicant's fixed-term appointment was terminated because of her non-disclosure of her previous service contract with UNODC and because "had it been known at the time of your appointment that your service contract with UNODC had been terminated for cause ... this fact would have precluded your appointment with the United Nations". The Applicant admits that she did not mention her former employment with UNODC in her PHP when applying for the job with UNMC because she feared that the information about her termination by UNODC would negatively affect her prospects of being selected; this information is also confirmed by the meeting note dated 9 November 2016, the interoffice memorandum dated 26 January 2017 and her 5 April 2017 comments, as hereinbefore mentioned. The Applicant also admits that, in the PHP form, she indicated that she was employed with TMK Columbia from July 2012 to July 2014; but omitted to state that she worked as a service contractor with UNODC from July 2012 to July 2013, and that this contract was terminated for cause.

24. The primary facts are therefore not contested by the Applicant. She not only made a deliberate omission in the PHP form (for whatever motive), but also

misrepresented that she was employed by TMK Columbia during a period when she was effectively under a service contract with UNODC.

25. The Applicant met with officials of UNMC in November 2016 and explained her position. She was given the opportunity to make written representations and to provide her comments on the circumstances surrounding the termination of her appointment with UNODC in 2013 and her omission to mention her previous engagement with UNODC. On 9 March 2017, the Chief of Human Resources Policy Services requested her comments, which she submitted by her 5 April 2017 letter.

26. However, the Applicant is also disputing the circumstances surrounding the termination of her service contract by UNODC in 2013 and alleges she was threatened and compromised into making certain admissions. She strenuously disputes that she was responsible for the financial mismanagement. Be that as it may, the Tribunal notes that the UNODC matters, which would have been governed by the terms of the service contract in any event, are way beyond the scope of this application, and the Tribunal has no competency to make any enquiry or determination regarding these elements. Nor does the Tribunal have jurisdiction over service or independent contractor disputes. The Acting Assistant Secretary-General of the Office of Human Resources in the termination letter of 28 June 2017 also noted that the Applicant did not contest the termination by UNODC at the material time.

27. The Dispute Tribunal's judicial review is limited and the Administration has a wide discretion in administrative matters. See, for instance, the Appeals Tribunal in *Toure* 2016-UNAT-660 (see, similarly, *Sanwidi* 2010-UNAT-084, *Jibara* 2013-UNAT-326, *Balan* 2014-UNAT-462, *Said* 2015-UNAT-500, *Mursi* 2015-UNAT-522, *Jaffa* 2015-UNAT-545, *Ogorodnikov* 2015-UNAT-549, and *Wilson* 2016-UNAT-676):

30. When judging the validity of the Administration's exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision

is absurd or perverse. But it is not the role of the Tribunal to consider the correctness of the choice made by the administration amongst the various courses of action open to it. Nor is it the role of the Tribunal to substitute its own decision for that of the administration [footnote omitted]. As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision.

...

28. These principles extend to questions concerning termination of appointments for errors or omissions in PHPs. Thus, in *Nourain* 2013-UNAT-362, para. 25, the Appeals Tribunal held that:

25. The Appeals Tribunal has consistently held that it will not substitute its own judgment for that of the competent decision maker. Under the circumstances, we agree with the UNDT that the conduct was established and that it was serious. Although perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of dismissal was unfair or disproportionate to the seriousness of the offences.

29. See similarly, the Appeals Tribunal in *Ainte* 2013-UNAT-388, para. 27 (see also in *Walden* 2014-UNAT-436), where it was stated that:

... The HRO/FPD was not under an obligation to inform Mr. Ainte that errors, deliberate or otherwise, on his PHP could result in disciplinary proceedings because not only should that be self evident, in particular to a senior official, but in certifying his PHP, Mr. Ainte took responsibility for the veracity of its content and certified that it was true and correct, and that he was aware any misrepresentation or material omission could result in disciplinary action. As such, he cannot now argue that he was unaware of the gravity with which the United Nations treats false applications.

30. Pursuant to staff regulation 9.3(a)(v) and staff rule 9.6(c)(v), the Applicant was therefore properly presented with a reason for her termination; the primary facts having been established and not contested by the Applicant. On a *prima facie* basis--referring also to the fact that by signing her letter of appointment she certified the accuracy of the information that she provided in her PHP--the Tribunal finds that the

deliberate omissions or misrepresentations, even if made for an innocent motive, to be so material such that the provided reason was, under the circumstances, not unreasonable. Furthermore, the Applicant was provided with an opportunity to defend herself before the issuance of the 28 June 2017 letter of termination. As regards matters concerning the UNODC and the Applicant's contract of service, the Tribunal has already stated it has no competency. The contested decision was therefore not *prima facie* unlawful on the grounds submitted by the Applicant.

31. In all the aforesaid circumstances, the Tribunal therefore finds that the application for suspension of action fails as the Applicant has failed to satisfy the condition of *prima facie* unlawfulness. Accordingly, it is not necessary for the Tribunal to consider the two remaining conditions, namely urgency and irreparable harm.

Conclusion

32. The application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 3rd day of August 2017