



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/113

Order No.: 277 (NY/2017)

Date: 19 December 2017

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

EL-BAGHIR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 17 December 2017, the Applicant, a Senior Reviser, Department for General Assembly and Conference Management, Documentation Division, Translation Services (“DGACM/DD/ATS”) at the P-5 level on a permanent appointment with United Nations, filed an application for suspension of action pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure. The Applicant requested the Tribunal to order the suspension, pending management evaluation, of the implementation of the decision to terminate his permanent appointment with DGACM/DD/ATS on 20 December 2017 and to separate him from the Organization.

Procedural and factual background

2. On 18 December 2017, the case was assigned to the undersigned Judge.

3. On 18 December 2017, the Registry acknowledged in receipt of the application and transmitted it to the Respondent.

4. On 18 December 2017, the undersigned Judge instructed via email the Applicant and the Respondent to attend a Case Management Discussion (“CMD”) at the court room of the Tribunal on 18 December 2017, at 12:30 p.m.

5. At the CMD on 18 December 2017, the Applicant was present and was assisted by his Counsel, Ms. Aleksandra Jurkiewicz, from the Office of Staff Legal Assistance (“OSLA”). The Respondent was represented by his Counsel, Mr. Alister Cumming. The Tribunal notes that on the same day, at 3:00 p.m., OSLA confirmed Ms. Aleksandra Jurkiewicz as Counsel assigned to the present case.

6. During the CMD, the Tribunal requested both parties to provide details regarding the contested decision in the light of paras. 3 and 4 of the application, which state as follows:

... On Tuesday, December 12th., I received the report from the [r]ebuttal panel upholding the negative rating for 2016-2017. The next day, Wednesday 13th, I had the last [performance improvement plan, "PIP"] meeting with [redacted name, Mr. AM]. During the meeting he verbally informed me that the PIP was successful and that I had nothing to worry about.

... A little while later, on that same day, I was called for a meeting with the Head of Division, [redacted name, Ms. CE], that was attended by the current Chief of Arabic Translation Service, [redacted name, Ms. RA-C] and the Executive Officer for DGACM, [redacted name, Mr. MMG]. During the meeting [Ms. CE] said that based on the decision of the rebuttal panel, they have decided to terminate me. She said that, nonetheless, for me not to be hurt and to be able to work with the UN in the future, I should apply for early retirement and they would approve it.

7. At the CMD, the Applicant confirmed that this information accurately reflected the discussions and the termination decision, which was notified orally to him and that the date to implement this decision is 20 December 2017. The Applicant also stated that initially he was requested to indicate by 18 December 2017 if he would apply to an early retirement and that, after having indicated that such deadline was very short, this time limit was postponed until 20 December 2017. He was also told that if he did not apply for early retirement his contract would be terminated.

8. Counsel for the Respondent indicated that due to the short notice for the CMD, he had not time to receive full instructions and stated that, in any case, the termination of a staff member's contract may only be decided by the Secretary-

General or the Under-Secretary for Management and that such process is usually finalized in a couple of months and not a couple of days.

9. The Tribunal recommended the parties to further discuss the circumstances of the present case for a possible informal resolution and instructed Counsel for the Respondent to inform the Tribunal by 3:00 p.m. the same date (18 December 2017) if an administrative decision to terminate the Applicant's contract had been taken and, in the affirmative, if the Administration would be willing to suspend by its own initiative the implementation of the contested decision pending management evaluation since it would appear that the alleged decision was not taken by the competent decision-maker. Further, the Tribunal indicated that if confirmed that a termination decision was taken regarding the Applicant's contract and the Administration would not be prepared to suspend it, the Tribunal, taking into consideration that the deadline for implementation of the alleged decision is 20 December 2017, would issue an order to suspend the implementation of the contested decision pending consideration of the application for suspension of action.

10. On 18 December 2017 at 3:00 p.m., the Respondent informed the Tribunal that following the CMD, the Deputy Executive Officer of DGACM, Mr. MMG, informed the Applicant via email that no decision has been made to terminate his permanent appointment in accordance with staff rules 9.6(c)(ii) and 13.1, and that there is no decision to suspend. This email was attached to the Respondent's response.

11. On the same day at 3:43 p.m., the Tribunal sent an instruction to the parties via email, instructing the Respondent to file by 4:30 p.m. a confirmation in writing from both the Director of the Division, Ms. CE, and the Chief of Arabic Translation

Service, Ms. RA-C, that no decision was taken on 12 December 2017 to terminate the Applicant's permanent contract and to separate him from the Organization on 20 December 2017.

12. At 4:30 p.m., the Respondent filed additional submissions informing the Tribunal that, due to time constraints, the Respondent had not been able to obtain the requested confirmation. However, on 18 December 2017, the Chief of the Management Evaluation Unit had notified the Applicant that his request for management evaluation was not receivable. The Respondent further indicated that the management evaluation has been completed and that the Dispute Tribunal does not have the jurisdiction to hear the application, according to art. 2.2 of the Dispute Tribunal's Statute. A copy of the management evaluation decision was attached.

13. On 18 December 2017 at 5:00 p.m., the Applicant filed an additional submission in which he stated that on 13 December 2017, he was told in an unequivocal manner by the Head of the Division that his appointment was to be terminated on 20 December 2017 or shortly after, and that should the Tribunal not acquiesce to the application for suspension of action, any decision that was to be rendered by the Tribunal should clearly reflect the position of the Administration as to his contractual situation.

14. On the same day at 5:18 p.m., the Tribunal further instructed the Respondent to file the requested confirmation from the Director of the Division, Ms. CE, and the Chief of Arabic Translation Service, Ms. RA-C by 19 December by 1:00 p.m. on 19 December 2017.

15. On 19 December 2017 at 1:00 p.m., the Respondent provided the requested confirmation from the Director of the Division, Ms. CE, in an email that she addressed to the Deputy Executive Officer, DGACM, copying Mr. MMG, Mr. PF, and Ms. RA-C. Ms. CE's email indicated that:

During the meeting on 13 December 2017, the staff member was informed of the intention of DD to initiate the termination process based on the long record of underperformance, but no action has been taken yet.

16. The Respondent indicated that no confirmation from the Chief of the Arabic Translation Service was received.

17. In his application for suspension of action, the Applicant presents the facts as follows:

... At the end of the Performance Cycle 2016-2017, performance was rated as "Does not meet expectations" by my First Reporting Officer, the then Chief of Arabic Translation Service, [name redacted, Mr. ELM]. Unsatisfied with that rating, I duly filed a rebuttal against it.

... Thereafter, [Mr. ELM], instituted a PIP for me for 6 months (March 1st, 2017-September 30th., 2017). When [Mr. ELM] retired in August 2017, that PIP was followed on by the OIC, [Mr. AM], on the understanding that if I achieve the goals of that PIP, I would have fulfilled what is required of me regarding my performance and would not have any further issues.

... On Tuesday, December 12th., I received the report from the Rebuttal panel upholding the negative rating for 2016-2017. The next day, Wednesday 13th, I had the last PIP meeting with [Mr. AM]. During the meeting he verbally informed me that the PIP was successful and that I had nothing to worry about.

- ... A little while later, on that same day, I was called for a meeting with the Head of Division, [Ms. CE], that was attended by the current Chief of Arabic Translation Service, [Ms. RA-C] and the Executive Officer for DGACM, [name redacted, Mr. MMG]. During the meeting [Ms. CE] said that based on the decision of the rebuttal panel, they have decided to terminate me. She said that, nonetheless, for me not to be hurt and to be able to work with the UN in the future, I should apply for early retirement and they would approve it.
- ... Naturally, I was shocked by the sudden turn of events and the reversal of [Mr. AM's] assurance that I had nothing to fear from the previous negative rating because I was going to be retained in service based on the strength of my positive performance in the PIP he had instituted.
- ... His decision led me to expect that I would be retained in service and be given the opportunity to continue with my improved service.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

18. Article 2.2 of the Dispute Tribunal's Statute states:

... 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.

19. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if:

... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required.

20. 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.

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

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

Whether application concerns an administrative decision that may properly be suspended by the Tribunal

22. The Tribunal notes that an administrative decision like the one contested in the present case, namely a decision to terminate the permanent contract and to separate the staff member from the Organization, is an administrative decision subject to being reviewed by the Tribunal, including its implementation being suspended pending management evaluation. However, the Tribunal notes that in the present case, as confirmed by two of the participants to the discussion of 13 December 2017 as reflected in the management and evaluation decision which states in the same sense that no decision to terminate the Applicant's permanent contract was taken, the Tribunal considers that the present application was diligently but prematurely filed by the Applicant and that this condition is not fulfilled.

Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

23. The Tribunal notes that it is uncontested that the Applicant filed a management evaluation request of the alleged contested decision on 17 December 2017, within 60 days from the date when he was verbally informed that his contract was going to be terminated on 20 December 2017. The management evaluation was finalized on 18 December 2017 as results from the decision filed by the Respondent on the same day. Therefore, the second condition is also not fulfilled.

24. The Tribunal considers that there is no need to further analyze the remaining cumulative conditions.

25. In the light of the foregoing:

IT IS ORDERED THAT:

26. The application for suspension of action is rejected.

27. The present Order is without any prejudice to the Applicant's right to submit an application before the Tribunal, including a suspension of action in relation to future decisions, if any, regarding his contract, including a termination decision.

Observation

28. The Tribunal considers necessary to underline the following due to the particular circumstances of the present case:

29. Regarding the request made by Ms. CE, Ms. RA-C and Mr. MMG during the meeting with the Applicant that he should inform the Administration on 20 December 2017 if he would elect to apply for early retirement, as an alternative to the termination of his contract for unsatisfactory services, the Tribunal observes that even if the Applicant is to be considered eligible to apply for early retirement, such request made by the Administration represents an invitation since an application for early retirement is entirely at a staff member's own discretion and free will and cannot be imposed by the Administration at any level. Imposing on a staff member to apply for an early retirement, especially as an alternative to a termination of his contract and separation from the Organization for unsatisfactory performance initiated by the Organization, may appear to constitute a termination and not an exercise of the staff member's right to do so. Moreover, the Tribunal underlines also that a termination for unsatisfactory service can only be taken according to mandatory rules of Sections

10.1, 10.2 and 10.3 of ST/AI/2010/5 (Performance Management and Development System) which state as follows:

10.1 During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as “partially meets performance expectations”, a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.

10.3 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1, a number of administrative actions may ensue, including the withholding of a within-grade salary increment pursuant to section 16.4, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3.

30. The Tribunal also observes that no legal provisions exist regarding the initiation and the preliminary steps to be followed for taking a termination decision based on unsatisfactory services and recommends that such clear provisions are to be adopted as soon as possible to prevent any misunderstandings and misinterpretations of such a process.

31. As results from the facts presented by the Applicant, it appears that he was informed by the Officer-in-Charge that his performance during his six months PIP was considered to be satisfactory and the shortcoming in his performance evaluated in the previous 2016-2017 cycle was rectified.

(Signed)

Judge Alessandra Greceanu

Dated this 19th day of December 2017