



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

MONTECILLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Natalie Dyjakon, OSLA

Counsel for Respondent:
Thomas Jacob, UNDP

Introduction

1. On 19 December 2017, the Applicant, a Team Leader in the Learning Technology team at the P-4 level on a permanent appointment with the United Nations Development Programme (“UNDP”), filed an application for suspension of action during management evaluation 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 by the Administration to not make good efforts to absorb him on to a new post after it decided to abolish his post”, resulting in his separation from the Organization following the expiry of his current temporary assignment on 31 December 2017.

2. On 19 December 2017, the case was assigned to the undersigned Judge.

3. On 19 December 2017, the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 5:00 p.m. on 20 December 2017.

4. On 20 December 2017, the Respondent filed his reply contending that the application is moot because the Applicant has been provided with the relief he is seeking. In this regard, the Respondent states that “[w]ithout prejudice to any argument that may be presented by the Respondent in its response to the Applicant’s request, on 20 December 2017, the Respondent extended the Applicant’s appointment until 18 January 2018, the date by which the Applicant may expect to receive a response to his request [for management evaluation]”.

Background

5. In his application for suspension of action, the Applicant presents the facts as follows (emphasizes and references to annexes omitted):

- ... [The Applicant] is currently serving as Team Leader, in the Learning Technology team at the United Nations Development Programme [...] at the P-4 level. He has worked at the UNDP for approximately 18 years. On 25 May 2011, [the Applicant] was granted a permanent appointment which took retroactive effect from 30 June 2009.
- ... In 2014, [the Applicant] provided testimony to the UNDP Office of Audit and Investigations (OAI) regarding an illegal recruitment implicating the Chief of Integrated Talent Management [“ITM”]) [...].
- ... In 2015, during a restructuring, [the Chief of ITM] who was Officer-in-Charge of the Office of Human Resources at the time, decided to abolish certain posts, including [the Applicant’s] post.
- ... As a result of the restructuring, [the Applicant] applied for a position as a P-4 in the OHRM [Office of Human Resources Management]/ITM/Learning team in Copenhagen and moved there in January 2016. His wife and two children followed him in June 2016.
- ... On 8 September 2016, the new Chief of Learning [...] who was recruited by and directly reports to the [the Chief of ITM] informed [the Applicant] during a meeting that his post in Copenhagen will be abolished. During this meeting, [the Applicant] was also informed that a new P-4 post would become available in November 2016 but that he should not apply because he was not suitable for the post and [the Chief of Learning] has other people in mind for it. [The Applicant] did not apply for the post referred to because he felt intimidated and threatened by [the Chief of Learning]. [The Applicant] made reference to this discussion in an email dated 25 January 2017 and there was no subsequent email from [Chief of ITM] or [Chief of Learning] disputing that he was discouraged from applying for the posts.
- ... On 16 December 2016, [the Applicant] attended another meeting with [the Chief of ITM], [the Chief of Learning] and [the Human Resources Specialist] who informed [the Applicant] that his post would be abolished and again reiterated that he should not apply for any P-4 positions.
- ... In March 2017, during a discussion regarding [the Applicant’s] mid-year review, [Chief of Learning] informed [the Applicant] that while he had previously received a very good rating, he will receive a lower rating for the rest of the year. Following

this discussion, [the Applicant] attended a meeting with [the Chief of ITM] who explained to him that she supports the rating of [the Chief of Learning] and she told [the Applicant] that he would not be successful with a rebuttal because she, amongst others, will be on the rebuttal panel so therefore, [the Applicant] should accept the rating. [The Applicant] nevertheless filed a rebuttal and he is still awaiting an outcome.

... On 17 April 2017, [the Applicant] attended a meeting with the Human Resources Director [...], Deputy Director [...], [Chief of ITM], [the Chief of Learning], and [the Human Resources Specialist]. During this meeting, [the Applicant] was informed that his post will be abolished and that they will be advertising his post with a new job description. [The Applicant] was then presented with two options:

- a. Option 1 – start a 30-day search period followed by a 30-day notice period.
- b. Option 2 – continue to work on his current projects and in addition [the Applicant] will be placed on a three-month temporary assignment with [name redacted] to assist with the e-Recruit project, Data Integrity and Clustering starting on 24 April 2017. [The Applicant's] search and notice period would be postponed until he completes the temporary assignment.

... [The Applicant] accepted the second option during the meeting.

... On 24 April 2017, [the Applicant] received an email formally notifying him that his post will be “coming to an end on 31 July 2017.” He did not however, receive a letter confirming that the search and notice period would be postponed despite being reassured by [the Human Recourses Specialist] during the meeting on 17 April 2017 that he would receive such a letter. [The Applicant] subsequently sent an email to [the Human Resources Director] expressing his concerns regarding the options presented to him.

... On 20 July 2017, [the Applicant] attended a meeting with [the Human Resources Director] and [the Deputy Director]. He was informed that his temporary assignment would commence on 24 July 2017 and end on 31 December 2017. He was also informed that his notice period will be paid out and not served at the end of the temporary assignment. This was confirmed in an email to [the Applicant] on 28 July 2017 from [the Human Recourses Specialist].

... On 19 December 2017, [the Applicant] submitted a Management Evaluation Request challenging the decision by the Administration to not make good faith efforts to absorb him on to absorb him on to a new post after it decided to abolish his post.

Parties' submissions

6. The Applicant's principal contentions may be summarized as follows:

The administrative decision is prima facie unlawful

a. It is well-established that administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation and renewals. In determining whether an administrative decision is *prima facie* unlawful, the Dispute Tribunal has found that this condition does not require more than serious and reasonable doubts about its illegality;

b. There are particular rules that apply to certain categories of staff, including staff on continuing appointments, who are affected by abolition of posts. As *lex specialis*, such rules apply to and govern the applicable situations;

c. In particular, the applicable rules, including staff rule 9.6(e) of the Staff Regulations and Rules, state that staff on continuing appointments and who are affected by abolition be retained on a priority basis as compared to fixed-term staff. Such an obligation mandates the Organization to transfer and assign staff members affected by the abolition of posts to suitable positions outside the normal selection process. As the Dispute Tribunal stated in *Timothy* UNDT/2017/080 :

63. The Tribunal underlines in order for the Administration to fully respect its obligation pursuant to staff rule 9.6(e), it

firstly has the duty to timely provide staff member(s) affected by the abolition of posts or reduction of staff with a list of: (a) all posts, at the staff member's duty station, occupied at the date of abolition by staff members with a lower level of protection than the one of the staff member(s) affected, if any; and (b) all vacant suitable positions at the same level or at the lower level, if any. Secondly, the Administration has to provide a formal offer, together with the list or as soon as possible period after the notification of the list in order for the staff member(s) to be able to evaluate all the options and to timely express his/her interest accordingly after consultations between the parties and the staff union, if necessary (in accordance with the mandatory provisions of art. 13.1 of the International Labour Organization ("ILO") Convention on Termination).

64. Further, the Tribunal underlines that staff member(s) affected by abolition of post or reduction of staff has the right to be considered and retained for any of the available suitable positions as detailed above on a preferred or noncompetitive basis in the mandatory order established by staff rule 9.6(e). Therefore, the staff member(s) is entitled to be retained without having to go through a competitive selection process for the available suitable post(s), including without applying for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff member(s) relative competence, integrity, length in service and where required to the his/her nationality and gender.

d. Regarding a continuing appointment holder whose contract was being abolished, the onus is on the Administration, and not simply on him, to make good faith efforts to find him a suitable available post. The Administration made no real effort to find him a suitable available post and failed to discharge its onus for the reasons outlined below;

e. Firstly, instead of taking any active steps to assist the Applicant in locating a suitable post, the Administration placed the entire burden of finding another suitable post on him. This is exemplified in the email dated 24 April 2017 from the Human Resources Specialist which stated:

... Given your background and abilities I am confident that you should be able to compete favorably for other suitable

positions. I encourage you to look for UNDP vacancies posted on the UNDP intranet website, <http://jobs-intra.undp.org/> and at the websites of our sister agencies.

... Given the length of service with UNDP, you will be given priority consideration over equally qualified candidates who are not permanent or long serving. You should keep your HR Business Partner, [...], informed of your search efforts so that we advocate for your candidacy where possible.

... As soon as it is known that a permanent staff member needs to find another position, s/he is advised at least three months in advance and given the opportunity to begin focusing on the active search for other job opportunities.”

... We would also like to take this opportunity to advise you of the options available to you in the event that you do not find an assignment by the conclusion of your search period on 23 July 2017.

... If none of these options are right for you, and you are still unassigned after the three months search period, you may apply for an agreed separation...

f. As a consequence, the Applicant applied for several vacancies. He was however, never given any information about the pending status of those applications or provided with any other assistance regarding locating a suitable post. Ultimately the Applicant was not considered and retained for any of the available suitable posts on a non-competitive basis, even though he had to apply for such posts;

g. Secondly, the offer of a three-month temporary assignment cannot be considered as a good faith effort to find a suitable alternative post. In the last two years, two of the posts that the Applicant occupied were abolished, he was not offered or informed of any other suitable available position and was instead given an offer of a three-month temporary assignment. Considering that the Applicant was a permanent appointment holder, had worked for the Organization for approximately 18 years and had a history of good performance, an offer of a three-month temporary assignment does not equate to a suitable available post considering the circumstances;

h. Thirdly, instead of the Administration assisting the Applicant to find suitable alternative posts, it actually took steps to discourage and impede upon the Applicant's efforts to find a suitable alternative post. For instance, in August and December 2016, the Applicant was informed of other posts that would be created when his post in Copenhagen was going to be abolished and he was told not to apply for them. The Applicant would likely have the necessary qualifications and experience required by the new post(s). The Dispute Tribunal has found that a staff member need not be fully competent for an alternative post and relative competence is sufficient;

i. The Applicant would likely have relative competence for the new post(s) and yet was not considered. Moreover, there was a directive issued by UNDP management which stated that vacant P-3 and higher positions should not be published. This clearly impeded upon the Applicant's efforts to find and apply for other positions. His search effort was further impacted by the UNDP People Realignment Policy and Processes which stated that, "[t]he time in post for staff members being relocated will be a minimum of two (2) years in all cases." The Applicant understood that, in order to comply with this policy, he was required to stay in the Copenhagen post for a period of at least two years and could not apply for other posts until he was formally notified of the abolition of his post;

j. Fourthly, the Administration failed to perform any of the steps outlined by the Dispute Tribunal in *Timothy* UNDT/2017/080 which are required in order to comply with its obligation under staff rule 9.6(e). In particular, the Administration did not: (a) provide a list of: i. all posts at the Applicant's duty station occupied at the date of abolition by staff members with a lower level of protection than the Applicant's post; ii. all vacant suitable positions at the same level or at a lower level, and (b) provide a formal offer, together with the list or as soon as possible after the notification of the list in order for the Applicant to be able to evaluate all the options and

to timely express his interest accordingly after consultations between the parties and the staff union if necessary;

k. Fifthly, there were no other UNDP staff members holding permanent appointments at the P-4 level which were affected by the restructuring process who were to be considered for available posts before or simultaneously with him. Also, the fact that he was the only staff member affected by the restructuring process and only given a three-month temporary assignment following two consecutive abolitions in a short period of time suggests that the Administration was adamant in terminating the Applicant's appointment, and potentially constitutes retaliation, considering that he was involved in an investigation into alleged misconduct involving the Chief of his department;

l. Sixthly, the Applicant is aware that there were a number of fixed-term and temporary appointments at the P-3, P-4 and P-5 levels in his unit which were advertised around the time that he received notification that his post would be abolished and he was not considered for these posts. Instead, each of these posts were filled by external candidates. Moreover, there were multiple staff members who held fixed-term and temporary appointments in the Applicant's unit at the time his post was abolished and the Administration did not consider offering one of those posts to the Applicant;

m. Finally, the Applicant was informed that the project that he was assigned to temporarily will be continuing next year and there is a need for someone to assist with the assignment. Therefore, the Administration has failed to provide a reasonable explanation as to why the Applicant cannot be retained to simply continue with the temporary assignment;

n. Therefore, there is no evidence that the Administration made a *bona fide* effort to review all possibly suitable available posts which were vacant or are likely to be vacant in the future. As such, the Administration failed to meet the requirement to reassign him as a matter of priority to another post

matching his abilities and grade, and if this was impossible, then to at least offer his duties at a lower grade and/or other posts they could have discovered if the Administration would have widened its search accordingly;

o. In light of the above, there are serious and reasonable doubts about the lawfulness of the decision and that such a decision is *prima facie* unlawful;

The matter is urgent

p. The matter is urgent because the Applicant's temporary assignment will expire on 31 December 2017 and he will thereafter be separated from service;

q. The Applicant has tried to find a suitable available post and has discussed the issue with Human Resources. However, once the Applicant realized that no genuine efforts were being made to assist him in finding a suitable available post, he immediately took steps to file a request for management evaluation and the present application. The Applicant would contend that this is not a case of self-created urgency in that legitimate steps were taken by him to try to resolve the matter informally;

Implementation of the impugned decision will cause irreparable harm

r. It is trite law that loss which can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action. Nonetheless, the Dispute Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage;

s. In the instant case, if the impugned decision is implemented, the Applicant will suffer harm due to the loss of employment and in relation to his career prospects. Specifically, he will lose the opportunity to advance his

career as a Team Leader in the Learning Technology team. Such harm cannot be compensated for by a monetary award.

7. On 21 December 2017, the Respondent filed his reply submitting that “the Respondent extended the Applicant’s appointment until 18 January 2018, the date by which the Applicant may expect to receive a response to his request [for management evaluation]”. Based thereon, the Respondent contended that the application is moot because the Applicant has been provided with the relief he is seeking and that there is no matter for the Dispute Tribunal to adjudicate.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

8. 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.

9. 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”.

10. 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.

11. 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

12. The Tribunal notes that it is uncontested that the contested decision in the present case, namely “the decision by the Administration to not make good efforts to absorb [the Applicant] on to a new post after it decided to abolish his post”, resulting in his separation from the Organization following the expiry of his current temporary assignment on 31 December 2017, is an administrative decision subject to review by the Tribunal, including its implementation being suspended pending management evaluation. Therefore, the Tribunal considers that the first mandatory condition is fulfilled.

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

13. The Tribunal notes that it is uncontested that the Applicant filed a management evaluation request of the contested decision on 19 December 2017, within 60 days from the day of notification and that the management evaluation is ongoing. The Tribunal concludes that the second mandatory condition is also fulfilled.

Urgency

14. The Tribunal notes that the Respondent has informed the Tribunal that the Administration has extended the Applicant's appointment until 18 January 2018, the date by which the Respondent states the Applicant may expect to receive a response to his request for management evaluation and considers that it results the Applicant's contract no longer expires on 31 December 2017. The Tribunal considers that the invoked urgency no longer exists and the third condition is not fulfilled.

15. Since one of the mandatory and cumulative conditions is not fulfilled, there is, therefore, no need for the Tribunal to consider the remaining mandatory and cumulative conditions.

Relief

16. The Tribunal takes note that the Respondent extended the Applicant's contract until 18 January 2018 during the pendency of the management evaluation which is expected to be finalized within 30 days from the date of filing of the Applicant's 17 December 2017 request for management evaluation.

17. It results that the relief the Applicant has requested, namely that "the decision by the Administration to not make good efforts to absorb him on to a new post after it decided to abolish his post", resulting in his separation from the Organization following the expiry of his current temporary assignment on 31 December 2017 be

suspended during the pendency of management evaluation, has already been granted by the Administration.

18. The Tribunal commends the Administration for its swift and appropriate response.

Conclusion

19. Taking act that the Administration has already granted the requested relief by extending the Applicant's appointment until 18 January 2018, the date by which the Respondent states the Applicant may expect to receive a response to his request for management evaluation., and that the implementation of the contested decision is therefore suspended pending management evaluation, the Tribunal ORDERS:

20. The application for suspension of action is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 21st day of December 2017