UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/029
Order No.: 145 (NY/2018)
Date: 11 July 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge, Registrar

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Peter Gallo, PC

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On the late evening of Monday, 2 July 2018, the Applicant, an Investigator at the P-4 level on continuing appointment in the Investigations Division of the Office of Internal Oversight Services ("ID/OIOS"), filed an application through the Tribunal's eFiling portal, under art. 2.2 of the Statute of the Dispute Tribunal and art. 13.1 of its Rules of Procedure, for suspension of action pending management evaluation of "[…] the decision to terminate the Applicant's temporary assignment with the Inspection and Evaluation Division [of OIOS] ("IED/OIOS")".

2. On Tuesday 3 July 2018, the New York Registry acknowledged receipt of the application.

3. On the same day, on 3 July 2018, the New York Registry served the application on the Respondent, directing that he file his response by 12:00 p.m. on Friday, 6 July 2018, the 4th of July being a US public holiday and an official United Nations holiday.

4. On 6 July 2018, the Respondent duly filed his reply, opposing the application and contending, *inter alia,* that the decision to return the Applicant to ID/OIOS on 2 July 2018 was lawful, and that in any event, the contested decision having already been implemented, is therefore no longer capable of being suspended under art. 2.2. of the Statute.

Relevant background

5. Applications for interim relief, including those for suspension of a contested decision pending management evaluation, have to be considered by the Tribunal within a very short period of time. Parties approaching the Tribunal for such relief must do so on genuine urgency basis and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. Pleadings should be concise and contain sufficient but only material and relevant information, the Tribunal should

not be overburdened with extraneous and irrelevant material. 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 following facts appear from the record:

6. From 18 April 2016, the Applicant, an ID/OIOS Investigator, was assigned a First Reporting Officer ("FRO"), [name redacted, Mr. VD], ID/OIOS Chief Investigator, and a Second Reporting Officer ("SRO"), [name redacted, Mr. BS], ID/OIOS Director.

7. The Applicant contends that he has been experiencing "harassment and disparate treatment" from both his FRO and SRO, and that his medical doctors have subsequently advised him "not to continue working in this hostile working environment".

8. On 13 March 2018, the Applicant received an email from the ID/OIOS Director stating that "[i]t is planned that you will be seconded to IED from ID from 1 May 2018. The period of said secondment will initially be for 6 months to 31 October 2018. This period may be extended, subject to satisfactory performance and an ongoing requirement by IED, for your continued services, to 30 April 2019". The Director also informed the Applicant in said email that IED/OIOS would provide him with terms of reference (which have not been produced and are not before the Tribunal), as his functions would consist of "us[ing] [his] legal experience, background and expertise", that his line of reporting would remain the same (with ID/OIOS), but that he would have an additional supervisor, [name redacted, Ms. SR], Chief of Section, IED/OIOS.

9. However, in an email dated 18 April 2018, the Applicant was advised that he would be "redeployed to the [Headquarters] team given the shortage of investigators in NY (New York) and the steady growth in casework there and elsewhere". In the same email, there is also reference to the Applicant having confirmed he was fit

enough to deploy to the Central African Republic, requesting that he make his availability known for such deployment.

10. The Applicant states that on 27 April 2018, following the 25 April 2018 judgment on receivibility, *Nadeau* UNDT/2018/052, in his favour, in the matter of Case No. UNDT/NY/2015/063, ID/OIOS contacted the Applicant to ask him if he would be willing to discuss informal resolution of his case. However, the Applicant contends that the Respondent subsequently declined to mediate the case if the Applicant was going to be advised by his Counsel during the process.

11. It is unclear when the Applicant commenced work at IED/OIOS, [but the Applicant states in his application that "[o]nly a month after starting with IED[/OIOS], the Applicant's assignment is being cancelled […]". However, at paragraph 7.30 of his application, the Applicant states that he "has worked quite satisfactorily in OIOS/IED for two months". It therefore appears that the Applicant started his work in IED/OIOS at the beginning of May or June 2018.

12. On 8 June 2018, the ID/OIOS Director wrote to the IED/OIOS Director, copying Mr. VD, the FRO, and the Applicant, stating that ID/OIOS had discussed the Applicant's reporting lines with the Office of Human Resources Management ("OHRM") who told him that it would be "inappropriate" to have Mr. VD and Mr. BS of ID/OIOS remaining as the Applicant's FRO and SRO during his assignment with IED/OIOS.

13. On 12 June 2018, the ID/OIOS Director informed the Applicant that he would have to return to ID/OIOS because "IED[/OIOS] d[id] not feel that they [were] able to assume responsibility for taking over as [the Applicant's] FRO/SRO for the period of [his] secondment", and ID/OIOS expected him to return to ID/OIOS on 2 July 2018 "unless [he could] provoke a change of heart in IED[/OIOS]". From the record, it is not readily discernable when the Applicant commenced his secondment in IED/OIOS, but it is evident that he was informed on 12 June 2018 that he was expected to return to ID/OIOS prior to the completion of his six-month secondment

or any extension thereof until 2019, apparently because the receiving office refused to assume responsibility for his supervision, which the Applicant contends is contrary to ST/AI/2010/5. Following the 12 June 2018 notification that he would have to return to ID/OIOS, in response to an email from Applicant's Counsel, on 28 June 2018, the Assistant Secretary-General of OIOS ("ASG/OIOS") sent an email to Applicant's Counsel confirming that the Applicant had been instructed to return to ID/OIOS on 2 July 2018 and that he would be expected to resume his duties on that date. The Respondent contends that on 2 July 2018, the Applicant returned to ID/OIOS, as instructed.

14. On 29 June 2018, the Applicant filed a request for management evaluation. To the Tribunal's knowledge there has been no response to such request, and management evaluation is still ongoing.

15. On 2 July 2018, at 10:26 p.m., the Applicant filed the present application in the eFiling portal.

Consideration

Legal framework

16. 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.

17. Article 13.1 of the Dispute 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.

18. 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.

19. A suspension of action order is, in substance and effect, akin to an interim order or 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. This extraordinary discretionary relief is generally not appealable, and is not meant to make a final determination on the substantive claim.

20. 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.

21. 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 action 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). Furthermore, 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 (para. 19). Finally, it follows also that an order for a suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented (*Gandolfo* Order No. 101 (NY/2013)).

22. The Applicant contends that the decision to cancel his assignment to IED/OIOS was unlawful, and has brought him back under the full control of his FRO and SRO, although the purpose for the assignment was to address the Applicant's request to be assigned to another office due to the alleged hostile environment he had been subjected to in ID/OIOS since April 2016.

23. The Respondent contends that since the Applicant returned to the ID/OIOS office with effect from Sunday, 1 July 2018, the contested decision has already been implemented, and therefore the application is not receivable.

Receivability

Implementation

24. As noted above, pursuant to art. 2.2 of its Statute, the Dispute Tribunal, is competent to hear and pass judgment on an application to suspend the implementation of a contested administrative decision that is the subject of an ongoing management evaluation.

25. It follows from art 2.2 that if the contested decision has already been fully implemented, there is no longer anything for the Tribunal to suspend. In the application for suspension of action, the Applicant acknowledges that the possibility to terminate his temporary assignment was raised on 8 June 2018, "but conveyed by email from [Mr. BS] on 12 June 2018" (Part V of the application). Furthermore, in the request for management evaluation, in response to the question "When was the decision taken/when did you become aware of it", the Applicant responds "8 June 2018 via email". Furthermore, in an email dated 20 June 2018 to the Officer-in-

Charge ("OiC") for Mr. VD, and copied to the Applicant, Mr. VD states that "[…] [the Applicant] is back in Unit 5 as of 1 July 2018. Since you are OiC during that time I am informing you about this change. […] I have informed [the Applicant] about it by email […]".

26. The Tribunal finds in the instant case that the Applicant became aware on 8 June 2018, or on 12 June 2018, or at the very latest on 20 June 2018, that he was to return to ID/OIOS on 1 July 2018.

27. Furthermore, on Thursday, 28 June 2018, at 3:20 p.m., the ID/OIOS Director, in response to an email from Applicant's Counsel of the same date, confirmed that "[the Applicant] has been instructed to return to [ID/OIOS] on 2 July 2018 and it therefore follows that he will be expected to be there to resume his duties from that date". The Respondent submits that the contested decision was implemented on Sunday, 1 July 2018, and that on the morning of 2 July 2018, the Applicant reported back for duty with ID/OIOS.

28. The Tribunal notes that the application for suspension of action was only filed via the eFiling portal on 2 July 2018 at 10:26 p.m. Practice Direction No. 4 on Filing of Application and Replies of 2014, sec. 14, provides that "[f]or filing purposes, the working hours of the Registries are: […] New York: 9:00 to 17:00 hours Monday to Friday". The Tribunal therefore considers that the application was filed after the New York Registry's official working hours, effectively on 3 July 2018. Further, the Tribunal determines that the contested decision was already implemented at the time the application was filed.

29. Consequently, as the contested decision in this case was already implemented by the time the present application for suspension of action was filed, there is nothing to suspend and the Tribunal cannot order its suspension.

30. As the contested decision is not capable of being suspended, the application for suspension of action stands to be dismissed.

Observations

31. In view of the findings above, the Tribunal need not examine whether the three statutory requirements specified under art. 2.2 of the Tribunal's Statute and art. 13.1 of the Rules of Procedure have been satisfied. However, in view of the fact that applications such as this disrupt the normal day-to-day business of the Tribunal and its attendance on other pressing and substantive matters, the following observations need to be made.

32. Firstly, a party approaching the Tribunal with a motion for interim relief must do so urgently, that is timeously, on well-grounded basis and with circumspection, making full disclosure of all relevant facts (including circumstances adverse to an applicant and within the applicant's knowledge). As previously mentioned, the Tribunal notes that in the present case, the Applicant became aware by email as early as on 8 or on 12 June 2018, and given the benefit of the doubt, at the very latest on 20 June 2018, of his return to ID/OIOS. Yet, he only filed this application on 3 July 2018.

33. The Dispute Tribunal has consistently held that "if an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions (*Jitsamruay* UNDT/2011/206) and then for the Tribunal to be satisfied if the urgency was created or caused by an applicant. The Tribunal considers that the urgency in the instant case is self-created, as the Applicant should have filed an application upon receiving information of the termination of his temporary assignment with OIOS/IED and his return to OIOS/ID, instead of waiting until late 2 July 2018, effectively 3 July 2018.

34. On Thursday, 28 June 2018 at 12:48 p.m., the Applicant's Counsel dispatched an email to the ASG/OIOS advising that if his client "[…] was instructed to report to [ID/OIOS] on 2 July 2018, this will result in an immediate request for management evaluation and an application for suspension of action, followed by an application on the merits before the already overworked [Dispute Tribunal]". On the same day, Thursday, 28 June 2018, at 3:20 p.m., the ASG/OIOS responded that "[the Applicant] has been instructed to return to [ID/OIOS] on 2 July 2018 and it therefore follows that he will be expected to be there to resume his duties from that date". A management evaluation was requested on 29 June 2018, but no application for suspension was filed with the Tribunal until after business hours on Monday, 2 July at 10:37 p.m., after the implementation of the decision. If indeed the Applicant was only finally apprised of the instruction to return on 28 June 2018, which on the facts appears not to be the case, he could have immediately filed an application for suspension of the decision pending the consideration of an application for suspension of action under art. 2.2 of the Statute, (*Villamoran*-type of application), instead of waiting until 2 July 2018.

35. Regarding *prima facie* unlawfulness, the Applicant submits, *inter alia*, that his assignment to IED/OIOS or "the alleged job swap was patently not an equitable or arms length transaction", since the incumbent that he swopped jobs with, still remains in ID/OIOS and has been designated as an Investigator/Team Leader, whilst he has been re-called back having served only a month or so after starting with IED/OIOS. Furthermore, that contrary to ST/AI/2010/5 (Performance Management and Development System), his previous reporting officers from ID/OIOS decided to retain supervision over him when the Division to which he was assigned, IED/OIOS, should have been responsible for his supervision and performance whilst he was engaged thereat. He questions whether the job swap was a legitimate reassignment of duties and alleges bad faith and unlawful intent since it has been demanded that he return to his ID/OIOS unit, whilst the IED/OIOS incumbent is not simultaneously returned back to her original unit.

36. The Applicant has indeed raised some matters of concern. The Tribunal notes that the reason ID/OIOS provided to the Applicant for his return to his previous function is unclear, since it would have appeared logical, if not compliant, for IED/OIOS, who had accepted to take the Applicant onboard, to have allocated him a new FRO and SRO for the duration of the assignment, in order for the Applicant's performance to be assessed by evaluators instead of investigators.

37. Moreover, the Tribunal finds it unclear why ID/OIOS retained the Applicant's former FRO and SRO as his supervisors while he was assigned to another Division, especially since the Applicant alleges that he was harassed by this FRO and SRO since April 2016.

38. Finally, the Tribunal observes that the Respondent submitted annexes, namely the Applicant's latest Personnel Action ("PA") History and PA, which do not reflect the Applicant's assignment to IED/OIOS. The Tribunal has not been provided with the terms of reference and/or the letter of assignment to IED/OIOS and/or the letter of reassignment back to ID/OIOS. In all the above circumstances, without making any determination on the merits hereof, the Tribunal notes that several challenges would have arisen for the Respondent had the Tribunal considered the matter of *prima facie* unlawfulness.

39. The Tribunal is aware that two of the Applicant's matters in Case Nos. UNDT/NY/2015/063 and UNDT/NY/2018/007 are listed for a Case Management Discussion ("CMD") next Tuesday, 17 July 2018. In light of the above comments, the Tribunal considers that the parties make every effort to resolve any outstanding issues in this matter and interrelated matters before the CMD scheduled for next week with a view to resolving matters on an amicable basis. This would save valuable resources all round and also contribute to inculcating a harmonious working environment and culture within the Organization, and to ensure public confidence and enhance the gravitas befitting the OIOS. Even more so, as ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides that managers and supervisors have a duty to take all appropriate measures

to provide a harmonious work environment, with sec. 6.1 providing that heads of departments and offices shall provide annual reports to the Assistant Secretary-General for Human Resources Management which shall include an overview of all preventive measures taken "with a view to ensuring a harmonious work environment". It would be therefore commendable that the Applicant and management see it fit to finally resolve these matters amicably, so that the Tribunal could dispose of the matters without the need for a hearing, with all its attendant costs, and the issuance of a reasoned judgment thereafter.

Conclusion

40. The contested decision having been already been implemented, the application for suspension of action is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 11th day of July 2018