



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

GIZAW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Esther Shamash, UNDP

Introduction

1. On 10 October 2016, the Applicant (Amsale Gizaw also referred to as Amsale Admassu), a staff member appointed at the P-3 level, step 11, as a “Change Release and Testing Specialist” with the United Nations Development Programme (“UNDP”), filed an application contesting “the refusal to address and rectify the inconsistencies and duplication in the job descriptions and duties of Change Release and Testing Specialist [her post] and Quality Assurance Specialist”. As a remedy, the Applicant requests that the contested decision be rescinded and that the Tribunal:

[...] order the elaboration of proper job descriptions reflective of the division of labor presently in effect and to award [the Applicant] compensation for material and moral damages in the amount of two years’ net base pay for the resulting damages to the Applicant’s professional career and reputation, loss of opportunity for proper recognition of her role and for the stress and anxiety resulting from the hostile working environment that has been created.

2. On 10 November 2016, the Respondent filed a reply stating *inter alia* that the application is not receivable as the contested decision is not an administrative decision subject to judicial review and in any case the application is time-barred. In the alternative, the Respondent states that the application is without merit.

3. On 21 November 2016, the Applicant filed a motion to admit additional evidence, seeking to admit an affirmation by the President of the UNDP/UNFPA/UNOPS and UN Women Staff Council, which the Applicant asserts relates to receivability of the application.

4. On 9 December 2016, pursuant to Order No. 268 (NY/2016), the Respondent filed a response to the Applicant’s motion of 21 November 2016 requesting that the Tribunal dismiss the motion.

5. On 5 June 2017, the Applicant filed a motion for interim measures pursuant to art. 10.2 of the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure, requesting:

[...] the Tribunal to suspend action on the proposal to exclude her name as the official responsible for Project Quality Assurance from the recent Project Initiation Document ["PID"] and subsequent PIDs, by removing attribution for her contribution and the organization's established project management methodology in accordance with the established PRINCE 2 methodology. Her supervisor, [...] took this measure on the grounds that 1) the Applicant had filed a case with the Tribunal, and 2) to avoid duplication and confusion of tasks. It is thus directly tied to her pending application and prejudices the outcome.

6. On 8 June 2017, the Respondent filed his response arguing that the motion is not receivable on the grounds that the decision is not, *inter alia*, the subject of substantive proceedings before the Tribunal. Furthermore, should the Tribunal find the motion receivable, it is without merit.

7. On 13 June 2017, by Order No. 151 (NY/2017), the Tribunal granted the Applicant's motion for interim measure and suspended the contested decision, namely the "[r]ejection of the Applicant's request for proper recognition of her project quality assurance responsibilities in present and future [PIDs] contrary to the Organization's project management standard [...]", pending the Dispute Tribunal's proceedings.

8. On 17 August 2017, the Respondent filed a "Motion for Expedited Review" stating that in the interests of justice and to avoid irreparable harm to the Organization and to the incumbent of the Quality Assurance Specialist post, a non-party to the proceedings, the Dispute Tribunal proceed with an expedited review of the case. The Respondent, relying on *Yisma* Order No. 65 (NY/2011) and UNDT/2011/61 submitted that there are exceptional circumstances warranting that the case be dealt with on an expedited basis. The Tribunal notes that this is simply a motion for an expedited hearing on the merits of the matter, the interim measures order already being in place and executable.

9. On 22 August 2017, the Applicant filed a motion requesting leave to comment on the Respondent's motion for expedited review and, "in the interests of economy", provided her comments as part of the motion to admit. The Applicant's submission addresses in large part the factual assertions underlying the Respondent's motion, highlighting recent developments. The Applicant states also that "[w]hile [she] would welcome a timely adjudication of her claim in principle, she is more interested in ensuring that the original Order of the Tribunal for interim measures be implemented in good faith and not circumvented". The Applicant suggests that the Respondent's arguments are misplaced and essentially consist of raising objections to implementation of the interim Order No. 151 (NY/2017) by suggesting that to do so would prejudice the outcome on the merits. In addition, the Applicant states that recent correspondence between Counsel indicated the intention behind the motion was to avoid implementation of Order No. 151 (NY/2017). In conclusion, the Applicant requests the Tribunal to consider awarding costs for abuse of process in regard to "the Respondent's Motion in light of the failure to implement the Tribunal's Order in good faith".

10. Following the Presiding Judge's return from sick leave, on 1 November 2017, by Order No. 244 (NY/2017), the Tribunal instructed the parties to participate in a Case Management Discussion ("CMD") set down for 8 November 2017.

11. On 2 November 2017, the Respondent filed a motion for extension of time, informing the Tribunal that the Counsel for the Respondent had incurred serious medical injuries and requested an extension of time to hold a CMD, while Counsel recovers.

12. On 7 November 2017, by Order No. 249 (NY/2017), the Tribunal granted the Respondent's motion for postponement of the CMD and, due to the Presiding Judge's impending departure on home leave, instructed the parties to confirm their availability for a CMD in the period between 8 January 2018 and 23 February 2018 by 15 December 2017.

13. On 9 November 2017, the Applicant filed a motion requesting leave to submit additional documentation “relevant to the Applicant’s situation and to address some of the issues surrounding the Tribunal’s Order on interim measures and related matters”. The Applicant states that the documentation “concerns actions taken with respect to past and on-going projects and quality assurance issues raised in recent official documentation”. The Applicant contends that the additional documentation is relevant to some of the Respondent’s contentions and will facilitate an expedited hearing of the issues.

14. On 14 November 2017, by Order No. 253 (NY/2017), the Tribunal granted the Applicant’s motion to file additional relevant documentation and instructed the Applicant to file the additional submission and documentation, including submissions on the relevance of each of the documents submitted by 27 November 2017, without prejudice to the Tribunal’s final determination of the relevancy thereof. The Tribunal instructed the Respondent to file a reasoned response and objections, if any, to the Applicant’s submission by 18 December 2017. In addition, the Tribunal instructed the parties to confirm their availability for a CMD in the period between 30 January 2018 and 23 February 2018 by 5 January 2018.

15. On 21 November 2017, the Tribunal was notified of a change of Counsel of record for the Respondent.

16. On 22 November 2017, pursuant to Order No. 253 (NY/2017), the Applicant filed a submission of additional evidence, in which she reiterates, *inter alia*, the Respondent’s failure to implement the Tribunal’s order in good faith, and expresses her concern that she may not be fairly credited for her work and achievements in quality assurance for the reporting period up to December 2017. On 18 December 2017, pursuant to Order No. 253 (NY/2017), the Respondent filed his response to the Applicant’s submission of additional evidence, addressing in large part the factual assertions, rationale, and underlying basis for the current application of functions and designations.

17. On 29 January 2018, by Order No. 20 (NY/2018), the Tribunal instructed the parties to attend a CMD on 13 February 2018 at the Dispute Tribunal's courtroom in New York. On 12 February 2018, the Registry informed the parties that the CMD was rescheduled to 23 February 2018, due to the unavailability of the Presiding Judge for medical reasons.

18. On 23 February 2018, the Tribunal conducted the scheduled CMD in the court room in New York, at which the Applicant, her Counsel, Mr. George Irving, and the Respondent's Counsel, Ms. Esther Shamash, participated in person.

Consideration

19. At the CMD, the Tribunal requested a case status update and enquired about the current situation. Applicant's Counsel submitted that his client, continues to do tasks related to quality assurance which are not fully recognized in the project and other documents, including her performance appraisals. The Tribunal noted that there is an executable interim measures order in place in this matter, in particular referring to matters regarding noncompliance with the Tribunal's interim measures Order No. 151 (NY/2017) as set out more particularly in paras. 19-21 of Order No. 20 (NY/2018) dated 29 January 2018, as follows:

[19] Firstly, in terms of art. 11 of the Dispute Tribunal's Statute, the judgments and orders of the Dispute Tribunal shall be binding upon the parties, and are executable upon the expiry of the time provided for an appeal before the Appeals Tribunal. Failure to implement the Tribunal's orders may merit contempt proceedings and accountability procedures. The case law regarding the inviolability of the Dispute Tribunal's orders, and accountability measures, is well-established. In *Igunda 2012-UNAT-255* the Appeals Tribunal stated that:

A party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body's jurisdiction, because it is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.

[20] The Tribunal notes that the Respondent does not address the Applicant's serious averments regarding the failure to comply in good faith with the Tribunal's interim measures order. The Tribunal notes that there is an executable interim measures order in place in this matter, together with the Respondent's motion for an expedited hearing on the merits of the matter, *simpliciter*. There is no application for stay of execution or stay of proceedings.

[21] Furthermore, there is no application before the Tribunal under the Dispute Tribunal's Rules of Procedure for revision pursuant to art. 29, or interpretation pursuant to art. 30 on the meaning or scope of Order No. 151 (NY/2017). Nor has an appeal been filed with the Appeals Tribunal on any basis. Even if such were the case, compliance with and execution of an order issued by the Dispute Tribunal is not voluntary, even if it is pending an appeal, or considered unlawful or deemed in excess of its jurisdiction (see *Villamorán* 2011-UNAT-160 and *Igbinedion* UNDT/2013/024) because it is not for a party to decide about these issues (see *Igunda* 2012-UNAT-255). Proper observance must be given to judicial orders. Parties must obey the Dispute Tribunal's binding decision regardless of the fact that the order is ultimately vacated by the Appeals Tribunal (See *Igbenedion* 2014-UNAT-410). There is need for due diligence and circumspection by counsel in the presentation and prosecution of a case as officers of the court who have a duty to contribute to the fair administration of justice and the promotion of the rule of law (see *Dalgamouni* UNDT/2016/094 and *Dalgaard* 2015-UNAT-232). The Dispute Tribunal may also refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered UN funds and programs for possible action to enforce accountability on the part of management and staff members in decisions made and actions taken by them (see art. 10.8 of the Dispute Tribunal's Statute and *Dalgamouni, supra*).

20. The Tribunal therefore invited the parties to provide their submissions on the status of the Respondent's compliance following Order No. 20 (NY/2018), with the said order. The parties agreed to confer and revert to the Tribunal on documents in possession of Respondent's Counsel subsequently prepared, and which apparently endeavor to comply with the interim measures order.

21. Noting the observations and concerns expressed at para. 22 of Order No. 20 (NY/2018) as follows;

[22] Secondly, from some of the documentation attached to the Applicant's submission of 22 November 2017, the Tribunal observes with concern that the current situation appears to be having a negative impact within the department, apparently creating an unhealthy if not hostile working environment, and a deterioration of workplace relations. All staff members, including the Applicant (who has served the Organization for some 30 years and is a few years away from retirement), are entitled to work in a safe and harmonious working environment. In light of the above, the Tribunal repeats the observations made in the interim measures order and enjoins and encourages the parties to explore possibilities in the interim, to informally resolve this case including by way of *inter partes* measures, or through the Ombudsman's office.

22. Therefore, in light of the particular circumstances and nature of this case, and to promote workplace harmony, the Tribunal strongly encouraged the parties to make all such endeavors for informal resolution of the case, either through the Office of the Ombudsman or through *inter partes* discussions. The parties confirmed that they had engaged in attempts for informal resolution of the case, and both parties are willing to engage in further *inter partes* discussions. The Tribunal commends both parties for any previous good faith efforts to resolve the case amicably through the Office of the Ombudsman and Mediation Services. Such efforts should be encouraged as amicable resolution of cases saves the valuable resources of staff and the Organization and contributes to the harmonious working relationship between the parties. At the Tribunal's request, the parties agreed to confer and prepare a jointly signed submission indicating whether the parties agree to attempt informal resolution and whether a suspension of proceedings was necessary.

23. Accordingly, without prejudice to the final determination of any motions currently before the Tribunal, any order regarding non-compliance of the interim measures order, and any further outstanding issues, pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure,

IT IS ORDERED THAT:

24. By **5:00 p.m. on Friday, 2 March 2018**, the parties shall file a jointly signed submission indicating whether the parties agree to attempt informal resolution, and, if so, whether the parties request a suspension of the proceedings.

(Signed)

Judge Ebrahim-Carstens

Dated this 23rd day of February 2018