



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/100

Judgment No.: UNDT/2009/004

Date: 30 July 2009

Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

FRADIN DE BELLABRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT
SUSPENSION OF ACTION

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Stephen Margetts, ALU

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

Judgment

The application to suspend action is declined.

1. The applicant was advised on 22 May 2009 that his current appointment of limited duration would not be extended beyond its expiry date of 31 July 2009. He has applied for a suspension of this administrative action. He has requested that his contract be renewed until:

- a. the rebuttal process is completed;
- b. a management evaluation is completed; and
- c. if the later is not satisfactory to him, until there is a hearing on the merits of the case by the United Nations Dispute Tribunal (“UNDT”).

The issues

2. Article 2.2 of the Statute of the UNDT and Rule 11.3 of the Staff rules provide that the Tribunal may suspend the implementation of a decision during the pendency of a management evaluation where three criteria have been met. There are therefore three issues to be considered:

- a. Is the decision not to extend the applicant appointment prima facie unlawful?
- b. Is this a case of particular urgency? This point was not in issue.
- c. Would irreparable damage be caused to the applicant if the implementation of the decision is not suspended?

Facts

3. From 28 January 2008 the applicant served two periods of appointment as a P-3 Coordination Officer with MINUSTAH in Port-au-Prince, Haiti. Each appointment was of limited duration under the 300 series of the staff rules.

4. His letters of appointment provided that the applicant’s employment would expire without prior notice, that it was “non-career in nature” and carried “no

expectancy of renewal”. The latest period of employment was to expire on 31 July 2009.

5. The applicant’s performance was assessed in November 2008 and in May 2009. He signed off his last end-of-cycle electronic Performance Appraisal System (“e-PAS”) report on 13 May 2009 but advised that he wished to rebut the overall rating he had received. He received his notice of non-renewal on 22 May. On 21 June 2009 he provided detailed reasons for his rebuttal.

6. The applicant told the Tribunal that his relationship with his P-5 supervisor was initially very good but deteriorated to the extent that the applicant felt it necessary to bypass his supervisor when making suggestions on how to improve the UN system. The applicant then took his proposals to a higher authority. His supervisor reacted badly to this.

7. The applicant was critical of the e-PAS process used by his supervisors to assess his performance. He alleges he was not provided with a work plan for his unit, there was no improvement plan suggested to deal with the adverse findings made against him, no reasons were given for the comments on his professionalism and integrity and there was no end-of-cycle discussion with him. In summary he believes his supervisors did not respect the e-PAS system.

8. As at the date of the hearing of this matter the rebuttal process was not completed although the applicant had been interviewed and interviews with his supervisors are planned. The applicant told the Tribunal he had received a fair hearing by the rebuttal panel members.

9. The applicant also requested a management evaluation of the e-PAS on 21 July 2009. He has been advised that he will receive an answer to that in 45 days.

10. The applicant wishes to have his contract renewed, his honour restored and an opportunity to discuss documents he has prepared about improvements to the United Nations system.

11. Finally the applicant told the Tribunal about financial harm he will suffer as a result of the loss of his position. He was preparing to leave Haiti for his home in France within three days and is concerned about meeting his on-going financial obligations.

The issues

Unlawfulness

12. Mr Danquah for the applicant submitted that the unlawfulness of the decision not to renew the contract lies in the breaches of the e-PAS procedure. As these are still being investigated by the rebuttal panel the applicant has been denied the right to have any positive findings that may arise from the rebuttal process factored into the decision not to renew. It is the applicant's case that a suspension is necessary to guard against arbitrary conduct such as the consideration of extraneous factors in deciding whether to renew his contract and other abuses of power.

13. While Mr Danquah accepted there can be no expectation of renewal for a contract of limited duration, he submitted that the non-renewal should be suspended to allow the rebuttal to be completed to avoid irreparable harm to the applicant.

14. Apart from the fact that his appointment was not renewed and that he received a negative e-PAS evaluation, at this stage the applicant can only speculate that the decision not to renew his contract may have been influenced by the allegedly and as yet unproven flaws in the e-PAS process. The non-renewable status of the appointment is irrefutable. The nexus between the alleged breaches of the e-PAS and the non-renewal is, at best for the applicant, tenuous.

15. I conclude that there is no evidence before the Tribunal to establish that it is probable that the non-renewal decision of itself was prima facie unlawful.

Irreparable harm

16. Article 2.2 of the Statute of the UNDT provides that in a claim for suspension of action it must be shown that the implementation of the disputed action would cause

irreparable harm. Harm is irreparable if it can be shown that suspension of the action is the only way to ensure that the Applicant's rights are observed.

17. Even if the applicant had made out a prima facie case of unlawfulness of the decision not to renew his appointment, he has not established that he will suffer irreparable harm as a result of that decision. I find that it is open for the applicant to be compensated for any wrong should it be found to have occurred in the course of the e-PAS process.

18. The nature of his appointment gave the applicant no expectation of automatic renewal of his position. That does not mean that he does not have an expectation of fair treatment by his supervisors when exercising the discretion to renew but any breach of due process is able to be compensated for in other ways.

19. It was accepted by Mr Margetts for the respondent that the outcome of the rebuttal process is binding on the Secretary-General. A positive outcome for the applicant will be reflected in an amended e-PAS and the original e-PAS cannot be used to prejudice any future applications for appointment. Mr Margetts confirmed that it is the policy of the Secretary-General that a former employee will not lose accrued rights to due process. Consequently the applicant will not be deprived of his right to continue to challenge the e-PAS by rebuttal or management evaluation even though he is no longer employed by the United Nations.

20. Next, it is clear that apart from the important matter of his honour, any harm to the applicant is financial. Should he be ultimately vindicated by the rebuttal process, management evaluation or by a decision of this Tribunal it is open to him to apply for monetary compensation to reflect any losses that arise out of defects in the performance management applied to him.

21. I am therefore satisfied that if it were established that there has been harm suffered by the applicant as a result of an unlawful e-PAS procedure such harm would not be irreparable as it can be compensated by the correction of his

performance record and by an award of damages should that be justified by the evidence.

Conclusion

22. I find that the applicant has not made out a case to suspend the action not to extend his current appointment. The application is declined.

(Signed)

Judge Coral Shaw

Dated this 30th day of July 2009

Entered in the Register on this 30th day of July 2009

(Signed)

Hafida Lahiouel, Registrar, New York