



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

MISELENI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. On 9 October 2012 the Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application for suspension of action, pending management evaluation, on the decision conveyed to him by letter dated 31 August 2012 in which he was identified as a staff member who could be affected by the special measures for reduction in workforce set out in the internal memorandum IOM/079-FOM/80/2012 (Special measures for reduction in international professional workforce as a result of the 2013 Annual Programme Review).

Facts

2. The Applicant joined UNHCR in 1989. In 2000, he was granted an indefinite appointment, and he is currently a staff member in between assignments (“SIBA”).

3. On 29 August 2012, the United Nations High Commissioner for Refugees (“High Commissioner”) promulgated IOM/079-FOM/80/2012 which introduces new measures to reduce costs. The memorandum provides, *inter alia*, that the indefinite appointments of international professional staff members whose posts are slated for discontinuation and who have been on full pay status but without an assignment for nine or more consecutive months will be subject to termination unless these staff members are selected for any vacant post advertised in or before September 2012.

4. By letter dated 31 August 2012 from the Director of the Division of Human Resources Management (“DHRM”), the Applicant was informed that, to the extent that he met the criteria set out in IOM/079-FOM/80/2012, he could be affected by the special measures for reduction in workforce. He was thus notified that his indefinite appointment could be subject to termination in the event he was not selected for any vacant post in the course of or before the September 2012 selection exercise.

5. The Applicant filed the application which forms the subject of the present Judgment on 9 October 2012.

6. By Order No. 150 (GVA/2012) issued on 11 October 2012, the Applicant was instructed to provide a copy of his request for management evaluation and, on the following day, he submitted the requested document, which was dated 1 October 2012. As directed by the Tribunal, the Respondent filed his reply on 19 October 2012.

Parties' contentions

7. The Applicant's contentions are:

Prima facie unlawfulness

a. IOM/079-FOM/80/2012 was not submitted to the Joint Advisory Committee for its review and recommendations, as required by inter-office memorandum IOM/FOM No. 014/1990 (Joint Advisory Committee) issued on 15 February 1990;

b. The Secretary-General did not delegate authority to the High Commissioner to take the contested decision. Further, it is unclear whether the High Commissioner sought his comments or consulted him prior to promulgating IOM/079-FOM/80/2012, although the latter relates to basic regulations;

c. To the extent that his indefinite appointment will likely be terminated before other types of appointments, the contested decision contravenes both the Applicant's terms of appointment and staff rule 9.6(e) which provides in particular that staff holding indefinite appointments have a priority for retention in service;

d. The contested decision also infringes his rights under staff regulation 9.3(a) and staff rule 9.6(e). IOM/079-FOM/80/2012 unilaterally defines the terms "available post" and "suitable post" in a sense that is contrary to the overall meaning of staff rule 9.6(e). This provision does not

define these terms. It provides however that, where the necessities of service require that appointments be terminated, staff members shall be retained in an order of preference, subject to the availability of “suitable posts” in which their services can be effectively utilized, and having due regard to relative competence, integrity and length of service. It is the contract status of a staff member which ought to determine whether or not he or she should be retained. The relative competence, integrity and length of service of staff members only becomes relevant where there is an excess number of staff holding the same type of appointment. Thus, a staff member with an indefinite appointment cannot be looked over to retain a staff member on a fixed-term appointment, irrespective of the latter’s fulfilment of the other criteria foreseen in staff rule 9.6(e);

e. The contested decision violates his acquired rights. An indefinite appointment brings with it protection against unilateral separation from service by the Organization. This constitutes a fundamental consideration in a staff member’s decision to join the Organization and the modification of this right entails grave consequences for the staff member;

f. The contested decision also infringes the principle of non-retroactivity as his termination will be based on two selection exercises that occurred in the past;

g. As his status of SIBA is the result of UNHCR’s failure to assign him to a post commensurate with his grade, skills, experience, education and training, the Respondent is estopped from separating him from service or to otherwise terminate his appointment on the grounds that he was not selected for a post;

Urgency

h. If the Applicant is not successful in the September 2012 selection exercise, he will likely be separated from service;

Irreparable damage

i. In view of the blatant irregularities in the decision-making process leading to the contested decision, the damage suffered by the Applicant far exceeds any harm to his future employment, and monetary compensation alone would not do justice to him;

j. As the holder of an indefinite appointment, which is akin to a permanent appointment, he had great expectation that he would pursue and finish out his career with UNHCR.

8. The Respondent's contentions are:

Admissibility

a. The letter of 31 August 2012 does not constitute a challengeable administrative decision within the meaning of the Tribunal's case law, as it is not capable of adversely affecting the Applicant's rights. There has not been any decision with regard to the September 2012 selection exercise and the letter of 31 August is only a preparatory step connected with an uncompleted selection process;

b. Similarly, IOM/079-FOM/80/2012 does not constitute a challengeable administrative decision since it has no individual application and carries no direct legal consequences;

c. The Applicant's request for management evaluation was not submitted to UNHCR, which only became aware of it in the course of the proceedings before the Tribunal. The submission filed by the Applicant on 12 October 2012 cannot be considered as a valid request for management evaluation, and there is therefore no basis for the Tribunal to suspend the implementation of the contested decision pending management evaluation;

Prima facie unlawfulness

d. The letter of 31 August was issued legally pursuant to IOM/079-FOM/80/2012. Further, as per the Appeals Tribunal's case law, neither this Tribunal nor the Appeals Tribunal have the authority to amend the rules of the Organization;

e. The Applicant's claim of unlawfulness is contradicted by the fact that he has been actively engaged in discussions with the Administration regarding a possible agreed separation from service;

Urgency

f. No decision has been taken with respect to the Applicant. The posts advertised in September 2012 are currently under consideration and the letter of 31 August has not modified in any way his contractual status;

Irreparable damage

g. No decision has been taken in relation to the September 2012 selection exercise or the Applicant's separation from service. In fact, he will be given priority consideration for available suitable posts he applies for;

h. The suspension of the contested decision is not the only way to ensure that the Applicant's rights are observed;

Abuse of proceedings

i. The application, which is similar to other applications for suspension of action recently filed with—and rejected by—the Tribunal, is frivolous. Like the other applications, it was based on improper legal advice, and its premature nature amounts to an abuse of proceedings within the meaning of article 10.6 of the Tribunal's Statute.

Consideration

9. The Applicant requests suspension of action, pending management evaluation, on the content of the letter of 31 August 2012 from the Director of DHRM informing him that he meets the criteria set out in IOM/079-FOM/80/2012, thereby resulting in his possible termination for reduction of staff.

10. Article 2.1 of the Tribunal's Statute provides :

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ...

(a) To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. ...

11. Article 2.2 of the Statute further 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. ...

12. In order for the Tribunal to act upon an application for suspension of action submitted pursuant to article 2.2, an "administrative decision", that is, a decision taken by the Administration which carries direct legal consequences in respect of the applicant's rights under the terms of his or her appointment or contract of employment, must be at issue (see, *inter alia*, *Elasoud* UNDT/2010/111, *Buscaglia* UNDT/2010/112, *Dudley* Order No. 308 (NY/2010)).

13. In view of the fact that the Applicant's termination for reduction of staff is only hypothetical at this stage, the content of the letter of 31 August 2012 cannot be considered to directly affect his rights, and the application can only be rejected as irreceivable.

14. The Respondent seeks the award of costs against the Applicant, pursuant to article 10.6 of the Statute. However, the Tribunal finds no grounds to make such a determination, particularly in view of the fact that the Applicant's possible termination could have given rise to legitimate concern, thereby prompting the filing of his application. Accordingly, the Respondent's request in this respect is rejected.

Conclusion

15. In view of the foregoing, the application for suspension of action is rejected, as is the Respondent's request for the award of costs against the Applicant.

(Signed)

Judge Jean-François Cousin

Dated this 22nd day of October 2012

Entered in the Register on this 22nd day of October 2012

(Signed)

René M. Vargas M., Registrar, Geneva