



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/033
Order No.: 094 (NBI/2020)
Date: 18 May 2020
Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR
INTERIM MEASURES**

Counsel for the Applicant:
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Counsel for the Respondent:
Katrina Waiters, UNFPA

Background

1. On 8 May 2020, the Applicant filed an application on the merits contesting his dismissal from the service of the United Nations Population Fund (“UNFPA”) as a disciplinary measure pursuant to staff regulation 10.1(a) and staff rules 10.1(a) and 10.2(a) (ix) (“the contested decision”).

2. On 11 May 2020, he filed a motion for interim measures¹ seeking suspension of action of the contested decision pursuant to arts. 10.2 of the UNDT Statute and 14 of the UNDT Rules of procedure pending the UNDT proceedings in his substantive application.

3. The Respondent filed a reply on 13 May 2020 in which it is argued, inter alia, that the application for suspension of action is not receivable *rationae materiae*.

4. On 13 May 2020, the Applicant sought leave, pursuant to art. 36.1 of the UNDT Rules of Procedure, to file a response to the reply. The response was attached to his motion seeking leave.

Relevant facts

5. On 13 April 2017, the Office of Audit and Investigation Services (“OAIS”) received a complaint of an alleged misconduct implicating the Applicant.

6. OAIS issued its Investigation Report on 23 October 2017.² On 25 October 2017, OAIS informed the Applicant that the investigation into the alleged misconduct levelled against him had been closed.

7. On 31 January 2019, UNFPA’s Chief, Legal Unit, requested OAIS to reopen the investigation by securing additional evidence.³

¹ The Applicant filed a corrigendum to the motion on the same day.

² Application, annex 1.

³ Application, annex 2.

8. On 4 February 2019, the Applicant was informed that OAIS had deemed it necessary to reopen the investigation in order to pursue further avenues of inquiry within the scope of the investigation and allegations raised.⁴

9. On 7 May 2019, OAIS wrote to the Chief, Legal Unit transmitting a memorandum on the additional witness statements and evidence it had obtained pursuant to his 31 January 2019 request.⁵

10. By letter dated 4 March 2020, the Applicant was notified of the charges of serious misconduct against him and was given 10 days to respond to the said charges.⁶

11. He filed his response to the charges on 19 and 30 March 2020.⁷

12. By letter dated 4 May 2020, Dr. Natalia Kanem, Executive Director, UNFPA, informed the Applicant of the contested decision.⁸

Considerations

13. This application for suspension of action raises a preliminary matter of receivability which the Tribunal must first determine.

14. The Applicant does not dispute the fact that summary dismissal as a disciplinary measure constitutes ‘termination’ under the UNDT Statute and that arts. 10.2 of the UNDT Statute and 14 of the UNDT Rules of Procedure oust the Tribunal’s jurisdiction in so far as the issuance of interim relief or grant of a suspension of action in cases of termination.

15. He however challenges the fact that his summary dismissal constitutes a ‘termination’ within the exclusionary clauses of the UNDT Statute and Rules of

⁴ Application, annex 3.

⁵ Application, annex 4.

⁶ Application, annex 5.

⁷ Application, annexes 12 and 15.

⁸ Application, annexes 16 and 17.

Procedure and invites the Tribunal to grant interim relief on that basis. In this regard, he argues that the decision to terminate him was manifestly unlawful and that the surrounding circumstances leading to the contested decision are so egregious that its practical effect is that there is no lawful decision in place, capable of terminating his employment, and consequently the prohibition under art. 10.2 is not relevant to this application. He invites the Tribunal to exercise the inherent powers vested in it to control the proceedings brought before it and exercise its jurisdiction.

16. The argument that a “manifestly unlawful” or “not lawful” decision to terminate an employee falls outside the purview of arts. 10.2 of the UNDT Statute and 14 of the UNDT Rules of Procedure is fallacious. This is because while the law gives powers to the Dispute Tribunal to order interim measures to provide temporary relief including an order to suspend the implementation of the contested administrative decision where the contested administrative decision appears *prima facie* unlawful, it specifically excludes the remedy of suspended implementation in cases of appointment, promotion or termination. The framers of the law were obviously alive to the fact that cases where termination decisions would be alleged to be *prima facie* unlawful would arise, yet provided that with regard to them, the Tribunal would have no jurisdiction to grant interim relief.

17. The argument that the surrounding circumstances leading to the contested decision in this case are “so unique, egregious, and unprecedented” does not remove the nature of complaint from the legal categorization of “appearing *prima facie* to be unlawful” and will not compel the Tribunal into creating other legal imperatives in order to be able to act in this case. The law expressly ousts the Tribunal’s jurisdiction as far as the issuance of interim measures in termination decisions.

18. Another of the Applicant’s arguments is that in order to ensure convenience and fairness in legal proceedings and to prevent steps being taken that would render judicial proceedings inefficacious and to prevent abuse of process, the Tribunal should exercise its inherent jurisdiction and grant the orders sought because the decision in issue is manifestly unlawful, it constitutes an abuse of authority since the decision

maker acted as a judge in its own cause and there exists a strong likelihood of bias.

19. As the Tribunal has already noted, even when the surrounding circumstances of the case are unique, egregious and unprecedented as it is argued these are, the law removes the case outside the Tribunal's jurisdiction at this stage and no force of argument can change that. The Tribunal will not exercise jurisdiction where it has none by operation of the law.

20. The Dispute Tribunal's inherent jurisdiction cannot be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the law.⁹ The Applicant's remedy does not lie in seeking jurisdiction in other spaces such as the proposed inherent jurisdiction of the court but in complying with the clear requirements of the law. The inherent powers of the Tribunal are not to be exercised when they are prohibited or excluded by the law. Articles 10.2 of the UNDT Statute and 14 of the UNDT Rules of Procedure deal with the situation at hand by way of ousting the Tribunal's jurisdiction. The Tribunal has no inherent power to do what the UNDT Statute and Rules of Procedure prohibit. Put in another way, inherent jurisdiction cannot be used to override and/or nullify the provisions of the Law.

21. Several arguments were raised to demonstrate that the impugned decision is unlawful and that the termination in issue does not conform to the definition of the word "termination" under the relevant Staff Rules. One such argument is that it is a condition precedent that for there to be a termination under the UNDT Statute, there must first be a finding of misconduct against a staff member at the conclusion of an investigation following which, the Secretary-General and/or those acting under his authority, can impose on a staff-member, a sanction such as that of dismissal as a

⁹ See for example in *Warren* 2010-UNAT-059 where the Appeals Tribunal acknowledged that General Assembly resolution 63/253 affirmed that the Tribunals shall not have any powers beyond those conferred under their respective statutes (at paragraph 13). In *Njadi* 2012-UNAT-197, it was held that the jurisdiction of the Dispute Tribunal is limited by its Statute, another resolution of the General Assembly or a provision of another act of the same level of United Nations internal law (at paragraph 19).

disciplinary measure. Further, that since there were no such findings in this case, there is *prima facie* no termination recognised by law and the Tribunal can therefore exercise jurisdiction in the matter pursuant to arts. 2, 3.1 and 10.2 of its Statute.

22. The Tribunal notes that “termination” is defined under staff rule 9.6(a) as, “a separation from service initiated by the Secretary-General”. Since the separation in issue was initiated by the Secretary-General¹⁰, the Tribunal is dealing with a termination as recognized by the Staff Regulations and Rules and does not agree with the argument that there was no termination.

23. The Tribunal further notes that all the Applicant’s arguments in support of this application for interim relief are the same arguments he raises in the main application on the merits¹¹. These include complaints that:

- a. the Respondent acted with an egregious display of bias, a flagrant abuse of its authority, impartiality and arbitrariness aimed at achieving the pre-determined purpose of causing the Applicant’s summary dismissal and rendering any subsequent judicial proceedings in challenge thereof inefficacious;
- b. the Respondent imposed disciplinary sanctions on the Applicant, contrary to the recommendation of the OAIS;
- c. the Respondent constituted itself into a judge; and
- d. the disciplinary sanctions are of no legal effect since they are not supported by any recommendations by the OAIS to that effect.

24. While the Tribunal is yet to finally pronounce itself on the merits of those complaints, which can only be done in the main application and not in this motion, the Applicant is asking it to base its decision on them to grant the interim relief in this case. Since the veracity of the complaints is still in issue, it would be as untenable as it would

¹⁰ The UNFPA’s Executive Director’s 4 May 2020 letter to the Applicant is instructive on this.

¹¹ From paragraph 33 onwards.

be irregular to base a decision to grant interim relief based on them at this stage, even if the Tribunal was legally positioned and amenable to granting the reliefs.

25. The Tribunal finds that the Applicant was separated from service on the basis of staff rule 10.2(a)(viii), meaning that his permanent appointment was terminated. The contested decision falls into the category of “cases of appointment, promotion or termination” which constitute exceptions to the UNDT authority to grant suspension of action as an interim measure.

26. Consequently, the Tribunal cannot order suspension of implementation of the contested decision in this case because of the limitation imposed by arts. 10.2 of the UNDT Statute, and 14 of the UNDT Rules of Procedure. In light of the foregoing, it is not necessary for the Tribunal to examine whether the three statutory requirements of *prima facie* unlawfulness, urgency and irreparable damage are met in this case.

Conclusion

27. The application is refused.

(Signed)

Judge Margaret Tibulya

Dated this 18th day of May 2020

Entered in the Register on this 18th day of May 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi