



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/053
Order No.: 229 (NY/2018)
Date: 12 November 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

KITAGAWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 28 September 2018, the Applicant filed an application contesting the decision not to extend fixed-term appointment as a Team Assistant in the Language and Communications Programme Learning, Development and Human Resources Services Division, Office of Human Resources Management (“OHRM”). Within the application, the Applicant made a motion for interim measures, in which the Applicant seeks the suspension of the implementation of the contested decision pending the proceedings before the Tribunal pursuant to art. 14 of the Dispute Tribunal’s Statute.

Factual and procedural background

2. On 9 October 2018, the Applicant filed an application for suspension of action pending management evaluation pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure, requesting that the decision not to renew his fixed-term appointment beyond 9 October 2018, which was notified to him on 8 October 2018 and scheduled to be implemented on 9 October 2018, be suspended pending management evaluation.

3. On 9 October 2018, the case was assigned to the undersigned Judge.

4. By Order No. 197 (NY/2018) dated 10 October 2018, the Tribunal granted, without prejudice to the Tribunal’s determination of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute, the suspension of the implementation of the decision not to renew the Applicant’s fixed-term appointment beyond 9 October 2018 until the Tribunal rendered its decision on the application for suspension of action, or until further order.

5. By Order No. 201 (NY/2018), the Tribunal granted the request for suspension of action in relation to the decision not to renew the Applicant’s fixed-term

appointment and ordered that the implementation of the decision be suspended pending management evaluation.

Parties submissions

6. The Applicants main contentions in support of his motion for interim relief are as follows:

a. MEU did not take into consideration the Applicant's claim that his First Reporting Officer ("FRO") failed to identify performance shortcoming and did not continually evaluate his performance from 1 April 2017.

b. The "remedial time-bound performance improvement plan ("PIP")" was taken with subjective goals/outcome which did not include "clear targets for improvement, provision for coaching and supervision by the first reporting officer ...".

c. Section 10.2 of ST/AI/2010/5 indicates that a written PIP shall be prepared by the FRO in consultation with the staff member and Second Reporting Officer ("SRO"), which was not done in this case.

d. The FRO acknowledged improvement in the Applicant's communication and had not heard any complaints from colleagues, however he refused to provide additional feedback regarding the Applicant's performance, until he accepted a written PIP pre-drafted in consultation with the SRO prior to end of performance cycle. The outcome of "partially meets performance expectations" had therefore been predetermined.

e. The Applicant was not provided guidance or support to improve his performance.

f. The rebuttal panel handling the Applicant's rebuttal of his performance appraisal did not hear the relevant witnesses.

7. The Respondent's main contentions in support of his motion for interim relief are as follows:

a. The Motion is not receivable. Article 10.2 of the Tribunal's status provides that the Dispute Tribunal may not suspend the implementation of a contested decision in cases of appointment. This is a case of appointment, i.e. the decision not to renew of the Applicant's appointment. Accordingly, the Dispute Tribunal lacks jurisdiction to hear the Motion.

b. The decision not to renew the Applicant's fixed-term appointment has been implemented as the Applicant separated from the Organization on 8 November 2018, at the expiration of his appointment.

c. The application is not receivable *ratione materiae* as the Applicant does not challenge and administrative decision but merely contests the outcome of the management evaluation process.

d. Should the Tribunal find that the Applicant is in fact challenging the decision not to renew his fixed-term appointment, the application is not receivable *ratione temporis* as the Applicant did not seek management evaluation of the decision not to renew his fixed-term appointment at its expiration when the decision was communicated to him on 20 July 2018.

Consideration

Applicable law

8. Article 10.2 of the Tribunal's Statute states:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

9. Article 14 of the Dispute Tribunal's Rules of Procedure states:

Suspension of action during the proceedings

1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.
2. The Registrar shall transmit the application to the respondent.
3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

10. The Tribunal considers that an order on interim measures may be granted at the request of the parties when the following cumulative conditions are met:

- a. The motion for interim measures is filed in connection with a pending application on the merits before the Tribunal, anytime during the proceedings;
- b. The application does not concern issues of appointment, promotion or termination;
- c. The interim measure(s) ordered by the Tribunal must provide solely a temporary relief to either party, such relief being neither definitive by nature nor having the effect of disposing of the substantive case in relation to which the application for interim measures is filed;

- d. The contested administrative decision appears *prima facie* to be unlawful;
- e. There is a particular urgency in requesting the interim measures;
- f. The implementation of the contested administrative decision would cause irreparable damage.

Considerations

11. The Tribunal notes that the Applicant's motion for interim measures and the application on the merits were filed contemporaneously. The first condition mentioned above is accordingly fulfilled.

12. The Tribunal considers that a request to suspend the implementation of a contested administrative decision pending proceedings cannot be granted when the request for suspension concerns issues of appointment, promotion or termination, pursuant art. 10.2 from the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure, as these issues are expressly excluded from being suspended by the Dispute Tribunal's Statute and Rules of Procedure.

13. The Applicant's request for interim measures relates to an appointment, namely the decision not to extend his fixed-term appointment. Consequently, the second condition identified above is not fulfilled as the issues raised by the Applicant are excluded from being suspended by the Dispute Tribunal.

14. Seeing that at least one of the above-mentioned cumulative conditions is not fulfilled, the Tribunal therefore need not consider whether the remaining requirements, namely temporary relief, *prima facie* unlawfulness, urgency and irreparable damage, are met.

15. In the light of the foregoing,

IT IS ORDERED THAT:

16. The present application for interim measures is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of November 2018