



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/080

Judgment No.: UNDT/2012/156

Date: 22 October 2012

Original: English

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

VIVARIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:

Introduction

1. On 8 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, whereby he challenges the internal memorandum IOM/FOM No. 079-80/2012 (Special measures for reduction in international professional workforce as a result of the 2013 Annual Programme Review), explaining that it is likely to result in his separation from service.

Facts

2. The Applicant holds the post of First Officer at grade P-4, under an indefinite appointment.

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. The Applicant filed the application which forms the subject of the present Judgment on 8 October 2012.

5. On 9 October 2012, the Registry of the Tribunal in Geneva requested the Applicant to submit copies of the contested decision and of his request for management evaluation. Also on 9 October 2012, an Officer of the Registry left a voice mail message at the Applicant’s home phone number, asking him to submit copies of the requested documents in order for the case to be processed.

6. On 11 October 2012, the Registry formally acknowledged receipt of the application and again requested the Applicant to provide without delay copies of the contested decision as well as his request for management evaluation.

7. By Order No. 148 (GVA/2012) also issued on 11 October 2012, the Applicant was instructed to provide a copy of the contested decision and of his request for management evaluation by 12 October 2012. The Applicant did not provide the requested documents.

Parties' contentions

8. 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.

Consideration

9. In his application, the Applicant did not identify the provisions under which he was seeking suspension of action.

10. Both article 2.2 and article 10.2 of the Tribunal's Statute allow a staff member to seek urgent relief, including suspension of action on a contested administrative decision.

Consideration under article 2.2 of the Statute

11. Article 2.2 of the Tribunal's Statute provides that the Tribunal may suspend the implementation of a contested administrative decision during the pendency of 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. As was recalled by the Tribunal in Order No. 148 (GVA/2012), it results from article 2.2 that the Tribunal is not in a position to rule on an application for suspension of action, pending management evaluation, on a decision, if copies of the decision in question or the request for management evaluation have not been submitted.

13. Despite the fact that the Applicant was asked three times in writing, including once by order of the Tribunal, to transmit a copy of the contested decision as well as his request for management evaluation, he failed to provide the requested documents.

14. In *Atogo* UNDT/2010/048 the Tribunal considered:

A party to a proceeding has a duty to comply with an order of the Tribunal and particularly an interlocutory case management order pursuant to Article 19. To persist in disobeying such orders despite full explanations being provided as to their purpose will risk the claim or the response, as the case may be, being struck out.

15. The Applicant's failure to comply with the Tribunal's order must therefore result in his application being rejected.

16. The above notwithstanding, the Applicant's failure to act diligently in pursuing the matter also casts doubts that the application meets the requirement of particular urgency.

Consideration under article 10.2 of the Statute

17. Under article 10.2 of its Statute, the Tribunal may, at any time during the proceedings, order an interim measure 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.

18. However, as was recently recalled by the Tribunal (*Dua* UNDT/2012/147), interim measures under article 10.2 of the Statute may be ordered only if the Tribunal is seized of an application on the merits under art. 2.1 of the Statute.

19. No application on the merits has been filed in this case and, the application for suspension of action must accordingly be dismissed under article 10.2 of the Statute.

Conclusion

20. In view of the foregoing and pursuant to article 9 of the Tribunal's Rules of Procedure, the application for suspension of action is rejected.

(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