UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2011/058
	Judgment No.:	UNDT/2011/133
	Date:	22 July 2011
	Original:	English

Before: Judge Ebrahim-Carstens

4. According to Counsel for the Applicant's above email, the two attachments were provided to the Tribunal in the event the MEU was "unable to extend the applicant's contract because of the terms of his appointment", the informal request having been made to the MEU to extend the Applicant's contract beyond 9 July 2011 "so as to forestall the outright rejection of his [suspension of action] application to the [Dispute Tribunal] for irreceivability". Counsel for the Applicant further submitted that "[i]t is not clear whether the MEU will be able to secure such an arrangement for our client".

5. On 8 July 2011, the Dispute Tribunal held a hearing on the application for

9. The Applicant claims that, on 5 January 2011, his supervisor, the Director, told him that he was "happy" with the job he was doing in TSS and that, when the Applicant expressed concern about his contract expiring in July 2011, his supervisor said, "no worries, you are good well into next year (2012)".

10. On 18 February 2011, the Director told the Applicant that there had been two candidates for a six-month temporary vacancy announcement ("TVA") for an Information Systems Assistant for TSS and that the Applicant should give him a recommendation on who should be selected for the position. The Applicant recommended interviews to ensure fairness and transparency, but the Director said that they were not required for a TVA.

11. On 21 February 2011, having reviewed the two candidatures for the position, the Applicant determined which candidate should be appointed to the six-month temporary vacancy.

12. On 23 February 2011, the Director requested that the Applicant meet with another colleague so that they could jointly provide input as to who would be the best applicant for the position. Both the Applicant and his colleague agreed on the same candidate as the Applicant had determined on 21 February 2011 and they informed the Director of this. The Applicant notes in his application that the Director "did not appear happy with our recommendation, but did not object".

13. On 27 February 2011, the Applicant received an email from the Director, essentially providing some advice and coaching as to how to better carry out a selection process. The Applicant claims that from this point his Director's "attitude toward [him] changed drastically. [The Applicant] felt for the next several weeks that [he] was working in a hostile environment".

14. The Applicant claims that, starting 28 February 2011, he had various conversations with colleagues who expressed "shock and dismay" that he had not recommended the unsuccessful candidate for the Information Systems Assistant

position because she and the Director had been close for years. The Applicant describes the unsuccessful candidate as "emotional and crying" on the telephone to him, and "demanding to know why she didn't get the position". In this same period, the successful candidate for the position said that he no longer wanted the job as he was "caught in the middle" between the unsuccessful candidate and the Director.

15. On 22 March 2011, the Director gave a presentation in which he stated that the Applicant would continue to be OIC for TSS for the foreseeable future.

16. On 10 May 2011, the Applicant received an email from the Director, stating as follows:

> As you know the new provisions for temporary contracts effective 1 July dictate that after 2 years, [temporary] staff must take a 3 month break in service. Your anniversary is 9 July 2011. At the same time, I must advertise the position which I have extended you against … . You will recall that I have extended you an extra year after the abolition of the post you were recruited to fill … at the end of June 2010.
>
> I will be advertising the position in Inspira and certainly you would be welcome to apply for it. However, at present I am only able to extend you until July 9.

17. The Applicant claims that, on 18 May 2011, he spoke to the Director about the non-renewal of his contract and that he was told that there was nothing the Director could do about it under the human resources rules. The Applicant questioned why other staff members in FIOS who were in the same contractual situation were being extended. The Director informed him that those staff members could be extended after or before their two years had expired because they were being funded by different budgets. The Director then suggested that the Applicant apply for a three-month TVA position for the job which he had been performing.

18. On 6 June 2011, the Applicant was informed by the Executive Office, DM, that any extension of his contract under a temporary appointment was ultimately up to his supervisor.

19. On 10 June 2011, the Applicant received a letter from the Executive Officer, DM, informing him in writing that his contract would not be extended beyond 9 July 2011.

20. On 13 June 2011, the Applicant wrote to the Executive Office, DM, disputing the decision not to extend his contract and asking to be converted to a temporary appointment. The letter highlighted his eight years of service with the Organization and concluded:

> I kindly request the confirmation for a Temporary Appointment contract extension after a 3-day break in service, starting July 13, 2011. If this is not possible (and for some reason I am being treated differently than other Fixed Term staff) then I kindly request a new contract to be signed as soon as possible with a starting date of October 9, 2011, three months after my current termination date of July 9, 2011.

21. On 15 June 2011, the Applicant had a follow-up meeting with the Executive Officer, DM, who told him that she would respond formally to his letter, which she had not yet done. She also said that there could be no extensions after a two-year period without a one-month break in service, and that there were no exceptions to the rule.

22. On 28 June 2011, the Director announced in an email to all applicants that he had cancelled the three-month TVA for the position the Applicant was then holding because the permanent Inspira position was going to be filled shortly.

23. On 6 July 2011, the Director informed the Applicant by email that he needed to announce to the staff that the Applicant would not be in the office as of the week after, and that they should therefore report to the Director. On 7 July 2011, the Director held a meeting with the staff to advise them accordingly.

Case

Irreparable harm

g. The decision would cause irreparable harm because the Applicant would lose his job and current livelihood;

h.

Consideration

26. This is an application for a suspension of action pending management evaluation. This manner of application is in the nature of urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Judge within five days of the service of the application on the Respondent (see art. 13.3 of the Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal. Therefore parties approaching the Tribunal must do so on genuine urgency basis and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. The proceedings are not meant to turn into a full hearing. The application must not be frivolous or an abuse of process, or else an

32. Due to the nature of urgent applications, both parties and the Tribunal are under pressure of time in such situations. It is not unusual, in many traditions, for counsel to be called into court at short notice to appear before a judge on the same day where circumstances and justice so require. In terms of the Tribunal's rules, an application for suspension of action should be considered within five days of service upon the Respondent. However, in some cases, a suspension of action cannot be granted where the contested decision has already been implemented. This may of course occur while time is allowed for the filing of papers, making it impossible for the Tribunal to grant relief which, after all, is only interim in nature. This gives rise to an absurdity where the relief is clearly warranted. As a result, the Tribunal has to deal with these matters as best as it can on a case-by-case basis depending on the particular circumstances and facts of each case, but the urgency should not be self-created.

33. A plea that requires a court or tribunal to decide a threshold question which is not related to the merits of an applicant's case is sometimes known as a dilatory plea (others being pleas in abatement, please in suspension, etc.). The due diligence plea to my mind is purely dilatory in nature. The test for an application for suspension of action is that there is urgency which is not self-created. The Applicant in this case was first informed of the decision not to renew his contract by email on 10 May 2011, reiterated by letter dated 9 June 2011 and received on 10 June 2011. He waited several weeks before he launched this application on 6 July 2011. His explanation for the delay is that he spoke many times with the Director and with the Ombudsman's office, although there was no formal mediation. When all that failed, the Applicant went to the MEU to ask it to suspend the action, after which he realised that he should have made his application to the Dispute Tribunal. There then followed a long weekend, which had put him "in a difficult situation".

34. The Tribunal finds it instructive that the email from Counsel for the Applicant, dated 7 July 2011, anticipates "the outright rejection of his [suspension of

action] application to the [Dispute Tribunal] for irreceivability". In addition, whilst the Tribunal commends the Applicant's attempts to informally resolve his situation, the Applicant has failed to provide the Tribunal with a satisfactory explanation as to why the delay in filing his application to the Dispute Tribunal should not be attributable to him.

35. The Dispute Tribunal held in *Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), and *Yisma* Order No. 64 (NY/2011), that the requirement of particular urgency will not be satisfied if the urgency was created by the applicant. The Tribunal has also held in *Sahel* UNDT/2011/023 and *Patterson* UNDT/2011/091 that informal attempts at settlement and mediation do not absolve an applicant from acting timeously in complying with deadlines.

36. Both *Sahel* and *Patterson* emphasise that ongoing informal discussions do not provide a valid excuse for an applicant for not complying with deadlines. Likewise, the Tribunal finds that, in the instant case, the Applicant's discussions with the Director and the Office of the O c 0.060arJ/TT3 1 Tfd4r1lMe9 Tc 0.0091.495 0 T2rying C1 Tcacurgen

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