



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/013
Order No.: 64 (NY/2011)
Date: 1 March 2011
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

Introduction

1. On 11 February 2011 the Applicant, a staff member of the Multi-Donor Trust Fund Office of the United Nations Development Programme (“UNDP”), filed an application contesting the disciplinary meas

6. On 22 February 2011 the Applicant filed and served an application seeking the Tribunal to grant temporary relief until it renders a final judgment in her case. The relief was requested in either of the following two forms: (i) suspension of action of the administrative decision to separate the Applicant; or (ii) payment of salary entitlements while the matter is being decided by the Tribunal. The Respondent filed a reply to this application on 25 February 2011.

7. On 1 March 2011 the Tribunal held a hearing on the application for temporary relief.

Brief facts

8. The Applicant is employed on a fixed-term contract as a general service-level staff member.

9. On 1 November 2009, the Applicant and a close relative submitted a rental application to the HDC for a two-bedroom apartment located in a new housing complex in New York City. In the Applicant's case, to be eligible for an HDC-financed apartment, she and her close relative were required to show a combined income not exceeding USD134,400.

10. The HDC detected irregularities in the Applicant's rental application form and, on 9 December 2009, contacted the Office of Human Resources, Bureau of Management, UNDP. On 10 December 2009 the Office of Human Resources referred the matter to the Office of Audit and Investigations ("OAI") for investigation.

11. The Applicant was notified of a formal investigation of the matter on 11 December 2009. The Applicant withdrew her application with HDC on 14 December 2009.

12. The OAI issued its investigation report in January 2010, finding that the Applicant had (i) misrepresented her annual salary and working hours in the HDC application form and (ii) forged the letter purportedly written by the Personal

Assistant to the Chief and Director, Executive Office, UNDP, in order to qualify for renting a subsidised apartment to which she was otherwise not entitled.

13. By a letter dated 26 May 2010 the Applicant was charged with misconduct. She replied to it on 28 June 2010, taking full responsibility for her “grievous mistake” and requesting UNDP to take into account a number of mitigating circumstances.

14. By a letter dated 1 December 2010 the Associate Administrator of UNDP imposed on the Applicant the disciplinary measure of separation from service with three months’ notice and two weeks’ termination indemnity, pursuant to Staff Rule 10.2(a)(viii). In this letter, the Associate Administrator referred to, *inter alia*, the mitigating circumstances offered by the Applicant, but found that the Applicant’s misconduct warranted the disciplinary measure of separation from service, with a three months’ notice period and two weeks’ termination indemnity.

Applicant’s submissions

15. The Applicant’s principal contentions may be summarised as follows.

a. The application for temporary relief is receivable. Notwithstanding any limitations in art. 10.2 of the Statute, the Tribunal has “inherent jurisdiction to judicially review cases where the existing rules do not conform to basic fundamental principles of law, in this case, principles of equity”.

b. The Applicant’s case is of particular urgency as she will be separated on 9 March 2011.

c. The contested decision appears *prima facie* unlawful. In determining the legality of a sanction, all facts and circumstances, including any mitigating factors, have to be considered. Although reference is made to the mitigating circumstances in UNDP’s letter dated 1 December 2010, there is no indication or evidence that UNDP made any efforts to contact the Applicant’s current supervisor or other colleagues or sought other information which would form

the basis for the decision to separate the Applicant from service. The disciplinary measure was irregular and defective because not all essential facts, including mitigating factors, were fully and fairly canvassed and considered by the Administration.

d. The requirement of irreparable damage is satisfied. Without proper financial support, the Applicant will be unable to sustain an existence in New York. Her personal and professional life will also suffer, precluding her from securing alternative employment. The Applicant will be unable to pay for rent, groceries, social security taxes, physician appointments, and medication. She is currently consulting a specialist and requires continued medical advice and treatment. If she loses her job with the Organisation she will be at serious risk of being without health insurance.

Respondent's submissions

16. The Respondent's primary contentions may be summarised as follows:

a. The application for temporary relief is only partly receivable. Article 10.2 of the Statute excludes possibility of temporary relief in the form of a suspension of action in cases of termination. However, art. 10.2 of the Statute permits temporary relief in the form of a payment in the amount of the Applicant's current salary, as requested by the Applicant in the alternative. Therefore, the application for temporary relief is receivable with respect to the Applicant's request for a payment of salary entitlements while the matter is being decided by the Tribunal.

b. However, the contested decision was not *prima facie* unlawful. The disciplinary measure imposed was proportionate to the misconduct. The Applicant brought all mitigating circumstances referred to in her application to the attention of the Respondent in her response to the charge letter. The Respondent was cognisant of all of these facts and took these and further

Conclusion

23. The application for temporary relief is denied.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of March 2011