
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/044
Order No.: 201 (NY/2018)
Date: 16 October 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

KITAGAWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM

Introduction

1. On 9 October 2018, at 5:07 p.m., the Applicant, a team assistant at the G-4 level on a fixed-term appointment with the Language and Communications Programme Learning, Development and Human Recourses Services Division, Office of Human Resources Management (“OHRM”) in New York, filed an application for

par. 14.2 of ST/AI/2010/5] Exclusions of my selection of panel members without replacements and limiting the pool of panel members that I could select from. 10.Rebuttal Process: [as per par. 15.3 of ST/AI/2010/5] No efforts were made by the panel to contact my additional FRO's [Names Redacted] for the rebuttal process. My pertinent files & statement I have provided the EO for HoD was shared with Mr. [Name Redacted], an action which was advised against by OHRM in E.O's e-mail. Mr. [Name Redacted] has used the statement to slander my rebuttal statement and put it forward as the statement represented by HoD to the rebuttal panel. 11.Rebuttal Process: E.O collaborated the fact that the panel rushed the decision of result due to non-renewal of my contract. The panel did not read the additional evidence I provided requested to provide on Friday. 12.Rebuttal Process: Final decision from rebuttal panel does not refer to any documents on my performance, as per FRO's decision to not extend my contract due to my [Performance Improvement Plan ("PIP")].

Urgency and irreparable harm

11. The Applicant indicated that his contract expires on 9 October 2018 and therefore he will separate from the Organization on 9 October 2018, the date of filing of the application for suspension of action.

12. The Respondent's principal contentions in his reply are as follows:

The Application is not receivable ratione temporis

a. The Applicant failed to request management evaluation of the contested decision within the 60-day time limit under staff rule 11.2(c) and Art. 8(1)(c) of the Dispute Tribunal's Statute. The Applicant's 9 October 2018 request for management evaluation was outside this time frame;

b. As a mandatory first step before filing a case before the Dispute Tribunal, the Applicant must request management evaluation of a contested decision, in accordance with staff rule 11.2. Such a request should be lodged within 60 days of the Applicant being notified of the contested decision.

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assist the Applicant in remedying the identified shortcomings, the FRO decided to institute a performance improvement plan (“PIP”). On 22 January 2018, the FRO sent a PIP to the Applicant. In implementing the PIP, the FRO provided detailed feedback to the Applicant on his performance. The final evaluation of the PIP took place on 25 June 2018. During that evaluation, the Applicant was informed that his performance had remained unsatisfactory during the implementation of the PIP.

1. The Applicant’s fixed-

the Applicant's performance as "partially meets" expectations. Accordingly, it was lawful not to renew his appointment and to separate him from service.

Any urgency has been created by the Applicant

p. Self-created urgency does not satisfy the requirements for suspension of an administrative decision.

q. The Applicant knew from 20 July 2018 that his fixed-term appointment would not be renewed beyond 9 October 2018. The Applicant could have sought management evaluation of that decision then.

r. Instead, he waited until after the Dispute Tribunal's close of business on 9 October 2018 to file a request for suspension of action. Any urgency has been created by the Applicant.

s. In view of the foregoing, the Respondent requests that the Application be dismissed.

13. The Respondent's further submissions filed on 12 October 2018 are as follows:

October 2018

a. Staff rule 9.4 provides that "A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment." Section 7.1 of ST/AI/2013/1 Administration of fixed-term appointments provides that "A fixed-term appointment expires on the expiration date specified in the letter of appointment." In the case of *Andreyev* (2015-UNAT-501), the Appeals

eco *was*
separated from the Organization and when he was contacted by the Rebuttal Panel

- e. The Applicant's SRO separated from the Organization on 16 June 2018. The Chair of the Rebuttal Panel wrote to the SRO on 5 October 2018. No response was received.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

14. Article 2.2` Or 21

a temporary assignment for a short-term appointment on 25 October 2018. The appointment on 25 October 2018 is for a temporary assignment for a short-term appointment on 25 October 2018.

performance. The decision of

28. The Tribunal underlines that the Rebuttal Panel is required to interview the staff member, the FRO, the SRO and any other persons considered to have relevant information and that these testimonies must be recorded in writing because they are part of the evidence gathered by the Rebuttal Panel. The Rebuttal Panel's decision while binding on the head of the department/office/mission and on the staff member concerned, is subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization who may review the matter as needed on the basis of the record. In the absence of a complete record containing the entire evidence evaluated by the Rebuttal Panel a proper review is not to be possible.

29. The Rebuttal Panel report does not include any specific reference to the content and the relevance of the testimonies before the panel and there is no mention of the new evidence requested by the Applicant in order to capture this relevant evidence.

30. Based on the foregoing, the Tribunal concludes that it appears that the mandatory provisions of ST/AI/2010/5 were not followed by the Rebuttal Panel and, consequently the decision not to renew the Applicant's fixed-term appointment beyond 9 October 2018 for reasons of poor performance appears to be *prima facie* unlawful.

31. The Tribunal is of the view that it appears to be necessary for these legal aspects to be addressed, clarified and corrected during the management evaluation review including if necessary by resending the matter to the Rebuttal Panel in order to ensure that the Applicant's due processes right are respected and to allow the Secretary-General to properly exercise his discretion in relation to the legality of the contested decision.

Is there an urgency?

32. The Tribunal considers that the condition of urgency is fulfilled, since the Applicant's appointment was due to expire on 9 October 2018. The Tribunal notes

that the contested decision was notified to the Applicant on the 8 October 2018 at the completion of the Rebuttal Report and the application for suspension of action was filed on 9 October 2018. The Tribunal considers that the Applicant filed the present application for suspension of action within a reasonable time and concludes that the urgency was not self-created.

Is there an irreparable harm to be caused by the implementation of the contested decision?

33. The Tribunal considers that the contested decision, if implemented, has the potential to cause the Applicant irreparable harm since he would be separated from the Organization. In the circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled, which is not contested by the Respondent.

34. In light of the above,

IT IS ORDERED THAT:

35. The application for suspension of action is granted in relation to the decision not to renew the Applicant's fixed-term appointment beyond 9 October 2018, and the implementation of this decision is suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 16th day of October 2018