
Original: English

Before: Judge Memooda Ebrahim-Carstens
Registry: New York
Registrar: Hafida Lahiouel

MIYAZAKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON SUSPENSION OF
ACTION**

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Stephen Margetts, ALU

Introduction

1. The applicant filed an application with the New York Registry of the United Nations Dispute Tribunal on 7 November 2009 seeking to contest a decision not to allow her a formal rebuttal process in relation to a short-term staff performance report dated 22 June 2009 which made adverse findings in relation to her performance. Further to this application, the applicant filed a “Motion for Temporary Relief”, sought pursuant to Article 10.2 of the Statute of the Tribunal and Article 14.1 of the Rules of Procedure, which the Tribunal considered filed on 10 November 2009. This “Motion for Temporary Relief” sought removal of the Report from the applicant’s Official Status File (“File”) pending the Tribunal’s determination of the substantive proceeding. As a preliminary matter, I note that in her request for review of 8 September 2009 the applicant also queried the administrative decision dated 9 July 2009 to withdraw her offer of appointment, but that this issue was not raised before me as it appeared to have been settled between the parties prior to the commencement of the present application.

Facts

2. On 25 November 2008, the applicant joined the United Nations as a Finance Officer with the Peacekeeping Financing Division (“PFD”). On 1 April 2009 she transferred to PFD as a Budget Officer for the United Nations Stabilization Mission in Haiti (“MINUSTAH”). The applicant stated, which was not contested, that she concluded her service in this position on 2 July 2009.

3. On 22 June 2009, the Section Chief and Director of PFD both signed a Form P.10-E Report on Short-Term Staff (“the Report”) evaluating the applicant’s performance. Amongst other things, the Report had a box checked noting the applicant’s proficiency in general as “below average”, with another checked in relation to whether the staff member would be considered for re-employment, as “No,

not at all". The Report was placed on the applicant's File the following day on 23 June 2009, as discussed below.

4. The parties do not agree as to the date that a copy of the Report was shown or made available to the applicant. The applicant states that she was not shown the Report until 2 July 2009, the final day of her appointment and that she did not receive a copy of it at all. The respondent on the other hand states that on 23 June 2009 the Assistant to the Section Chief copied the Report and provided a copy to the applicant, thereafter delivering a copy to the Executive Office to be placed on the applicant's File with a third copy being delivered to the Section Chief for placement on the PFD file.

5. There is further factual disagreement as to the events immediately subsequent to the finalization of the Report. The respondent contends (citing the Assistant to the Section Chief's statement) that on 24 June 2009 the applicant unsuccessfully sought to make contact by telephone with the Director on whose behalf the Assistant to the Section Chief took the telephone call, which the applicant denies. The respondent further contends (again via the Assistant to the Section Chief) that immediately after this telephone call the applicant attended the Assistant to the Section Chief's desk in person to request her to provide to the Director a Report on Short-Term Staff dated 13 March 2009 which had been prepared and signed by the applicant's former supervisor ("March 2009 Report") and which was more favorable to the applicant. The applicant appears to deny this as well, although she does appear to admit that at some stage the Director was provided a copy of the March 2009 Report. I note that both parties provided statements attesting to their version of events. The applicant's, dated 13 November 2009, was unsigned, although I note was accompanied by an email purporting to be from the applicant outlining reasons for this. The respondent provided a statement dated 11 November 2009 and signed by the Assistant to the Section Chief in support of its contention of factual events.

6. The parties agree that the al d6.Thion EMC At(kehed [/Bottom]/BBox [278.82 3502 T9 Tc03

meeting on 2 June when you are back from missions”, although they are at odds as to the significance of this email. Subsequent to this email, it appears to be common ground that on 2 July 2009 the applicant met with the Director and discussed, among other things, the Report and whether or not the Director would sign the March 2009 Report, as she had not previously done so at the time of its preparation. On 16 July 2009 the Director provided the Executive Office of the Department of Management with the March 2009 Report.

7. On 20 August 2009, the applicant wrote to the Controller, in relation to her performance reports. On the same date she also wrote to the Assistant Secretary-General, seeking to rebut the Report. In relation to her email to the Assistant Secretary-General, on 24 August 2009, the applicant received, on behalf of the Assistant Secretary-General, an email which stated that “there are currently no formal rebuttal procedures on short-term reports. However, we will ensure that your comments are placed in your official status file so that they can be viewed together with all of your reports on file”.

8. On 8 September 2009, the applicant requested the Secretary-General to reconsider the decision communicated to the applicant on 24 August 2009, advising the applicant that she was not entitled to a rebuttal procedure in relation to the Report.

9. On 14 October 2009, the applicant received the Secretary-General’s decision on her request for management evaluation, endorsing the findings and recommendation of the Management Evaluation Unit. In relation to Report, the Management Evaluation Unit found that the offer to place the applicant’s comments in her File constituted “a reasonable remedy in view of the current lack of rebuttal provisions for performance reports of short-term staff”. Subsequently, on 6 November 2009, the applicant filed an application with the Dispute Tribunal and subsequent thereto a Motion for Temporary Relief.

Analysis

10. Article 10.2 of the Statute of the United Nations Dispute Tribunal provides that:

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,

this version of events, contending that she was not shown the Report until 2 July 2009, the last day of her appointment, and that she was never given a copy of it.

14. The sequence presumed by the usage of the words “unless” and “thereby” in paragraph 2 of ST/AI/292 will only be satisfied if the placement of adverse material on a staff member’s file occurs after they have been given an opportunity to make comments on the material. To be in any way meaningful within the spirit of

and the recommendation that “[the applicant] was not worthy of re-employment”. During the hearing of the matter, the applicant objected to the placement of this communication on her File. Counsel for the respondent, evincing surprise that this email was on the applicant’s File, undertook on the respondent’s behalf that this email would immediately be removed from the applicant’s File and accordingly I so ordered.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 17th day of November 2009

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(Signed)