

Introduction

1. The Applicant, a permanent staff member of the United Nations Development Programme (“UNDP”), has three cases before the Tribunal:
 - a. Case No. UNDT/NY/2012/012, in which the Applicant contests UNDP’s alleged failure to protect her from harassment and abuse of authority by her supervisors;
 - b. Case No. UNDT/NY/2013/015, in which the Applicant contests the decision of 20 December 2012 to reprimand her with a written reprimand; and
 - c. Case No. UNDT/NY/2013/096, in which the Applicant contests, *inter alia*, the decision to place her on a “search period” (i.e., a period of time to look for a new position) and subsequent notice of separation.

Procedural background

Order No. 181 (NY/2013) on interim measures

2. On 31 July 2013, the Tribunal issued Order No. 181 (NY/2013) in Case No. UNDT/NY/2013/096, suspending the implementation of the decision to end the Applicant’s search period and to separate her from service. At para. 64 of the Order, the Tribunal entreated the parties to “explore informal resolution of this matter and the two related cases in the interim”.

Initial mediation efforts

3. By Orders No. 223 (NY/2013), No. 224 (NY/2013), and No. 225 (NY/2013), the Tribunal referred the three matters to mediation. By Order No. 223 (NY/2013), the interim relief granted by Order No. 181 (NY/2013) was extended further by

Case No. UNDT/NY/2012/012
UNDT/NY/2013/015
UNDT/NY/2013/096
Order No. 94 (NY/2014)

management discussion, on 15 November 2013, the Tribunal issued Orders No. 315–317 (NY/2013), directing the parties to file further submissions on the following issues:

- a. Whether the three cases should be heard together in a joint hearing;
 - b. Whether the present case should be given expedited consideration;
 - c. Showing cause as to whether the interim measure ordered by Order No. 181 (NY/2013), and extended by Orders No. 223 (NY/2013) and 292 (NY/2013), should be discharged, particularly in view of the requirements of art. 10.2 of the Statute.
8. The parties' submissions were duly filed on 25 November 2013.

Order No. 332 (NY/2013)

9. In his submissions filed on 25 November 2013, the Respondent requested the discharge of the interim measures pending the expedited disposal of the matters on the grounds, *inter alia*, that the Applicant was being paid whilst not discharging any functions, and it was unlikely Respondent would recover these costs should he prevail on the merits.

10. On 5 December 2013, the Tribunal issued Order No. 332 (NY/2013), rejecting the Respondent's request to discharge interim relief ordered by Order No. 181 (NY/2013) and extended by Orders No. 223 (NY/2013) and 292 (NY/2013), on the basis that the *status quo* prevailed, but stating also:

However, the interim measure provided under art. 10.2 is to provide "temporary" relief to a party. The nature and duration of such temporary relief will depend on the facts and circumstances of each particular case. In this case the Tribunal is mindful of *inter alia*, the apparent dispute of facts in the matters, the deteriorating employment relationship, the continuing cost to the Respondent and

the continuing losses that may be sustained by the Applicant. The Applicant has been in the Respondent's employment for 34 years and is apparently four years away from retirement, and the parties appear to be in irreconcilable relations. Although the expediting of cases above and beyond the chronological listing of pending matters before the Tribunal is not desirable as a general rule, in all the particular circumstances of this case, the Tribunal finds it appropriate to order that the present three cases be subject to an order for combined proceedings and that the three cases be heard on an expedited basis on a date in the first half of February 2014 as agreed by the parties.

11. Therefore, the Tribunal further ~~decide~~ that Cases No. UNDT/NY/2012/012, UNDT/NY/2013/015, and UNDT/NY/2013/096 be ~~heard~~ jointly and on an expedited basis. The parties were ordered to, ~~file~~ by 19 December 2013, an agreed list of witnesses they intended to call; ~~joint~~ proposal as to the ~~dates~~ of hearing in the first half of February 2014; and an agreed ~~bundle~~ of documents (indexed and paginated).

Parties' proposed list of 29 witnesses

12. On 19 December 2013, the parties ~~filed~~ a joint submission, submitting, *inter alia*, a list of 29 witnesses. No information ha

was not explained to the Tribunal. The Tribunal found it necessary to defer the proposed hearing that was originally anticipated to take place in the first half of February 2014. Instead, the Tribunal ordered that the parties attend a case management hearing on Tuesday, 21 January 2014, at which both Counsel and the Applicant would be required to appear order to assist the Tribunal with determining how to proceed with these cases.

Case management discussion rescheduled

14. On Monday, 20 January 2014, the New York Registry notified the parties that the case management discussion for 21 January 2014 would be postponed, on account of unavailability of the Presiding Judge due to ill health.

Order No. 15 (NY/2014)

15. On 21 January 2014, the Tribunal issued Order No. 15 (NY/2014), directing the parties to attend a case management discussion on Tuesday, 28 January 2014. However, the same day Counsel for the

preferably during the period of 3 to 14 March 2014 or, alternatively, the period of 8 to 18 April 2014.

17. The Tribunal further reiterated its view that it would be in the interests of both parties to attempt informal resolution of these matters, including, if at all possible, through the Office of the United Nations Ombudsman and Mediation Services. The parties were directed to opt on any prospect of informal resolution by 19 February 2014.

Joint submission of 19 February 2014

18. On 19 February 2014, the parties filed in its submission with revised lists of their witnesses. The Respondent requested the cases be heard “at the first available opportunity on or after 3 March 2014”. The Applicant stated that, “based on the availability of the Applicant and Applicant’s Counsel”, she was available for a hearing on the merits on 8–18 April 2014.

Case management discussions of 12 and 18 March 2014

19. On 12 and 18 March 2014, the Tribunal held case management discussions with a view to preparing the cases for a hearing on the merits and exploring the possibility of amicable resolution. Mr. Levine appeared for the Respondent. Ms. Lewis appeared as Counsel for the Applicant, who is also her mother, and they both also attended the case management. Parties agreed to attempt informal resolution of the three cases, on the understanding that the undersigned Judge would be available to assist the parties, on the terms being negotiated, but on the form in which the final settlement agreement may be placed before the Tribunal (i.e., under seal, etc.).

20. In the late afternoon of 18 March 2014, following *inter partes* discussions, the parties notified the Tribunal that the terms of settlement had been agreed in

principle, and the Tribunal ruled, with the agreement of the parties, that settlement should be finalized and executed by 3 p.m. on 28 March 2014.

Applicant's motion dated 23 March 2014

21. Having been previously advised that settlement had been reached, the Tribunal was therefore taken by surprise when, on 23 March 2014, the Applicant filed a motion entitled "Applicant's motion for judicial intervention regarding the parties proposed settlement agreement." In her motion, the Applicant went into considerable detail regarding some aspects of the draft proposed settlement agreement, stating that parts of the Respondent's proposals contradicted UNDP's Human Resources Policy. She requested the Tribunal to "intervene in this matter to provide assistance to the parties as pertains to said terms of the proposed settlement agreement".

Case management discussions of 25 March 2014

22. On 25 March 2014, the Tribunal held further case management. Both Counsel and the Applicant participated by telephone. During the case management discussion, the undersigned Judge indicated to the Applicant *inter alia*, that it was inappropriate to place before the Tribunal any of the terms of the draft confidential settlement which was in the process of being

hearing the undersigned Judge ~~ced~~ that the Applicant's Counsel was to revert to the Respondent's Counsel to ~~final~~ize the previously-agreed settlement by 10 a.m. the following day (Wednesday, 26 March 2014), the legal clarifications, if any were indeed warranted, had been made.

Respondent's motions of 26 March 2014 and 1 April 2014

23. On 26 March 2014, the Respondent ~~filed~~ a motion for emergency directions, stating that despite the Tribunal's order made at the ~~case~~ management discussion of 25 March 2014, he received no further communications from the Applicant's Counsel by the deadline of 10 a.m., but was informed by the UNDP Career Transition Unit of an email from the Applicant herself dated 25 March 2014 (sent at 7:36 p.m.), stating that the Applicant "has been placed on Certified Sick Leave by [her] physician". At 11:17 a.m. on 26 March 2014, Counsel ~~for~~ the Applicant sent an email to Counsel for the Respondent, stating: "My client is very ill and is currently on medical leave. Resultantly, ~~am~~ unable to provide Applicant's terms of the proposed settlement agreement at ~~this~~". The Respondent contends that this notification by Counsel ~~clearly~~ belies the Applicant's own email of 25 March 2014.

24. In his motion of 26 March 2014, the Respondent sets out the difficulties encountered in the attempt ~~at~~ informal resolution and ~~of~~ setting the matters down for consideration, expressing the view ~~that~~ the Applicant is abusing the court process, and requesting *inter alia*, "the immediate discharge ~~of~~ the interim measures imposed by Order No. 181, ~~such~~ directions as the Tribunal deems appropriate". The Respondent further stated that "should ~~the~~ learned Judge feel unable to hear this case on the merits, the Respondent ~~respectfully~~ submits ~~that~~ she remains seized of the interim measures imposed by Order ~~No~~ 181 and therefore competent to rule on their continuation or discharge, even in the event the case is to be transferred to another Judge of the Tribunal ~~for~~ any hearing on the merits".

25. On 1 April 2014, the Respondent filed a ~~trio~~ for urgent directions, stating that the scarce documents provided by Applicant to UNDP regarding her sick leave were open-ended and provided no information as to the duration of sick leave, and did not satisfy UNDP's criteria for the certification of sick leave. The Respondent further submitted that the Applicant and her Counsel were acting in wilful defiance of the Tribunal's order made on 25 March 2014 to revert to the Respondent's Counsel by 10 a.m. the following day to finalize the settlement that had been agreed upon previously. The Respondent stated that the certificate attested solely to the Applicant having fainted, with no other diagnosis or prognosis. The Respondent stated that the Applicant must be deemed to have unilaterally withdrawn from the settlement process and should not be permitted to enjoy the benefits of the interim measures any longer.

Tribunal's directions of 2 April 2014

26. On Wednesday, 2 April 2014, the Tribunal instructed the Applicant to respond to the Respondent's motions of 26 March and 1 April 2014. The parties were also instructed to attend a case management discussion on Monday, 7 April 2014, at 2:30 p.m.

Applicant submission dated 4 April 2014

27. On 4 April 2014, the Applicant's Counsel replied to the Respondent's motions of 26 March and 1 April 2014, stating, *inter alia*, that her client is not in a position to make decisions regarding her three pending cases "as she is undergoing

by her physician and United Nations Medical Services". She submitted that the interim relief in her case should be maintained and she "continues to demonstrate that she will suffer more harm than the Respondent if the interim relief is discharged". Counsel for the Applicant further states that no urgency would be created by the Applicant as the Applicant believes that there is no need for your Honour's recusal, and thus, would oppose such motion if they were to be made by the Respondent".

28. The Tribunal notes that nowhere in her submission of 4 April 2014 did the Applicant's Counsel indicate that she was able to take instructions from, or to advise, her client who is also her mother. She contends that the Applicant is not in a position to make decisions regarding the settlement, yet she has decided she is still open to the settlement process, and will resume her participation at some indefinite unspecified time. This is despite the fact that both the Applicant and her Counsel had clearly confirmed to the Tribunal that the terms of the settlement had been agreed in principle on 18 March 2014.

29. On 4 April 2014, Counsel for the Applicant also sent an email to the New York Registry, confirming her attendance at the case management discussion scheduled for Monday, 7 April 2014, at 2:30 p.m.

Applicant's email of 7 April 2014

30. At 10:08 a.m. on Monday, 7 April 2014, less than five hours before the scheduled case management discussion, Counsel for the Applicant sent an email stating:

prior to the case management discussion order to attempt to bring all outstanding matters to conclusion.

Applicant's submission of 21 April 2014

34. On 21 April 2014, the Applicant's Counsel filed a submission stating that she had provided the United Nations Medical Division with documents stating that the Applicant was ill and therefore should be placed on sick leave effective 25 March 2014 until 26 May 2014, at which point she would be re-evaluated. The Applicant asked leave to file a motion to stay the proceedings due to her illness. No supporting documentation was attached to this submission.

Case management hearing of 22 April 2014

35. Pursuant to Order No. 72 (NY/2014), on 22 April 2014, the Tribunal held a case management discussion, which was attended by both Counsel in person. It was only upon prompting by the Tribunal that Counsel for the Applicant apologized for not attending the case management discussion of 7 April 2014, without giving sufficient notice or reason for her non-attendance, and for what transpired at the telephonic case management discussion of 25 March 2014. Counsel for the Applicant stated that the Applicant was ill and had submitted the relevant documents to the United Nations Medical Services Division. She explained that she was seeking suspension of the proceedings, initially until 27 May 2014, and until further date thereafter needed. Counsel for the Applicant was unable to provide the Tribunal with any date after May 2014 when these cases could possibly be listed for a hearing on the merits.

36. The Applicant in essence requested suspension of the proceedings, until at least 26 May 2014 or indefinitely, and stated that she could not commit to any hearing dates for expedited proceedings. The Respondent argued that as long as

the interim measures remained in place there was no incentive for the Applicant to finalize this matter. He requested the discharge of the interim measures particularly as the Applicant was in defiance of the order of 25 March 2014 and her undertaking to finalize and return the settlement agreement to the Respondent. The Applicant's Counsel on the other hand said that he would suffer irreparable harm if the interim measures were to be discharged. The Respondent's Counsel reiterated

39. Orders on interim measures pending proceedings are governed by art. 10.2 of the Tribunal's Statute, which provides that the Tribunal may order an interim measure to provide temporary relief to either party, only if it is satisfied that all three requirements of that article have been met, i.e., that the case is of particular urgency, that the implementation of the contested decision would cause irreparable damage, and that the decision appears *a facie* to be unlawful.

40. An interdict or interim measure is an equitable discretionary relief which is granted by the Tribunal with a great degree of measured caution taking into account the balance of interests and convenience. It is temporary in nature and is usually in place as long as a situation prevails until the final outcome can be ascertained. The nature and duration of such temporary relief will depend on the facts and circumstances of each particular case. It is a great responsibility on the Tribunal to determine the matter with a view to finality and to expedite the proceedings, thus placing the duration of the measures within the direct control of the Tribunal.

41. Interim interdicts can, in appropriate cases, be granted for lengthy periods of time or may be extended to protect a *prima facie* right until, for example, an action has been finalized. But they can also be discharged when there is a change in circumstances, on the lack of *bona fides* or good faith, when the interim measure is no longer practical, or when the balance of convenience has shifted, thus affecting, *inter alia*, the criteria for the grant of interim relief.

42. There are cases where it may be inappropriate to continue interim measures and their particular urgency is that the Tribunal must give final judgment with a minimum of delay, depending on the circumstances. Where the continuation of an interim measure is based solely on the fact of a difficulty or encumbrance on the part of either party, the proceedings are taken beyond the ambit and control of the Tribunal which bears the responsibility to ensure measures are not in place permanently or for an unreasonable period of time, depending on the circumstances.

43. In this instance, the Tribunal previously rejected the motion for discharge of interim measures made by the Respondent by Order No. 332 (NY/2013), which Order was clearly premised on the basis that proceedings be expedited to a final outcome, as interim measures are only temporary in nature, and in light of the particularities of these cases. The Respondent thereafter engaged in settlement discussions, and agreed the terms of a settlement, but no agreement has been executed and there is no certainty as to when this matter could be possibly heard on the merits. In the interim, the Respondent continues to pay the Applicant's monthly salary although she is not discharging any functions.

44.

has broken down irretrievably. It is clear that any employment relationship, if it subsists at all, has irretrievably broken down as the allegations of harassment and abuse extend across the entire UNDP. Furthermore, the Respondent's has already submitted that he would elect the payment of monetary compensation as an alternative to specific performance or rescission. The Applicant thus has an available alternative remedy in damages, as reinstatement or reengagement is highly unlikely.

g. Further, with respect to the requirements of particular urgency and irreparable harm, the Tribunal finds

currently a matter for the Tribunal, nor ~~is~~ there a need for any expeditious consideration of these matters.

46.