



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

CORCORAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
Rose Marie Dennis, OSLA

Counsel for Respondent:
Stephen Margetts, ALU, OHRM

The issues

1. By application dated 2 November 2009 and submitted to the United Nations Dispute Tribunal (UNDT) on 3 November 2009, the Applicant requests the suspension of the decision dated 12 October 2009 not to extend her fixed-term appointment (FTA) beyond 12 November 2009.

Facts

2. Having entered the United Nations in May of 1996 the Applicant started working for the United Nations Peacekeeping Force in Cyprus (UNFICYP) on 4 June 2004.
3. On 17 December 2007, the Applicant received the midpoint review as part of the Performance Appraisal System (ePAS) for the period 2007-2008, in which she was rated “*does not meet performance expectations*”. The Applicant was transferred out of the mission on the same day and served as a United Nations Volunteer during the period January to February 2008 and at the Committee on Missing Persons from March to July 2008, both positions she held in Cyprus and during which her performance was rated better.
4. By memorandum dated 1 June 2008, the Applicant was informed that based on her performance during the reporting period, her FTA was not going to be renewed after 30 June 2008. On 24 June 2008, the Applicant submitted a request for administrative review of the decision of 1 June 2008 to the Secretary-General.
5. The ePAS for the period 2007-2008 was signed off on 12 June 2008 and the Applicant submitted a rebuttal of the ePAS on 30 June 2008.
6. By memorandum dated 1 July 2008, the Applicant was informed that her appointment would be extended on a monthly basis from now on. Since then, the Applicant’s FTA was extended on a monthly basis, until 30 June 2009. From July 2008 to May 2009, the Applicant was on sick leave.
7. The Rebuttal Panel submitted its report on 1 August 2008, recommending that the Applicant’s performance rating be raised to “*partially meets*”

performance expectations". This recommendation was accepted by the Special Representative of the Secretary-General (SRSG) and the Chief of Mission. The Rebuttal Panel further noted, *inter alia*, that "*underlying many of the issues identified in the staff member's PAS was a problem, and at times a breakdown, in communication*", which was manifested notably in the failure to sign off on a work plan for the staff member until very late in the appraisal period.

8. By letter dated 12 August 2008 and in reference to the Applicant's request for administrative review dated 24 June 2008, the Officer-in-Charge, Administrative Law Unit (OIC/ALU) informed the Applicant that since her contract had been extended through 31 August 2008, the decision not to extend the FTA beyond 30 June 2008 had become moot.
9. On 29 September 2008, the Applicant submitted another request for administrative review of the "*decision conveyed to her on 27 June and 31 July 2008 which extended her contract through 31 August 2008*".
10. By memorandum dated 23 December 2008, the Acting Chief, ALU/OHRM responded to the Applicant's request for review dated 29 September 2008, stressing that her appointment had been extended to allow her to use her sick leave entitlements and that upon the Applicant's return to duty, an improvement plan against which her performance would be monitored would be implemented, so that the renewal of her appointment could be properly considered.
11. The Applicant submitted a statement of appeal against the decision not to renew her FTA beyond 30 June 2008 and to subsequently renew her FTA on a monthly basis on 13 March 2009 to the Joint Appeals Board (JAB) New York. This appeal was transferred to the UNDT on 1 July 2009, where it was registered under UNDT/GVA/2009/50.
12. Meanwhile, on 14 July 2008, the Applicant had also submitted a complaint against the Chief, Civil Affairs Branch and the Senior Advisor, UNFICYP to the Office of Internal Oversight Services (OIOS). OIOS had subsequently requested the Department of Field Support (DFS) to contact UNFICYP to conduct an investigation on the allegations submitted.

UNFICYP had requested the Conduct and Discipline Team (CDT), UNIFIL, to conduct a review of the Applicant's complaint.

13. From May to September 2009, the Applicant was placed on special leave without pay (SLWOP).
14. By letter dated 8 May 2009 the OIC FPD/DFS/UNFICYP informed the Applicant that in view of her medical clearance by her doctor, her FTA was to be extended for three months in the framework of a performance improvement plan, which would be implemented in collaboration with her First- and Second Reporting Officer. He further stated "*we hereby request you to make the necessary arrangements to report for duty within three working days following the receipt of this letter*".
15. The Applicant responded to that letter by email dated 15 May 2009, regretting that despite the conclusions of her medical doctor that she was fit to return to UNFICYP under a different supervisor, her return would be under the same supervisor, against whom she had filed a complaint the investigation into which was not yet terminated.
16. By email dated 29 May 2009 to the Applicant, the OIC FPD/DFS/UNFICYP noted "*pending the resolution of your complaint against your supervisor, which is the basis for your refusal to return to your post in Cyprus, and due to the exhaustion of your leave entitlements, I have decided to place you on special leave without pay, as at 31 May 2009, until further notice*".
17. On 14 July 2009, the OIC FPD/DFS/UNFICYP informed the Applicant by email that he had decided to extend her SLWOP through 31 July 2009 since the review of her case had not yet been completed.
18. By email dated 26 August 2009 to the OIC FPD/DFS/UNFICYP, the Applicant requested an extension of her SLWOP status beyond 31 August 2009. By email dated 1 September 2009, the OIC, FPD/DFS/UNFICYP informed the Applicant "*I hereby approve the extension of your SLWOP through the end of September 2009, when I will review the matter.*"

19. By confidential memorandum dated 2 October 2009, the Applicant was informed by the Officer in Charge, Mission Support, UNFICYP that the investigation report had concluded that the allegations made in her complaint were not supported by the evidence and that the DFS had hence concluded that the case should be considered closed.
20. By memorandum dated 12 October 2009, the Applicant was informed that after review of the initial decision of 1 June 2008, it had been concluded that there was no option but to proceed with her separation and that her contract would not be extended beyond 12 November 2009.
21. The Applicant submitted an application requesting the suspension of the decision dated 12 October 2009 on 3 November 2009. The Respondent submitted his response on 5 November 2009 and additional information with respect to the Applicant's status, as requested by the Tribunal, on 9 November 2009. Upon the Tribunal's order, the Applicant proved that she has submitted a request for management evaluation of the above-referenced decision on 9 November 2009.

Contentions of the parties

The **Applicant's** principal contentions are:

22. The Applicant recalls the jurisprudence of the United Nations Administrative Tribunal (UNAT) according to which even though the Secretary-General has brought discretionary power not to extend an FTA, where a reason is provided for doing so, that reason must be supported by the facts. The Applicant notes that though Staff Rule 104.12 (b) is quoted in the letter dated 12 October 2009, the letter clearly indicates that the underlying reason for not extending the Applicant's appointment is the same as in the initial decision of 1 June 2008, i.e. the Applicant's alleged poor performance.
23. The Applicant argues that the findings of the Rebuttal Panel are at variance with the Respondent's inaccurate statement that the Applicant's performance was substandard and that moreover, her performance from January to July 2008 - after she had been moved out of the mission - had been "frequently exceeds expectations" and "fully meets expectations".

She stresses that since July 2008, she had been on medical leave and then SLWOP. The Applicant considers that in view of the foregoing, the reason provided for the non-renewal of her FTA – i.e.- her poor performance – is not supported by the facts, *“is totally without any legal or factual basis and this is an abuse of discretion”*.

24. The Applicant considers the matter to be urgent since her FTA will not be extended beyond 12 November 2009, as of which date she will be permanently separated from the Organization.

25. The Applicant considers that the implementation would cause her irreparable harm since it would permanently deny her the opportunity of redeeming her due process rights which are being grossly violated by the decision not to renew her appointment based on her alleged poor performance. As such, she would also be permanently denied the possibility to have her contract renewed, which she could expect after 14 years of excellent performance in the UN system at eight different duty stations. The Applicant expresses her view that the decision not to renew her FTA was arbitrary and biased and an abuse of power and authority on the part of her supervisor. She further believes that the fact that she had been denied the possibility to review the findings contained in the investigation report into her complaint lodged against her supervisor denies her due process and impacts on her ability to properly defend herself against the decision not to extend her FTA on the ground of abuse of authority.

The **Respondent**'s principal contentions are:

26. The Respondent states that the decision not to extend the Applicant's FTA beyond 12 November 2009 was taken *“in light of the initial decision not to renew the Applicant's appointment and on the basis of the Applicant's failure to return to the mission and engage in a performance improvement plan”*

27. According to the Respondent, the Applicant failed to establish a *prima facie* case of illegality and *“to present any persuasive evidence that the*

decision was tainted by bad faith, improper motivation, arbitrariness, discrimination or was in violation of her due process rights”.

28. The Respondent also believes that there is no urgency in this application, since the Applicant has been on notice since 1 June 2008 that due to her performance failings, UNFICYP had decided not to renew her contract. He argues that the Applicant had a long time to prepare for her separation from the Organization.
29. The Respondent further notes that the Applicant did not demonstrate that the implementation of the decision would cause her irreparable harm and that – should the Applicant win her case on the merits – she could be compensated by a monetary award.

Considerations

30. The application is receivable under art. 2.2 of the statute of the UNDT (UNDT Statute) and art. 13.1 of the Tribunal’s rules of procedure (UNDT RoP).
31. In the new system of Administration of Justice the Dispute Tribunal can release two different types of interim measures. These types are related to the stages of the application. One of them is connected to the administrative review, now called management evaluation. The other one has its place during the proceedings of judicial review.
32. According to art. 2.2 of UNDT Statute the Dispute Tribunal shall be competent to hear and pass judgment on an application to suspend, *during the pendency of the management evaluation*, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. Art. 13.1 of UNDT RoP state, using the same words, that the Dispute Tribunal shall order a suspension of action in such a situation.

33. According to art. 10.2 of UNDT Statute, the Dispute Tribunal may order an interim measure at any time *during the proceedings* to provide temporary relief to either party, where the contested decision administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination. This provision is repeated in art. 14.1 of UNDT RoP.
34. As a result of this configuration these two types of interim measures have to be clearly distinguished. Every application for interim measures has to be considered either under art. 13 UNDT RoP or under art. 14 UNDT RoP. It is not possible to apply both provisions simultaneously to a single application.
35. A decision under 13 of UNDT RoP can only be released during the pendency of the management evaluation, whereas it is an indispensable prerequisite of an interim measure under art. 10.2 of UNDT Statute and art. 14 of UNDT RoP that judicial proceedings have already been started, in other words that the case is already before the Dispute Tribunal. In terms of timing both types of measures are separated by the moment of the completion of the management evaluation. It is the underlying philosophy of these provisions to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff member the opportunity to request a suspension of the impugned decision pending an evaluation by management under art. 13 UNDT RoP (cf. UNDT/2009/054 – *Nwuke*).
36. The pendency of management evaluation comes to an end once the Secretary-General's response, reflecting the outcome of the management evaluation, is communicated to the staff member (cf. Staff Rule 11.2 (d)). From that moment on there is no room for applying art. 13 UNDT RoP. In

addition, orders to suspend action that were released under Article 13 UNDT RoP become ineffective, since they have reached their exclusive purpose to secure the Applicant's rights during the management evaluation process.

37. From now on, having received the Secretary-General's response, it is the staff member's right to submit an application to the Dispute Tribunal according to art. 2 and 8 UNDT Statute. With regard to the fact that - as an outcome of the management evaluation - a new decision has been taken by the Administration, it may also be necessary to submit - at the same time - an application for an interim measure under art. 10.2 of the UNDT Statute and art. 14 UNDT RoP.

38. A sharp distinction is also important since the two types of interim measures have a different scope and are subject to different restrictions. During the - rather short - pendency of the management evaluation *every* administrative decision can be suspended under art. 13 of the UNDT RoP, but *no other interim measure* can be released, whereas during the proceedings before the Dispute Tribunal *every interim measure to provide temporary relief* can be released, but *no suspension of action in cases of appointment, promotion or termination* is allowed under art. 14 of the UNDT RoP.

39. The distinction has also important implications for questions of receivability. An application under art. 13 UNDT RoP is only receivable in case of the pendency of the management evaluation. If a request for management evaluation has not yet been made at the time of the filing of the application for interim measures this may be caught up upon order of the Tribunal. Thus an application has to be rejected as not receivable if no proof of the initiation of the management evaluation is given within the time limits set by the Tribunal.

40. In the present case it is not easy to draw the line. Since the Applicant initially contested the administrative decision of 1 June 2008 not to renew her contract, which is already before the Dispute Tribunal, being case No. UNDT/GVA/2009/50, it might be arguable that her new application for suspension of action has to be considered under art. 14 of UNDT RoP. On the other hand it is the decision dated 12 October 2009 which the Applicant is contesting now. There are, of course, close relations between these two decisions, since both of them deal with the non-renewal of the Applicant's appointment. Notwithstanding this connection the decision dated 12 October 2009 concentrates on the special leave without pay which did not start before May 2009 and the Respondent, secondly, adds new reasons for the non-renewal by pointing out "the Applicant's failure to return to the mission and engage in a performance improvement plan".
41. Hence the Tribunal holds the view that the decision dated 12 October 2009 is not covered by the proceedings of case No. UNDT/GVA/2009/50. Therefore, the application has to be considered under art. 13 UNDT RoP. Since – in accordance with the Tribunal's order – the Applicant has requested for management evaluation of that decision on 9 November 2009, her application for suspension of action is receivable.
42. With regard to merits a request for suspension of action can only be granted in cases where all criteria have been satisfied. It results from the words of the above cited provision that all three of the requirements for suspension – *prima facie* unlawfulness, urgency, irreparable damage - have to be fulfilled in a cumulative way (cf. UNDT/2009/003 *Hepworth*, UNDT/2009/ 36 *Tadonki*). This is the case in the present application.
43. In terms of urgency it is of no use to point out the fact that the initial decision not to renew the Applicant's appointment has already been taken in June 2008. Indeed, after that date her FTA has been renewed several times and it was not before 12 October 2009 – on the basis of new elements taken into account by the Administration - that the Applicant was

informed about the non-extension beyond 12 November 2009. Thus, it cannot be said that the Applicant knew since June 2008 that her appointment was not going to be renewed in November 2009 and as such, the matter has become urgent by now.

44. Irreparable damage may already be at hand where serious harm to professional reputation and career prospects or on health or unemployment after a very long time of service would result from the implementation of the contested decision (cf. UNDT/2009/007 *Rees*, UNDT /2009/016 *Tadonki*, UNDT/2009/008 *Osman*). In the applicant's case all of these elements appear. Her appointment not being renewed because of lack of performance would injure her professional reputation as well as her general career prospects; her health has obviously already suffered, and being unemployed at her age after a period of 14 years within the Organization would also be a serious harm, that could not simply be compensated by an award of damages. Thus, not any harm to the applicant is financial, as it might have been in the case quoted by the Respondent.
45. The contested decision appears also - and most important – *prima facie* illegal. Since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision. This understanding can also rely on the fact that Art. 2.2 of the UNDT Statute only requires that the contested decision “appears” *prima facie* to be unlawful (cf. UNDT/2009/003 *Hepworth*).
46. According to Staff Regulation 4.5 (c), a FTA does not carry any expectancy of renewal or conversion to any other type of appointment. Staff Rule 9.4 provides that “*a temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment*”. In its longstanding jurisprudence UNAT held that in keeping with former Staff Rule 104.12(b)(ii),

employment with the Organization ceases on the expiration date of fixed-term appointments and that a legal expectancy of renewal is not created by efficient or even by outstanding performance (cf. UNAT judgments n° 173, *Papaleontiou* (1973); n° 440, *Shankar* (1989)). The Tribunal adheres to UNAT jurisprudence which held that while the Administration has discretionary authority in deciding on the non-renewal of FTAs and is not obliged to provide a reason for non-renewal, if the Administration “*gives a justification for [the] exercise of discretion, the reason must be supported by the facts*” (cf. UNAT judgement n° 1003, *Shasha’a* (2001) and n° 1177, *Van Eeden* (2004)). In both cases, the reason provided for the non-renewal was unsatisfactory performance which UNAT found was not supported by the evidence hence it concluded that the Administration exercised its discretionary power improperly.

47. In the present case, the reasons provided by the Respondent to justify the decision not to renew the Applicant’s FTA beyond 12 November 2009 are not supported by the available evidence.
48. The decision not to renew the Applicant’s FTA beyond 12 November 2009 was based – firstly - on the Applicant’s performance rating in the ePAS 2007/2008, which was initially rated *does not meet performance expectations*. Indeed, by referring to the “*initial decision not to renew [her] contract upon its expiration on 30 June 2008*”, it is clear that the contested decision of 12 October 2009 has a close connection to the decision of 1 June 2008, which was based on the alleged lack of performance. Since after the rebuttal the initial rating has been raised to *partially meets performance expectations* in August 2008, the decision of 12 October 2009 has no basis. As such, and for the purpose of a suspension of action, it cannot be concluded that her substandard performance – which was, at least partly, the basis of the decision of 12 October 2009 - was established.
49. The Respondent further argues that the decision of 12 October 2009 is based on the fact that the Applicant did not return to the mission upon the expiration of her SLWOP on 30 September 2009. The last communication

with the Applicant on her contractual status is an email from the OIC, FPD/DFS/UNFICYP dated 1 September 2009, in which he only informed the Applicant that he approved the extension of her SLWOP through the end of September 2009, at which moment he would review the matter. By no means was the Applicant informed that she was expected to return to the mission on 1 October 2009 to engage in the performance improvement plan and that otherwise, her appointment would not be renewed. Therefore, no reproachable behaviour can be found on the part of the Applicant.

50. Even more, in May 2009, the Respondent had informed the Applicant that her contract would be extended for three months and that upon her return to the mission, she would undergo a performance improvement plan, under the supervision of her former First- and Second Reporting Officer. Though the Applicant had, at some point, noted that in view of her medical condition, she would not go back to the mission under the same supervisor, she did now, in her submission to the Tribunal, manifest that she was willing to go back to the Mission to undergo the performance improvement plan. By the decision of 12 October 2009, the Applicant is no longer been given that opportunity.

51. Finally, being aware of the intensity of the conflict and the negative impact to both parties the Tribunal takes the opportunity to advise them to try an amicable settlement. In establishing the new System of Administration of Justice the General Assembly - in its resolution A/RES/63/253 from 17 March 2009 - *“reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, and emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation”*, and *“requests the Secretary-General to take advantage of existing mechanisms for conflict resolution and mediation, as deemed useful and appropriate, in order to facilitate a renewed dialogue between staff and management”* (par. 18 and 20). Therefore, mediation is recognized as playing an important and vital role in the new internal justice system of the

Organisation. The logic for this is that while it is crucial that staff members who feel aggrieved are able to seek a remedy through the judicial process, the enforcement of these rights should not overlook the basics of working relationships within, and the interests of, the Organisation (cf. UNDT/2009/053 *Adrian*). It may be added that a referral to mediation is also possible during the management evaluation process, and this has also already been applied.

Meanwhile,

IT IS ORDERED

That the decision of 12 October 2009 not to renew the Applicant's Appointment beyond 12 November 2009 be suspended during the pendency of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 11th day of November 2009

Entered in the Register on this 11th day of November 2009

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva