UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/143
Judgment No.: UNDT/2009/096
Date: 31 December 2009
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

UTKINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for applicant:
Kevin Petkos

Counsel for respondent:
Stephen Margetts, ALU

Introduction

1. The applicant is a programme officer in the United Nations Office for Disarmament Affairs (ODA). She is employed on a fixed-term contract expiring on 10 January 2010. However, on 5 November 2009, the applicant received a letter informing her that her contract would be terminated for financial and administrative reasons effective 31 December 2009. On 24 December 2009, the applicant filed an application for a suspension of action on the decision received on 5 November 2009. On the same day, the applicant filed a request for a management evaluation of the same decision.

The facts

2. In August 2007, while the applicant was employed by the United Nations Monitoring, Verification and Inspections Commission (UNMOVIC), she was involved in the discovery and containment of dangerous material in the United Nations archives. On verification that the material was hazardous she reported the discovery to the Department of Safety and Security. She subsequently cooperated with the investigations conducted by the United Nations and the United States law enforcement authorities.

3. On 7 September 2007, the applicant and several of her colleagues were notified by UNMOVIC that their contracts would not be renewed. However, the applicant's contract was subsequently renewed until February 2008. Based on the parties' submissions, on 8 February 2008, the Secretary-General issued a decision stating that five individuals, including the applicant, should be retained in order to assist ODA in carrying out its responsibilities more effectively and efficiently. The Secretary-General's decision further stated that the financial support for this would be provided through bridge funding from extra-budgetary resources and that regular budget funding should be sought to retain appropriate capacity after the initial period.

4. On 6 March 2008, the applicant and four of her UNMOVIC colleagues were moved to ODA. The applicant's salary, as well as the salaries of several former UNMOVIC colleagues transferred to ODA, was paid through extra-budgetary resources.

5. The effective letter of appointment, signed by the applicant on 11 February 2009, provided that the appointment would expire on 10 January 2010. It further stated: "This fixed-term appointment is limited to service with ODA and subject to availability of funds. Fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment".

6. On 14 July 2009, the applicant signed off on her electronic performance appraisal system (e-PAS) report. She was rated as "outstanding" with respect to integrity, professionalism, respect for diversity/gender and teamwork, and "fully competent" with respect to planning and organization, accountability and client orientation. Her overall rating was "[f]ully successful performance".

7. Between June and September 2009, the applicant applied and was interviewed for several positions in ODA; however, her job applications were not successful.

8. According to the applicant, in September 2009, she was verbally informed by her second reporting officer that her contract was to be terminated on 31 December 2009 due to the lack of funding. Two of her former UNMOVIC colleagues who were transferred to ODA were also informed of the termination of their contracts.

9. On 5 November 2009, the applicant received a letter dated 20 October 2009 informing her of the termination of her contract effective 31 December 2009. The letter was signed by the Executive Officer, ODA, and stated—

> Further to the discussions which [the Chief of the Weapons of Mass Destruction Branch—the applicant's second reporting officer] and [ODA's administrative officer] had with you earlier this year, I am writing to officially inform you that, regretfully, the Office for Disarmament Affairs will be required, for financial and administrative reasons, to curtail the length of your contract with the United Nations.

> We will therefore be separating you as of 31 December 2009 instead of 10 January 2010. This requirement for early severance from the Organization is in conformity with Staff Regulation 9.3.
>
> As a consequence, the fore-shortening of your appointment will leave less than one month of service remaining when compared with your original end of service date. Therefore, in conformity with Annex III of the United Nations Staff Regulations and Rules, you will not be entitled to a termination indemnity.
>
> I wish to reassure you, however, that this measure is being taken strictly for administrative and financial reasons and should not be construed as a reflection of your performance with the Organization.

10. On 9 December 2009, ODA sent a memorandum to the Office of Human Resources Management (OHRM) seeking its approval to grant a status of internal candidates to four former UNMOVIC staff members, including the applicant "for the duration of their appointments with the United Nations and for the period following their appointments up to the issuance of the new [administrative instruction] on staff selection". The memorandum further stated:

> These staff members are a special group of individuals who have served for numerous years with the Organization but whose standing has always been insecure due to the nature of their contracts. During the time of [United Nations Special Commission—UNSCOM]'s and UNMOVIC's tenure, their status was tied to the six month review and renewal of the Security Council mandate.
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> Following UNMOVIC's closure at the beginning of 2008, the four individuals named above were able to secure temporary employment with the Office for Disarmament Affairs when the United Nations received bridge funding from the MacArthur Foundation to retain expertise that would allow the Secretary-General to receive timely and in-depth analysis on matters related to [Weapons of Mass Destruction] and non-proliferation.
>
> As the MacArthur Foundation project now comes to a close (on 31 December 2009), these individuals once again find themselves in the delicate and unfortunate position of the Organization terminating their employment due to lack of funding and not on the basis of their performance. The duration of service among the four staff members ranges between 6 and 18 years and an annex showing each person's grade and dates of service is attached for your convenience.
>
> While these individuals assumed their responsibilities because of the very special expertise they possessed for the UNSCOM and

> UNMOVIC missions, they have gained skills, capacities [and] competencies that are transferable to other functions in the UN Secretariat.
>
> Given that their expertise and dedication have unquestionably served the United Nations extremely well over the years, and due to the downsizing affecting this project, we are seeking OHRM's kind consideration to grant these individuals, on an exceptional basis, status as internal candidates as per the recommendation made in para 1 above, allowing them to be considered as either 15 or 30 day candidates for vacancies under Galaxy.

11. On 24 December 2009, the applicant submitted an application for a suspension of action on the 5 November 2009 decision. The applicant filed a request for a management evaluation on the same date.

12. The application was forwarded by the Registry of the Dispute Tribunal to the counsel for the respondent, who was informed that the respondent's reply was expected on 28 December 2009. The reply was filed in time. On 29 December 2009, the Tribunal held a substantive hearing on the present application. At the hearing, both parties sought and were granted leave of the Tribunal, with strict deadlines, to file additional submissions with supporting documents. The submissions were filed timeously on 30 December 2009.

13. Subsequent to the expiration of the deadline, the applicant filed further submissions. Although the respondent objected to this, I decided to give the applicant the benefit of the doubt and therefore considered the applicant's submissions prior to the rendering of this judgment.

Applicant's submissions

14. The applicant submits that the decision not to renew her appointment is prima facie unlawful as it appears to be based on illegitimate considerations. She avers that following her move to ODA in March 2008, her supervisors abused their authority with respect to her and discriminated against her on the grounds of her nationality and because of her involvement in the discovery and reporting of the dangerous material in 2007.

15. The applicant stated that she feels that she was sidelined by the ODA management and that her work responsibilities were gradually relegated to "technical support" functions without her consent. The applicant proffers that this is evidenced by the fact that her second reporting officer did not allow her to participate in a ten-day training course in Sweden in May–June 2009 and that she was not selected for several vacancy announcements. Further, the applicant was instructed by her supervisors to remove references to some of the projects she had worked on from her e-PAS report. According to the applicant, as a result of the actions of her supervisors, out of the four staff members transferred from UNMOVIC the applicant is "the only one who is out of the system".

16. The applicant submits that the matter is urgent because her contract is due to end on 10 January 2010. After the expiry of her contract, the applicant "will no longer be able to effectively pursue her request for management evaluation of . . . the decision not to renew her contract".

17. According to the applicant, the implementation of the contested decision would cause irreparable harm because the applicant has a dependent child who relies on the applicant's rights to medical insurance and education grants. The applicant also suffers from a medical condition that may require surgery. At the hearing, the applicant also stated that, due to the nature of her job and qualifications, she requires a secure working environment.

Respondent's submissions

18. The respondent submits that the applicant has failed to establish a prima facie case of illegality. The applicant's contract was foreshortened due to the expiry of funding. After the termination of the mandate of UNMOVIC, five staff members involved in UNMOVIC archiving activities—including the applicant—were renewed until February 2008 and "bridge funding" was arranged to allow for the UNMOVIC staff to be taken on by ODA when the engagement with UNMOVIC terminated. Initially it was anticipated that efforts would be made to obtain regular budget

funding for several posts for the UNMOVIC staff to work in ODA, and that these staff would then have the opportunity to apply for these posts. The General Assembly did not approve this funding and, accordingly, the anticipated posts were not created. Since the funds held in the UNMOVIC escrow account for entitlements earned by the UNMOVIC staff are to expire on 31 December 2009, several affected staff members, including the applicant, were notified, by letters dated 20 October 2009, of the ending of their appointments.

19. The respondent asserts that the records demonstrate that, contrary to the applicant's contention that ODA discriminated against her, ODA took efforts to assist the applicant with her job applications. The respondent submits that there was no need for the applicant to participate in the training course in Sweden in May–June 2009 because of her high qualifications. The respondent explained to the Tribunal at the hearing that the applicant was asked to make changes to her e-PAS report in order to remove some sensitive information (for example, country names) since performance evaluation reports are often provided to various UN offices when staff members apply for jobs.

20. According to the respondent, the present application is not urgent as the applicant has been on notice since 2007 that UNMOVIC's mandate had ended and, accordingly, that her appointments were of a temporary nature. Further, the applicant was notified on 5 November 2009 that her appointment with ODA would be coming to an end.

21. The respondent maintains that the applicant has failed to demonstrate that she would suffer irreparable harm should the contested decision be implemented. Should the applicant prove at the substantive hearing of the matter that the non-renewal of her appointment was unlawful and that she suffered loss, she can be compensated by an award of damages. Since the applicant can be fully compensated by a monetary award, suspension of the decision would be unfair to the respondent because any amounts paid by him to the applicant following a suspension of action order would

not be recoverable by the respondent from the applicant should the respondent successfully defend the claim.

Contested administrative decisions

22. There are some preliminary matters I wish to address. Firstly, in her application of 24 December 2009, the applicant requested suspension of action on two separate decisions—the decision to terminate her appointment effective 31 December 2009 and the decision not to renew her contract beyond 10 January 2010. The applicant's request for management evaluation, filed on 24 December 2009, also covered both administrative decisions.

23. The Tribunal therefore intended to examine both administrative decisions. On 28 December 2009, after its examination of the parties' submissions, the Tribunal issued an order directing the respondent to

> file and serve a submission—with supporting documentation—addressing the following questions:
>
> – Who made the decision to terminate the applicant's contract?
>
> – Did the decision-maker have the delegated authority to terminate the applicant's contract?

24. On 29 December 2009, the respondent filed a response to the Tribunal's order, stating:

> The Decision [to terminate the applicant's contract] was made by . . . [the] Executive Officer, . . . [ODA,] in consultation with . . . [the] Director and Deputy to the High Representative, acting in the capacity as Officer-in-Charge of ODA at the time.
>
> Neither . . . [the Executive Officer] nor . . . [the Director and Deputy to the High Representative] had delegated authority to make the Decision. Pursuant to paragraphs 4 and 7 of Administrative Instruction ST/AI/234/Rev.1, Annexes I and IV, the authority to terminate appointments in ODA pursuant to Staff Regulation 9.3 is vested in the Secretary-General and has not been delegated to officials in ODA.

25. On the same date, the Administration informed the applicant of the withdrawal of the notice of termination. A letter to the applicant, dated 29 December 2009, stated:

> Reference is made to proceeding UNDT/NY/2009/143 before the United Nations Dispute Tribunal and to Order No. 187 of the Tribunal and the Respondent's response thereto dated 29 December 2009.
>
> Please be advised that following a further review of the relevant regulations and rules prompted by the Tribunal's order, we understand that officials of the Office for Disarmament Affairs are not vested with the authority to terminate appointments under Regulation 9.3, regardless of the reasons for doing so, and such a decision must be taken by the Secretary-General.
>
> Accordingly, we have decided to withdraw the decision to terminate your appointment and your appointment will now continue until 10 January 2010, whereupon it will expire in accordance with your terms of appointment.

26. Following its response to the Tribunal's order, the respondent requested the Tribunal to consider whether it was necessary to proceed with the scheduled hearing. The Registry informed the parties of my view that this case involved two decisions—to terminate the applicant's contract and not to renew her appointment—and that I was of the view that the non-renewal matter remained pending. The parties were therefore informed that the hearing would take place as scheduled, on 29 December 2009. With the termination matter no longer outstanding, this judgment addresses the issue of the non-renewal of the applicant's contract only.

Receivability

27. The second preliminary matter relates to receivability. Pursuant to staff rule 11.2, the applicant had sixty calendar days from the date on which she received notification of the administrative decision to file a request for management evaluation. The applicant submits that she received the contested decision on 5 November 2009, and I understand that this date is not disputed by the respondent, although the respondent contends that the applicant was aware long before that she was on a non-renewable fixed-term contract.

28. The respondent made an oral submission at the hearing that the application was not receivable because the applicant was on a fixed-term contract that required no notice of expiration; therefore, if she wanted to contest the decision, she should have filed her request for management evaluation at the earliest possible moment when she became aware she was on such a contract contingent upon availability of further funding. Essentially, this would have been within sixty days of the signing of her contract. I cannot subscribe to this argument. If the respondent were correct, it would render most if not all applications against decisions not to renew fixed-term contracts irreceivable. It is neither fair nor reasonable to expect staff members on fixed-term contracts—many of which are for a duration of some months—to file their requests for management evaluation within sixty days after the contract is signed. In my view, in the applicant's case, the triggering point should have been the moment when the staff member was made aware by the Administration that there was no reasonable chance or possibility of renewal. In this case, it was 5 November 2009—the date when the applicant was notified of the termination of her contract, prior to which date the applicant was not aware that further funding was not forthcoming. Therefore, I deem this application receivable.

Respondent's request for confidentiality

29. The third preliminary matter relates to the issue of confidentiality of some of the records submitted by the respondent. Attached to the respondent's reply of 28 December 2009 were four annexes, including three annexes identified as "confidential" by the respondent. Additional annexes marked "confidential" were provided to the Registry on 29 and 30 December 2009. All documents marked "confidential" were provided to the applicant. The Registry requested the respondent to clarify the meaning of the term "confidential" as applied to several annexes submitted by him and to provide the reasons for his request to consider those submissions confidential. The respondent explained that the identified annexes were "confidential internal working documents . . . not intended for distribution to a wider audience" and that "the public interest mediates in favour of confidentiality" of the

documents since they relate to the sensitive issue of the use of funds provided to ODA.

30. The Tribunal addressed the respondent's request at the hearing. As noted above, these documents were filed and served on the applicant, who thus had the opportunity to examine them. The applicant did not raise any objections to the respondent's request that the annexes identified by the respondent be subject to a confidentiality undertaking by the applicant, and, being satisfied with the explanations given by the respondent, I so ordered.

Articles 13 and 14 of the Rules of Procedure

31. The fourth preliminary issue in this case was that of the applicable procedure. The Tribunal has authority to order interim measures under two articles of its Rules of Procedure. Article 13 covers applications requesting the Tribunal 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. Article 14 is not linked to the management evaluation stage and may be used by the Tribunal "[a]t any time during the proceedings". As the Tribunal stated in *Corcoran* (UNDT/2009/071, para. 34), "these two types of interim measure have to be clearly distinguished" and the Tribunal must rely on one of these articles—not both—when ordering temporary relief. The Tribunal further stated in paragraphs 35 and 38 of *Corcoran*:

> 34. 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*).
>
> . . .
>
> 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. [Emphasis in the original.]

32. The purpose of a suspension of action pending the outcome of management evaluation is to secure the rights of the applicant while the Administration evaluates the correctness of its decision. Since there is an ongoing management evaluation of the decision not to renew the applicant's appointment, the applicable interim measure to be ordered would be that under article 13 of the Rules of Procedure.

33. Article 13.1 of the Rules of Procedure provides:

> The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal 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.

34. To grant the order for a suspension of action, the Tribunal must be satisfied that all three conditions specified in article 2.2 of its Statute and article 13 of its Rules of Procedure are met. The following is my consideration of the parties' submissions with respect to the three conditions required for a suspension order under article 13.

Decision not to renew the applicant's contract

Urgency

35. Under article 13 of the Rules of Procedure, one of the criteria that must be satisfied for the Tribunal to order a suspension of action on a decision is that the case must be of a "particular urgency". The Tribunal has rendered several judgments elaborating on this requirement.

36. In *Tadonki* (UNDT/2009/016, para. 12.1), the Tribunal found the requirement of urgency to be satisfied based on a determination that "if the decision contested [i.e., the non-renewal of the applicant's appointment] is implemented before the consideration of the substantive appeal on the merits, the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful on the substantive case especially if the position were to be filled". In *Calvani* (UNDT/2009/092, para. 34), the Tribunal concluded that the decision to place the applicant on administrative leave without pay would deprive the applicant "of his salaries in such a sudden and unexpected way [that would] obviously [place] him and his family in a situation of particular urgency, which the respondent cannot seriously contest".

37. At the hearing, the applicant explained that she initiated her efforts to appeal the decision in early December 2009. The applicant engaged in extensive consultations with the Office of Staff Legal Assistance, who, at the last minute, were unable to provide her with the support she required, although they had initiated the preliminary drafting of the application. As a result, she had at the last minute secured the services of private counsel.

38. I find that the urgency requirement is satisfied as the applicant's contract is due to expire on 10 January 2010 and, on the balance of probabilities, the applicant has provided sufficient and reasonable explanations for the delay in contesting the decision communicated to her on 5 November 2009.

Prima facie unlawfulness

39. As the Tribunal held in *Buckley* (UNDT/2009/064, para. 7) and *Miyazaki* (UNDT/2009/076, para. 11), in order to show that the decision appears prima facie unlawful, the applicant must demonstrate an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt.

40. Pursuant to staff rule 104.12(b)(i), in effect at the time the applicant received her last appointment, fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment. Provisional staff rule 4.13(c), currently in force, also provides that fixed-term appointments generally do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. Under provisional staff rule 9.4, "A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment" (former staff rule 109.7 contained a similar provision).

41. The Administration has an obligation to make decisions that are proper and in good faith (see *Sefraoui* (UNDT/2009/095) and *James* (UNDT/2009/025)). The Tribunal therefore examined whether the applicant was given any express or implied promises that her contract would not expire on 10 January 2010 and whether the decision not to renew her appointment was motivated by any improper considerations or was made in bad faith.

42. Other than bare allegations that funding was available, the applicant did not establish in this case that she was given any express or implied promises that her employment would continue after 10 January 2009. There are also no records before the Tribunal to suggest that any such promise was made, and I need not discuss this issue further.

43. The Tribunal considered whether the decision was motivated by any improper motives. In *Bernard* (UNDT/2009/094, para. 19), the Tribunal held that the decision not to extend the applicant's appointment beyond its date of expiry did not appear

prima facie unlawful, in part because the applicant failed to show that "the non-extension of her appointment results solely from the desire of her supervisor to remove her from the service". I find that in order to show that the contested decision appears prima facie to be unlawful, it is not necessary to demonstrate that it was motivated solely by improper motives. As long as the applicant can demonstrate that the decision was influenced by some improper considerations and was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith, the test for prima facie unlawfulness will be satisfied. I will now examine whether the applicant has demonstrated in this case that the decision was tainted by improper considerations.

44. The applicant has made extensive submissions attempting to demonstrate that she was singled out and discriminated against by the management of ODA. The applicant's submissions are at odds with the records furnished by the parties.

45. The applicant's e-PAS report for 2008–2009 reflects that both the first and the second supervisors spoke highly of her performance. The applicant also appears to have sought support from her second reporting officer with respect to her employment options. Further, the evidence in this case—including the applicant's e-PAS report, signed by her—demonstrates that the applicant's assignments were not limited to administrative support functions and she was in charge of substantive projects.

46. The respondent explained in his written pleadings and at the hearing that the extra-budgetary funds obtained to finance the work of the applicant and several other ODA staff members would end in January 2010, and the posts occupied by these staff member would no longer be available. This was supported by the records provided by the respondent and was not disputed by the applicant. Thus, the applicant is not the only former UNMOVIC staff member presently with ODA whose contract is due to expire in January 2010. It appears that the other staff members whose contracts expire in January 2010 applied and were able to secure further appointments on posts other than those currently occupied by them. The Tribunal is not convinced by the

applicant that she was unfairly singled out by the Administration. Indeed, the very documents furnished by the applicant, consisting mainly of emails between herself and her second reporting officer, belie her submission that she was discriminated against, unfairly selected for non-renewal and not assisted in her job search. The records provided by the parties suggest that the applicant's second reporting officer encouraged the applicant to apply for various posts and provided some assistance to her. Regrettably, the applicant was not successful in her efforts to secure further employment. Furthermore, she did not formally appeal, challenge or contest the results of the selection exercises she took part in, thus her contentions with regard to those exercises may be irreceivable.

47. I find, on a balance of probabilities, that there is no evidence that the decision not to renew the applicant's contract was influenced by any reasons other than the financial and budgetary constraints. Accordingly, I do not find that there is an arguable case that the decision was unlawful.

48. Although this finding necessarily means that the applicant's request for a suspension of action on the contested decision fails, I will nevertheless discuss whether the implementation of the contested decision would cause irreparable harm as this issue was extensively addressed in the parties' pleadings.

Irreparable damage

49. The requirement of irreparable damage has been addressed in several judgments of the Tribunal. In *Fradin de Bellabre* (UNDT/2009/004), the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the applicant's rights are observed. In *Tadonki* (UNDT/2009/016, para. 13.1), the Tribunal further elaborated on the general rule expressed in *Fradin de Bellabre*. In *Corcoran* (UNDT/2009/071, para. 44), the Tribunal held that 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". In *Calvani*

(UNDT/2009/092, para. 28), the Tribunal considered the impact of the implementation of the contested decision on the applicant's reputation, taking into account that the applicant "has been in the employ of the United Nations for more than 20 years and that . . . he holds a highly responsible and visible position".

50. In his reply, the respondent refers to *Fradin de Bellabre* (UNDT/2009/004), in which the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the applicant's rights are observed. Relying on *Fradin de Bellabre*, the respondent argues that if the applicant can be fully compensated by a monetary award, no suspension of action order should be granted. Indeed, this is an accurate restatement of the general rule for temporary relief measures (also expressed and discussed in *Tadonki*).

51. In each case, the Tribunal has to look at the particular factual circumstances. In my view, there are many instances when the Tribunal will be able to fully compensate for any harm to professional reputation and career prospects should the applicant pursue a substantive appeal and should the Tribunal decide in her favour. I note in this respect the Tribunal's judgment in *Wu* (UNDT/2009/084, paras. 34 and 42), in which it held that "[i]n certain cases compensation may be necessary even if no financial damage can be found" and that "immaterial damage in terms of being neglected [by the Administration] and emotional stress may not be regarded as not being worth to be compensated in money". Indeed, article 10.5 of the Tribunal's Statute allows compensation for non-pecuniary losses, as has been awarded by the Tribunal in several cases (see, e.g., *Crichlow* (UNDT/2009/028) and *James* (UNDT/2009/025)). Thus, it is not the case that any loss to professional reputation or harm to career prospects or other damages will necessarily result in a finding of irreparable harm; in many cases, should the applicant win the substantive case, the Tribunal will be able to repair the damage with an award of appropriate compensation.

52. In the present case the applicant submits that with the loss of her employment, the applicant and her dependants would lose access to the medical insurance and

education grants provided through the Organization, which would have immediate detrimental impact on them. The respondent submitted at the hearing that any reimbursement of education grants by the applicant that she would be required to make, should the suspension not be granted, could be recompensed by the Organization at a later stage, if the applicant proceeded with the application and was successful on the merits. I find this argument convincing.

53. The applicant submitted to the Tribunal—and this was not contested by the respondent—that, because the applicant's contract expires on 10 January 2010, she will be able to secure medical insurance until the end of January 2010. If I were to grant the suspension of action request until the end of the management evaluation process, my order would be in force only until 23 January 2010 at the latest, as the Administration is required to complete its management evaluation within thirty days of the staff member's request. Therefore, the suspension order would not provide the staff member with any additional benefit with respect to medical insurance. Further, even if the applicant would have no access to medical insurance in January 2010, I am not at all convinced on the basis of evidence currently before me that the irreparable harm requirement would be satisfied; however, I need not discuss this issue further in light of my findings above.

54. Other issues were advanced orally by the applicant at the hearing on the issue of apprehension of irreparable harm that may arise from the applicant no longer working in a secure environment due the nature of her qualifications and work. As these issues were not canvassed in her written application and as they will, no doubt, be fully canvassed at the hearing on the main application in due course (should the applicant decide to proceed with it), they may prove relevant to the final outcome. For this reason, and in light of my findings in regard to other requirements to be established by the applicant for the interim relief she now seeks, I am of the opinion that it is neither necessary nor prudent for the Tribunal to express any views or make any finding on the question whether a finding of irreparable harm arising from any apprehended security threats has been made out.

55. Therefore, although I am satisfied that the applicant has demonstrated that this case is urgent, she has failed to show that the decision appears prima facie unlawful and that it would cause irreparable damage if implemented.

56. The applicant, therefore, failed to satisfy two of the requirements for a suspension of action. A suspension of action is, it must be remembered, a discretionary remedy; the Tribunal will exercise its discretion on a consideration of all the circumstances in the case. In the present case, there is, in my opinion, no absence of a satisfactory remedy available to the applicant, and, furthermore, the applicant did not show that she would suffer irreparable harm if a suspension of action was not granted in her favour.

57. This judgment, of course, does not preclude the applicant from filing a substantive application contesting the decision not to renew her appointment.

Conclusion

58. The application is dismissed.

(*Signed*)

Judge Memooda Ebrahim-Carstens

Dated this 31st day of December 2009

Entered in the Register on this 31st day of December 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York