UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/144
Judgment No.:	UNDT/2009/097
Date:	31 December 2009
Original:	English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

LEWIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Jorge Ballestero, UNICEF

Introduction

1. Because of the urgency of the application, it was heard by me on 31 December 2009 and an *ex tempore* judgment was given at the time of the hearing. That judgment follows, with some editorial changes of no substance.

Background

2. The applicant is employed as a local officer on a twelve-month fixed-term contract at UNICEF, Jamaica. Her contract was due to expire on 31 December 2009. On 30 November 2009, the applicant was informed in writing by the Representative of UNICEF Jamaica (Representative) that her contract would not be renewed after its expiration on 31 December 2009.

3. On 29 December 2009, the applicant filed a request for management evaluation and an application for a suspension of action on what she alleged to be the decision not to renew her contract. The management evaluation has not been completed; it is expected that it will take about one month. The application was made after some delay, but the applicant has explained why this came about and it is unnecessary to go into the details. Counsel for the respondent concedes, rightly if I may say so, that her explanation is reasonable.

Considerations

4. The applicant's case is that the Representative informed her that her contract was not being renewed because of her performance inadequacies. It is reasonably clear that his information about the applicant's performance came from the Deputy Representative of UNICEF Jamaica (Deputy Representative), who was the applicant's immediate supervisor and who the applicant claims recently developed against her feelings of ill will which, so the argument goes, led to the Representative being mislead about the applicant's performance.

5. The matter said to give rise to the perceived ill will is a complaint made by the applicant that the Deputy Representative had not given her sufficient financial allowance for the purpose of attending a very important conference in Panama, an issue which the applicant raised with the staff association on her return from the training. The applicant said that, following this report, the Deputy Representative ceased talking to her, which was a marked change from her previous "open office" approach. The applicant noted that hitherto there had been continuous interaction between her and the Deputy Representative, although the latter was an extremely busy manager, and that whenever there was an occasion to discuss what the applicant had been doing in her work, the response was positive.

6. The applicant also relied on a performance evaluation report (PER) which was completed on 17 December 2009 after she was informed about the non-renewal of her contract. Unlike her two previous evaluations, this was critical and, although overall she was assessed as having met most expectations with room for improvement, the comments of the Deputy Representative can only be read as being very critical of the applicant's performance in a number of important respects.

7. Counsel for the applicant pointed in substance to three matters. First, the evidence of the applicant was that the Representative said, in substance, that the contract was not being renewed because of the applicant's inadequate performance. Indeed, it was stated that he said that, based on her performance, "it was not possible for [the applicant] to get another post in the United Nations and [the applicant] should carefully consider [her] position". This assessment could only have come from what the Representative was told by the Deputy Representative. Secondly, until the contretemps over the applicant's allowance, the Deputy Representative had been both available to her and approving of her performance, whilst afterwards she was not spoken to. Thirdly, the PER was extremely critical, a marked difference from her previous evaluations. Counsel submitted that when these facts are viewed as a whole they demonstrate a reasonably arguable case that the decision of the Representative

was influenced, if not entirely controlled, by information from the Deputy Representative which was biased against the applicant for reasons of personal ill will.

8. I should mention that there had also been a mid-term review (MTR) of the office's performance undertaken during September–November of 2009, during the course of which the applicant was complimented by the Representative on her presentation in respect of her program.

9. One's immediate response to the line of reasoning proposed by counsel for the applicant is that it seems unlikely, not in respect of the significance of the PER, but because it seems irrational and unreasonable that the Deputy Representative would have been motivated to, in effect, destroy the career prospects of the applicant for reasons of personal pique. Of course, such things have occurred, but they are rare.

10. The Deputy Representative has not had an opportunity to respond to the allegations against her and in the circumstances the respondent had not had the advantage of that evidence. It is immediately obvious though, that had a decision been made as a result of the MTR not to renew the applicant's contract, and if hitherto the Deputy Representative (who must have been aware of that decision) and the applicant had had a good relationship, the non-communicativeness of the Deputy Representative might well have been due to embarrassment — a perfectly normal human reaction and one which to my mind is more likely to explain the Deputy Representative's behaviour than the explanation proposed on the applicant's behalf. However, the applicant also gave evidence that in November 2008, thirteen months before the expiration of her contract, the Deputy Representative received an email requesting that the applicant be allowed to attend training in February 2009, but that the Deputy Representative indicated that she would not consent to the applicant's attendance and would not respond to the email, stating that someone else should attend the training instead. The applicant said that the Deputy Representative told her that

> [the applicant] was no good and as far as she was concerned [the applicant] did not add anything to the staff – if [the applicant] was removed [she] would not be missed…she will fix it so that after the MTR next year [to which I have already referred] [the applicant] would not have a job.

This, if accepted, shows that the negative attitude of the supervisor towards the applicant's performance preceded by almost a year the issue that arose concerning the allowance. Of course, I am not in a position to assess whether the Deputy Representative's assessment of the applicant's performance was fair. Certainly, the language in which it was expressed, if the applicant's evidence is to be accepted, did not reflect objectivity and the closing remark about "fixing", if made, is certainly suggestive of ill will.

11. The respondent submitted, but was not in a position to prove at the time of the hearing, that

> [t]he management decided not to renew the contract at this time to reconsider the key assignments of the post. We informed [the applicant] on 30th November 2009 that her contract would not be renewed. At no time did we state that the contract would not be renewed based on performance.

12. There are hints in the applicant's evidence suggesting that the MTR was relevant as a consideration of the assignments at the post. However, there is also positive evidence from the applicant that the Deputy Representative did state, more than once, and in more than one way, that the contract would not be renewed because of shortcomings in her performance. I am far from convinced that the explanation for the non-renewal of the applicant's contract is indeed that for which counsel for the applicant contends, however, I consider that on balance it is a reasonably arguable case. Accordingly, the prerequisite of prima facie unlawfulness for suspension of action is satisfied.

13. The prerequisite for urgency is plainly satisfied since the contract expires today. Counsel for the respondent did not seek to argue otherwise.

14. Of greater difficulty for the applicant is the requirement that irreparable harm would be caused if the application is not granted. The applicant is a highly educated person working in her home town in Jamaica and there is no evidence of any immediate financial emergency which would follow from the expiration of her contract. She is living in rental accommodation and is guardian for a young child of fifteen years and apparently cares for her mother. She is single and does not have a partner. She has sought rebuttal of her PER but that rebuttal process can continue to completion even after separation. Certainly, without suspension, she will have lost her job and the income which it provides and I think I would accept that it is more difficult to apply for a position with the United Nations from outside than if she were still an employee. However, the applicant has always been aware that her contract was for a fixed-term, expiring on 31 December 2009, and it explicitly says that there is no expectation of renewal. I do not doubt that the applicant expected that she would be renewed and based on what she was told by the Representative it seems that she would have been renewed, but for her performance.

15. I have found this issue rather difficult to assess. It seems clear that mere economic loss can never be irreparable since if the applicant succeeds in the substantive action, compensation will be payable. On the face of it, there is nothing in this case, as I read the evidence, which provides a basis for concluding that the applicant's loss is other than economic. At the same time, as has been mentioned by several of my colleagues in other suspension of action cases, the loss of employment for performance reasons is more than a purely economic act with more than purely economic consequences and can constitute irreparable harm for the purpose of articles 13 and 14 of the Tribunal's Rules of Procedure. Although I am myself skeptical about this reasoning, I am not persuaded that it is wrong and therefore for reasons of comity I feel I should adopt the same approach. I would point out that a suspension of action under article 13, if granted, is only for the period of a

management evaluation and it is therefore in the hands of the respondent, to a significant degree, to limit the cost of such an order.

16. If the management evaluation is adverse to the applicant and she seeks to contest the administrative decision in the Tribunal, of course she can seek a further suspension. However, she should have no expectation that a further suspension would be granted under article 14 of the Tribunal's Rules of Procedure.

Conclusion

17. I have concluded, on balance, that the suspension of action should be granted until the management evaluation is completed and notified to the applicant.

(*Signed*)

Judge Adams

Dated this 31st day of December 2009

Entered in the Register on this 6th day of January 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York