UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/007
Judgment No.: UNDT/2011/059
Date: 31 March 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

PIRNEA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Thomas Elftmann**,** UNDP, Bureau of Management, Legal Support Office

This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 19 February 2011, the Applicant submitted an application for suspension of action of the "implied" administrative decision not to renew his fixed-term appointment beyond its expiry date, i.e. Saturday, 19 February 2011 ("impugned decision"). The application was officially registered by the UNDT Registry on the next working day, i.e. Monday, 21 February 2011.

2. By an order dated 21 February 2011, the Tribunal decided to grant the application for suspension of action until 9 March 2011, owing to the fact that the Applicant's contract was due to expire on 26 February 2011, (which was only five business days away from the date of the order) and to afford the Respondent with an opportunity to file comments and any relevant documentary evidence. The Tribunal further decided that the necessity of a hearing will be decided upon receipt of the Respondent's reply.

3. Through the Registrar, the application and its annexes were served on the Respondent on 21 February 2011, with a deadline of Monday, 28 February 2011 for the filing of a reply. The Respondent submitted his reply by the deadline.

4. By order dated 9 March 2011, the Tribunal decided not to hold a hearing in the matter and to dismiss the application. It further decided that written reasons would follow.

5. The Applicant's appointment was extended until 9 March 2011.

Facts

6. The Applicant joined the United Nations on 26 February 2007 as a Field Security Coordination Officer in Côte d'Ivoire, under a Letter of Appointment from the United Nations Development Programme (UNDP) but serving with the United Nations Department of Security and Safety (UNDSS).

7. In a letter dated 4 September 2009, the Applicant was reassigned to Mogadishu, Somalia as a Security Analyst. He continued to hold a UNDP Letter of Appointment.

8. By letter dated 17 May 2010, the Applicant was reassigned as a Field Security Coordination Officer to Hargeisa, Somalia. He again continued to hold a UNDP Letter of Appointment.

9. Because of an incident involving allegations of sexual assault against the Applicant which took place on 23 July 2010, UNDSS found that it was no longer in a position to ensure the safety of the Applicant on Somali territory. On 24 July 2010, the Applicant continued his duties in Nairobi, Kenya, whilst his formal duty station remained that of Hargeisa, Somalia.

10. On 5 October 2010 the Applicant was informed by UNDSS that his appointment would not be renewed beyond its expiry date of 31 October 2010. The Applicant wrote to the Under-Secretary-General ("USG") for UNDSS challenging the impugned decision. On 26 October 2010, the Applicant received a communication from a Senior Human Resources Officer notifying him that his contract would be extended until the end of February 2011.

11. When on 2 February 2011 the Applicant requested clarification from UNDSS as to why his contract would not be renewed, a Senior Human Resources Officer replied on the following day that "a fixed-term appointment …, as stipulated in

Staff Regulation 4.5 'does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service'."

12. On 9 November 2010, the Office of Human Resources for UNDP in Copenhagen extended the Applicant's contract until 26 February 2011.

13. As the Applicant's contract was due to expire on 26 February 2011 and that he had not been informed of an extension of appointment, the Applicant requested on 17 February 2011 management evaluation of the impugned decision, including a request for suspension of action pursuant to "Provisional Staff Rule 11.3 (b)(ii)". On 19 February 2011, he was notified that the Secretary-General had decided not to suspend the implementation of the impugned decision.

14. On 19 February 2011, the Applicant submitted an application for suspension of action of the "implied" administrative decision not to renew his fixed-term appointment beyond its expiry date of 26 February 2011. The application was officially registered by the Registry of the Dispute Tribunal on the next working day, i.e. Monday, 21 February 2011.

Applicant's case

15. The Applicant argues that this is a case of particular urgency as his contract is due to expire on 26 February 2011.

16. He further argues that there is no evidence showing the Applicant's post is identified for abolition or evidence suggesting that his performance would warrant his immediate separation. Further the Applicant was not provided a reason why the impugned decision was taken. Referring to the *Obdeijn* case[1], he submits that the said decision was "arbitrary, capricious and therefore *prima facie* unlawful".

[1] UNDT/2011/032

17. In dealing with the question of irreparable harm, the Applicant submits that his impending separation would cause irreparable harm to his career aspirations and prospects, both within and outside the United Nations. Firstly, he argues, if separation was effective, he would no longer be considered as an internal candidate for other vacancies within the United Nations with the result that he would lose his rights to priority consideration which loss cannot be quantified. He further submits that he would suffer from a loss of the right to work and to gain further professional experience, which is, he argues, more than a mere economic loss that cannot be compensated. Thirdly, the likelihood of finding alternative employment outside the United Nations would be seriously reduced as he will not be in a position to explain to a potential employer why he was separated. Fourthly, assuming that he finds alternative employment within the United Nations, the Applicant argues that separation would entail an administrative "break-in-service" that would affect his right to certain entitlements that accrue with continuous service, including but not limited to the right to home leave.

18. In the light of the above, the Applicant moves the Tribunal to suspend the impugned decision until completion of the management evaluation.

Respondent's case

19. The Respondent argues that the Applicant fails to demonstrate in what way the impugned decision is *prima facie* unlawful despite the Tribunal's jurisprudence in this regard. With regards to Applicant's contention that the decision was "arbitrary and capricious" based on the *Obdeijn* judgment, he submits that the Applicant did not adduce any evidence in support of this allegation and that it was mere speculation.

20. The Respondent further submits that the *Obdeijn* judgment cannot be relied on in the context of an application for suspension of action. Contrary to the factual context of the *Obdeijn* case, UNDSS did not refuse to disclose information on the

non-renewal of the Applicant's appointment "to the Tribunal" (emphasis added). It did not follow either the pronouncement of the *Obdeijn* Judgment insofar as that judgment makes it clear that a staff member has a right to know why his contract is not renewed. The Respondent submits that it did not infer though that the decision was tainted by improper motives if such reason is not provided to the Applicant.

21. The Respondent further notes that the *Obdeijn* judgment was rendered on 10 February 2011, after UNDSS had already notified the Applicant of the non-renewal of his appointment on 2 February 2011. The Respondent claims that the management evaluation will be guided by the principle set in the *Obdeijn* judgment notably regarding the reasons as to why the Applicant's appointment was not further extended. The decision not to advise the Applicant of the justifications of the impugned decision was based on a longstanding jurisprudence inherited from the former United Nations Administrative Tribunal according to which the Administration was not obliged to provide any reason for the non-renewal of a contract.

21. The Respondent argues that the condition for irreparable harm was not fulfilled in the present case. The Tribunal consistently held that no irreparable harm occurs if an Applicant can be adequately compensated by monetary award (*Fradin de Bellabre* UNDT/2009/004; *Utkrina* UNDT/2009/063; *Philippart* UNDT/2010/106). Further, Article 10.5 of the Tribunal's Statute allows compensation for non-pecuniary losses. In this connection the Tribunal decided that "the harm to professional reputation and career prospects" can generally be compensated (*Jaen* UNDT/2010/164; *Utkrina* UNDT/2009/096). The Applicant did not specify any such harm and that even if there was harm to his professional reputation and career prospects as a result of the contested decision, adequate compensation could be provided to the Applicant.

22. According to the Respondent, the Tribunal has further held that in an exceptional case irreparable damage may "be at hand where serious harm to professional reputation and career prospects (…) after a very long time of service would result from the implementation of the contested decision" (see *Corcoran* UNDT/2009/071; *Osman* UNDT/2009/008). the Respondent argues that in the present case the Applicant needed five years of continuous service as a minimum requirement in accordance with the spirit of staff rule 9.6 (e) and human resources practice, to be given "priority consideration" when applying for posts whilst he served for four years only. Moreover, the Applicant does not bring evidence that the contested decision will cause "serious harm" and that his record with the Organization shows "a very long time of service".

23. The Respondent requests the Tribunal to find that the contested decision not to renew the appointment of the Applicant was not *prima facie* unlawful and that its implementation would not cause irreparable harm to the Applicant. Accordingly, the Respondent requests the Tribunal to dismiss the application and to give the Respondent an opportunity to undertake a management evaluation of the contested decision.

24. The Respondent finally comments that he would look into the reasons why the Applicant's contract could not be further renewed at the management evaluation stage.

Considerations

25. Based on the submissions and documentation filed by the parties, the Tribunal considers that a hearing is not required in the present matter.

26. Pursuant to Article 13 of its Rules of Procedure, the 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."

27. The burden in this case lies on the Applicant. The latter should demonstrate to what extend the impugned decision is *prima facie* unlawful, of particular urgency and, finally, that its implementation would cause him irreparable damage.

28. The general rule is that a fixed-term contract has an expiry date and such contract does not carry any expectancy of renewal. From the case law of the former United Nations Administrative Tribunal and the United Nations Dispute Tribunal, two schools of thought have emerged. Firstly, there is no duty to give reasons for the non-renewal of a fixed-term appointment but if the Organization decides to give reasons these reasons must be supported by evidence or by facts. Secondly, there is an emerging jurisprudential thinking that when a contract is not renewed or terminated reasons must be given to the concerned staff member so that he or she is in a position to take any action as he or she deems fit.

29. The question arises therefore whether the sole fact of not giving any reasons when a contract is not renewed would amount to unlawfulness and would therefore render the decision not to renew the concerned staff member's appointment null and void.

30. In the case of *Kasmani* UNDT/2009/36, the Tribunal held that in the absence of cogent reasons for not renewing a contract from the Respondent the inference can and should be drawn that the Respondent acted unlawfully. The Tribunal relied on the following :

> *Inherent in the duty to act with procedural fairness there is in some situations a limited implied obligation on administrative bodies to give reasoned decisions.*[2]

[2] *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 5th edition, paragraph 9-058.

> *When an applicant seeks to impugn a decision of an administrative authority by challenging the legality or rationality of the decision a failure by that authority to offer an answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers unlawfully.*[3]
>
> *The silence of a party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus depending on the circumstances, a prima facie case may become a strong or even an overwhelming case.*[4]

31. In *Kasmani* the Applicant was given a promise at the time of his recruitment that his contract would be renewed for another six months. The management Evaluation Unit confirmed this fact. The Respondent could not and did not explain why the contract was not renewed as a result of the promise. The Tribunal concluded in these circumstances that the failure to give any reason was unlawful.

32. Whether reasons should be given or not, when a contract is not being renewed should be decided on a case to case basis. It is the considered view of the Tribunal that the absence or failure to give reasons must be analysed by taking into account the context in which the decision was taken. There cannot be an absolute and general rule that the failure to give reasons would be an unlawful exercise of the discretion not to renew. Nor should there be a general rule that the Respondent should never give reasons.

33. The matter involves a delicate exercise of judgment in the decision making process. There may be cases where the contract lapses automatically at the end of its term. If no promise has been made to the staff member and if there are no extraneous factors pointing to improper motives there would be as a rule no need to give reasons because the staff member would be fully aware that the contract is due to come to an end at a specified date.

[3] *Idem,* paragraph 9-056
[4] *Ibid.*

34. On the other hand if a promise has been made to the staff member that there would be a possibility of renewal and, if funds are available for the particular position for which the staff member was recruited logically, fairness would require that reasons be given and the reasons must be justifiable in the context of the relevant circumstances of the case.

35. In the case of *Obdeijn* Carstens J made a thorough analysis of the issues relating to the giving of reasons in a non renewal of a contract. It was the considered view of the learned Judge that the failure to give reasons in a non renewal case would be unlawful. The present case can be distinguished from *Obdeijn*. In that case though the learned Judge requested for the reasons management declined to do so. In the present case the Respondent did advance in his reply the reason for the non-renewal of the Applicant's contract. The Respondent averred that it was materially impossible to send the Applicant back to Hargeisa, Somalia to continue his functions in the security field as the Applicant had put himself in a situation that created this difficulty.

36. One important legal issue that arises is whether the initial absence or failure to give reasons, when reasons are required, can be cured if reasons are made available to a staff member subsequently. The Tribunal takes the view that the main purpose of giving reasons is to enable a staff member to take any action he/she deems appropriate when the contract is not renewed. If no reasons are initially available but are subsequently brought to the knowledge of the staff member either in pleadings or on order of the Tribunal or any other form of communications, both the Applicant and the Respondent are in presence of the reasons. In that scenario the Tribunal would be in position to assess whether the reasons for non renewal were valid or not.

37. The Tribunal notes that the Applicant holds an appointment to serve as a Field Security Officer in Somalia, but because of allegations of sexual assault against him in Somalia, the Organization had no choice than to move him to Nairobi,

where UNDP Somalia Headquarters are located, while his official duty station remained Hargeisa. The Tribunal was not informed whether this matter was investigated. Be that as it may that incident compelled the Organization to move the Applicant to Nairobi for his own protection.

38. Firstly, it is undisputed that the Applicant's post was not earmarked for abolition. However, there were allegations of sexual assault against the Applicant while he was serving in Somalia as Field Security Coordination Officer and that made him unable to perform his duties in the duty station where he was appointed. The Applicant continued his duties in Nairobi whilst his formal duty station remained Hargeisa, Somalia and there was no possibility of him being sent back to Hargeisa. The blunt fact is that the Organization had to take immediate remedial measures to deal with what appeared to be a sensitive situation. The Tribunal therefore wonders how the Applicant would have been able to fulfill the duties pertaining to his position in his official duty station, a place he had to be moved from through no fault of the Organization. Secondly, the Applicant, who moved to Nairobi on 24 July 2010, was informed on 5 October 2010, that his contract would not be renewed beyond its expiry date on 31 October 2010. He had thus been notified of the non-renewal within a reasonable delay. In fact his contract was extended for four months following a challenge of the decision filed with the USG for UNDSS.

39. Based on the above facts, the Tribunal does not find *prima facie* evidence of gross negligence or improper motives which could have motivated the Organization not to renew the Applicant's contract without a proper reason. It is also the considered opinion of the Tribunal that the Organization acted in good faith in extending the Applicant's appointment by four months to give time to find alternative employment.

40. The Tribunal concludes that the element of unlawfulness has not been established. Having reached this conclusion the Tribunal considers that it is not relevant to go

into the other conditions relating to a suspension of action application. For the above reasons,

41. IT IS ORDERED THAT,

The application for suspension of action be dismissed.

(*Signed*)

Judge Vinod Boolell

Dated this 31st day of March 2011

Entered in the Register on this 31st day of March 2011

(*Signed*)

Jean-Pelé Fomété, Registrar, Nairobi