UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/016
Judgment No.: UNDT/2012/035
Date: 14 March 2012
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

CASTILLO CABRERA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Alexandre Tavadian, OSLA
Louis-Philippe Lapicerella, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. On 7 March 2012, the Applicant, a Training Officer with the United Nations Integrated Mission in Timor-Leste ("UNMIT" or "Mission"), sought suspension of action, pending management evaluation, of the decision not to renew her contract beyond 19 March 2012.

2. The Applicant received the final decision that her contract would not be renewed in writing on 1 March 2012. She requested management evaluation of the decision on 7 March 2012.

3. The Applicant contends that she has a legitimate expectation of renewal and that the decision not to renew her contract was motivated by extraneous considerations. The Respondent contends that the decision was taken as a result of UNMIT's downsizing in view of its eventual closure.

4. The New York Registry of the United Nations Dispute Tribunal transmitted the application to the Respondent on 7 March 2012. The Respondent duly filed his reply, as directed, on 9 March 2012.

Background

5. On 20 March 2011, the Applicant commenced a one-year fixed-term appointment with UNMIT. The Applicant is currently employed in the UNMIT office in Dili. She is on loan from UNMIT office in Suai. Her responsibilities include training and coaching of national staff in order to facilitate their future career prospects after the expiration of the mandate of UNMIT.

6. By Security Council resolution 2037, the mandate of UNMIT was extended until 31 December 2012.[1]

7. According to the Applicant, ever since the arrival of her new supervisor (Chief, Integrated Mission Training Center) on 30 July 2011, they have had a difficult working relationship and she often feels that she is treated unfairly and improperly. The Applicant raised the matter with the Staff Counselling Services in September 2011, directly with her supervisor on 30 November 2011, and with the Chief of Mission Support on 1 December 2011.

8. The Applicant submits that, on 2 December 2011, the Chief of Staff convened a meeting with her and her supervisor. According to the Applicant, during the meeting they agreed that they "would try to find a solution to [their] interpersonal conflict in the coming weeks". The Applicant submits that, at that meeting, her supervisor not only did not take any issue with her performance but, on the contrary, acknowledged that she was performing well.

9. On 6 January 2012, the Human Resources Division sought the Applicant's supervisor's recommendation for the extension of her appointment. He was provided with a form, where he had to recommend an extension or a non-extension of the contract, which stated:

> The above staff member's appointment with UNMIT will expire on 19 March 2012. If the performance of the staff member is satisfactory, you are kindly requested to make a recommendation for the continued requirement of the staff member's services. However, if there are any performance-related issues which need to be taken into account, please consult Civilian Personnel Section before completing this form. Please note in this context that the possibility of extension could be up to 30 June 2012.

10. The Applicant submits that, on 20 January 2012, while she was on sick leave, her work materials were removed from her office and relocated without her consent.

[1] Security Council resolution 2037 (2012), S/RES/2035, para. 1 (23 February 2012).

(The Respondent submits that this alleged incident consisted merely of some office equipment being moved.) According to the Applicant, it was explained to her that staff needed office space, although the Applicant was aware that there were other vacant offices available. The Applicant immediately raised the matter with the Chief of the Conduct and Discipline Unit, who told her that he would follow-up on the matter with the Chief of Staff.

11. The Applicant was called to the office of the Chief Administrative Services on 6 February 2012, and informed that her contract would not be extended beyond 19 March 2012.

12. On 10 February 2012, the Applicant's supervisor signed the form provided to him on 6 January 2012, marking the box stating "No extension beyond expiry". According to the Applicant, on 10 February 2012, her supervisor asked her to also sign the form. According to the Applicant, she was given no explanation for the non-renewal of her appointment.

13. The Applicant sought the Ombudsman's intervention on 10 February 2012. Her attempt to resolve this dispute informally failed and, on 23 February 2012, the Ombudsman recommended that she contacts the Office of Staff Legal Assistance.

14. The Applicant submits that, on 22 February 2012, the Chief of Mission Support confirmed that her appointment would not be renewed and that the non-renewal was related to a restructuring exercise. The Applicant alleges that the Chief of Mission Support did not provide a clear or meaningful description of the restructuring effort but promised to explore the possibility of transferring the Applicant to another post and confirmed that the non-renewal was not related to the Applicant's work performance.

15. The Applicant received a formal notification of the decision not to renew her contract on 1 March 2012.

Applicant's submissions

16. The Applicant's principal contentions may be summarised as follows:

Urgency

a. The matter is urgent as the Applicant's contract will expire on 19 March 2012. As the Applicant received a formal written notification of the contested decision on 1 March 2012, the urgency in this case was not created by the Applicant;

Prima facie *unlawfulness*

b. The Applicant has a legitimate expectation of renewal. The Applicant's performance has always been satisfactory. The Applicant's post has not been abolished, redeployed, or reclassified. The Applicant's post has an approved budget until 31 December 2012 and the funding remains available. Indeed, in the proposed budget for UNMIT for the period from 1 July 2012 to 30 June 2013, the Administration proposed to abolish a number of posts. However, none of the posts proposed for abolition is the one encumbered by the Applicant;

c. The allegation that the Applicant's appointment is not being renewed as a result of a restructuring exercise is manifestly misleading. The Applicant has not been informed of any restructuring plans. Also, the timing of the decision not to renew the Applicant's contract coincides with the difficulties she had with her supervisor. The Applicant's supervisor decided not to recommend a renewal shortly after the Applicant complained about his behavior to the Conduct and Discipline Unit;

Irreparable damage

d. The suspension of action is the only remedy available to the Applicant that can prevent the Administration from unlawfully redeploying his current post.

Respondent's submissions

17. The Respondent's principal contentions may be summarised as follows:

Urgency

a. The Respondent concedes that this matter is urgent;

Prima facie *unlawfulness*

b. The decision not to renew the Applicant's contract was due to the anticipated closure of UNMIT. The Administration of UNMIT held a number of town hall meetings advising staff of the imminent cuts in personnel. The Administration of UNMIT began a phased closing down of UNMIT, deciding that appointments would only be renewed on the basis of absolute need and that current appointments would not be renewed beyond 30 June 2012. As the Applicant's appointment was due for renewal on 19 March 2012, the Administration of UNMIT did not consider it of benefit to renew her appointment for such a short period of time, given UNMIT's eventual closure;

c. The Applicant is not alone in being affected by UNMIT's closure. UNMIT will cut 58 posts in total over the coming year. Thirty-five of those 58 posts currently remain encumbered. Several other staff members' appointments will not be renewed in the coming months, including that of the Applicant;

d. The Applicant does not have any legitimate expectation of renewal. No promises were made to her regarding the renewal of her contract;

e. The Applicant made her complaint to the Conduct and Discipline Unit on 20 January 2012, two weeks after her supervisor had recommended that her appointment not be renewed, at which time she accepts she was on amicable terms with her supervisor. The Applicant's contention that her supervisor decided not to recommend the renewal of her appointment only after her complaint to the Conduct and Discipline Unit is incorrect, and this could not have impacted upon the contested decision;

Irreparable damage

f. The Applicant has not demonstrated how the implementation of the decision not to renew her appointment would cause her irreparable harm. The mere fact that the Applicant's appointment will not be renewed is insufficient to demonstrate irreparable harm. The reason for the non-renewal is UNMIT's downsizing and scheduled closure, not because of reasons of non-performance or bias towards the Applicant. Thus, the reasons for the non-renewal will not cause any harm to the Applicant's future career prospects. Consequently, there is no evidence that the contested decision will cause her irreparable harm. In addition, there cannot be any irreparable harm when, in any event, UNMIT is downsizing and scheduled to complete its mandate.

Preliminary matters

18. This is an application for a suspension of action pending management evaluation. It is discretionary relief of an interim nature, generally not appealable, and which, in accordance with the Rules of Procedure, requires consideration by the Tribunal within five days of the service of the application on the Respondent.

Therefore, parties approaching the Tribunal must do so with sufficient information for the Tribunal to preferably decide the matter on the papers before it.

19. The normal procedure that has evolved in these matters before the Tribunal is for the applicant to file an application, the respondent to file a reply, and thereafter for the Tribunal to consider the matter on an urgency basis, although in some jurisdictions the applicant may have the right of last reply. It is, of course, within the discretion of the Dispute Tribunal to request further information or the filing of further papers or even to hear *viva voce* evidence if it deems necessary. Suffice to say that due to the nature of this relief, time is of the essence and only a peek into the merits is required. This is, after all, only interim relief pending management evaluation.

20. On 12 March 2012, the Applicant sought leave to file a response, already dispatched to the Registry with annexes, to the Respondent's reply. The Applicant also invited the Tribunal to strike out allegations of fact not supported by evidence in the Respondent's reply.

21. On 12 March 2012, Counsel for the Respondent, by email addressed to the Registry, also sought leave to file a further submission, advising that "[s]hould the Tribunal consider it necessary to hear additional evidence from the Respondent, Counsel and, potentially, witnesses can be made available to attend".

22. Parties approaching the Tribunal on an urgency basis must ensure that their pleadings are properly prepared and contain all relevant information and annexes. An application may well stand or fall on its founding papers. The same also applies to submissions filed by the Respondent in suspension of action cases, which by their nature do not envisage that the parties would be filing multiple submissions or that a full hearing on the merits would be held.

23. Having considered the Applicant's motion, and in light of the Respondent's papers as filed, the Tribunal has decided to grant the Applicant leave to submit the

response to the Respondent's reply. However, Counsel for the Applicant is reminded that such motions should be made prior to filing the relevant pleading in question, although the Tribunal recognises that this is an urgent application and that time is of the essence. As regards the Applicant's motion to strike out, suffice to comment that pleadings in themselves do not constitute evidence; in light of the findings herein, the Tribunal makes no order.

24. In view of the documentation filed by the parties, the Tribunal did not consider it necessary to hold a hearing in this case. With regard to the Respondent's email request, the Tribunal considers that it has sufficient information to render a judgment on this urgent application.

Consideration

25. Article 2.2 of the Tribunal's Statute provides that the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Urgency

26. The Applicant contends that there has been no self-created urgency. The Respondent concedes that this matter is urgent. The Tribunal is satisfied on the facts that the urgency requirement has been met.

Prima facie *unlawfulness*

27. Given the interim nature of the relief the Tribunal may grant for a suspension of action, an applicant must demonstrate only that the decision appears *prima facie* to be unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an

applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011)).

28. The Applicant concedes that, upon their expiration, fixed-term appointments do not carry an automatic expectation of renewal. The Applicant contends that two exceptions to this general rule apply in her case, namely that a legitimate expectation has been created giving rise to an obligation to renew, and that the decision is based on extraneous and countervailing circumstances. The Respondent submits that the decision not to renew her appointment was due to the anticipated closure of the Mission.

29. Security Council resolution 2037 (2012) provides that UNMIT's mandate has been extended until 31 December 2012 "at the current authorized levels". Eventually, the Mission will be phased out in consultation and collaboration with the Government of the Democratic Republic of Timor-Leste. In order to enhance the skills of its national staff so they have greater employment prospects after the Mission is withdrawn, UNMIT is implementing multiphase capacity-building and training projects. It appears that these projects will continue to be implemented at least until 31 December 2012, and there remains a possibility of a post-UNMIT engagement in Timor-Leste by the United Nations.[2]

30. The Tribunal finds that the documents before the Tribunal indicate that it is unlikely that the contested decision was based on any current downsizing or eventual closure of UNMIT. There is no evidence that there are any actual downsizing plans affecting the Applicant's post. For instance, A/66/711 (Report of the Secretary-General on the Budget for the United Nations Integrated Mission in Timor-Leste for

[2] See, e.g., S/2011/641, Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 8 January 2011 to 20 September 2011), para. 59 (14 October 2011); S/2012/43, Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period of 20 September 2011 to 6 January 2012), para. 64 (18 January 2012).

the period from 1 July 2012 to 30 June 2013), dated 21 February 2012, does not appear to identify the Applicant's post as proposed for abolition.

31. Further, if the decision not to renew the Applicant's appointment was a result of an alleged restructuring exercise, there is no reasonable explanation for the request found in the form sent to the Applicant's supervisor by the Human Resources Division on 6 January 2012. The form stated that, if the Applicant's performance is satisfactory, "you [i.e., the supervisor] are kindly requested to make a recommendation for the continued requirement of the staff member's services".

32. Accordingly, the reason provided by the Respondent in support of the contested decision appears to be unsupported by the facts and the documents in this case.

33. Furthermore, it is unclear whether the Administration followed its own procedures with regard to the non-renewal of the Applicant's contract. The Human Resources Handbook of the Department of Peacekeeping Operations explains procedures for extension of appointments and assignments of staff members serving in field missions. It states that the process of obtaining recommendations for extensions of appointment and assignment should commence 16 weeks in advance of the expiry date of appointment or assignment. It does not appear from the documents before the Tribunal that the Administration complied with its own procedures, which resulted in a belated decision being made in the Applicant's case and necessitated an urgent application, placing both parties, Counsel, and the Tribunal under pressure to consider this matter on an urgency basis.

34. The Tribunal also does not accept the Respondent's submission that the Applicant contacted the Conduct and Discipline Unit two weeks after her supervisor had recommended that her appointment not be renewed. Firstly, although the extension of appointment form was provided to the supervisor on 6 January 2012, his hand-written remarks indicate that he signed the form, recommending "[n]o extension

beyond expiry", on 10 February 2012—approximately three weeks after the Applicant contacted the Conduct and Discipline Unit. Secondly, the Applicant submits that she has had a difficult relationship with her supervisor since his arrival in July 2011—well before the decision not to renew her contract—and has sought various avenues for resolving the situation.

35. The Tribunal further finds that the Applicant may have an arguable case of legitimate expectation of renewal beyond 19 March 2012. Firstly, the documents referred to above indicate that UNMIT is continuing its training and capacity-building operations, which is the field in which the Applicant is employed, beyond 19 March 2012. Secondly, there are no issues with her performance and the budget and post appear to be available. Thirdly, the Applicant is currently employed in the UNMIT office in Dili on loan from the UNMIT office in Suai, and the form by which her loan arrangement was processed (it appears to be dated 4 August 2011) states that the effective period of her loan is from 1 July 2011 to 30 June 2012.

36. Accordingly, the Tribunal finds that no verifiable reasons have been provided by the Respondent regarding the decision not to renew the Applicant's contract. The Applicant, on the other hand, has made allegations of extraneous reasons and procedural flaws, some of which appear to be supported by the available documentation. The Applicant also presented an arguable case of legitimate expectation of renewal beyond 19 March 2012.

37. In light of the documentary evidence in this case, and in view of the issues identified above, the Tribunal finds that the contested decision appears *prima facie* to be unlawful.

Irreparable damage

38. One of the requirements for a successful application for interim relief is that the Applicant must satisfy the Tribunal that the implementation of the decision would result in irreparable harm.

39. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage.

40. The Applicant submits that "[t]he suspension of action is the only remedy available to the Applicant that can prevent the Administration from unlawfully redeploying his current post".

41. The Tribunal finds that, in the circumstances of this case, the sudden deprivation of employment for no verifiable reason, when there is an arguable case that the Applicant has an expectation of renewal, would result in irreparable damage.

42. The Tribunal is satisfied that monetary compensation alone in the face of decision-making found to be *prima facie* unlawful would not do justice to the Applicant. Therefore, in view of the circumstances in this case, the Tribunal finds that the implementation of the contested decision would cause the Applicant irreparable damage.

Conclusion

43. The three conditions for a suspension of action, required under art. 2.2 of the Tribunal's Statute, have been met in this case.

Order

44. The Tribunal orders suspension, during the pendency of the management evaluation, of the implementation of the decision not to renew the Applicant's contract.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 14th day of March 2012

Entered in the Register on this 14th day of March 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York