



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DIOP

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Louis-Philippe Lapicerella, OSLA

Counsel for the Respondent:

Bérengère Neyroud, UNOG

Bettina Gerber, UNOG

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime (UNODC), based in Bamako, Mali, is applying for a suspension of the decision [“the Second Decision”] to separate him from service on the expiry of his fixed-term contract on 31 May 2012.

2. The Applicant requested a management evaluation of this decision on 18 May 2012 and therefore makes this Application under article 13 of the Rules of Procedure of the Tribunal.

3. This is the second application for suspension of action filed by the Applicant in the last few months. In February 2012 the Tribunal issued Judgment No. UNDT/NBI/2012/029, granting a suspension of the Respondent’s decision [“the First Decision”] to separate the Applicant by non-renewal of his contract as of 29 February 2012. The Applicant had requested a management evaluation of the First Decision on 9 February 2012 but has still not received a substantive response. The Management Evaluation Unit (MEU) indicated that the case had been put on hold pending involvement of the Ombudsman.

4. On 24 May 2012 the Applicant filed a request to be authorised to submit additional evidence he only became aware of on 23 May 2012, after the filing of his Application for Suspension of Action.

5. The Application was served on the Respondent on 21 May 2012. The Respondent filed a Reply on 25 May 2012.

Facts

6. The Applicant joined UNODC on 12 January 2011 as Project Coordinator at the P4 level. The specific project he was to work on was “Assistance for the implementation of the National Integrated Programme for the control of illicit trafficking and organized crime in Mali” (“PNI”).

7. The Applicant asserts that he has performed satisfactorily, and has received no indication that there were any performance-related concerns. The Tribunal has seen no evidence to the contrary.

8. The Applicant's position, when advertised, was described as "related to a project and initial appointment will be for one year. Any extension is subject to availability of funding."

9. The budget for 2012, which included the Applicant's post costs, was approved on 9 January 2012. The PNI was due to continue until 30 November 2012.

10. On 9 January 2012, the Applicant received an email notification from the Human Resources Management Service of UNODC in Vienna, advising him that his contract would be renewed until 29 February 2012.

11. On 11 January, the Applicant received a further email from his supervisor, Mr. Alexandre Schmidt, also in Vienna, which advised him that his contract would not be renewed, but did not give any explanation as to why not.

12. On 13 January, Mr. Schmidt wrote again to the Applicant, advising that he had just received a very embarrassing email from the Minister of Justice of Mali which he had to keep confidential in view of the Applicant's persistent position in relation to the Coordinator of PNI. He went on to state that this was the more regrettable because he had such esteem for the Applicant.¹

13. On 17 January the Applicant wrote to Mr. Schmidt requesting further clarification of the reasons behind the non-renewal of his contract, given that there was funding in place, the work was being performed, and the project on-going. At the time of the issuance of UNDT/NBI/2012/029, no response had been received by the Applicant.

¹ Free translation from French. The original reads as follows: "Pour ton information je viens de recevoir un mail tres embarrassant du ministere de la justice du Mali que je dois garder interne pour confidentialite quant a ta position continue vis-à-vis du role du coordonnateur du PNI. Je regrette au plus fort cette situation d'autant plus que je t'estime beaucoup."

14. Receiving no further information from UNODC, the Applicant approached the Minister of Justice in Mali to enquire as to the nature of the complaint against him. The Minister expressed surprise and on 16 February 2012, sent the Applicant a formal letter stating that his office had never sent any email to UNODC complaining about the Applicant's work or asking that he be removed from his post.

15. The Minister of Justice of Mali also signed a testimonial, stating his complete satisfaction with the work of the Applicant.

16. The Tribunal's Judgment UNDT/2012/029 was issued on 22 February 2012. On 23 February 2012, the Applicant received an email from Mr. Schmidt, with the subject heading: "Complains [sic] from gvt officials, donor, and UNODC staff (harassment)".

17. The email presents a catalogue of criticism, both about the Applicant's performance as a Project Coordinator—dating well back into the previous year—and also about his relations with his colleagues and staff in UNODC. The email invites the Applicant to respond to the allegations. In his response, the Applicant expressed surprise at the timing of the message and indicated that "it strikes sharply as an attempt to retaliate".

18. On 22 March 2012, there was a coup d'état in Mali, and on 8 April 2012 the Applicant was evacuated. He was redeployed in the Regional Office in Dakar, Senegal and began working there on 10 April 2012.

19. On 7 May 2012, Mr. Schmidt received an email from a representative of the Embassy of Denmark in Mali, one of the main donors funding the PNI, who stated that "[t]he current situation calls for prudence in order to safeguard the future of the project, and I believe it calls for a total suspension including of the contracts held by international staff."

20. Purportedly as a result of receiving this message, Mr. Schmidt wrote to the Applicant on 8 May 2012, as follows:

I wish to inform you of the new development pertaining to the UNODC project for Mali...and especially of the major donor call and written request for a total suspension of the project, including the contracts held by international staff. Please be also advised that the second donor to the project expressed—along with the first donor—same positioning [sic] and will formally advise us. Under these circumstances and in light of this development, UNODC might not be in a position to extend your contract beyond its current expiry date of 31 may 2012.

21. On 11 May 2012, Mr. Schmidt received an email from a representative of the second donor, Luxembourg, which also expressed the view that the UNODC should limit its project costs, including personnel costs.

22. On 14 May 2012, the Applicant was formally advised by Human Resources that his contract would indeed not be extended beyond 31 May 2012 for the reasons stated above.

23. According to the Applicant, he is the only international staff member of the project who has been treated in this way, and indeed, he has produced evidence to the Tribunal which does suggest that the two other international staff of the project, FQ and AS, are funded at least in part under the same project budget, known as MLIU58.

The Parties' submissions

24. The Applicant contends that the Second Decision is *prima facie* unlawful because it breaches the express order of this Tribunal in Judgment No. UNDT/2012/029. Simply because the Respondent has found a “new” or “alternative” reason to seek to justify the non-renewal, does not give him the right to go ahead and not renew in disregard of the Tribunal’s order.

25. The Applicant also argues that insofar as the Respondent took the decision as a result of the comments of the two donors, this amounts to the fettering of the Respondent's discretion and is unlawful as such. Pursuant to article 100 of the United Nations Charter, the Secretary-General should not accept any instruction from a national government. In any event, this is just a pretext, since the norm within the Organization is that staff who must be evacuated in circumstances such as those in which the Applicant found himself, are redeployed or returned to their home country whilst their salary continues to be paid. Furthermore, the donors have not withdrawn funding, nor have they brought the project to a close.

26. The Applicant argues that a number of circumstances indicate bad faith in the decision-making process. He suggests that the Applicant's supervisor, Mr. Schmidt, instigated the messages from the donors. He points out that after the coup on 22 March 2012, when the project was revised, all the donors agreed that funding of personnel would not be affected.

27. The Respondent submits that the decision not to renew the Applicant's fixed-term appointment is not *prima facie* unlawful as the Applicant's appointment is renewable subject to the availability of funding. The donors of the project requested UNODC to suspend implementation of the project; therefore, there are no longer funds available to renew the Applicant's appointment beyond 31 May 2012. The Respondent denies that there is a conspiracy against the Applicant, and refutes the contention that the Second Decision is in breach of the Tribunal's order, arguing that the latter suspended only the First Decision and not the Second Decision.

28. The Applicant contends that the matter is urgent because the non-renewal will take effect in a few days' time. The Respondent states that there is no particular urgency, since the Applicant was first informed of the decision on 8 May 2012 and in any event, his contract carries "no expectancy of renewal".

29. On irreparable harm, the Applicant contends that suspension of action is the only means of preserving his rights and that the loss of employment results not merely in economic loss, but, citing *Diop* UNDT/2012/029, “there is more to the harm caused by the non-renewal of a contract than that. There is a loss of career prospects, loss of self-esteem, and unquantifiable potential harm to the Applicant’s professional reputation.”

30. The Respondent argues that any economic loss suffered by the Applicant is compensable, and therefore not “irreparable”. Furthermore, the Respondent argues that there is unlikely to be any economic loss suffered by the Applicant as he is on secondment from the Senegalese Police Force and will therefore have a position to return to when his contract with UNODC expires.

Considerations

Prima Facie *unlawfulness*

31. A decision not to renew a fixed-term appointment may be unlawful where countervailing circumstances render it so. It is assumed that the Respondent acts in good faith when taking the decision not to renew a contract, and any indication that he has not, or that prejudice, bias, or other improper motives are at play will taint the whole decision making process and render it unlawful.²

32. At this stage, the Tribunal need only find a *prima facie* case of unlawfulness. “[T]he combination of the words ‘appears’ and ‘*prima facie*’ shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt.”³

33. In the present case, it could be said that the 22 March 2012 coup d’état in Mali and consequent donor concerns about funding are quite legitimate justifications for giving consideration to adjusting contractual arrangements. However, this Tribunal has

² UN Administrative Tribunal Judgment No. 885, *Handelsman* (1998); *Azzouni* UNDT/2010/005; *Abdalla* UNDT/2010/140.

³ *Corna*, Order No. 80 (GVA/2010).

ample reason to suspect that this is a case of retaliation and/or pure prejudice in the decision-making process, given the history of the case.

34. The Tribunal is disturbed that the Respondent has chosen to flout its Judgment No. UNDT/2012/029 by seeking not to renew the Applicant's contract when a management evaluation is still pending in respect of the First Decision of 9 February. The Tribunal considers that if the Respondent believes that some *novus actus interveniens* such as a coup d'état so alters the position of the Parties as to require reconsideration of the previous Order, then the appropriate response is to approach the Tribunal for assistance. Simply to proceed with an alternative scheme for separating the Applicant is not only an act of contempt, but invites the Tribunal to consider that move to be tainted by extraneous motives.

35. In *Gaskins*, UNDT/2010/119, the Tribunal held that it was wrong for the Administration to violate a staff member's rights simply at the behest of a Member State. The circumstances in *Gaskins* were not the same as in the present case, but nonetheless it is true that, according to the bilateral agreements between the donors and the UNODC, personnel recruited to work on the project do so under contracts regulated by the Rules, Regulations and directives of the United Nations. Thus it is not appropriate for a Member State, be it a donor or otherwise, to interfere with those contracts.

36. The United Nations has staff operating in many hazardous and volatile locations and it is therefore common that staff must cease their local work and be evacuated, just as occurred with the UNODC staff in Mali following the coup. The United Nations' Security Policy Manual, published by the Department of Security Services, states that:

During the period of evacuation to the destinations authorized by the USG DSS, staff members will continue to be paid their net base salary plus post adjustment, mobility hardship allowance applicable at the official duty station, and rental subsidy of the official duty station plus the security evacuation allowance...

If staff members and/or their eligible family members are not authorized to return to the duty station within 30 days following the evacuation, each respective organization will decide with regard to:

- a. reassignment, temporary or otherwise, of the staff member together, as applicable with his/her eligible family members;
 - b. travel to the home country
37. It is therefore envisaged that in the normal course of events, where an evacuation occurs, staff are not automatically cast aside. Indeed, in the present case, the Applicant was redeployed to Dakar.
38. In spite of the remarks of the donors, UNODC is not obliged to terminate (or not renew) the contracts of international—or any—staff, since the project is on-going.
39. Furthermore, at some time after 29 March 2012, UNODC prepared a document entitled “Project Revision” which was, according to the Applicant, approved by the donors. The said document states that:
- It should however be noted that by email of 29 March 2012, the Regional Representative informed the Headquarters that following consultations with the donors to the project, it was agreed to suspend all activities in Mali after the coup d’état of 22 March 2012. However, all donors agreed that personnel and office costs can nevertheless be charged against the project.
40. The Applicant asks the Tribunal to infer that the Second Decision is tainted by bad faith and that one of the indicators of this is that the two pertinent emails from the donors seem suspiciously to place undue importance on the issue of the contracts of ‘international staff’. The Applicant suggests that the authors of these messages were put up to it by Mr. Schmidt. The Tribunal must reserve its opinion on this at this stage: however, given the nature of the 23 February 2012 email from Mr. Schmidt to the Applicant, it does not seem altogether unlikely that the Applicant’s supervisor did indeed use the donors to achieve his own desired result—separation of the Applicant.
41. However, the Tribunal cannot but be influenced by the circumstances surrounding the Second Decision: that is, the previous attempt—which this Tribunal found to be

prima facie unlawful—to separate the Applicant, and the hasty response to the Tribunal’s Judgment by Mr. Schmidt.

42. It is abundantly clear that the allegations formulated in the email of Mr. Schmidt to the Applicant on 23 February 2012 date from well back into 2011 to early 2012. It is noteworthy that the Judgment of this Tribunal of 22 February 2012—the day before Mr. Schmidt’s email—not only found in favour of the Applicant but criticised the conduct of Mr. Schmidt. It seems to this Tribunal to be the weirdest of coincidences that the email containing all these allegations followed immediately after the issuance of the Judgment. There can be only one logical conclusion to this most unbecoming conduct of the part of the supervisor of the Applicant. In any contractual relationship the balance of power is always with the employer and this is why rules have been made and international conventions have been erected to protect the rights of the employee. Strict rules apply when an employer has to deal or cope with a defaulting employee. The action of Mr. Schmidt as the supervisor smells like a personal vendetta against him and seems to be a direct consequence of the Judgment granting the Applicant suspension of action. This is a most lamentable course of conduct.

43. Had Mr. Schmidt been so minded he would have brought to the attention of the Applicant all of the alleged shortcomings he raised in the 23 February 2012 email long before then, and taken the appropriate remedial measures in accordance with the Organization’s performance appraisal system. There is no evidence that this has been done. Instead Mr. Schmidt has used all the power conferred upon him by virtue of his position to pounce brutally on a subordinate.

44. The argument of the Respondent that the suspension of action granted by the Tribunal on 22 February 2012 was implemented, and that the Second Decision not to renew the contract of the Applicant appears to be an ingenious submission but it is to say the least specious. The Tribunal takes the view that this is a subterfuge found by the Respondent not to renew the contract. In fact what the Respondent is doing is to invoke a new justification for his First Decision. This is compounded by the fact that the Applicant

is the only member of the international staff targeted by the Respondent. Two other staff members who are being funded albeit in part only by MLIU58 are still in post and both of them will apparently have their contracts renewed in the coming months notwithstanding the coup d'état. The Tribunal cannot condone the use of such a colourable device in these circumstances.

45. Taking into account this conduct by the Applicant's supervisor, and the flouting of the Tribunal's order in Judgment No. UNDT/2012/029, this Tribunal has no hesitation in finding that there exists a *prima facie* case of unlawfulness in the taking of the Second Decision.

Urgency

46. The requirement for particular urgency is clearly met in this case, since the Applicant's contract will expire on 31 May 2012. The Applicant approached the Tribunal within four days of receiving formal notification of non-renewal. There are only a few days to go before the Applicant will be separated. The matter is clearly of particular urgency.

Irreparable Harm

47. As stated in *Tadonki* UNDT/2009/016:

a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.⁴

⁴ Paragraph 13.1

48. The Tribunal reiterates its remarks in *Diop* UNDT/2012/029 that whereas mere economic loss deriving from the loss of employment can be compensated in damages, there is more to the harm caused by the non-renewal of a contract than that. There is a loss of career prospects, loss of self-esteem, and unquantifiable potential harm to the Applicant's professional reputation.

49. This Tribunal has no difficulty in concluding that the deprivation of employment in the present case, motivated as it appears *prima facie* to be by bias, prejudice and bad faith, will cause irreparable harm to the Applicant.

Conclusion

50. The Application is granted. The Respondent is ordered to suspend the Second Decision not to renew the Applicant's contract pending management evaluation of the Second Decision.

(Signed)

Judge Vinod Boolell
Dated this 28th day of May 2012

Entered in the Register on this 28th day of May 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi