UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/035
Judgment No.: UNDT/2012/091
Date: 15 June 2012
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for the Applicant:
Miles Hastie, OSLA
Seth Levine, OSLA

Counsel for the Respondent:
Miouly Pongnon, UNON

Introduction

1. The Applicant joined the United Nations Office at Nairobi's (UNON) Joint Medical Services (JMS) on 8 June 2010 pursuant to an Agreement between UNON and the members of the United Nations Country Team Somalia (UNCT) dated 5 March 2010. Her fixed-term appointment was subsequently renewed up to 6 June 2012.

2. The Applicant prays for a suspension of action of a decision not to renew her appointment beyond 6 June 2012. The decision was conveyed to her in a memorandum dated 6 June 2012.

Facts

3. On 5 March 2010, UNON and UNCT entered into an Agreement whose stated objective was to establish the terms and conditions of medical services to be provided by UNON as service manager in coordination with the JMS to UNCT.

4. The Applicant's appointment was made pursuant to and in furtherance of the Agreement and she joined UNON/JMS on 8 June 2010. Her appointment was subsequently extended up to 6 June 2012. The Applicant's First Reporting Officer (FRO) was the Chief of UNON/JMS.

5. On 16 March 2012, the Applicant wrote to her FRO requesting for annual leave from 6 to 20 June 2012 in order to attend the International Conference on Infectious Diseases in Bangkok, Thailand. Her FRO responded on the same date advising her, inter alia, as follows:

> [Applicant] pls put in the eleave system also so I can approve. I hope you enjoy the conference. It look [sic] interesting. As I explained to you earleir [sic] such international conferences are beyond the budget of what the UN can support financially from the JMS budget. However even profession [sic]development activites [sic]that we do on our own and at our own time and expense are to be recorded in the section of your epas that is about professional development. As it is for the next cycle 2012-2013 whch [sic]we will start in april I remind you to eneter [sic] it then.

6. On 24 March 2012, the Applicant wrote an email entitled "Report on my misconduct" to her FRO. In the email, she raised various concerns about her work environment including the difficulties that she was experiencing working with the nurses in JMS. The FRO responded on 26 March 2012 advising her, inter alia, as follows:

> Given that it appears that reasons of mental health have caused you to be unable to return from leave on the appointed date, please indicate as soon as possible (within 14 days) the number of days you anticipate you will need to be on sick leave….Please note in this connection, you will be required to provide medical reports from a psychiatrist of at least ten years standing in the profession, consistent with the requirements of ST/AI/2005/3, Sick leave, to enable certification of your sick leave and certification of your medical clearance for fitness to return to work. In order to safeguard your right to confidentiality I request that you send the full medical reports to the chair of the Medical directors working group…

7. In another email dated 26 March 2012, the Applicant informed her FRO that she may have misunderstood her 24 March 2012 email and that she was ready to work but that she was not yet ready to attend to patients. Her FRO responded to the email on 26 March 2012 informing her that it was not for the Applicant to determine whether she was fit to return to work and that she was not cleared to return to work until she was officially cleared by the Chair of the Medical Directors as advised in the FRO's email of 26 March 2012.

8. On the morning of 27 March 2012, the Applicant's FRO called her on her mobile phone and warned her of possible arrest by the UNON gate security if she was spotted anywhere near the UNON compound. Further, she would only be allowed into the UNON compound if she was escorted by her colleagues from JMS.

9. On 28 March 2012, UNON's Chief of Human Resources Management Service wrote a memorandum to the Applicant reiterating that the Applicant must submit, by 11 April 2012, a medical note or certificate indicating the number of days necessary for her to remain on sick leave and, by 17 April 2012, a detailed medical report by a qualified psychiatrist indicating whether the Applicant was fit to return to full duty or indicating what aspects of her duty must be modified in

order to accommodate specific medical conditions that she was diagnosed as having.

10. On 12 April 2012, the Applicant filed a workplace discrimination and harassment grievance in accordance with the provisions of ST/SGB/2008/5, "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority", with the Assistant Secretary-General of the Office of Human Resources Management (OHRM) in New York. She received a response from the Director General of UNON stating that a Panel would be convened to review her complaint.

11. The Applicant nevertheless returned to work without the required psychiatric clearance and on 30 May 2012, her FRO wrote to her to inform her of the cancellation of their weekly coordination meeting until further notice. On the same date, her FRO requested her to finalize one of her work-related reports by 5 June 2012.

Filing of the Application

12. At approximately 4.00 p.m. (Nairobi time) on 6 June 2012, an official of UNON's Human Resources Management Section hand delivered a memorandum dated 6 June 2012 notifying the Applicant of the expiry and non-renewal of her fixed-term appointment. The memorandum is reproduced below:

> Effective today, please be advised that your fixed-term appointment expired on its stated expiry date of 6 June 2012. As you may be aware, your appointment as a Medical Officer at UNON was made in furtherance of the terms of a certain Letter Agreement dated 5 March 2010 between UNON and the Members of the United Nations Country Team Somalia. It has been decided that this Agreement will not be continued beyond 30 June 2012. Accordingly, UNON is not in a position to renew your appointment...

13. Upon receipt of this memorandum, the Applicant immediately consulted the Office of Staff Legal Assistance (OSLA). She filed a request for management evaluation of the decision at 4.50 p.m. on 6 June 2012 and thereafter filed an *ex*

parte Application for suspension of action at approximately 6.00 p.m. on the same day.

14. On the same date, the Tribunal issued Order No. 077 (NBI/2012) suspending the contested decision pending review of the Respondent's submissions and a full determination of the Application. The case was set down for hearing on 11 June 2012.

15. The Respondent filed a Reply on 8 June 2012. The matter was heard in closed sessions on 11 and 12 June 2012 during which the Tribunal received testimony from the Applicant. At the end of the first day of the hearing, the Tribunal posed several questions to both Counsel and requested their responses on the second day of the hearing. The questions were:

a. What the definition of "Notice" is by law especially where the Respondent purports to give notice.

b. What the expression "close of business" means vis-à-vis the expiry date of the Applicant's appointment on 6 June 2012.

c. What the term "implementation" means and when a personnel action becomes effective. In this case, whether the personnel action in relation to the non-renewal of the Applicant's appointment became effective on 6 June 2012.

d. Whether there was bad faith on the part of the Respondent or any attempts by the Respondent to oust the jurisdiction of the Tribunal.

16. Towards the end of the first day of the hearing, the Respondent filed a letter dated 31 May 2012 from UNON's Director of Administration to the UN Resident Coordinator/Humanitarian Coordinator for Somalia, who is also the UNCT signatory to the Agreement dated 5 March 2010. The letter is partly reproduced below.

> Further to your exchanges and discussions with [Applicant's FRO], I regret to inform you that due to the evolving situation in UNON operations in Kenya and changes in our staffing and

> mandates we are unable to continue with provision of medical technical support to Somalia UN Country Team beyond the expiry date of the 2010 MOU between your office and UNON. Therefore, JMS/UNON will discontinue the technical support to Somalia UNCT with effect from 1 July 2012.

17. At the end of the hearing on 12 June 2012, the Tribunal made an oral Judgment granting the Application and suspending the implementation of the contested decision pending the outcome of management evaluation. The Tribunal further informed the parties that a reasoned and written decision would be issued by Friday, 15 June 2012.

18. On 13 June 2012, the Tribunal issued Order No. 081 (NBI/2012) in which it set down in writing the said oral Judgment and consequential orders.

Applicant's case

19. The Applicant's case as pleaded before the Tribunal is summarized below:

Prima facie unlawfulness

20. The Applicant filed a complaint of harassment and abuse of authority against her FRO with OHRM in New York on 19 April 2012. The complaint is a protected activity as defined by ST/SGB/2005/21, "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations". In order to demonstrate that there was no retaliatory conduct against her, the burden of proof lies on the Administration to show by conclusive evidence that the non-renewal of her appointment did not relate to retaliation.

21. As a result of filing the complaint, she was suspended from carrying out her duties. There had been numerous problems between her and her FRO which had caused her significant distress.

22. Whereas, normally, a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives, the refusal to disclose the reasons for the contested decision shifts the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives. If the Administration does not comply with a

Tribunal's order to disclose the reasons for an administrative decision as such it is entitled to draw an adverse inference from the refusal.

23. The Applicant was never notified that her contract was not to be renewed. She had approached a Human Resources Officer who informed her that if her contract was not to be renewed, she would have been given notice. In addition, she had been assigned duties that would require action beyond 6 June 2012 which led her to believe that her appointment would be renewed. She had patients booked to see her beyond 6 June 2012 and additionally, she was to take up medical evacuation duties assigned to her by her FRO which would ordinarily take two weeks. As recently as 30 May 2012, she received an email that related to ongoing arrangements that would lead to believe that she would be working in JMS after 6 June 2012.

24. The decision not to renew her contract and to immediately separate her from service was *prima facie* unlawful as it was served at approximately 4.00 p.m. The Applicant submits that the only rationale for this was to prevent her from seeking timely redress against the decision and that this is fundamentally incompatible with the obligation to act "fairly, transparently and justly".

25. The reasons proffered by the Respondent in the 6 June 2012 notice was that her appointment was not renewed as a result of the termination of the Agreement dated 5 March 2010 between UNON and UNCT. The Applicant submits that the said Agreement was subject to review by UNON and UNCT annually. According to the terms of the Agreement, termination required six months' written notice.

26. The Applicant had never seen the 31 May 2012 letter terminating the Agreement between UNON and UNCT until it was tendered towards the end of the first day of the hearing. The letter raised more questions than it answered. In particular, the letter purports to give one month's notice of termination whereas the Agreement stipulated six months' written notice. In addition, the Applicant submits that the termination letter originated from UNON within a short period following the filing of the Applicant's harassment complaint against her FRO. The Applicant further submits that the only inference to be drawn from this is that

the 31 May 2012 termination notice was sent to UNCT on the instructions of her FRO.

27. The issued guidelines on separation from service provide that it is best practice in the case of fixed-term appointments that staff members are provided 30 days' notice. In this case, this best practice was not followed. She was informed 30 minutes before the close of business in UNON about the intended non-renewal of her appointment yet the Administration stated that it had been aware from the third quarter of 2011 that her appointment would not be renewed.

Urgency

28. The Application is urgent as the Applicant was given less than one hour's notice of her immediate separation. This in itself demonstrates ill motive that there was a conscious effort to frustrate her legal challenge of the contested decision.

29. The Application for a suspension of the decision was made before the close of business on 6 June 2012 and before the expiry of her appointment and the Tribunal subsequently acted on it and issued an Order.

30. The purpose of a notice is to inform someone that something will happen in the future and not to inform them that it has already happened. The Applicant submits that the Management Evaluation Unit (MEU) acknowledged receipt of her request at 4.50 p.m. and that her filing was timely, considering that there was no time provided for her to seek redress.

Irreparable damage

31. A suspension of action is the only way to preserve a staff member's rights which cannot be adequately compensated for in monetary terms and that an obvious illegality should not allowed to continue simply because the wrongdoer is able and willing to compensate for the damage inflicted. Monetary compensation should not be used as a cloak to shield what is a blatantly unfair procedure in the decision-making process.

32. The Applicant will suffer emotional, professional and financial distress if the contested decision is implemented. She has been going through a difficult period because of her various attempts to seek remedy for her hostile work environment. Justice being therapeutic, the denial of this opportunity to have the impugned decision suspended will cause the Applicant irreparable damage.

33. A denial of her present Application will cause the Applicant professional harm because her profession requires her to study and to be alert and that her professional abilities will be wasted.

34. Further, the implementation of the impugned decision will mean that the Applicant's performance evaluation will remain incomplete denying her the opportunity to seek other employment in the UN.

Respondent's case

35. The Respondent's case as pleaded before the Tribunal is summarized below:

Prima facie unlawfulness

36. The Applicant is unable to show that the decision not to renew her fixed-term appointment was *prima facie* unlawful because she had no legitimate expectancy of renewal.

37. The Applicant has not tendered any evidence that can reasonably support a finding, even on a *prima facie* basis, that the non-renewal of her fixed-term appointment was motivated by improper motives. Whilst the Applicant claims that she was provided no reason for the non-renewal, the text in the 6 June 2012 memorandum gives a specific reason where it is stated that the Agreement between UNON and UNCTS dated 5 March 2010 would not be continued beyond 30 June 2012.

38. The financial resources used to fund the Applicant's post derived from the terms of the Agreement and upon its termination on 30 June 2012, UNON would no longer be able to fund an extension of the Applicant's fixed-term appointment.

39. The decision not to renew the Applicant's fixed-term appointment constituted a valid exercise of the Secretary-General's authority, which may only be vitiated upon a showing by the Applicant that it was motivated by extraneous considerations or otherwise violated a right she possessed as a staff member. No such showing has been made.

Irreparable damage

40. The Applicant has not shown that the non-renewal decision will result in irreparable damage to her rights as a staff member. She has made no factual showing to support her claim that she would sustain irreparable harm if the suspension application were not granted. All the harm that the Applicant may suffer is adequately compensable by a monetary award if she succeeds in her case on the merits.

Urgency

41. The Applicant is unable to show particular urgency because the non-renewal decision had already been implemented before she filed the Application for suspension of action on 6 June 2012.

42. An order for suspension of action cannot therefore be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

43. The Applicant received the impugned decision at about 4.00 p.m. on 6 June 2012, the very day it became effective automatically at close of business hours. As such, the decision had already been implemented by the time she filed the request for suspension of action sometime after the close of business hours at the Nairobi duty station which is at 4.30 p.m. These facts work to deprive the Tribunal of the authority to issue a suspension order.

44. Moreover, because the impugned decision had been implemented before the Respondent received Order No. 077 (NBI/2012), it is not possible for the Respondent to comply with it.

45. The Applicant has failed to make the requisite showing of each of the elements of the test prescribed in art. 2.2 of the UNDT statute. Therefore the UNDT lacks the requisite factual or legal basis to grant a suspension of action in respect of the Secretary-General's decision not to renew the applicant's fixed-term appointment beyond its stated expiry date of 6 June 2012.

46. There have been no attempts to oust the jurisdiction of the Tribunal and the Respondent acted consistently with the applicable rules and the Applicant's Letter of Appointment when it decided not to renew the Applicant's appointment.

Considerations

47. Article 13 of the UNDT Rules of Procedure provides for the suspension of the implementation of an administrative decision where the said decision is the subject of an on-going management evaluation pending the outcome of such evaluation.

48. Under the said Article 13, three conditions must be satisfied before the Tribunal can grant an order for suspension of a contested administrative decision. These are (1) where the decision appears prima facie to be unlawful, (2) in cases of particular urgency and (3) when its implementation would cause irreparable damage.

49. In presenting the application, M. Hastie esq. for the Applicant argued that the requirement of prima facie unlawfulness was satisfied. He referred to annex 6 of the Application and submitted that the Applicant having only two months before filed a pending harassment complaint against her supervisor, the Chief of Joint Medical Services, UNON, the decision not to renew her contract was a direct response to the harassment complaint. Counsel continued that the filing of the complaint was the entitlement of the Applicant in the circumstances in which she found herself and that her action in that regard is a protected activity.

50. It was the submission of Counsel that the Applicant must be protected from retaliatory action and that the burden of proving that the decision not to renew the Applicant's contract was not retaliatory had shifted to the Respondent

to discharge. A failure to discharge this burden, he said would establish that the impugned decision is unlawful.

51. Counsel also submitted that in circumstances where the Administration relies on a particular reason as to why a decision was taken, it must show that such is the case. The Applicant's Counsel invited the Tribunal to examine the terms of the Respondent's annex R/1 which is an Agreement between United Nations Office at Nairobi (UNON) and the members of the United Nations Country Team, Somalia (UNCT) which took effect from 5 March 2010. He pointed out that the Respondent had in his Reply to the Application claimed that the non-renewal of the Applicant's contract was based on the annexed agreement R/1 and referred to its paragraph 7 where it is provided that it was to be reviewed annually or upon the written request of either party.

52. He additionally called attention to paragraph 13(i) of the document which provides that the Agreement may be terminated by either party upon six months written notice and submitted that since the required six months' notice was not given by either of the parties to the agreement, the decision not to renew the Applicant's contract was unlawful. It was also the submission of Counsel that the attempt to separate the Applicant on 6 June 2012 was extremely fishy as UNON had failed to comply with its own guidelines that prescribed that one month's notice be given prior to separation from service.

53. On the element of urgency, the Applicant's Counsel argued that where, as in this case, a staff member is served with a notice of non-renewal of his or her contract of employment within less than an hour to the expiry of such contract, the issue of urgency is obvious and goes without saying. He submitted that the requirement of urgency had been met.

54. The Applicant gave sworn testimony on the issue of irreparable damage. She told the Tribunal that she would suffer serious emotional distress, damage to her professional career and financial ruin if the decision not to renew her contract is not reversed. She testified also that she had been made to undergo a difficult emotional and psychological period and that since November 2011; she had made efforts to seek remedy for work-related hostility at the JMS.

55. The Applicant stated further that any action aimed at preventing her from attending to her duties would damage and destabilize her as a professional especially since her E-PAS remained undone hampering her ability to be employed in the future. In answer to a question put to her in cross-examination, the Applicant denied frustrating any efforts to give her a performance appraisal adding that she took steps to compel her reporting officer to initiate it. Replying to another question, she denied questioning her own mental capacity in an email to her supervisor.

56. She added that the sudden and unexpected non-renewal of her contract would jeopardize financial commitments already made by her. In re-examination, the Applicant stated that the Director-General, UNON was yet to convene a panel to look into her harassment complaint.

57. Counsel for the Applicant submitted that monetary damages are insufficient to compensate for unhappiness, emotional distress and the stunting of career development. He cited the decision in *Tadonki* UNDT/2009/016, where it was held that 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. He urged the Tribunal to hold that the element of irreparable damage was present and established.

58. In response the learned Counsel for the Respondent, Ms. M. Pongnon submitted that the Applicant had not made any showing of the three elements required to grant her Application.

59. With regard to the requirement of prima facie unlawfulness, she argued that a valid and lawful reason existed on which the impugned decision was taken. Respondent's Counsel referred to annex R/2, a letter dated 31 May 2012 addressed to the representative of the UNCT, Somalia, and signed by UNON's Director of Administration. Counsel submitted that annex R/2, which was only filed before the Tribunal after the oral arguments and the submissions of the Applicant's Counsel earlier in the day, had satisfied the provision of paragraph 13(i) annex R/1, the Agreement between UNON and UNCT, for notice to be given before its termination.

60. Counsel argued that an entitlement to one month's notice did not exist in respect to the Applicant's fixed term contract. She pointed out that the Applicant's letter of appointment was clear on this. With regards to the UN Guidelines on Separation from Service on Expiration of Service, Counsel submitted that the prescription of one month's notice was merely aspirational, that giving the Applicant only one month's notice was not unlawful or illegal and that the Applicant had no right to a renewal of her contract. The requirement to make a showing as to unlawfulness, she submitted, was not met.

61. Concerning the element of urgency, learned Counsel for the Respondent submitted that no showing had been made.

62. As to the element of irreparable damage, it was Counsel's argument that most of the Applicant's testimony on this requirement only went to show tangible financial loss which could be compensated in damages. She submitted that irreparable damage was not established.

Urgency

63. In considering the pleadings, evidence tendered and submissions made before the Tribunal and the three requirements that must be satisfied for this Application to succeed, it is unnecessary to belabour the element of urgency. For a staff member who gets a thirty-minute notice of expiry and non-renewal of her contract, the situation could not be more urgent. There is no gainsaying the fact that the Application passes the test for urgency. The Tribunal finds that in the circumstances, the requirement for urgency was met.

Irreparable damage

64. With regard to the element of irreparable damage, the Respondent's Counsel had submitted that most of the oral evidence tendered by the Applicant went to show that she would merely suffer tangible financial loss. The Applicant's Counsel urged the Tribunal to find that monetary compensation cannot be sufficient for unhappiness and the arrest of career development among other losses that were bound to result if the Application was not granted.

65. In her sworn testimony, the Applicant told the Tribunal that she had been undergoing harassment at the hands of her supervisor in the workplace who on one occasion had threatened to have her removed by security officers if she came to work. It was her testimony also that she had passed through a difficult emotional and psychological period due to this state of affairs. By November 2011, she decided to address the issue and had to file a harassment complaint. She added that being prevented from attending to her duties would also damage and destabilize her professionally.

66. The harassment complaint is annex 6 of the Application. There is unrebutted evidence that in spite of the complaint being filed since 12 April 2012, action is yet to be taken on it. The Applicant in her oral evidence also enumerated some of the financial losses she would suffer if the Application was not granted. The Tribunal agrees with the Respondent's Counsel that such financial losses can be compensated but the Applicant's testimony concerning the emotional and psychological damage that would result remain completely unchallenged.

67. After a full and proper consideration of the evidence and submissions, the Tribunal makes no hesitation in finding and holding that the element of irreparable harm has been satisfied in this Application.

Prima facie unlawfulness

68. The Applicant's Counsel had submitted that the non-renewal of her contract was a response to a harassment complaint filed by the Applicant in April 2012 and that the said harassment complaint had not yet been addressed by the Administration. The Applicant pleaded the harassment complaint as annex 6 of her Application and testified orally about it. While learned Counsel for the Applicant righty submitted also that the burden was on the Respondent to show that retaliation based on the harassment complaint was not the reason for the non-renewal, the Respondent did not call evidence in rebuttal or make any efforts to discharge that burden. This failure on the part of the Respondent is fatal to this case.

69. Still on the element of unlawfulness, the Applicant's Counsel had pointed out that the agreement R/1 between UNON and the UNCT Somalia, which was the basis for the Applicant's employment, had provided in its paragraph 13(i) for termination of the said agreement. It was his submission that the six-month notice that was required to be given by the party wishing to terminate the agreement had not been given by UNON.

70. The Respondent's Counsel had submitted that R/2, a document purportedly made by UNON on 31 May 2012, less than one week to the decision not to renew the Applicant's contract satisfied the requirement for the terminating party to give six months' notice. She had also urged that the Applicant under the express terms of her contract was not entitled to a one month notice and although prescribed by the guidelines, a one month notice was only aspirational.

71. The Tribunal having examined R/2 in the light of paragraph 13(i) of R/1 finds that on the face of it, the condition stipulated for termination of the UNON/UNCT contract had not been met.

Notice of expiry of contract and non-renewal

72. The Tribunal had directed Counsel for the parties to address it on the meaning of giving of notice in law and the issue of when the expiry date on a contract of employment ends. M Hastie for the Applicant referred the Tribunal to staff rule 3.1(7) where the word "notice" appears. He also referred to chapter 9 of the staff rules on separation from service.

73. He cited the definition of the word "notice" in the Oxford English Dictionary which suggests a warning of something that will happen in the future. No notice therefore, Counsel urged, could be given of something that had expired. In the context of this case therefore and in any employment contract, a notice of non-renewal to an employee must be properly given. A proper notice under the Administrative guidelines of the United Nations on separation from service is a thirty-day notice, not a thirty-minute one. He submitted that there is a legal expectancy of proper administrative conduct on the part of UNON.

74. The Respondent's Counsel while addressing the Tribunal on the meaning of "notice" referred to the Applicant's letter of appointment and submitted that on the express terms of the said letter, there was no requirement for notice to be given. The contract had run its course and expired on 6 June 2012 at close of business which for JMS, UNON is 4.30 p.m. Nairobi time.

75. The Tribunal in considering the meaning of "notice" in law, had recourse to definitions of the word in the "Shorter Oxford Dictionary" volume 2, 6th edition, 2007; "the Webster's Ninth New Collegiate Dictionary" 1990 and the "Dictionary & Thesaurus" by Geddes & Grosset, 2005.

76. All of these dictionaries define the word "notice" (as it is relevant to this case) as an announcement, intimation or warning by one of the parties to an agreement that it is to terminate at a specified time in the future. Additionally, the Guidelines on Separation from Service on Expiration of Appointment states in its paragraph 2 that although the rules do not require notice that a fixed term appointment will not be renewed, it is good administrative practice to do so, typically one month before the end of the appointment.

77. The Respondent had argued that he was not required to give notice of non-renewal to the Applicant but that he had nevertheless gone ahead to give her a thirty-minute notice on 6 June 2012.

78. The question that arises on this score is: where the Respondent purports to give notice in spite of submitting that he is not required in law to do so, can he choose what length of notice he can give? In other words, when the Respondent, in his magnanimity and in exercise of good administrative practice, elects to give notice to a staff member in spite of not being bound to do so, does it not become imperative that he must abide by his own published administrative guidelines as to how such notice is to be given?

79. As Applicant's Counsel submitted, it is utterly nonsensical to purport to give a staff member who has served the Organization for not less than two years thirty minutes' notice of non-renewal. A claim of a right to give an employee, who has not committed any offence or misconduct a thirty minutes notice, as is

being urged in this case, is unfortunate, amounts to a petty and disgraceful game and portrays irresponsible managerial practice.

Implementation of expiry of contract and non-renewal

80. The Respondent's Counsel had sought to impress upon the Tribunal on 11 June 2012 when hearing commenced in this case, that suspension of the contested administrative decision could not be granted because the non-renewal decision had already been implemented by the Administration. According to Counsel, the interim order of the Tribunal of 6 June 2012 suspending the impugned decision had been issued after its implementation and could not be given effect.

81. The Tribunal asked for addresses of Counsel for both parties on the issue of the implementation of the impugned administrative decision. The Applicant's Counsel submitted that if it is accepted as submitted by the Respondent that UNON close of business is indeed 4.30pm Nairobi time and that the Applicant's contract expired at that time on 6 June, it would be impossible for the Respondent to implement the impugned administrative decision on the same day. This is because implementation would necessarily follow after the decision had been made.

82. Counsel also pointed out that the Tribunal's interim order having been made at about 6.00 p.m. on 6 June 2012 and properly served on the Respondent, the said order had been made before any implementation of the impugned decision could be started on the next day which was 7 June 2012. The learned Counsel for the Applicant referred the Tribunal to the suspension of action Judgment *Wang* UNDT/2012/080 where Laker J held that the implementation of a promotion which would take effect on a future date had not taken place at the time the successful candidates were informed and that a suspension of action application was receivable and an order suspending the promotion could be validly made in the circumstances.

83. The Respondent's Counsel at that stage informed the Tribunal that she would not argue the issue of implementation of the impugned decision and submitted that implementation was unnecessary and that what mattered was that

the fixed term appointment expired automatically at close of business on 6 June 2012.

84. The Tribunal is in agreement that any implementation of the impugned decision not to renew the Applicant's contract had not begun since it could not be embarked upon before the expiry of the said contract. The Tribunal takes judicial notice of the fact that the Organization takes certain properly set-out steps to separate a staff member upon expiry of an employment contract. The tendering of a Personnel Action Form dated 6 June 2012 before the Tribunal to show that the impugned decision was implemented on the date that the Applicant's contract expired betrays indecent haste and dishonesty on the part of those agents of the Secretary-General who appear anxious to deny the Applicant any opportunity to challenge their decision not to renew her contract.

Bad Faith

85. The Tribunal had asked Counsel on both sides to address it on the issue of bad faith in this case. Specifically, is it right in law and in particular in the UN internal justice system that a manager or managers would in order to ensure that his or her decision to separate a particular staff member cannot be challenged before the Tribunal resort to methods aimed at ousting the Tribunal's jurisdiction?

86. The Applicant's Counsel submitted that in this case, it was obvious that UNON's Administration had unfortunately taken steps to ensure that the Applicant would not have any recourse to the available legal process. With regard to the Respondent's annex R/2 which was filed after his submissions, Counsel noted that it was dated 31 May 2012, less than one week to the decision not to renew the Applicant's contract but did not satisfy paragraph 13(i) of the UNON/UNCT Somalia agreement that six month's notice be given by either party in the event of a termination of the agreement.

87. The Respondent's Counsel for her part submitted that there was no bad faith on the part of UNON administration and that it did not find it necessary to give a long notice and had acted within UN rules and the Applicant's letter of appointment.

88. Workplace harassment is viewed with great seriousness within the Organization. The United Nation's administrative policy seeks to promote a conducive working environment in which every staff member is respected and which is devoid of hostility, fear or discrimination. The Secretary-General had promulgated ST/SGB/2008/5 in which the misconduct of workplace harassment belongs in a special class of prohibited conduct. It is to be expected that where a harassment complaint is filed against a manager, urgent and necessary steps must be taken to address it. Where in fact a staff member has filed such a grievance, it is both illegal and unethical to separate him or her without entertaining the complaint. The separation of a complainant with a pending complaint of prohibited conduct is a mockery of the Secretary-General's efforts to protect staff members and a subversion of the rule of law.

89. The Tribunal finds that the non-renewal of the Applicant's appointment was predicated on her harassment complaint of 12 April 2012 against her supervisor.

Legitimate expectation

90. The question as to whether the Applicant had a legitimate expectancy of renewal was fully canvassed by the parties. The Respondent pointed out that under the Applicant's contract of employment, it was expressly provided that her fixed-term appointment did not carry any expectancy, legal or otherwise of renewal or conversion to any other type of appointment.

91. Part of the Applicant's case is that in spite of that provision in her contract, a legitimate expectation of a renewal of the said contract had been created by the conduct of the Respondent's agents. Documentary evidence in the form of email correspondence tendered before the Tribunal showed that on 16 March 2012, the Applicant had sought the approval of her FRO for annual leave to enable her attend a medical conference in Bangkok, Thailand, from 6-20 June 2012. In her response, the FRO had advised the Applicant, whose employment contract was to expire on 6 June 2012, to apply through the online e-leave system so that she could approve. She additionally advised the Applicant that such professional development activities including those carried out within JMS would be reflected

in the relevant sections of her E-PAS for the next reporting cycle of 1 April 2012 to 31 March 2013.

92. On another occasion, the Applicant had before the expiry of her employment contract and having received no notice of it, approached a Human Resources Officer who informed her that if her contract was not to be renewed, she would have been given notice.

93. In her pleadings, the Applicant stated that she had been assigned duties by her FRO which required action beyond 6 June 2012 leading her to believe that her appointment would be renewed. She had patients booked to see her beyond 6 June 2012 and had recently been assigned to take up medical evacuation duties which would ordinarily take two weeks. On 30 may 2012, just one week before the expiry of her appointment, she received an email about ongoing arrangements that led her to believe she would be working in JMS after 6 June 2012.

94. The Tribunal found in *Kasmani* UNDT/2009/017 that the applicant's hopes of renewal of his temporary appointment were raised when his FRO promised him that his contract was likely to be renewed. It was held in that case that the promise created a legitimate expectation of renewal.

95. The Respondent has not joined issues or rebutted the facts as stated in the Applicant's pleadings that she had been led to believe that she would be working beyond 6 June 2012 in JMS. In the absence of a denial, rebuttal or challenge of the Applicant's pleadings on this score, the Tribunal can only accept them as the true position. In accepting this version of events as pleaded by the Applicant, the tribunal finds and holds that a legitimate expectation of renewal of the Applicant's employment contract existed as at 6 June 2012 when her contract expired.

Conclusion

96. The Tribunal finds and holds that the three elements for a grant of an order for suspension of action have been established in this case. In the light of this, the judgment of the Tribunal is that a suspension of action of the impugned decision

not to renew the Applicant's appointment is accordingly granted pending management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 15th day of June 2012

Entered in the Register on this 15th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi