



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

TIBOUTI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Jorge Ballesterro, UNICEF

Introduction

1. The Applicant joined the United Nations Children’s Fund (“UNICEF”) in January 1992, where he has held the post of Senior Health Adviser at the P-5 level since 1994. On 4 April 2012, the Applicant was informed that his fixed-term contract would not be renewed and, on 1 June 2012, he requested management evaluation of the contested decision.

2. The Applicant requests a suspension of action of the decision not to renew his appointment from 30 June 2012 until 31 July 2012 pending the completion of certain post selection processes in which his job applications for other posts are being considered.

3. The Registry received the application on 15 June 2012, 2:01 p.m., through its eFiling portal. It was served on the Respondent the same date, at 5:06 p.m., with a request for the filing and service of a written reply by 5:00 p.m., 19 June 2012. The Respondent apparently inadvertently filed a draft reply without annexes on 19 June 2012 at 5:25 p.m, and subsequently filed the appropriate reply at 5.38 p.m. Neither party requested a hearing, and upon consideration of the submissions and the information before it, the Tribunal decided to determine the application on the papers.

Background

4. The following factual chronology is based on the information contained in the Applicant’s application and the Respondent’s reply.

5. From June 2004 until December 2011, the Applicant’s post was funded from the Support Budget (core funding) of his office. In February 2010, as part of the planning for the 2012-2013 Office Management Plan (“OMP”), the Health Section engaged in informal discussion with senior staff, including the Applicant. Subsequently, three staff meetings were convened in the Health Section as the

suggested changes would affect its entire staff. At a meeting on 1 September 2010, a new organigramme was shared with the staff that indicated the changes in funding sources.

6. On 31 May 2011, the Applicant wrote to the Director of the Programme Division, stating that “I just learned today that the funding source of my post ... has been converted from [Support Budget] to [Other Resources] in the proposed 2012-2013 OMP”. The Director confirmed this by email of 11 June 2011, noting that the Section is “only proposing a change in the source of funding ... NOT abolishing the post”. In reply, on 12 June 2011, the Applicant replied, “I have no doubt that [the Chief of Health Section, UNICEF]’s intention is to terminate my contract using the excuse of unavailability of funding”.

7. Since December 2011, the Applicant’s post has been funded from a donor program funded by the Programme Budget Allotment.

8. On 5 April 2012, the Applicant was notified via letter dated 4 April 2012 that due to a lack of funding his contract would not be renewed beyond 30 June 2012. In the letter, it was indicated that:

This is to share with you that for the past several months, we have been seeking funding for the position you encumber. Nonetheless, to date we have not been successful in securing sufficient funding to extend your contract beyond its expiration date, 30 June 2012.

9. Since being notified of his intended separation, the Applicant has applied to over 16 currently vacant posts with the Organization.

10. On 20 April 2012, the Applicant requested the assistance of the Ombudsman’s office in an attempt to resolve his situation.

11. On 17 May 2012, the Applicant was granted a permanent appointment contract with UNICEF as part of the United Nations’ One-Time Review for Permanent Appointment.

12. On 1 June 2012, the Applicant filed a request for management evaluation. On 4 June 2012, the Chief of the Policy and Administrative Law Section of UNICEF acknowledged receipt of the request, noting that the time limit for the management evaluation to render its findings was 2 July 2012 and that, if the Applicant had not received the evaluation by then, he could file an application with the Dispute Tribunal.

13. On 11 June 2012, the Division of Human Resources of UNICEF forwarded the Applicant a separation letter, informing him of his separation package should he not be appointed to a regular post at the end of his notice period on 30 June 2012.

14. By the date of this Judgment, according to the information submitted by the parties, the Applicant has not received any management evaluation.

Applicant's submissions

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

Prima facie unlawfulness

a. The Applicant was informed that the non-renewal was the result of the lack of availability of funds. However, upon reviewing the source of the funding for his current position, a total unused balance of USD245,954 as of 14 May 2012 can be identified that would fully support the renewal of his contract. Also, the decision does not respect the provisions of sec. 9.1 of UNICEF Administrative Instruction CF/AI/2010-001 (Separation from service);

b. In 2010, the Chief of the Health Section refused to fund the Applicant's work plan for the purpose of undermining his performance. In line with those actions, the current decision is a retaliatory measure by the Chief of the Health Section, and the decision to abolish the Applicant's

current post is a direct result of the conflict between himself and the Chief of the Health Section;

Urgency

c. The urgency of the Applicant's request for a suspension of action is due to the fact that, despite engaging in efforts to find another suitable position within either UNICEF or in another UN organization, his appointment is scheduled to end on 30 June 2012;

d. A suspension of action until 31 July 2012 is urgently needed so that he can improve his chances for selection for one of the vacancies to which he applied as well as to enable UNICEF to fulfill its obligation under the operative Administrative Instruction to duly assist him to be appointed to another post;

Irreparable damage

e. The decision to separate him from service will result in him losing the opportunity to benefit from his recently earned permanent contract status and such a loss cannot be compensated by the financial remedies currently available in the United Nations' justice system;

f. The Applicant has served with UNICEF for over two decades and his minor children are both currently enrolled in school in the United States. Consequently, abolishing his post would result in the psychological, emotional and financial trauma of having his family relocate back to his country of origin, Morocco, where his children would have to undertake their secondary studies in languages (French and Arabic) which they have not studied in school.

Respondent's submissions

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

The timing of the requested suspension of actions

a. Upon filing his request for management evaluation on 1 June 2012, the Applicant was informed that a response would be provided to him no later than 2 July 2012. The Applicant was subsequently verbally informed that the requested management evaluation would actually be issued prior to the expiration of his contract on 30 June 2012. The United Nations Appeals Tribunal has clearly stated that the Dispute Tribunal does not have the authority to suspend an action beyond the deadline of the completion of the management evaluation (*Tadonki* 2010-UNAT-005). Consequently, the Applicant's request for a suspension of action until 31 July 2012 cannot be granted under art. 13 of the Rules of Procedures of the Dispute Tribunal;

Prima facie unlawfulness

b. The United Nations Tribunals have consistently enforced the provision that fixed-term contracts do not carry any expectation of renewal;

c. While the Applicant states that the contested decision was not based on a lack of funding but rather on other factors, it is undisputed that at least some evidence must be provided by the Applicant to support the alleged breach of his contractual rights and that it is not sufficient to make "mere verbal assertions" (*Abdalla* 2011-UNAT-138, para. 24);

d. In addition to the contested decision being the result of an exercise of its discretion, the evidence provided to the Tribunal clearly shows that it was justified when the Administration stated that the non-renewal of the Applicant's contract was the result of a lack of funding;

e. All of the current staff members of the Health Section, UNICEF, including the Applicant, were not only fully appraised of the declining funding as well as the measures that were being implemented to deal with the funding reductions, but they were also invited to participate in the budgetary discussions;

f. If the decision to change the source of funding for the post encumbered by the Applicant could somehow be construed as breaching his contractual rights, he would be time-barred from requesting a management evaluation of this decision, since he was actually aware of the budget changes as of 31 May 2011;

g. Contrary to the Applicant's submission that there was some animosity between himself and the Associate Director, the evidence shows the Associate Director not only continued to support the Applicant, but also retained him over other high performers;

h. While the Applicant avers that the funding changes were made by the Associate Director, they were actually made by the Director of Programmes who the Applicant praises as fully supporting his claims. The Respondent also contends that the sole criteria for selecting which posts would be funded by the Support Budget versus Other Resources was solely based on a question of necessity;

i. The Applicant was fully aware that the funding of his post was contingent upon receiving new funds. Consequently, his rights were not affected by the reduction in funding seeing that, per the terms of his contract, his post was fully funded until the expiry of its two-year fixed-term;

Urgency

j. The Applicant was informed as early as 4 April 2012 that despite all of its attempts, UNICEF had not managed to obtain new funding for the renewal

of his fixed-term contract. More importantly, the Applicant was fully aware since 2010 that any renewal of his fixed-term contract would be contingent on UNICEF securing new funding;

k. Since the Administration committed to provide the Applicant with the findings of the management evaluation prior to the expiration of his contract on 30 June 2012, any reversal of the contested decision would be implemented prior to the separation actually taking effect. Therefore, there is no actual urgency in the Applicant's claim;

Irreparable damage

l. As a result of the Applicant's conversion to a permanent appointment, he becomes eligible for financial benefits such as a separation indemnity which he would not otherwise qualify for. Furthermore, the Applicant benefits from priority status for the posts to which he applied. Should the Applicant obtain a new post within twelve months of his separation, he would be reinstated with all the benefits he accrued during his tenure;

m. Should there have been any breach of the Applicant's contractual rights "any losses incurred could, in this case, be adequately compensated by a monetary award" (*Stephens* UNDT/2011/167). The Appeals Tribunal has held that if a loss can be adequately compensated by a monetary award, it cannot then qualify as an irreparable harm which would warrant a suspension of action (*Tadonki* 2010-UNAT-005, *Ballestrieri* 2010-UNAT-041).

Consideration

The nature of an application for suspension of action and the conditions

17. This is an application for suspension of action pending management evaluation, although the Applicant has requested for its implementation beyond the time required for management evaluation. Article 2.2 of the Statute of the Dispute

Tribunal 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 decision only if all three requirements of art. 2.2 of its Statute have been met.

The extension of the requested suspension of action—during management evaluation

18. Article 2.2 of the Statute of the Dispute Tribunal (and art. 13 of its Rules of Procedures) provides that the Tribunal may suspend the implementation of a contested administrative decision pending management evaluation of that decision.

19. In the present case, the Applicant contests the decision not to renew his contract beyond 30 June 2012 and requests that the separation date be postponed until at least 31 July 2012 “to improve his chances of being selected to one of the vacancies to which he has made an application”. This effectively means that the Applicant requests suspension of the decision beyond the time for management evaluation.

20. On 4 June 2012, the Applicant was informed that the time limit for rendering the management evaluation was 2 July 2012. In the reply dated 19 July 2012, the Respondent further submits that the Applicant was “verbally informed that the management evaluation would be issued before the expiration of [the Applicant’s] contract”.

21. The Tribunal notes that the United Nations Appeal Tribunal has explicitly ruled that, pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Dispute Tribunal cannot extend the suspension of action beyond management evaluation (*Tadonki* 2010-UNAT-005, *Kasmani* 2009-UNAT-015). Accordingly, in the present case, the Tribunal cannot suspend the decision not to renew the Applicant’s fixed-term contract beyond 2 July 2012. If the Applicant wishes to have this decision further suspended, he would need to file an application on the merits of his case and

request that, as an interim measure in accordance with art. 10.2 of the Statute of the Dispute Tribunal (and art. 14 of its Rules of Procedures), the decision be suspended during the proceedings before the Tribunal. In this regard, the Tribunal observes that the matter under litigation does not concern a case of appointment, promotion or termination, but the separation of the Applicant as a result of the non-renewal of his fixed-term contract (see *Adundo et al* UNDT/2012/077).

Prima facie unlawfulness

22. The Applicant's case is, in essence, that the reason that he was provided for not renewing his contract, namely that there was no funding for his post, was false.

23. In a case concerning the non-renewal of a fixed-term contract, as in the present case, the United Nations Appeals Tribunal has determined that, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (*Islam* 2011-UNAT-115, para. 29).

24. The Applicant refers to a decision by which the funding for his post was changed in 2011. The Applicant was aware of this decision, at least on 31 May 2011, when he wrote an email to the Director of the Programme Division, UNICEF. However, despite his disagreement with the decision, and his suspicion that the change in the funding of his post was a ruse to terminate his contract, the Applicant apparently never appealed this decision; perhaps because he was assured at the time that there was to be no abolishment of post. He also contends that his position was thereafter moved to the Programme Division Director's office in order to redress the managerial issue created by the Associate Director. Pursuant to art. 8 of the Statute of the Dispute Tribunal, it would therefore appear that the Applicant is time-barred from appealing the 2011 decision now.

25. However, the Applicant contends that there is actually funding under the current budget for a renewal of his post, and that he has identified a total unused balance of USD245,954 as of 14 May 2012 that would enable UNICEF to do so.

26. In his reply, the Respondent states that no funding is available and refers to an email exchange between the Counsel for the Respondent, the Chief of the Health Section, the Chief of Health Systems and Strategic Planning, and the Head of the Health Section Equity Focused Evidence, Policies and Strategies Group, in which the latter notes that:

... no new funding has been secured for the Equity Focused Evidence, Policies and Strategies Group, and this Unit remains dependent on allocations from other Health Section and Programme Division budgets to retain [three] current [international professional] staff until end of current contracts, including [the Applicant], and a vacant fourth post could not be filled due to lack of funding.

27. In support of this contention that there is money available, the Applicant has adduced a document which appears to be a 2012-2013 budget for the Health Section, UNICEF. The exact amount of USD245,954 of the unused balance is not clearly discernable in this document, nor is it assessable whether enough funding is available for extending the Applicant's fixed-term contract.

28. Even though the Head of the Health Section Equity Focused Evidence, Policies and Strategies Group explicitly states that his unit remains dependent on allocations from other Health Section and Programme Division budgets to retain the Applicant, the Respondent fails in the reply to comment on the apparent unused balance of USD245,954 in the Health Section mentioned by the Applicant. The Respondent does not question this amount, nor state why this sum cannot be used for funding a renewal of the Applicant's fixed-term contract.

29. Accordingly, the Tribunal is left with the inference that the unused balance of USD245,954 may be available to fund the Applicant's contract renewal and that the reason provided to the Applicant, namely the lack of funds, was incorrect and therefore unlawful. The Tribunal notes that the Applicant is requesting only an interim measure, and the financial implication of suspending the decision not to renew the Applicant's contract pending management evaluation would, at a maximum, be an extension of the Applicant's current contract for an additional two

days. Furthermore, the Applicant has been given a vague verbal undertaking that he can expect an outcome to the management evaluation prior to the expiration of his contract on 30 June 2012. This means he may be informed imminently or on Friday, 29 June 2012, in which event the decision will have been implemented before the Applicant has had opportunity to approach the Tribunal to preserve his alleged rights. As a result, the Respondent can hardly be seen to be dealing in good faith, and the time spent in defending this application could well have been used in expediting management evaluation or finding a resolution to this matter, particularly in view of the Applicant's length of service. The Respondent is encouraged to ensure a timely outcome of the management evaluation.

Urgency

30. The Respondent contends that there is no actual urgency in the Applicant's claim as any reversal of the contested decision would be implemented prior to the separation actually taking effect, but does not address what would happen if the contested decision was not set aside.

31. It is undisputed that the Applicant's contract expires on 30 June 2012, i.e., eight days from the date of the present Judgment, and that the Applicant has actively, but without success, been seeking alternative employment with the Organization ever since he was notified of his possible separation.

32. Considering the imminent risk of the Applicant being separated from UNICEF, the Tribunal finds that his case is one of particular urgency and that this is not the result of the Applicant's own actions.

Irreparable damage

33. The Respondent does not challenge the circumstances and harm to which the Applicant refers concerning him and his family. Rather, the Respondent contends that any possible damage to the Applicant may be compensated by financial means.

34. The harm that the Applicant contends that he and his family will suffer from the non-renewal of his contract, and thereby also his separation from the Organization, is of a nature that is generally non-pecuniary, including the harm related to his family's potential relocation to Morocco.

35. The Applicant also contends he will suffer harm from losing the opportunity to benefit from his recently earned permanent contract status and that such a loss cannot be compensated by the financial remedies currently available within the system. The Respondent contends that the Applicant benefits from priority status for the posts to which he has applied and should he obtain a new post within twelve months of his separation, he would be reinstated with all the benefits he accrued during his tenure.

36. In *Khambatta* UNDT/2012/058, the Tribunal stated that:

Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.

37. The Tribunal finds the reasoning in *Khambatta* persuasive and applicable to this case. Thus, the Tribunal finds that the implementation of the decision not to renew the Applicant's fixed-term contract would cause him irreparable harm.

Conclusion

38. The Tribunal finds that the three elements required for the granting of a suspension of action pending management evaluation have been established.

Order

39. The Tribunal orders a suspension of action of the impugned decision not to renew the Applicant's fixed term contract pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 22nd day of June 2012

Entered in the Register on this 22nd day of June 2012

(Signed)

Hafida Lahiouel, Registrar, New York