



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

ULLAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. On 7 September 2012, the Applicant submitted an application for suspension of action, pending management evaluation, of the decision not to extend his fixed-term appointment expiring on 25 September 2012 as Logistics Officer with the United Nations Logistics Base (“UNLB”) of the United Nations Department of Peacekeeping Operations (“DPKO”).

Facts

2. The Applicant joined DPKO on 26 September 2011, on a one-year fixed-term appointment as Logistics Officer within the Standing Police Capacity (“SPC”) of the Police Division at UNLB in Brindisi, Italy, at level P-4. He was seconded by the Government of Bangladesh following a call for nominations transmitted by DPKO to all Member States through a note verbale dated 3 September 2010. The note verbale indicated that secondment was sought for an initial period of two years.

3. On 10 April 2012, the Applicant signed off his electronic performance appraisal system (hereinafter “e-PAS”) report for the period from 27 September 2011 to 31 March 2012; his first and second reporting officers gave him the overall rating of “successfully meets performance expectations”.

4. By letter dated 9 July 2012, the Applicant requested information from the Chief of SPC regarding the renewal of his appointment “for a second term”.

5. By letter dated 10 July 2012, the Chief of SPC replied that he had already informed the Applicant of his decision not to request an extension of his appointment after having carefully reviewed his file.

6. In his reply dated 23 July 2012 to the Chief of SPC, the Applicant indicated that he had received oral assurances from him that a request for extension of his appointment would be made as soon as the Office of Internal Oversight Services (“OIOS”) closed a pending investigation against him.

7. By letter dated 9 August 2012, Counsel for the Applicant requested the assistance of the Ombudsman.

8. On 31 August 2012, the Applicant requested management evaluation of the decision not to renew his fixed-term appointment.

9. On 7 September 2012, the Applicant submitted an incomplete application for suspension of action. After its completion on 12 September 2012, the application was sent to the Respondent who submitted his reply on 14 September 2012.

Parties' contentions

10. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The Applicant was seconded from government service with the expectation of remaining in service with the Organization for at least a period of four years, subject to satisfactory performance;
- b. The Applicant's performance was assessed as fully competent and having successfully met all performance expectations. The first reporting officer commented on his extra effort and noted the intention to allow him to meet his full potential in the coming performance year;
- c. The reason provided for the non-renewal of the Applicant's fixed-term appointment was an "undefined" OIOS investigation. The Applicant was never advised of any allegations or of any such investigation;
- d. While fixed-term appointments do not carry an expectation of renewal, any administrative decision must satisfy the requirements of reasonableness and fairness. A decision based on an unarticulated and undisclosed investigation fails to meet this requirement and violates the Applicant's due process rights.

Urgency

- e. The Applicant's appointment is due to expire on 25 September 2012;
- f. Under the terms of the secondment agreement the Applicant is required to give notice to the Government of his future plans sufficiently in advance to make arrangements for his relocation and return to Government service;

Irreparable damage

- g. The irreparable harm which would be caused by the implementation of the decision includes damage to his professional reputation;
- h. The return of the Applicant to his home country without advance preparation and notice would cause unforeseen expenses and diminish his livelihood. Moreover, the uncertainty over his future causes him severe emotional distress.

11. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The Applicant argues that he has a right to renewal of his appointment but his letter of appointment expressly provides that his appointment is for a fixed-term of one year, that it expires, without prior notice, on 25 September 2012, and that it does not carry any expectancy of renewal in accordance with staff rules 4.13(c) and 9.4.;
- b. While the Applicant contends that he had an expectation of renewal of four years, he was recruited for one year;
- c. There was reasonable apprehension that the Applicant had acted improperly in his role as a guardian of a child. In *Sina* UNDT/2010/060, the Tribunal found that where there is more than a reasonable suspicion of a staff member's lack of integrity or

transgression of the Staff Rules, this is not a matter that can be discounted or ignored in determining whether his/her appointment should be renewed. In accordance with the Tribunal's findings in *Riquelme* UNDT/2010/107, as reconfirmed in *Jennings* UNDT/2010/213, the decision of non-renewal is not in breach of contractual obligations;

- d. The Applicant repeatedly failed to meet performance standards. His e-PAS report only recorded that he had met performance expectations in the initial stages of his appointment. Thereafter, from April to July 2012, his performance was inadequate, and he was informed that this would likely result in his appointment not being extended;
- e. Contrary to the Applicant's contentions, he was informed by the Chief of SPC of the reasons for his non-renewal, and was aware of the reasons for an investigation;

Urgency

- f. There is no urgency in the application as the Applicant had been informed of the decision for over a month as of the date of submission of the Respondent's reply and has had ample time to make arrangements for his return to his home country where he will resume service in the police force;

Irreparable damage

- g. The Applicant can be compensated financially, and therefore the application fails to meet the required element of irreparable harm;
- h. The Applicant is on secondment from his career appointment as a Police Officer and the non-renewal of his appointment has no impact on his long-term career prospects;

- i. The Applicant is aware that he does not have an expectancy of renewal, and there is nothing unexpected or unusual about a secondment ending after one year.

Consideration

12. 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.

Prima facie unlawfulness

13. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Osmanli* UNDT/2011/190, *Chattopadhyay* UNDT/2011/198, and *Wang* UNDT/2012/080).

14. In a case concerning the non-renewal of a fixed-term appointment, such as the one at hand, 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).

15. In the present case, the Chief of SPC, by his letter of 10 July 2012 to the Applicant, stated that the Applicant's appointment was not renewed after careful review of his file. According to the Respondent, this refers to the Applicant's inadequate performance as well as to an OIOS investigation. It is the Tribunal's view that there are serious and reasonable doubts about whether this reference is based on facts.

16. Regarding the Applicant's performance, his end-of-cycle appraisal for the period from 27 September 2011 to 31 March 2012 was completed on 28 March 2012 and 8 April 2012 by the first and second reporting officers respectively, and indicated that the Applicant successfully met performance expectations. The Respondent seems to suggest that the six-month appraisal of the Applicant had been of a preliminary nature, and would thus not reflect his actual performance which was felt to be marginal. In accordance with section 3.2 of administrative instruction ST/AI/2010/5 (Performance Management and Development System), "[w]hen a staff member takes up new duties upon recruitment, transfer or assignment in the course of the performance year, an individual workplan shall be established within the first two months ...". ST/AI/2010/5 also provides that the performance evaluation cycle ends on 31 March of each year, and that the performance period may normally be not less than 6 months. The completion of the Applicant's e-PAS after six months of service as of 31 March 2012 was hence in compliance with the applicable rules and the Respondent's contention that it is of a preliminary nature does not have merits.

17. The Respondent also alleges that during the appraisal period there were a number of concerns with the Applicant's performance that had been raised with him. Section 10 of ST/AI/2010/5, is dedicated to identifying and addressing performance shortcomings and unsatisfactory performances and clearly states in section 10.1 that "[d]uring the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s)." There is no evidence to show that instances of difficulties and/or shortcomings of the Applicant's performance had arisen or were brought to his attention. If there had been concerns with his performance, the Respondent has not met his obligations with regards to the ePAS Performance Record for the 2011-2012 PAS cycle. In addition, the performance appraisal does not reflect any of the alleged shortcomings. On the contrary, the Applicant was given the second

highest rating under the “evaluation of values and competencies” as well as under “overall rating”.

18. The Respondent further alleges that the Applicant’s performance was inadequate from April 2012 to June 2012. The only evidence presented is an email dated 11 April 2012 indicating that in one single instance shortcomings were identified by the Applicant’s first reporting officer. The Respondent, however, failed to demonstrate which other situations of inadequate performance had been identified, which steps had been taken to rectify the situation and how these were formalised in the framework of the Applicant’s performance evaluation. The Respondent’s offer to submit supporting documents (e.g. paragraph 10, 11 and 18 of the Respondent’s reply) in case the Tribunal were to grant leave to do so, cannot be accepted in the context of this application for suspension of action. The Tribunal is legally obliged to take a decision on applications for suspension of action as stipulated by article 13.3 of the Tribunal’s Rules of Procedure “within five working days of the service of the application on the respondent.” (see also *Nwuke* 2012-UNAT-230). The Respondent must present all evidence together with his reply. This is not an impossible task. In the case at hand, the Respondent was aware of the issues in this case since 31 August 2012 when the Applicant requested management evaluation.

19. The Tribunal is not in a position to assess the Applicant’s performance after the end of his first appraisal. It might have been poor, and according to the case law, poor performance is a valid reason for non-renewal (see *Ahmed* 2011-UNAT-153). At the present stage, due to the lack of evidence, the Respondent’s allegations cannot be considered as facts on which the decision of non-renewal can be based. This aspect may be pursued in the course of the ongoing management evaluation procedure.

20. The Respondent further contends that additional reasons for the non-renewal of the Applicant’s appointment were questions regarding his professionalism and integrity and an investigation initiated by OIOS.

21. The Tribunal notes that the incidents which, according to the Respondent, raised doubts with respect to the Applicant's professionalism and integrity took place and were discussed in the first two months of 2012. Accordingly, those events fall within the period covered by the Applicant's appraisal which ended on 31 March 2012. As already mentioned, said e-PAS report does not contain any such criticism. Therefore, the Respondent's allegations cannot be assessed and taken as facts on which the decision not to renew the Applicant's appointment can be based upon.

22. Regarding the OIOS investigation, the Respondent admits that OIOS determined in June 2012 that it would not pursue the investigation. The Tribunal was not presented with any evidence that a determination of misconduct by the Applicant had been made by the Secretary-General further to the OIOS investigation, as stipulated in staff rule 10.1 (a) and (c). In addition, it did not receive any evidence that the Applicant was formally charged with allegations of misconduct or that disciplinary proceedings had been initiated. The Tribunal does not find that the mere initiation of an investigation by OIOS, which in the end is not pursued, would constitute a valid argument not to extend the Applicant's appointment.

Urgency

23. With the Applicant's appointment expiring on 25 September 2012, this case is clearly urgent. The Applicant requested the assistance of the Ombudsman and upon his advice filed his request for management evaluation. Shortly thereafter the Applicant filed the present application. The Tribunal finds that the Applicant has satisfied the requirement of particular urgency and that this urgency has not been self-created.

Irreparable harm

24. While the Tribunal has established that mere financial loss is not enough to satisfy this requirement (see *Fradin de Bellabre* UNDT/2009/004, and *Utkina* UNDT/2009/096), it has also found in a number of cases that harm to professional

reputation and career prospects, or harm to health, or sudden loss of employment may constitute irreparable damage (see e.g., *Corcoran* UNDT/2009/071, *Calvani* UNDT/2009/092, *Villamorán* UNDT/2011/126).

25. 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.

Bearing in mind the Applicant's previous professional experience with the Organization and considering the instant circumstances of this case, the non-renewal of his appointment would entail damage to future career opportunities. The consequential effects on one's life chances cannot adequately be pecuniary compensated. The Tribunal finds that the requirement of irreparable damage is satisfied.

Conclusion

26. In view of the foregoing, it is ORDERED that the implementation of the decision not to renew the Applicant's fixed-term appointment for the post of Logistics Officer, within the SPC of the Police Division at UNLB in Brindisi, Italy, be suspended during the pendency of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 20th day of September 2012

Entered in the Register on this 20th day of September 2012

(Signed)

René M. Vargas M., Registrar, Geneva