



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

ALIKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Kong Leong Toh, UNOPS
Benedetta Audia, UNOPS

Introduction

1. On 21 September 2012, the Applicant submitted an application for suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment expiring on 30 September 2012 as Portfolio Manager, at the P-3 level, with the Switzerland Operations Centre (“SWOC”) of the United Nations Office for Project Services (“UNOPS”).

Facts

2. By email dated 20 February 2012, the Applicant was informed that the Internal Audit and Investigation Group (“IAIG”) had received a complaint regarding activities within his portfolio and that IAIG was conducting an initial review.

3. By email dated 7 August 2012, the Director of SWOC informed the Applicant that the post he encumbered would be abolished on 30 September 2012, and that a new Portfolio/Grants Manager post at the P-4 level would be created. According to the Applicant’s submission, he was also informed that his appointment would not be renewed.

4. On 20 September 2012, the Applicant submitted a request for management evaluation of the decision not to renew his fixed-term appointment.

5. On 21 September 2012, the Applicant submitted an application for suspension of action. The Respondent submitted his reply on 25 September 2012. Without leave from the Tribunal, the Applicant submitted further observations on 26 September 2012. On the same date, the Respondent filed a motion for leave to respond or file submission. On 27 September 2012 the Respondent, also without leave from the Tribunal, filed an additional reply.

Parties' contentions

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

Prima facie unlawfulness

a. The Applicant contends that upon expiry of his appointment and repatriation to his home country, Albania, he will have no opportunity to be interviewed in the course of the IAIG investigation or comment on the findings of investigation, and he will not be able to access the documents necessary to substantiate his case. This, in the Applicant's view, would constitute a violation of his due process rights rendering the non-renewal decision unlawful.

Urgency

b. The time elapsed between the expiry of his contract and the entry on duty of the incumbent of the newly created P-4 post will negatively impact the portfolio operations;

c. The notice period of the decision not to renew his appointment is not sufficient to relocate to Albania without this being disruptive to his children's education and overall family life.

Irreparable damage

d. The fact that he will not be able to provide information in relation to the IAIG investigation, or rebut its findings, will damage his professional reputation;

e. Implementation of the decision not to renew his appointment will disrupt his children's education, and the uncertainty over his future will cause him and his family severe emotional distress.

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

Prima facie unlawfulness

- a. The decision to abolish the Applicant's post was the result of a restructuring that was necessary to meet the growing demands of the portfolio. This is a legitimate reason for non-renewal of an appointment. Moreover, a fixed-term appointment does not carry any expectancy of renewal;
- b. The Applicant is not the subject of the IAIG investigation, but is merely involved as a witness. The non-renewal of his contract will therefore not prevent him from contributing to the investigation;
- c. Even if the Applicant were the subject of the IAIG investigation, it would be possible to limit his access to the Organization's premises in accordance with staff rule 10.4 and UNOPS Organizational Directive 36 without violating any due process rights;
- d. The Applicant is not obliged to relocate to Albania as he is also a national of France, the country in which he currently resides;
- e. There is no legal right to a contract extension for the purpose of preparing an interview with investigators.

Urgency

- f. The application was filed six weeks after the Applicant was advised of the abolishment of his post;
- g. The urgency must relate to the Applicant and not to UNOPS. While any negative impact on the operations of the portfolio is an issue of concern to UNOPS, it is not relevant to the present application.

Irreparable damage

- h. There is no damage to the Applicant's professional reputation and integrity as he is only a witness in the IAIG investigation;
- i. Any irreparable damage that could result from the transition between the expiry of the Applicant's contract and the entry on duty of the new incumbent is not relevant to the Applicant. Moreover, it presupposes that UNOPS cannot make temporary arrangements for this transitional period;
- j. The Applicant is not a long-serving staff member and there is nothing to indicate that this case would fall outside the general rule that no damage is irreparable if it can be fully compensated.

Consideration

8. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision, during the pendency of management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decisions only if it finds that all three requirements have been met. Therefore, an application has to be rejected whenever one of the conditions is not met (see for example *Hepworth* UNDT/2009/003, *Bernard* UNDT/2009/94).

9. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness requires serious and reasonable doubts about the lawfulness of the contested decision (see for example *Ullah* UNDT/2012/140). No such doubts can be found in this case.

10. The general rule is that a fixed-term appointment has an expiry date and it does not carry any expectancy of renewal. In the case at hand, the Applicant was informed that his non-renewal was due to the abolition of the post he encumbered, and such abolition is undisputed by the parties.

11. An international organization has discretion to organize its services, to restructure its departments or units and to abolish or create posts; it is not for the Tribunal to assess the merits of such decisions (see for example *Gehr* 2012-UNAT-236). Decisions in this sphere may be set-aside only on limited grounds, for example upon the breach of procedural rules, or if discretion was exercised in an arbitrary, capricious or illegal manner (see *Asaad* 2010-UNAT-021). Abolishment of a post as a result of reorganization is considered as a valid reason for not renewing the contract of the concerned staff member (see *Islam* 2011-UNAT-115).

12. The Appeals Tribunal further held in *Asaad*, and also in *Hepworth* 2011-UNAT-178, that the burden of proving improper motivation lies with the staff member contesting the decision. In the present case, the Applicant has not submitted any evidence to conclude that the decision to abolish his post was based on improper motives.

13. Finally, regarding the Applicant's major concern with reference to the on-going investigation of the IAIG, no evidence has been submitted that the contested decision was based on this investigation. The Applicant's participation in the investigation does not require the renewal of his appointment. Whether the Applicant's due process rights are respected, be it as the subject of the investigation or be it as a witness, is not at stake in these proceedings.

14. Therefore, the Tribunal finds that the decision not to renew the Applicant's contract does not appear *prima facie* to be unlawful. In view of this finding, it is neither necessary to examine if the other conditions for suspension of action are met, nor to consider the parties' additional submissions.

Conclusion

15. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 27th day of September 2012

Entered in the Register on this 27th day of September 2012

(Signed)

René M. Vargas M., Registrar, Geneva