UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/055
Judgment No.: UNDT/2012/177
Date: 14 November 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

OCHEM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat
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Introduction

1. On 8 November 2012, the Applicant, a Programme Officer with the ICT and Science and Technology Division ("ISTD") of the United Nations Economic Commission for Africa ("UNECA"), requested management evaluation of the decision not to renew his fixed-term appointment beyond 9 November 2012. On the same day, he filed the current application for suspension of action in relation to the same decision with the United Nations Dispute Tribunal ("the Tribunal").

2. The Application was served on the Respondent the same day and he was given the opportunity to file comments, if any, by 12 November 2012. The Tribunal, by Order No. 141 dated 8 November 2012, ordered suspension of the administrative decision for five working days pending review of the Respondent's submissions. The Respondent submitted his Reply on 12 November 2012 and was subsequently instructed, in Order No. 145 of 12 November 2012, to provide the Tribunal with several documents relating to matters he had raised in his Reply. On 12 November 2012, the Respondent complied with Order No. 145 and the Applicant filed a Motion to submit additional evidence, which was granted.

3. After a careful review of the submissions of the parties, the Tribunal did not deem it necessary to hold an oral hearing in this matter.

Facts

4. The Applicant, who was initially on secondment from the World Health Organization ("WHO") but is currently employed on a temporary appointment with UNECA, is working with the African Network for Drugs and Diagnostics Innovation ("ANDI"), which is a joint WHO and United Nations programme. WHO and UNECA signed a Memorandum of Understanding ("MOU") in October 2010 with a view to promoting and sustaining "African-led health product innovation to address African public health needs through the assembly of research networks and the building of capacity". Based on the MOU, UNECA is responsible for hosting ANDI.

Additionally, the ANDI Secretariat is comprised of individuals recruited in accordance with UNECA Staff Rules and Regulations and employed under UNECA staff contracts.

5. On 30 March 2012, the Director, ISTD ("D/ISTD"), requested that the Chief of the UNECA Human Resources Services Section ("HRSS") create the position of P-4 Program Officer for the ANDI Secretariat in ISTD. She indicated that the funding for the post would be made available by WHO in April 2012. On 12 April 2012, the Director, ISTD, completed a request for a vacancy announcement for the P-4 Programme Officer post within ANDI/ISTD. The duration of the vacancy announcement was for 6 months initially. The post was approved.

6. On 9 May 2012, the D/ISTD wrote to the Chief, UNECA HRSS, requesting that the Applicant be given a temporary appointment with effect from 15 May 2012 for a period of three months to "avoid a break in the essential duties inherent in the P4 position in the ANDI Secretariat […]". She explained that he was on secondment from WHO and that his contract with WHO was due to expire on 14 May 2012.

7. On 28 May 2012, the D/ISTD wrote to the Chief, ECA HRSS to inform him that the Chief of the UNECA Partnership and Technical Cooperation Office ("PATCO")[1] had assured her that additional funds were being processed by WHO to cover the costs of the P-4 Programme Officer post, the Temporary Vacancy Announcement ("TVA"), as well as the programme implementation. She indicated that the funds were expected to be available by July 2012. On 13 June 2012, she wrote to the Chief, UNECA HRSS requesting that a TVA be created for the approved P4 – Program Officer Position for a period of six months pending the formal recruitment to fill the position. She indicated that this would prevent the disruption of ongoing activities of the ANDI Secretariat. The position was advertised on 9 July 2012 with a posting period until 8 August 2012.

[1] Responsible for all UNECA inter-agency partnerships.

8. Effective 10 August 2012, the Applicant was offered a temporary appointment at the P-4 level as a Programme Officer with ISTD. The temporary appointment was for a period of three months with an expiration date of 9 November 2012.

9. In October 2012, the D/ISTD expressed her concerns regarding the management and productivity of ANDI and requested that the Director of the Division of Administration (D/DoA) terminate the MOU. The D/ISTD forwarded a draft notice to terminate to the PATCO on 16 October for his review and advice prior to finalization. On 5 November 2012, the PATCO expressed to the D/ITSD the need to handle the matter carefully and proposed that they meet with the Deputy Executive Secretary to "strategize on a common ECA position". In responding to the PATCO on 7 November 2012, the D/ISTD pointed out that "[s]o the sooner we take a decision the better for ECA/WHO relationship [*sic*] as we cannot keep holding this decision".

10. According to the Applicant, at approximately 1800 hours on 7 November 2012, the Director, ISTD, informed him verbally that his contract would not be renewed. He applied for management evaluation of the decision on 8 November and also filed an Application with the Tribunal.

Considerations

11. Applications for suspension of action are governed by article 2 of the Statute and article 13 of the Tribunal's Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must all be satisfied for an application for suspension of action to be granted.

Prima facie unlawfulness

12. The Applicant submits a number of reasons for the unlawfulness of the contested decision, which include, *inter alia*, that he was not given reasons for the non-renewal.

13. The Respondent also submits several reasons regarding the lawfulness of the contested decision. This includes, *inter alia*, that: (i) the Applicant had been provided with a reason for the non-renewal of his contract in that the D/ITSD had informed him that "[g]iven that the ANDI programme was coming to an end, the Director of ISTD decided not to issue a temporary job opening and advised the Applicant accordingly"; and (ii) an organizational review of ECA and the ANDI programme led to the decision that ECA would no longer host ANDI.

Considerations

14. The Tribunal refers to what was stated by Judge Ebrahim-Carstens in regard to the threshold of proof of the unlawfulness of a decision in the case of *Miyazaki* UNDT/2009/076:

> *The first of the three criteria required by this article* [Article 10.2 of the Statute of the UNDT] *is that the contested decision "appears prima facie to be unlawful". The combination of the words "appears" and "prima facie" indicate that the threshold required to be met by the apparent unlawfulness is commensurate to that which has been required in different national jurisdictions for similar applications. That is, in the context of an application for interim relief pending the outcome of the substantive application, what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt.*

15. A decision may be deemed unlawful for a number of reasons. It would be unlawful if it is in breach of the United Nations Charter and/or the Staff Regulations and Rules, if it was motivated by countervailing circumstances (such as a mistake of law or fact; bias; wrong inferences or conclusions from facts; abuse of authority; improper motives or considerations; arbitrary or irrational exercise of discretion; and the giving of a false reason). Further an absence of a reasoned decision may amount to the unlawfulness of a decision.

16. In *Obdeijn* 2012-UNAT-201, the United Nations Appeals Tribunal ("the Appeals Tribunal") held that:

> *The obligation of the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Staff Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by General Assembly Resolution A/RES/63/253 and the principle of accountability of managers that the Resolution advocates for.*

17. In *Pirnea* UNDT/2011/059, the Tribunal noted that if the Organization decides to give reasons, these reasons must be supported by evidence or by facts. In the present matter, the Tribunal is satisfied that the Applicant was given a reason for the non-renewal of his contract, which was that UNECA had decided to terminate the MOU regulating the ANDI programme. The Tribunal, however, is not satisfied in the least that the reason given was an accurate reflection of the status of the ANDI programme and/or the MOU.

18. Between 30 March and 13 June 2012, the D/ISTD actively campaigned for the creation and advertising of the Applicant's post. Her efforts bore fruit in that by 9 July 2012, the post had been created and was advertised in *Inspira* with a closing date of 8 August 2012.

19. Sometime after 8 August, it appears that the D/ISTD developed very strong doubts about ANDI. In an email dated 1 October 2012, she expressed her concerns regarding the management and productivity of ANDI to a number of UNECA staff members, including the Applicant. Acting on her misgivings, on 10 October 2012, she formally requested that the D/DoA: (i) terminate the MOU; (ii) discontinue the recruitment process for the ANDI Director; and (iii) terminate all other contracts. On 16 October, she forwarded a draft Notice to Terminate to the PATCO for his review and advice prior to finalization.

20. Based on subsequent communications from the PATCO to the D/ITSD, it appears that she was the only one at UNECA who was determined to terminate the MOU. Upon receipt of the draft Notice to Terminate, the PATCO advised the D/ITSD that "[w]e need to handle this more carefully". Additionally, in an email

dated 5 November 2012, the PATCO reminded the D/ITSD again of the need to handle the matter carefully and reminded her of an earlier agreement to "follow all the laid down procedures on MOU [*sic*] towards settling the current challenge amicably". He noted that since the Assistant Director General of WHO had requested a meeting with UNECA on the matter, it was necessary for the relevant UNECA offices (i.e. DoA, ISTD, PATCO and the Deputy Executive Secretary) to meet and "strategize on a common ECA position and the way forward before the requested meeting with WHO".

21. At 1709 hours on 7 November 2012, the D/ISTD responded to the PATCO. She agreed that there was a need to handle the matter carefully but noted that "[o]ur taking time to ponder on a way forward will delay and will make it seem as if we are dithering on a concrete decision […]". She also pointed out that "[s]o the sooner we take a decision the better for ECA/WHO relationship [*sic*] as we cannot keep holding this decision".

22. Based on the available evidence, it appears that only one person, the D/ITSD, had decided to terminate the MOU and end ANDI. However, it is quite clear from the PATCO's email that the final decision to terminate did not lie solely with the D/ITSD. Thus, the Tribunal cannot conclude that by 22 October 2012, as submitted by the Respondent, ECA had **decided** to terminate the MOU and therefore bring the ANDI programme to an end. In actuality, the Tribunal can only conclude that as of 7 November 2012, UNECA lacked a common position on ANDI, that notice had not been given by UNECA to terminate the MOU, that the MOU is still in full effect and as such, it is mendacious for the Respondent to cite termination of the MOU as the basis for the decision not to extend the Applicant's appointment.

23. Based on the foregoing, the Tribunal finds, in accordance with Article 2 of its Statute and Article 13 of its Rules of Procedure, that the Respondent's decision not to renew the Applicant's fixed-term appointment is *prima facie* unlawful having been motivated by an erroneous representation in regard to a non-existent decision on the

status of the MOU and ANDI. Thus, the Applicant has met his burden of proof in this respect by establishing that he has an arguable case of unlawfulness.

Particular urgency

24. The Applicant's temporary appointment was due to expire on 9 November 2012 but was extended by five working days by the Tribunal's Order No. 141 (NBI/2012). In view of the fact that this extension is also due to expire tomorrow, the Tribunal considers that this is a matter of "particular urgency".

Irreparable damage

25. The Applicant submits that he would suffer irreparable harm in that he is approaching retirement age and his prospects for employment at this age are limited. He submits that loss of career prospects associated with a contract non-renewal, particularly in the late stages of one's career, is regularly recognized as giving rise to irreparable harm. He also submits that implementation of the contested decision will damage his professional reputation and cause him stress.

26. The Respondent submits that the Applicant has not identified any specific harm that he will suffer upon implementation of the contested decision. He also submits that the Applicant's contention that his prospects of employment would be limited due to age is without merit. The Respondent submits that the Applicant contradicted himself by stating that he was offered employment recently but refused the offers. The Respondent also submits that the Applicant has not presented any evidence that his career prospects would be damaged.

27. In *Mills-Aryee* UNDT/2011/051, the Tribunal concluded that the Applicant, who was approaching the mandatory retirement age and was concerned about her career prospects inside and outside of the United Nations due to her age, had established the element of "irreparable damage". While the Applicant in the present case may have had some limited prospects of employment, he submits that he turned

these prospects away because of the ANDI project. The Tribunal has no reason to doubt this submission.

28. In addition the Tribunal would endorse what was said in the case of *Tadonki* UNDT/2009/016

> *The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But 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.*

29. In view of the foregoing, the Tribunal finds that the Applicant has established the element of "irreparable damage"

Conclusion

30. The Applicant has raised a prima facie case that the decision was arguably unlawful, that the matter is of particular urgency and that he will suffer irreparable damage from its implementation.

Decision

31. In view of the foregoing, the application for suspension of action is granted pending a response from the Management Evaluation Unit on the Applicant's request for management evaluation.

(Signed)

Judge Vinod Boolell

Dated this 14th day of November 2012

Entered in the Register on this 14th day of November 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi