Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ABU RAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Alexandre Tavadian, OSLA
Annelise Godber, OSLA

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

Introduction

1. On 13 November 2012, the Applicant, a staff member of the United Nations Economic and Social Commission for Western Asia ("ESCWA"), requested management evaluation of the decision not to renew her fixed-term appointment beyond 31 December 2012 ("the Contested Decision"). On the same day, she filed the current application for suspension of action 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 15 November 2012. The Respondent submitted his Reply on 15 November 2012.

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 joined ESCWA on 14 May 2009 as the Regional Advisor for the Centre for Women at the P-4 level in Beirut, Lebanon.

5. According to the Applicant, she met with investigators from the Office of Internal Oversight Services ("OIOS") on 23 May 2012 and reported alleged misconduct on the part of her First Reporting Officer ("FRO"), the Chief of the Centre for Women. The Applicant alleges that soon after her meeting with the OIOS Investigators her FRO started harassing her and abusing her authority thus, on 30 July 2012, she requested a fact-finding panel be constituted pursuant to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority). On the same day, she wrote an email to the Ethics Office requesting protection against retaliation.

6. During a meeting on 6 August 2012, the Applicant's FRO informed the staff that the Executive Secretary ("ES") had decided to "upgrade" the Regional Advisor

position to P-5 by the end of 2012. She invited the Applicant to apply for the new post.

6. By a memorandum dated 17 October 2012, the Officer-in-Charge ("OIC") of the ESCWA Human Resources Management Section ("HRMS") informed the Applicant that "due to the nature of the funding of the post" her appointment would not be extended once it ended on 31 December 2012.

7. On 2 November 2012, the Executive Secretary of ESCWA informed the Applicant that the fact-finding panel constituted in accordance with ST/SGB/2008/5 to investigate her complaint had found no evidence of discrimination or harassment.

8. On 12 November 2012, ESCWA advertised a Temporary Vacancy Announcement ("TVA") for the post of Regional Advisor in the Centre for Women at the P-5 level with a closing date of 26 November 2012.

9. On 13 November 2012, the Applicant filed the current application for suspension of action.

Preliminary Matters

Remedy being sought by the Applicant with respect to the Temporary Vacancy Announcement for the P-5 Regional Advisor post in the Centre for Women

10. The Applicant indicates in her application for suspension of action that she is "seeking a suspension of the selection process for the Temporary Vacancy Announcement which was advertised by [ESCWA] on 12 November 2012". She contends that the purpose of this selection process is to implement the contested administrative decision i.e. the Administration's refusal to renew her appointment.

11. The issue here is can the Tribunal suspend the selection process for the Temporary Vacancy Announcement?

12. Article 2.2 of the Tribunal's Statue read together with art. 13 of the Rules of Procedure clearly state that the Tribunal can only suspend the implementation of an administrative decision that is the subject of an ongoing management evaluation.

13. In the present case, the temporary vacancy announcement was advertised on 12 November 2012, which makes this an administrative decision that was implemented prior to the filing of the Applicant's application on 13 November. In view of the fact that this decision has been implemented, the question of suspension does not arise as there is nothing left to be suspended.

14. Additionally, it is clear from the Applicant's request for management evaluation dated 13 November 2012 that she had not sought evaluation of the ongoing recruitment process when she applied to the Tribunal for a Suspension of Action. In actuality, she only sought suspension of the decision not to extend her fixed-term appointment beyond 31 December 2012. Consequently, the Tribunal will only review the decision not to extend her appointment and not entertain the application to suspend the selection process

The Applicant's Application for Leave to File Additional Evidence

15. On 16 November 2012, the Applicant filed an Application for Leave to File Additional Evidence. The additional evidence comprised of a one-page email communication between Applicant's counsel and one GL on 15 November 2012. The subject matter of the email was "informal resolution". In his email, the Applicant's counsel asks GL to confirm whether one DI declined the Ombudsman's request to resolve the matter informally. GL responds that he had agreed with DI that the discussion would continue upon his return from New York. He also stated that, "[DI] was very responsive and open to dialogue. This first contact with DI was to inform him and to establish contact. It is still in the process […]".

16. In response, the Respondent submitted an email from DI dated 14 November 2012, in which he states that ESCWA has no plans to pursue any informal resolution and that he had made this clear to the Ombudsman.

17. Based on DI's email, the Tribunal has been able to figure out that DI is the Director of the Administrative Services Division at ESCWA. Unfortunately, no evidence has been placed before the Tribunal to shed light on the identity of GI. It is noteworthy that his email to Applicant's counsel merely identifies him as "G". He did not include his functional title, Office or any contact information that could be used to properly identify him as the Ombudsman or someone else.

18. In view of the foregoing, the Tribunal has decided to reject the Applicant's Application to file additional evidence. Additionally, the Tribunal wishes to take this opportunity to remind Counsel that it is not acceptable practice to include the text of the document that one is seeking leave of the Tribunal to file as evidence in the body of the motion or the application that is being submitted. The additional evidence should either be attached as a separate document to the motion or the application or should be held in abeyance until the Tribunal makes a decision to grant leave.

Considerations

14. 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

15. The Applicant submits that the Contested Decision is unlawful because: (i) the Administration failed to provide legitimate reasons in support of the decision not to extend her appointment (i.e. insufficient funding, poor performance, abolition of post or reclassification of her post); and (ii) the contested decision constitutes an

attempt to retaliate against her for assisting with an OIOS investigation into misconduct against her FRO.

16. The Respondent made no submissions in his Reply in relation to *prima facie unlawfulness*.

17. In *Chawla* UNDT/2011/071, the Tribunal noted that when considering an application for suspension of action, it is only required to determine, based on a review of the evidence presented, whether the contested decision appears to be *prima facie* unlawful.

18. A decision would be unlawful if it is in breach of the United Nations Charter and/or the Staff Regulations and Rules or if it was motivated by countervailing circumstances (such as bias, abuse of authority, retaliation, improper motives or considerations, arbitrary or irrational exercise of discretion, etc.). Further an absence of a reasoned decision may amount to the unlawfulness of a decision.

19. Pursuant to sections 1.1 and 1.2 of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), staff members have a duty to report misconduct and to cooperate with audits and investigations. Section 1.3 prohibits retaliation against individuals who have reported misconduct or have cooperated with investigations. Pursuant to section 1.4, retaliation is:

> *"any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by ST/SGB/2005/21"*.

20. Section 2.1 provides that protection against retaliation applies to any staff member, intern or United Nations volunteer who reports misconduct or cooperates in good faith with a duly authorized investigation. Pursuant to section 3, reports of misconduct should be made through established internal mechanisms such as OIOS, the Assistant Secretary-General for Human Resources Management, etc.

21. Section 5.1 advises individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with an investigation to send a complaint to the Ethics Office in person, by regular mail or by email. Pursuant to section 5.2(c), the Ethics Office is then required to conduct a preliminary review of the complaint to determine if: (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

22. In the present case, the Applicant alleges that in May 2012, she cooperated with an OIOS investigation into alleged misconduct on the part of her FRO. She claims that soon after her meeting with the OIOS Investigators her FRO started harassing her and abusing her authority. Consequently, on 30 July 2012, she requested that a fact-finding panel be constituted pursuant to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority).

23. Further, on 30 July 2012, she wrote an email to the Ethics Office requesting protection against retaliation. In view of the fact that the Respondent did not address any of the Applicant’s contentions in his Reply, the Tribunal accepts that she made a complaint under ST/SGB/2008/5 and also lodged a complaint with the Ethics Office for protection.

24. Pursuant to section 5.3 of ST/SGB/2005/21, the Ethics Office “will seek to complete its preliminary review within 45 days of receiving the complaint of retaliation”. Although the Applicant lodged her complaint with the Ethics Office on 30 July 2012, the available evidence does not indicate that she has received a response.

25. In *Applicant* UNDT/2012/091, Izuako J. very eloquently stated the following, which is endorsed by this Tribunal:

> *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.*

26. Noting that the Applicant cooperated with an OIOS investigation in May 2012, that she filed a complaint of harassment and abuse of authority against her FRO in July 2012, that she made a complaint to the Ethics Office for protection against retaliation in July 2012, which has yet to be entertained, and that the Respondent failed to provide reasons in his Reply as to why the decision not to renew her appointment is lawful, the Tribunal can only infer from the available evidence that the Contested Decision was motivated by countervailing circumstances and is therefore *prima facie unlawful*.

Particular Urgency

27. The Respondent submits that the requirement for urgency has not been satisfied because the Management Evaluation Unit ("MEU") has more than 45 days to provide an outcome in accordance with staff rule 11.2. The Respondent submits that MEU is required to respond to the Applicant within the statutory 45 day time-limit, namely by 28 December 2012 and that since this is before the Applicant's appointment expires on 31 December 2012, the requirement of urgency has not been met.

28. While the Respondent has correctly stated the time frame within which MEU is statutorily mandated to respond to the Applicant's request for management evaluation, the Tribunal considers that this is neither here nor there with respect to the issue of urgency because the Tribunal and MEU work independently of each other. In

other words, there is no statutory requirement that estops the Tribunal from pronouncing on an application for suspension of action solely because the Applicant is astute enough to file in advance and because the deadline within which MEU is required to respond falls before the implementation date of the decision i.e. the expiry date of the Applicant's contract.

29. In *Jitsamruay* UNDT/2011/206, the Tribunal took note of the fact that the Applicant had had knowledge of the administrative decision for more than three weeks and yet waited almost until the eleventh hour to file an application for suspension of action. The Tribunal found that the urgency in the matter was created or caused by the Applicant, "who did not act timeously in filing the present application with sufficient urgency and who failed to provide any explanation for the delay of more than three weeks". The Tribunal held that:

> "Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions."

30. In light of *Jitsamruay*, the Tribunal considers that the Applicant in the present matter has acted prudently by filing her application in a timely manner instead of waiting until 28 December 2012 to seek urgent relief on the decision not to extend her contract beyond 31 December 2012.

31. Consequently, the Tribunal finds that in the circumstances, the requirement for urgency has been satisfied by the Applicant in this matter.

Irreparable Damage

32. The Applicant submits that her career prospects will be affected in an irreparable manner should the Contested Decision be implemented.

33. The Respondent submits that since there is no particular urgency, there is no risk that the Applicant will suffer irreparable harm. He submits that since the Applicant's appointment does not expire until 31 December 2012 and the outcome of her request for management evaluation is due by 28 December 2012, should the Management Evaluation Unit conclude that the contested decision violates the Applicant's terms of appointment, the Under-Secretary-General for Management may reverse the decision.

34. Generally, an interim measure should not be granted in a case where damages can adequately compensate an Applicant, if he is successful on the substantive case. In the present case, the Tribunal considers that the contested decision was motivated by countervailing circumstances and is therefore *prima facie* unlawful. Thus, the irreparable damage that would be suffered by the Applicant far exceeds any harm to her future employment prospects.

35. The Tribunal has previously held that:

> "[m]onetary 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…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".[1]

36. Consequently, monetary compensation alone in the face of an unjust and unlawful decision made by ESCWA would not begin to do justice to the Applicant. Under the circumstances of this case, the Tribunal finds therefore that implementation of the contested decision would cause the Applicant irreparable damage.

[1] *Tadonki* UNDT/2009/016.

Conclusion

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

Decision

38. Pending the necessary action on the part of the Ethics Office, the Tribunal deems it necessary to safeguard the interests of the Applicant by granting suspension of the Contested Decision.

39. 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 20th day of November 2012

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

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi