Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

CORNA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. By email dated 9 December 2010, the Applicant filed with the United Nations Dispute Tribunal an application requesting it to suspend, during the pendency of the management evaluation, the implementation of the decision not to extend her fixed-term appointment beyond its expiration on 31 December 2010.

Facts

2. The Applicant entered the service of the World Heath Organization ("WHO") in October 1990 as a secretary (G-4). In June 1996, she was appointed as a clerk (G-3) in the WHO Joint Medical Service. While her contract was with WHO, she was physically performing her functions at the medical service of the United Nations Office at Geneva ("UNOG").

3. In April 2001, the Applicant's son entered the service of UNOG in the Security and Safety Section and has been working there since then.

4. At the Joint Medical Service Interagency Meeting held on 5 November 2004, it was decided to dissolve the Joint Medical Service and to discontinue the existing arrangements between United Nations organizations and agencies. As a result of this, in January 2005, the Applicant and six other staff members were seconded from WHO to the UNOG Medical Service Section. The Applicant was thus granted a one-year fixed-term appointment with UNOG, from 1 January 2005 to 31 December 2005, as a secretary (G-4).

5. In a letter dated 19 April 2005, the Officer-in-Charge of the UNOG Human Resources Management Service ("HRMS") requested assistance from the Director of the WHO Human Resources Service concerning the Applicant's situation, as follows:

> As explained during the meeting [of 5 November 2004], I regret that UNOG is unable to guarantee the integration of [the Applicant] from 2006 given that her son is presently employed by the United Nations. Unfortunately, her employment would be in contradiction with our Staff Rule 104.10 (a) on family

> relationships which prohibits the employment of both a parent and child. As a result, I would be most grateful for any assistance your office can provide in helping to find an alternative assignment for this particular staff member effective 1 January 2006 or earlier.

6. On 1 January 2006, all seven WHO staff members who had been performing their functions at the UNOG Medical Service Section were transferred to UNOG, with the exception of the Applicant whom WHO agreed to loan on a reimbursable basis to UNOG and who thus continued to be a WHO staff member, in order to respect rule 104.10(a) of the United Nations Staff Rules.

7. On 30 June 2008, the Applicant's last contract with WHO expired and no action was taken to renew it.

8. By email dated 30 July 2008, the Chief of the UNOG Medical Service Section requested that WHO urgently clarify the administrative situation of the Applicant.

9. By email of the same date addressed to the Chief, HRMS/UNOG, the Director of the WHO Human Resources Service responded that one of the reasons for the Applicant's situation was that:

> [W]e had expected that by this date you would have already implemented an inter agency transfer as we have been abundantly clear with UNOG in our discussions that we were no longer prepared to continue this arrangement beyond the past expiration of appointment i.e. 30 June 2008 and that you would request [the Office of Human Resources Management] New York for an exception for her transfer notwithstanding the fact that her son was working in UNOG, there has been exceptions approved in the past and this case merited such an exception.

10. WHO nevertheless agreed to give the Applicant a three-month extension with retroactive effect from 1 July 2008 to 30 September 2008, so as to allow UNOG to formally integrate her in service.

11. On 1 October 2008, UNOG granted the Applicant a three-month fixed-term appointment. Her letter of appointment stipulated under "Special Conditions": "This appointment is limited to the Medical Services Section and exceptionally authorized as an interim measure pending receipt of authorization from [the Office of Human Resources Management ("OHRM")]". She

subsequently received eight consecutive fixed-term appointments, for periods of one to six months, the last one expiring on 31 December 2010. While only the letter of appointment for the month of January 2009 contained the same special condition as the previous one, it was noted on the related Personnel Action forms for all subsequent extensions that these were "pending resolution of the family relationship issue".

12. By memorandum dated 13 November 2008, HRMS/UNOG sought from OHRM, UN Secretariat, New York, an exception to staff rule 104.10(a) in favour of the Applicant "in view of the particularity of the situation, taking into account the age of [the Applicant] (55 years old) and the fact that both staff members are assets to the Organization".

13. By email dated 21 November 2008, OHRM requested clarifications on the Applicant's administrative situation.

14. Further to this request, on 29 November 2008, HRMS/UNOG provided additional explanations to OHRM on the particular situation of the Applicant and reiterated its request that an exception to staff rule 104.10(a) be granted.

15. According to the Respondent (no supporting documents were provided), in February 2009 OHRM requested the then Chief, HRMS/UNOG to look for a "local solution" and between February 2009 and February 2010, HRMS/UNOG made various efforts to place the Applicant or her son in other agencies or funds and programmes.

16. On 23 March 2010, the then Chief, HRMS/UNOG, wrote again to OHRM to seek an exception on "humanitarian grounds aimed at preventing a long servicing colleague from losing her employment". It was explained why the placement of either the Applicant or her son outside UNOG was particularly difficult and that "finding a solution outside the Secretariat may not be realistic".

17. By email dated 7 October 2010, OHRM informed the new Chief, HRMS/UNOG, of its decision not to grant an exception to staff rule 4.7(a) in favour of the Applicant and asked him to proceed with her separation upon the expiration of her current appointment. The email noted that:

> Following extensive consultations on this matter with the Policy Service, OHRM, and in light of the amended SR 4.7 (a), which further restricts the employment of individuals who have family relations (father, mother, brother and sister) with the Organization, it was determined that an exception to this rule would have a wider repercussions [sic] on the Organization and therefore it was not recommended.

18. On 11 October 2010, the Chief, HRMS/UNOG, had a meeting with the Applicant in which he informed her that her fixed-term appointment would not be extended beyond 31 December 2010.

19. By letter dated 15 October 2010, the Chief, HRMS/UNOG, notified the Applicant in writing of the decision not to extend her appointment beyond its expiration on 31 December 2010 "as it was determined that OHRM is not in a position to grant an exception to [staff rule 4.7(a) on family relationships]".

20. On 15 November 2010, the Applicant wrote to the Secretary-General to request a management evaluation of the decision not to extend her fixed-term appointment.

21. By email dated 9 December 2010, the Applicant filed with the Tribunal an application requesting it to suspend, during the pendency of the management evaluation, the implementation of the above-mentioned decision.

22. The application was transmitted to the Respondent on 10 December 2010, who submitted his reply on 14 December 2010 as instructed by the Tribunal.

Parties' contentions

23. The Applicant's contentions are:

a. The contested decision is unlawful because it affects the Applicant's acquired rights as UNOG was fully aware of her family situation since at least early 2005 and nevertheless granted her a fixed-term appointment in October 2008 and retained her services since that time. After serving with UNOG for almost three years and being physically employed with the UNOG medical service for over 15 years,

the Applicant had a legitimate expectation that her employment would continue for the four years left prior to her retirement date;

b. The Tribunal's dicta in *Boutruche* UNDT/2009/085, paragraphs 37 and 38, support a finding in the instant case that the Applicant had an acquired right as a staff member and could not be separated from service without respecting these acquired rights;

c. The Administration's express promises to the Applicant created a legitimate expectation of renewal of her contract. In 2008, the Applicant did not challenge WHO decision to discontinue the reimbursable loan agreement because she was assured by the then Chief, HRMS/UNOG, that her employment with UNOG would continue. During the past two and a half years, the former Chief, HRMS/UNOG, repeatedly promised her that an exception would be made to the family rule or that some other arrangement would be found. Those promises were made to the Applicant in the presence of other colleagues, including her immediate supervisor. While fixed-term appointments carry no expectancy of renewal, there are countervailing circumstances in the present case, including the Administration's failure to act fairly towards the Applicant who relied in good faith on the Administration's commitments to her and express promises by senior human resources officials of continued employment notwithstanding the family relationship;

d. The Administration should be estopped from invoking staff rule 4.7(a) due to its conduct. In Judgement No. 981, *Masri* (2000), the former Administrative Tribunal held that since the Administration had actual knowledge of the Applicant's family relationship and still hired him and gave him successive appointments, the decision not to renew his contract on this ground was unlawful and concluded that separating him after four years of service due to the family relationship rule was an act of bad faith;

e. The delays and the conduct of the Administration in not resolving the Applicant's situation for over two years is a violation of her due process rights, which renders the contested decision unlawful. Former staff

rule 104.10(a) and now staff rule 4.7(a) stipulate that the Organization may recruit a person whose brother, sister, son, daughter, father or mother is a UN staff member if another well qualified candidate cannot be recruited: it is submitted that this exception to the rule was never explored by the Administration, which also renders the decision unlawful and arbitrary. To date, the Administration has not shared with the Applicant the reasons for not granting an exception to staff rule 4.7(a);

f. The case is of particular urgency because the Applicant's contract is due to expire on 31 December 2010;

g. Irreparable damage will be caused because if the Applicant's contract is not extended, she will be forced to separate from service. The Applicant has an impeccable performance record and service with the UN for over 20 years. She is four years away from the statutory retirement age and would likely not be able to be employed elsewhere. Her separation under these circumstances would cause her extreme emotional and financial harm.

24. The Respondent's contentions are:

a. The contested decision is not unlawful. It was taken pursuant to staff rule 4.7(a) currently in force which provides that "[a]n appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member" and is applicable to the Applicant and her son. Since the Respondent refused to grant an exception and no alternative placement could be found for the Applicant, her employment with UNOG was illegal and the Respondent had no other option but to let her contract expire so as to put an end to that illegal situation;

b. Furthermore, while it is true that the Respondent was fully aware of the situation when it renewed the Applicant's fixed-term appointment on several occasions, he only did so on an exceptional basis pending a decision on whether or not an exception would be granted. The Applicant

was also fully aware of her precarious situation and thus cannot claim an acquired right to continuous employment;

c. The Applicant did not substantiate her claim that the Administration had expressly promised her that she would continue to be employed by UNOG. Furthermore, the former Chief, HRMS/UNOG, confirmed that he never promised the Applicant that an exception to staff rule 4.7(a) would be granted;

d. This is not a case of particular urgency. The condition of urgency can only be considered as fulfilled where the implementation of the contested decision would deprive the Applicant of a right, which is not the case since fixed-term contracts do not carry any expectancy of renewal. Furthermore, in view of the fact that the Applicant's current contract is going to expire on the same day as a potential suspension pending management evaluation, the urgency criterion is not fulfilled;

e. As regards irreparable damage, the Tribunal held in *Fradin de Bellabre* UNDT/2009/004 that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. In the present case, since no rights of the Applicant were violated, this condition is also not fulfilled.

Considerations

25. The Applicant requests suspension of action, during the pendency of the management evaluation, on the decision not to extend her fixed-term appointment beyond its expiration on 31 December 2010.

26. Article 2.2 of the Tribunal's Statute specifies the three statutory prerequisites for suspending implementation of an administrative decision, namely prima facie unlawfulness, irreparable harm and urgency.

Prima facie unlawfulness

27. Taking the first of the three prerequisites, the Tribunal must determine whether "the decision appears prima facie to be unlawful".

28. As the Tribunal held in *Buckley* UNDT/2009/064 and *Miyazaki* UNDT/2009/076, the combination of the words "appears" and "prima facie" shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. This was echoed in *Corcoran* UNDT/2009/071, in which the Tribunal held that "since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that prima facie [unlawfulness] in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision". In *Utkina* UNDT/2009/096, the Tribunal also stated that as long as the Applicant can demonstrate that the decision was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith, the test for prima facie unlawfulness will be satisfied.

29. Pursuant to staff regulation 4.5(c) and provisional staff rule 4.13(c), fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. Under provisional staff rule 9.4, fixed-term appointments "shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". However, exceptions have been found to this rule if there are countervailing circumstances, including an abuse of the Administration's discretion in not extending the appointment or an express promise by the Administration that gives a staff member an expectancy that his or her appointment will be extended.

30. In the present case, the Respondent justifies his decision not to extend the Applicant's fixed-term appointment on the basis of provisional staff rule 4.7 (Family relationships), which provides that:

> (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

31. It is important to note that the above-mentioned rule came into force only recently, with the issuance of the Secretary-General's bulletin ST/SGB/2010/6 (Staff Rules) on 2 September 2010.

32. In comparison, former provisional staff rule 4.7, applicable from 16 June 2009 to September 2010 (see ST/SGB/2009/7), provided that (emphasis added):

> (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member, *unless another person equally well qualified cannot be recruited*.

33. Similarly, former staff rule 104.10 applicable when the Applicant joined UNOG in October 2008 until June 2009 stipulated (emphasis added):

> (a) *Except where another person equally well qualified cannot be recruited*, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister.

34. The Applicant, who is apparently not aware of the entry into force of a new staff rule 4.7(a), stresses that the Staff Rules allow her appointment if "another person equally well qualified cannot be recruited" and submits that the Administration's failure to explore the possibility of making an exception on that basis renders the decision to separate her unlawful and arbitrary. The Respondent's reply to that is that the Applicant cannot claim the benefit of an exception that is no longer provided for in the more restrictive staff rule 4.7(a), which came into force on 2 September 2010.

35. The Tribunal notes that it took the Respondent almost two years—from November 2008 to October 2010—to decide whether or not to make an exception to the family relationship rule in favour of the Applicant and that he finally decided not to make an exception only one month after the more restrictive rule came into force. No reasons for this delay were given by the Respondent. It is an extraordinary coincidence that, after almost two years of renewing the Applicant's contract on a monthly basis, a decision was finally taken only shortly after a more restrictive rule came into force. This raises the legitimate question as to whether or not the Respondent acted in good faith.

36. Furthermore, the Tribunal notes that in delaying taking a decision until a more restrictive rule came into force, the Respondent deprived the Applicant of the possibility to be considered for an exception on the basis of the former staff rule and to seek judicial review of his decision should it be negative.

37. As far as promises are concerned, the parties have made conflicting submissions and the Tribunal considers that it does not have sufficient information before it to rule out the possibility that indeed promises were made by

persons with appropriate authority which gave the Applicant an expectancy that her appointment would be extended.

38. The above is not to say that the Respondent did act in bad faith or that another person equally well qualified as the Applicant could not have been recruited or even that a promise was made. However, in view of the particular circumstances of this case, it is sufficient for the Tribunal to consider that the prerequisite of prima facie unlawfulness is satisfied.

Irreparable damage

39. The requirement of irreparable damage has been addressed in several judgments of the Tribunal, the general rule being that no damage is irreparable if it can be fully compensated by a monetary award (see *Fradin de Bellabre* UNDT/2009/004, *Tadonki* UNDT/2009/016 and *Utkina* UNDT/2009/096). Such a rule, however, is not unqualified.

40. In *Fradin de Bellabre* UNDT/2009/004, the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. In *Tadonki* UNDT/2009/016, the Tribunal further elaborated on the general rule noting that:

> 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.

41. In *Corcoran* UNDT/2009/071, the Tribunal also held that:

> Irreparable damage may already be at hand where … unemployment after a very long time of service would result from the implementation of the contested decision (cf. UNDT/2009/007 *Rees*, UNDT/2009/016 *Tadonki*, UNDT/2009/008 *Osman*). In the applicant's case … being unemployed at her age after a period of 14 years within the Organization would also be a serious harm, that could not simply be compensated by an award of damages.

42. The Applicant is four years away from retirement. She argues that if she is separated now, she will likely not be able to be employed elsewhere and that her

separation under these circumstances would cause her extreme emotional and financial harm.

43. It is clear that mere economic loss can never be irreparable since if the Applicant succeeds in the substantive action, compensation will be payable. In the present case, however, the Applicant's separation has more than purely economic consequences. If she is separated now, it is not only her age that may be an obstacle to her finding further employment. As long as her son remains in the service of the United Nations, she will no longer be able to seek employment with the United Nations since her appointment would be strictly prohibited under the new, more restrictive staff rule 4.7(a). The Tribunal considers that this is not a damage it would be able to repair with an award of appropriate compensation, should the Applicant win her substantive case.

44. The Tribunal therefore considers that the prerequisite of irreparable damage is satisfied.

Urgency

45. The prerequisite for urgency is also satisfied since the Applicant's contract expires at the end of the month, in two weeks from now. Of course this circumstance alone is not sufficient. As the Tribunal held in *Applicant* Order No. 164 (NY/2010), urgency must not be self-created. In the present case, however, the Tribunal finds that the Applicant was diligent enough in filing her request for suspension of action.

46. The Respondent claims that "in view of the fact that the Applicant's current contract is going to expire on the same day as a potential suspension pending management evaluation, the urgency criteri[on] is not fulfilled". The Tribunal presumes that this argument is based on the fact that the Applicant filed her request for suspension of action on 15 November 2010 and that the Secretary-General's response is therefore due by 30 December 2010. However, at this stage of the proceedings, it is still open whether the Secretary-General will respond to the request for management evaluation within 45 days or before the Applicant's contract expires. Should the Secretary-General fail to do so, the Tribunal's order

on suspension will remain effective until his response is communicated in writing to the Applicant.

Conclusion

47. In view of the foregoing, the Tribunal ORDERS the suspension, during the pendency of the management evaluation, of the decision not to extend the Applicant's fixed-term appointment beyond its expiration on 31 December 2010.

(*Signed*)

Judge Thomas Laker

Dated this 16th day of December 2010

Entered in the Register on this 16th day of December 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva