



**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** René M. Vargas M.

ANDERSEN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Amal Oummih, OSLA

Alexandre Tavadian, OSLA

**Counsel for Respondent:**

Seth Levine, UNDP

Lauren Alaie, UNDP

## **Introduction**

1. The Applicant is a Human Resources Manager, Benefits and Entitlements Services, at the P5 level, with the United Nations Development Programme (“UNDP”) based in Denmark. On 9 April 2013, she filed an application for suspension of action of three decisions, namely:

- a. The decision not to renew her Fixed-Term Appointment (“FTA”);
- b. The decision to place her on Special Leave with Full Pay (“SLWFP”) for the remaining period of her contract; and
- c. The decision to discontinue the Applicant’s access to the office and the necessary tools for the performance of her functions.

2. The application was served on the Respondent on 10 April 2013, requiring him to file a reply by Friday, 12 April 2013.

3. The Respondent filed a reply on 11 April 2013, in which he consented to suspend the decision not to renew the Applicant’s contract, pending the outcome of the management evaluation, while indicating that the Applicant will remain on SLWFP without access to her office.

4. The Tribunal directed the Applicant to file comments to the Respondent’s reply and further instructed the Respondent to provide the Organization’s reasons behind the three decisions contested by the Applicant by Monday, 15 April 2013.

## **Facts**

5. The Applicant commenced her career with the United Nations in May 1994 and later joined UNDP in May 2010.

6. On 24 January 2013, the Staff Administrative Services (“SAS”) of UNDP wrote to the Applicant’s supervisor, informing him of the impending expiry of the Applicant’s contract on 30 April 2013. On the same date, the Applicant’s then

supervisor replied that he had reviewed the request for extension and that according to him, it was in order.

7. On 22 February 2013, the Applicant wrote to the Director of the Office of Human Resources, Bureau of Management (“Director/OHR/BOM”), through the Human Resources Advisor (“HR Advisor”), making several requests, *inter alia*, that the SLWFP be extended to 31 August 2013 to give her enough time to secure another job.

8. The HR Advisor, after having discussed the Applicant’s requests with the Director/OHR/BOM, responded to the Applicant on 27 February 2013. She informed the Applicant that in view of the financial situation it was not possible to extend her SLWFP until August 2013. She also informed the Applicant that the Director/OHR/BOM expected to receive her hand-over notes by 28 February 2013 and that this would facilitate the Applicant’s extension of contract until the end of June 2013.

9. On 27 February 2013, the Director/OHR/BOM, sent an email to all OHR staff members with the subject “End of service: [Applicant], Manager, Benefits and Entitlements Services, SAS/OHR/BOM.” In his message he informed the staff members that the Applicant “will be leaving the Organization due to personal and family reasons.” He went ahead to praise the Applicant for her valuable service and acknowledged her numerous contributions to the Organization.

10. On 28 February 2013, the Applicant wrote to the HR Advisor, requesting the review of the decision not to renew her contract. She noted that if the decision was taken in the interest of the Organization, due to her managerial and performance issues, as alleged by the Director/OHR/BOM, then she was entitled to know the criteria that led to the decision. Additionally, she stated that due process was not followed. On the same date, the Applicant sent her handover note to the HR Advisor.

11. On 2 March 2013, she sent a reminder to the HR Advisor and informed the Organization that if she did not receive a response by 6 March 2013, she would

conclude that the Office of Human Resources was not interested in discussing her request any further.

12. The post that the Applicant encumbers was advertised with 1 April 2013 as the deadline for receiving applications and 14 May 2013 as the expected start date of employment. The job advertisement also indicated the expected duration of assignment as two years. The Applicant avers that the terms of reference of the vacancy announcement are similar to her current functions.

### **Applicant's submissions**

13. The Applicant's submission in relation to the three separate claims may be summarized as follows:

### **The decision not to renew the Applicant's FTA**

#### *Prima facie unlawfulness*

- a. The failure by the Administration to provide her with credible reasons in support of the decision not to extend her FTA gives room for the Tribunal to draw adverse inference;<sup>1</sup>
- b. The decision is based on extraneous reasons and although the Administration has discretionary power when deciding whether a staff member's contract should be extended, the power should not be exercised arbitrarily;
- c. The Applicant's post was neither abolished nor reclassified. It was advertised with the same terms of reference which points towards availability of funds; and
- d. She had a legitimate expectation of renewal of contract when she received a written confirmation from her immediate supervisor approving the extension of her appointment.<sup>2</sup>

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<sup>1</sup> *Obdejin* 2012-UNAT-201

*Urgency*

e. The Applicant's appointment expires on 30 April 2013 and the outcome of the management evaluation is due after the expiry of her appointment hence a suspension of action is the only means to preserve her contractual rights;

f. She was told to make a hand-over note, her departure has been publicly announced, the post she encumbers has been advertised and she has been requested to surrender her *Laissez-passer*; and

g. The urgency is not self-created, because the Applicant undertook steps to resolve the dispute informally and when negotiations fell through, she challenged the decision.

*Irreparable damage*

h. The Applicant submits that if her appointment is allowed to expire, her employment prospects with the United Nations system will be adversely affected;

i. She has been a United Nations employee since 1994 and any administrative decision that is likely to affect her career prospects will have a detrimental effect on her psychologically, financially and on her professional reputation; and

j. She is two years away from the mandatory age of early retirement and the decision not to renew her appointment significantly affects her pension benefits if she has to retire now.

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<sup>2</sup> *Ahmed* 2011-UNAT-153, *Bowen* UNDT-2010-197 and *Bowen* 2011-UNAT-183

### **The decision to place the Applicant on SLWFP**

#### *Prima facie unlawfulness*

a. The Applicant never agreed to be placed on SLWFP, instead it was unilaterally imposed on her by the Director/OHR/BOM; she was instructed not to report to the office as from 1 March 2013; and

b. The decision to place her on SLWFP is a disguised disciplinary measure which violates the Applicant's due process rights; there is no evidence that she has committed any wrongdoing that could justify the decision to place her on SLWFP in line with the UNDP policy on Special Leave.

14. The Applicant did not make any submissions on the urgency and irreparable damage that could be caused by this decision.

#### **The decision to discontinue the Applicant's access to her office hence hindering the performance of her functions.**

15. The Applicant did not make any submissions on the unlawfulness, urgency and irreparable damage of this decision.

#### **Respondent's submissions**

16. The Respondent's submissions in relation to the three separate claims may be summarized as follows:

#### **The decision not to renew the Applicant's FTA**

a. The Organization has agreed to extend the Applicant's contract until the response to the request for management evaluation is communicated, therefore making the application for suspension of the decision not to renew her FTA beyond 30 April 2013 moot.

*Prima facie unlawfulness*

b. The fact that the Respondent did not address the Applicant's submission on *prima facie* unlawfulness did not amount to a concession that the impugned decisions was *prima facie* unlawful.

17. The Respondent did not make any submissions on urgency and irreparable damage of this decision.

**The decision to place the Applicant on SLWFP and the decision to discontinue the Applicant's access to her office**

18. The Respondent argues that:

a. The above two decisions are one and the same, the second being a consequence of the first decision.

*Prima facie unlawfulness*

b. The relief sought by the Applicant is not injunctive in nature and actions it seeks to suspend are not administrative decisions;

c. The decision to place the Applicant on SLWFP was arrived at in agreement with the Applicant, and as such this would entail the suspension of her employment functions, thereby not constituting a unilateral administrative decision.

d. The Applicant was offered to be placed on SLWFP, accepted it, engaged in discussions of the terms surrounding it and further sought an extension of the SLWFP; therefore it cannot be said that the decision is adverse to her;

e. Reluctant acceptance of the SLWFP in the absence of misrepresentation or coercion is still acceptance;

f. The SLWFP was not linked to any allegations of misconduct, therefore it is not a disguised disciplinary measure as alleged by the Applicant; and

g. Both decisions are not legally amenable to suspension because the relief sought is not injunctive.

*Irreparable damage*

h. There is no irreparable harm engendered to the Applicant by the continuation of SLWFP pending the outcome of management evaluation and if the Tribunal or the MEU finds that the SLWFP was unlawful, appropriate compensation will be awarded to the Applicant; and

i. The Applicant has not argued the irreparable harm caused to her by her placement on SLWFP.

19. The Respondent did not make any submissions on the urgency of these decisions.

**Consideration**

20. Article 2.2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal provides that the Tribunal can 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 to the Applicant. All of these requirements must be met in order for a suspension of action to be granted.

**The decision not to renew the Applicant's FTA**

21. The Respondent has made an undertaking to the Tribunal to extend the Applicant's contract until the response to the request for management evaluation is communicated. The Tribunal finds no reason to doubt that the Organization will renege on this undertaking and confirms that the Applicant's contract shall be



extended until she is notified of the response to her request for management evaluation.

22. In light of the above, there is no matter for the Tribunal to adjudicate under this claim.

### **The decision to place the Applicant on SLWFP**

#### *Prima facie unlawfulness*

23. Chapter V of ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations) provides for annual and Special Leave. Rule 5.3 specifically provides for Special Leave. It *inter alia* provides that SLWFP may be granted in exceptional circumstances, by the Secretary General, if it is in the interest of the Organization. Later parts of staff rule 5.3 focus on situations in which a staff member can be granted Special Leave, *inter alia*, where the staff member is undertaking research that would benefit the Organization, or where a staff member is unable to perform his or her duties due to illness or child care obligations.

24. The UNDP Human Resources Policy on Special Leave issued on 16 October 2008, section 1.5, paragraph 10, provides for reasons for Special Leave with full or with partial pay. It states:

10. Special Leave with full or with partial pay may be authorised for:

- a) Cases of extended illness (after all sick leave entitlements have been exhausted) and pending determination of the award of disability benefits by the Pension Fund Committee
- b) For other compelling/important reasons, determined by the Director, Office of Human Resources (OHR), such as extreme conditions of national security or a life-threatening situation;
- c) Civil service, jury duty and appearance in court as a witness;
- d) Study leave at the expense of the organization e.g. sabbatical leave;
- e) The Administrator may, in exceptional cases, at his/her initiative, place a staff member on Special Leave with full pay if she/he considers such leave to be in the interest of the Organization.

25. The Applicant states that on 19 February 2013 she had a brief meeting with the Director/OHR/BOM, who is also her Second Reporting Officer, who verbally informed her that he had decided to place her on SLWFP until 30 June 2013. The Director/OHR/BOM also asked the Applicant to remain at home as from 1 March 2013. The Applicant further states that within an hour of the above referenced meeting, her access to the Human Resources systems was cut off, which prevented her from carrying out her duties thereby forcing her to stay at home, albeit unwillingly.

26. With respect to the Applicant's statement that this decision is a disguised disciplinary measure, the only argument proffered by the Respondent is that it is not a disciplinary measure and that there was an agreement to place the Applicant on SLWFP and that this was in the interest of the Organization and the Applicant. Although the Tribunal has ordered the Respondent to give the reason of the contested decision, the only answer given by the Respondent is that the Applicant had agreed to the decision which was taken because "it was in the interest of the Organization as well as the Applicant to facilitate the transition period." The Tribunal finds this answer provided by the Respondent is devoid of meaning and the Tribunal's questions still remain unanswered.

27. In *Lauritzen*, UNDT/2010/172, it was held that it is not in the interests of the Organization to keep a staff member on SLWFP for an extended period without assignment of work. Further in *Kamunyi* UNDT/2010/214 it was held that the phrase "the interest of the Organization" is a constraint on the discretion of the Secretary-General to grant Special Leave. Such interests include the financial interests of the Organization.

28. Without being specific, the use of the phrase "interest of Organization" does not in itself reflect the reason for the decision.

29. The interests of the Organization being alleged by the Respondent to warrant the Applicant's placement on SLWFP have not been specified. There is no legal basis for this decision and it could as well make the Tribunal draw inferences of a veiled disciplinary measure on the Applicant (See *Cabrera* 2012-UNAT-215).

30. In absence of a precise reason given by the Respondent, the decision to place the Applicant on SLWFP seems *prima facie* to be unlawful as it appears to be based on extraneous reasons.

#### *Urgency*

31. It is neither in the interest of the Organization to pay the Applicant nor in the interest of the Applicant, to draw a salary every month without performing her duties. Therefore, the Applicant's service to the Organization needs to be restored with utmost urgency because letting the current situation to persist is a waste of public money.

#### *Irreparable damage*

32. It is clear that no economic damage is caused to the Applicant because she is being paid during her Special Leave status. However, the irreparable damage for the Applicant lies on the fact that she suffers undue stress and harm to her professional reputation. (See *Requérant* UNDT/2011/187 paragraph 41)

33. 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.

34. Therefore the Respondent's argument that if, ultimately, it is held that the SLWFP was unlawful, appropriate compensation will be awarded is untenable.

#### **Conclusion**

35. The Tribunal finds that the requirements for granting the suspension of the decision to place the Applicant on SLWFP have been met. Consequently this suspension means that the decision to deny the Applicant access to her office and the necessary tools, thereby hindering the performance of her functions, is equally suspended.

36. Since the Respondent undertook to renew the Applicant's contract until the response to the request for management evaluation is communicated, there is

nothing for the Tribunal to adjudicate with respect to the decision not to renew the Applicant's FTA.

37. In view of the foregoing, it is **ORDERED** that:

a. The decision placing the Applicant on SLWFP is suspended with immediate effect and the Applicant shall return to work for UNDP until the notification of the answer of management evaluation; and

b. The Respondent shall restore the Applicant's access to all her tools of employment along with all essential means and material necessary to exercise her function.

*(Signed)*

Judge Jean-François Cousin

Dated this 16<sup>th</sup> day of April 2013

Entered in the Register on this 16<sup>th</sup> day of April 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva