



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/039

Order No.: 108 (GVA/2013)

Date: 25 July 2013

Original: English

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

OUMMIH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES PENDING
PROCEEDINGS**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 19 July 2013, the Applicant, a Legal Officer at the Office of Staff Legal Assistance (“OSLA”) and based in Geneva is contesting the decision not to extend her fixed-term appointment pending completion of the rebuttal process of her 2012-2012 performance evaluation.

2. By motion filed also on 19 July 2013, the Applicant seeks an interim measure, pending proceedings, to suspend the implementation of the above-mentioned decision.

Facts

3. On 1 September 2009, the Applicant was granted a fixed-term appointment of two years as a Legal Officer, OSLA, Office of Administration of Justice (“OAJ”), UN Secretariat.

4. On 22 August 2011, the Chief, OSLA, recommended the non-renewal of the Applicant’s contract, due to expire on 31 August 2011, on underperformance grounds. Nevertheless, the Applicant’s contract was renewed several times pending completion of the rebuttal processes that she initiated concerning her 2009-2010 and 2010-2011 performance appraisals.

5. On 22 May 2012, following completion of the rebuttal processes and the upgrading of the Applicant’s overall ratings for her 2009-2010 and 2010-2011 performance appraisals, the Applicant’s contract was renewed for one year, until 11 June 2013.

6. On 12 September 2012, the Applicant was provided with a copy of her 2011-2012 performance appraisal rating her performance as “partially meets performance expectations”. Following a rebuttal process, the rating was upheld and the Applicant was informed accordingly on 1 February 2013.

7. Effective 26 March 2013, the Applicant went on certified sick leave.

8. By letter dated 9 May 2013 and communicated to the Applicant by e-mail on 10 May 2013, the Applicant was informed that her appointment would not be renewed beyond 11 June 2013.

9. On the same day, *i.e.* on 10 May 2013, the Applicant was informed that her performance for the period 1 April 2012 to 31 March 2013 (“2012-2013 performance appraisal”) had been rated as “partially meets performance expectations”.

10. On 15 May 2013, the Executive Director, OAJ, informed the Applicant about the reasons of the non-renewal decision.

11. On 3 June 2013, the Applicant initiated a rebuttal process of her 2012-2013 performance appraisal; at the same time she asked that her appointment be renewed until the completion of said rebuttal in accordance with section 4.12 of Administrative Instruction ST/AI/2013/1 (Administration of fixed-term appointments). On the same day, however, the Director of Office, Executive Office of the Secretary-General, replied to the Applicant that through consultations with the Applicant’s Programme Manager and the Office of Human Resources Management, he had been informed that the provision in question did not apply to her.

12. On 4 June 2013, the Applicant requested a management evaluation of the 3 June 2013 decision not to extend her appointment until the completion of the rebuttal process.

13. On 5 June 2013, the Applicant filed an application for suspension of action with this Tribunal in connection with the 3 June 2013 decision not to extend her appointment until the completion of the rebuttal process. By Order No. 78 (GVA/2013) of 10 June 2013, this Tribunal ordered the suspension of the decision not to extend the Applicant’s appointment pending completion of the rebuttal process of her 2012-2013 performance appraisal until there is a response to the Applicant’s request for management evaluation of 4 June 2013.

14. Following the issuance of Order No. 78 (GVA/2013), the Applicant’s appointment was extended from 12 June 2013 until 19 July 2013.

15. On 10 July 2013, the Applicant requested management evaluation of the decision of 9 May 2013 not to renew her fixed-term appointment beyond its expiration date of 11 June 2013.

16. On 19 July 2013, the Applicant requested management evaluation of two “implied decisions” not to extend her appointment beyond 19 July 2013, and filed with this Tribunal an application for suspension of action concerning those decisions. This application was registered under Case No. UNDT/GVA/2013/038.

17. In the evening of the same day, *i.e.* 19 July 2013, the Director of Office, Office of the Chef de Cabinet, Executive Office of the Secretary-General, instructed the United Nations Office in Geneva (“UNOG”) to “action a further administrative extension” of the Applicant’s contract through 22 July 2013 “in accordance with Dispute Tribunal’s Order No.78 (GVA/2013)”.

18. On 22 July 2013, the Under-Secretary-General for Management addressed a letter to the Applicant, in which he replied to her requests for management evaluation of 4 June 2013 and 10 July 2013. In his letter, he indicated that the Management Evaluation Unit (“MEU”) had considered that both requests concerned the same decision, namely the decision not to extend the Applicant’s appointment beyond 11 June 2013, and therefore they had been examined at the same time. He further informed the Applicant that after a review of the case, the Secretary-General had decided to “endorse the findings and recommendations of the MEU and to uphold the decision not to renew [the Applicant’s] fixed-term appointment”.

19. In another letter of the same day, *i.e.* 22 July 2013, the Chief, MEU answered the Applicant’s request for management evaluation of 19 July 2013 that the Applicant had filed in the context of her request for suspension of action of 19 July 2013.

20. By e-mail also dated 22 July 2013, the Director of Office, Office of the Chef de Cabinet, Executive Office of the Secretary-General, informed the Applicant that her appointment would be further extended by UNOG until 29 July 2013 solely for the purpose of allowing her to utilize her sick leave entitlements.

21. By e-mail of the same day, *i.e.* 22 July 2013, the Director of Office, Office of the Chef de Cabinet, Executive Office of the Secretary-General, requested the Chief, Human Resources, UNOG, to extend the appointment of the Applicant “solely for the purposes of utilization of sick leave in accordance with Sections 4.9 and 4.10 of ST/AI/2013/1 and taking into account the maximum entitlement to sick leave at full pay and half pay under staff rule 6.2”. Accordingly, on 23 July 2013, the Applicant was issued a “letter of appointment”, which expressly provided under “5. Special Conditions” that the “appointment [was] extended through 29 July 2013, solely to enable the staff member to utilize her sick leave entitlement under sections 4.9 and 4.10 of ST/AI/2013/1”. A Personnel Action (“PA”) was issued on the same day reflecting the extension.

22. On the same day, *i.e.* 22 July 2013, the Applicant filed a new Application on the merits and the present request for interim measures, with the Tribunal’s Geneva and New York Registries. In her submission, the Applicant contests the decision to not to extend her appointment pending the conclusion of the rebuttal of her 2012-2013 performance appraisal and requests an interim measure suspending the implementation of the contested decision pending the proceedings.

23. On 23 July 2013, the Applicant filed a request with the UNDT New York Registry for an Order “adjourning the hearing of the suspension of action matter and the motion for interim relief until it [could] be heard by the Geneva Tribunal”.

24. By Order No. 105 (GVA/2013) of 24 July 2013, this Tribunal ruled that the application for suspension of action filed on 19 July 2013 (Case No. UNDT/GVA/2013/038) was moot because the Applicant’s contract had been extended until 22 July 2013. The Tribunal also noted that the Applicant had received on 22 July 2013 an answer to her request for management evaluation of 4 July 2013.

25. On 25 July 2013, the Respondent filed his response to the motion for interim measures served to him on 23 July 2013.

26. On the same day, *i.e.* on 25 July 2013, the Applicant commented on the Respondent’s response and asked the Tribunal to hold a hearing.

Parties' contentions

27. The Applicant's contentions, as listed in her motion for interim measures pending proceedings, may be summarized as follows:

Prima facie unlawfulness

a. The decision not to further extend her contract beyond 22 July 2013 manifestly violates paragraphs 15.6 of ST/AI/2010/5 (Performance Management and Development System) and 4.12 of ST/AI/2013/1 (Administration of Fixed-Term Appointments) providing that a fixed-term contract should be renewed for the duration necessary for the completion of a rebuttal process in case unsatisfactory performance was the basis for a decision of non-renewal of appointment, and a rebuttal process had been initiated by the staff member. In Order No. 78 (GVA/2013), the Tribunal already found that the decision not to extend the Applicant's appointment until completion of the rebuttal process was *prima facie* unlawful for the same reasons;

Urgency

b. Her current appointment will expire on 22 July 2013, and although it is possible that her contract be extended to allow her to exercise her sick leave entitlement, such an extension still remains hypothetical and can in "no way assure an extension of the Applicant's engagement until the completion of the rebuttal process";

c. The Tribunal's reasoning in *Amar* UNDT/2011/040, that in the face of unlawfulness of "gross nature" of the contested decision and its adverse impact on the Applicant's career the requirement of urgency is met, should apply to her case.

Irreparable harm

- d. The execution of the contested decision would cause her irreparable harm as already found by the Tribunal in the context of its Order No. 78 (GVA/2013);
- e. The implementation of the decision would have a “devastating impact” on her professional reputation and career prospects within the United Nations, which the Tribunal ruled in *Villamorán* UNDT/2011/126 was considered irreparable damage;
- f. Harm was also considered irreparable by the Tribunal in *Fradin de Bellarbe* UNDT/2009/004 “if it can be shown that suspension of action is the only way to ensure that the Applicant’s rights are observed”, and the same reasoning should be applied to her case;
- g. Such a blatant violation of her rights cannot be cured through monetary compensation at a later stage as has been ruled by the Tribunal in *Tadonki* UNDT/2009/016 and *Amar* UNDT/2011/40;
- h. She would also suffer irreparable harm in that any later re-employment by the United Nations would be impossible for her pursuant to Section 3.9 of ST/AI/2013/1, which provides that in case of non-renewal of appointment for unsatisfactory service a former staff member is ineligible for re-employment following his or her separation.

On interim measures

- i. Regarding the Respondent’s submission that the present case concerns the non-renewal of a contract and hence falls within the exceptions listed by Article 10.2 of the Statute preventing the Tribunal to suspend a contested administrative decision in cases of appointment, she claims that the jurisprudence quoted by the Respondent (*Benchebbak* 2012-UNAT-256 and *Igbinideon* 2011-UNAT-159) is not applicable since her case is not a case of non-renewal because she is contesting the decision of 3 June 2013 not to extend her appointment pending completion of the rebuttal process;

j. Moreover, said judgments are not relevant in this case because they “both dealt with a situation where suspension of the contested decision was ordered beyond what [is] authorized by [the Tribunal’s S]tatute, i.e. [until] completion of the management review”;

k. She currently holds a letter of appointment extending her contract until 29 July 2013; she is not asking for a new appointment and therefore the case does not involve a matter of “appointment”. In the quoted jurisprudence, the applicants did not hold valid letters of appointment and were in fact contesting their separation of service, and hence the broader decision of non-renewal of their appointments with the Organization;

l. Taking a broad view and interpretation of which decisions are sufficiently related to “appointment” would “severely limit the Tribunal’s ability to grant relief in connection with any decision even slightly linked to appointments” such as non-extension of appointment to allow completion of a performance improvement plan (Section 4.11 of ST/AI/2013/1), to utilize sick leave entitlements (Section 4.9 of ST/AI/2013/1), to extend probationary appointments (Section 4.13 of ST/AI/2013/1);

m. Finally, the contested decision has not yet been implemented since she is holding a valid letter of appointment through 29 July 2013. According to Section 7.1 of ST/AI/2013/1, a fixed-term appointment expires on the expiration date specified in the letter of appointment or letter of renewal of appointment”.

28. The Respondent’s contentions can be summarized as follows:

a. Pursuant to Article 10.2 of the UNDT Statute, the Tribunal may not suspend the implementation of the contested administrative decision in cases of appointment, promotion or termination;

b. A decision not to renew a staff member’s appointment falls within the meaning of “appointment” in Article 10.2 of the UNDT Statute, as has been confirmed in *Benchebbak* 2012-UNAT-256 and *Igbinedion*

2011-UNAT-159. Therefore the request for interim measures cannot be granted;

c. Moreover, the Applicant was advised of the implementation of the decision not to renew her contract when she received on 22 July 2013 the outcome of her request for management evaluation filed on 4 June 2013. The further extension of her contract until 29 July 2013 was made “for the sole purpose of utilizing her remaining sick leave, as provided for in Section 4.9 and 4.10 of ST/AI/2013/1”;

d. Since the contested decision in the present case has already been implemented, it can no longer be suspended and the motion for interim measures should be rejected.

Consideration

29. At the outset, the Tribunal underlines that in the present case it solely has to rule on the “motion for interim measures pending proceedings” filed by the Applicant on 22 July 2013. The Tribunal considers that the submissions filed by the parties in this regard have sufficiently explained the issues at stake and that there is no need to hold a hearing. The Applicant’s request for a hearing is hence rejected.

30. Article 10.2 of the Statute of the Tribunal reads as follows:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

31. Article 14 of the Rules of Procedure of the Tribunal, under the title “Suspension of action during the proceedings”, reads as follows:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears *prima facie* to be

unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

32. It follows from these provisions that a request for an interim measure may only be entertained if the contested decision has not yet been implemented and if the three statutory conditions of *prima facie* unlawfulness, urgency and irreparable damage are met. The interim measure may consist of a suspension of the implementation of the contested administrative decision; however, the Tribunal cannot grant such sort of temporary relief in cases of “appointment, promotion or termination”.

33. Since the Applicant asked for the suspension of the implementation of the contested administrative decision as temporary relief, the Tribunal should first address the question whether the contested decision falls into the category of “appointment” referred to in Article 10.2 of the Tribunal Statute and Article 14.1 of the Tribunal’s Rules of Procedure.

34. The Tribunal observes that the decision contested by the Applicant is still the decision not to extend her appointment pending the completion of the rebuttal of her 2012-2013 performance appraisal, even if her appointment has in fact been extended until 29 July 2013.

35. Notwithstanding what the parties claim in this regard and the jurisprudence they quote, it is very clear for this Tribunal that the United Nations Appeals Tribunal (UNAT) ruled in *Benchebbak* 2012-UNAT-256 that a non-extension of an appointment beyond a certain date falls within the category of “appointment”.

36. The Tribunal notes that in *Benchebbak*, the Applicant contested the decision not to extend his contract beyond 22 October 2011—communicated to him on 23 September 2011—and the UNDT issued a series of orders extending the appointment.

37. In *Benchebbak*, the Appeals Tribunal expressly states:

32. Finally, Order No. 142 decided a suspension in a **matter of appointment** but failed to follow the clear and reiterated jurisprudence of the Appeals Tribunal. (emphasis added)

33. The Statute clearly prohibits the adoption of such suspension in cases of appointment, promotion, or termination. The appeals are receivable because the UNDT exceeded its jurisdiction in ordering the suspension of contested decision beyond the date of completion of management evaluation **in a matter concerning an appointment**. (emphasis added)

38. The Tribunal further notes that the same approach had been already followed by the UNAT in its judgment *Igbinedion* 2011-UNAT-159, where the Applicant was contesting the decision “not to renew his appointment”.

39. In the present case, the contested decision is a decision of non-extension of contract, as it was the case in the UNAT judgments quoted above. Therefore, the Tribunal cannot order a suspension of its implementation because of the limitation of Articles 10.2 of its Statute and 14.1 of its Rules of Procedure. Indeed, based on the UNAT jurisprudence, such a decision falls into the category of “cases of appointment, promotion or termination” that constitute exceptions to the UNDT authority to order suspension of action as a temporary relief.

40. It follows that it is not necessary for the Tribunal to examine if the three statutory requirements specified in Article 2.2 of the Tribunal’s Statute and Article 13.1 of its Rules of procedure, namely prima facie unlawfulness, urgency and irreparable damage are met in the case at hand.

Conclusion

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

- a. The Applicant’s motion for interim measures pending proceedings be rejected.

(Signed)

Judge Jean-François Cousin

Dated this 25th day of July 2013

Entered in the Register on this 25th day of July 2013

(Signed)

René M. Vargas M., Registrar, Geneva