UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/067
Order No.: 188 (GVA/2013)
Date: 28 November 2013
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

WU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 25 November 2013, the Applicant, a retiree re-employed as a Reviser at the Division of Conference Management/Languages Service/Chinese Translation Section, United Nations Office at Geneva ("DCM, CTS, UNOG") seeks the suspension of action, pending management evaluation, of the decision not to renew his temporary appointment beyond 30 November 2013.

2. The application was served on the Respondent the same day, and he filed his response on Wednesday, 27 November 2013. The Applicant submitted additional comments on 28 November 2013, without requesting prior leave from the Tribunal.

Facts

3. Prior to his separation from service and retirement on 30 June 2011, the Applicant was a P-4 Reviser at the United Nations Office at Nairobi ("UNON"). In 2011 and 2012, he was re-employed as a Reviser, at the R-III level, at UNON under several temporary appointments. Thereafter, from 13 August 2012 to 30 November 2012, he was employed as Reviser at DCM, CTS, UNOG, also under a temporary appointment.

4. In 2013, the Applicant was again granted a temporary appointment as Reviser, at the R-III level, at DCM, CTS, UNOG, from 1 July 2013 to 27 September 2013. That appointment was subsequently renewed on 28 September 2013 until 30 November 2013.

5. On 18 November 2013, upon the Applicant's inquiry, the Chief, CTS, UNOG, confirmed that his temporary appointment would not be extended beyond 30 November 2013.

6. On 25 November 2013, the Applicant requested management evaluation of the decision not to extend his temporary appointment and submitted the present application for suspension of action.

Parties' contentions

7. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The contested decision shows differential treatment of the Applicant as compared to other retired revisers, who, unlike the Applicant, have been offered temporary contracts to the maximum of 125 working days for 2012 and 2013; he was granted only 77 working days for 2012 and 106 for 2013;

b. The decision to extend temporary appointments of others while refusing it to the Applicant shows discrimination and favouritism; it results in a waste of resources, since the Applicant is more qualified and efficient than those other retired revisers and unlike them is able to use new translation technologies which, according to the DCM policy on temporary appointment, are mandatory for temporary translators/revisers;

c. The Chief, CTS, favours those who make him gifts and invite him to dinner to get a promotion or short-term contracts, or contracts for up to a maximum of 125 working days for retirees; this is a clear abuse of authority;

d. He and his wife are among the few within CTS who never make gifts or invitations to the Chief, CTS, who therefore discriminates against them; already in the past, the Chief, CTS, has shown a discriminatory attitude vis-à-vis the Applicant and his wife;

e. The reason provided by the Chief, CTS, that "temporary assistance for meetings (TAM) is arranged in the light of the Section's projected workload and standing capacity", is an excuse to not to extend the Applicant's contract and is contradicted by the fact that others got an extension for December; it is also contradicted by what was stated at the Language Section Chiefs meeting at 31 October 2013, namely that "since there were enough funds at the end of biennium, the chiefs of sections were encouraged to recruit temporary staff to process the backlog";

Urgency and irreparable damage

f. The case is urgent since the decision will be implemented on 30 November 2013;

g. In case the decision is implemented, it would cause "serious harm to the confidence in UN principles and standards of conduct for international civil servants, in addition to [his] contract of employment".

8. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The Applicant worked a total of 121 in 2012 and 106 days in 2013; the decision is not *prima facie* unlawful;

b. The Applicant's appointment is subject to the Agreement between the United Nations System/Chief Executive Board for Coordination and the *International Association of Conference Translators* regulating the conditions of employment of short-term translators and persons serving in related functions, to the extent these provisions differ from the rules of the employing organisation governing temporary or short term staff; the agreement is further governed by ST/AI/2010/4 (Administration of temporary appointments);

c. In view of his status as a retiree, his contractual status is further subject to ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees), according to which former staff members may be employed beyond their mandatory age of separation only on an exceptional basis, and subject to certain conditions; such employment can only be approved if it is in the interest of the Organization;

d. Under the relevant Staff Rules and Regulations, temporary appointments do not "carry any expectancy, legal or otherwise, of renewal", and ST/AI/2010/4/Rev.1 (Administration of temporary appointments) provides that "temporary appointment may be granted for specific

short-term requirements that are expected to last for less than one year" "to meet a seasonal or peak work requirement of limited duration that cannot be carried out by existing staff members";

e. In view of the Applicant's status as a retiree and his contractual status, he had no expectancy of renewal or right to have his contract extended up to the maximum 125 workings days, which constitutes the maximum employment period and not an entitlement;

f. The Applicant does not provide any evidence allowing to conclude that the Administration made an "express promise"; hence he had no legitimate expectancy that his temporary appointment be renewed;

g. The Applicant, who refers to incidents dating back to 2004 or 2007 and his appeal in 2009, does not provide evidence that the decision was discriminatory or biased; on the contrary, the case record shows that he had been re-hired in 2012 and 2013, upon the request of the Chief, CTS, which shows that the latter was not biased against the Applicant;

h. The Applicant's argument that he is the most qualified retired reviser is unsubstantiated and irrelevant for the question of the *prima facie* illegality of the decision;

i. The actual reason provided to the Applicant was that his contract would not be renewed since the workload could be carried out by the current workforce of the section and that therefore, his services were no longer required; as of 13 November 2013, the backlog in DCM, CTS, UNOG, was insignificant, as supported by the evidence and no major meetings are projected for the end of the year;

j. Even if the backlog had been significant, the Administration would not have been obliged to extend the Applicant's contract if the regular staff members could carry out the projected workload;

Urgency

k. There is no particular urgency and the Applicant, who was aware of the expiration of his temporary contract at the end of November, did not anticipate the outcome, as required under the Tribunal's jurisprudence;

Irreparable damage

l. The difference of 19 working days between the maximum 125 days and the 106 days actually worked by the Applicant in 2013 can be adequately compensated by the payment of damages; also, in view of the Applicant's status as a retiree, implementation of the decision will not affect his career and will not result in irreparable financial consequences;

9. The Tribunal is requested to dismiss the application in its entirety.

Consideration

10. Article 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to 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. Suspension of action can only be granted where all three requirements are fulfilled.

Prima facie unlawfulness

11. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080).

12. The Applicant's submission in support of his claim does not raise serious and reasonable doubts as to the lawfulness of the non-renewal of his temporary appointment.

13. The Tribunal recalls that Staff regulation 4.5(b) and staff rule 4.12 provide that "[a] temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment". Section 1 of Administrative Instruction ST/AI/2010/4/Rev.1 (Administration of temporary appointments) provides that "[t]he purpose of the temporary appointment is to enable the Organization to effectively and expeditiously manage its short-term staffing needs", namely to address "seasonal or peak workloads and specific short-term requirements for less than one year".

14. The employment of retirees is further restricted by Administrative Instruction ST/AI/2003/8/Amend.2, which provides that "[r]etention in service of staff members beyond the mandatory age of separation is an exception … which may be approved by the Secretary-General only when it is in the interest of the Organization", "due to the exigencies of the service concerned". It also provides that "Language services staff may not be re-employed for more than 125 days actually worked during a calendar year". This is confirmed by the Applicant's letter of appointment, which notes under special conditions, *inter alia*, that "this offer and consequent appointments are subject to a maximum limit of 125 days actually worked per calendar year".

15. The Tribunal further recalls that according to the longstanding jurisprudence of the Appeals Tribunal, fixed-term and temporary appointments do not carry any expectancy of renewal or conversion to any other type of appointment (*Beaudry* 2010-UNAT-085, *Abdalla* 2011-UNAT-138, *Ahmed* 2011-UNAT-153; *Appellee* 2013-UNAT-341), unless the Administration has made an express promise which may create an expectancy for a staff member that his or her appointment will be extended (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153, *Appellee* 2013-UNAT-341). At the same time, a decision not to renew an appointment shall not be motivated by bias, prejudice or improper motives, and the Administration has the duty to act fairly, justly and transparently in dealing with the staff member (*Pirnea* 2013-UNAT-311). The Appeals Tribunal has also consistently held that the burden of proof to establish that the decision was motivated by such improper

motives falls on the Applicant (*Badawi* 2012-UNAT-261, *Pirnea* 2013-UNAT-311).

16. In the case at hand, upon his retirement, the Applicant was granted several temporary appointments to work as a reviser both at UNON and at DCM, CTS, UNOG. It is not disputed that in 2013, the Applicant was employed for 106 working days.

17. It is clear from the actual wording of the above-quoted provisions that retirees who are employed as languages services staff do not have an entitlement to be employed for a maximum of 125 working days; rather, the applicable rules—confirmed by the special condition contained in the Applicant's appointment—prohibit the employment of retirees beyond the maximum of 125 days actually worked per calendar year. Within that limitation, the actual employment, under temporary appointment, up to the maximum of 125 days, depends on the current and projected needs and exigencies of each service. The Tribunal is satisfied that in the present case, the reason provided by the Administration for its decision not to extend the Applicant's temporary appointment beyond 30 November 2013, namely the projected workload and available workforce at DCM, CTS, UNOG, is supported by the available evidence.

18. Moreover, nothing on file allows concluding that the Administration created an expectancy, through an express promise to the Applicant, that his appointment would be extended up to the maximum of 125 days. The Applicant himself does not even claim to have received any such promise.

19. Finally, the Applicant, who bears the burden of proof in this respect, fails to provide any evidence of his allegations of bias or discrimination. The Tribunal notes that according to the 'CTS attendance list' submitted by the Applicant, nearly half of the listed staff have received fewer working days than the Applicant in 2013. Taking into account that the Applicant's contract had even been extended in September 2013, the Tribunal does not see any proof of bias and/or discrimination.

20. It follows from the above that the Tribunal cannot but conclude that the test of *prima facie* unlawfulness is not satisfied.

21. Since one of the three cumulative conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal does not need to examine the two remaining conditions, namely urgency and irreparable damage.

Conclusion

22. In view of the foregoing, the application for suspension of action is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 28th day of month 2013

Entered in the Register on this 28th day of month 2013

(*Signed*)

René M. Vargas M., Registrar, Geneva