



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

DING

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 11 June 2014, the Applicant, a Text Processing Clerk (G-3) at the Chinese Text Processing Unit (“CTPU”), Chinese Translation Section (“CTS”), Languages Service (“LS”), Division of Conference Management (“DCM”) of the Office of the United Nations at Geneva (“UNOG”), sought suspension, pending management evaluation, of the implementation of the decision not to renew her fixed-term appointment beyond 30 June 2014.

Facts

2. The Applicant entered service at the CTPU in May 2002 on a temporary contract as Text Processing Clerk at the G-3 level. Her temporary appointment was extended numerous times, until she was offered a fixed-term appointment as from 11 January 2010, which was subsequently renewed. Her current appointment is due to expire on 30 June 2014.

3. In June 2012, two temporary (six months) Chinese Text Processing Clerk posts at the G-3 level within CTPU were advertised by Vacancy Announcement No. 12/GS/INT and EXT/27. The Applicant applied for these two positions, which were both cancelled in December 2012. The Applicant requested management evaluation of their cancellation on 6 February 2013. The Management Evaluation Unit replied by letter dated 28 March 2013 upholding the decision, and the Applicant did not appeal said decision before the Tribunal.

4. On 6 March 2013, the Applicant, together with two colleagues of her unit, brought a complaint for harassment and abuse of authority against the Chief, CTPU. An amicable settlement was subsequently reached with only one of the three complainants.

5. On 2 February 2014, the Applicant submitted to the Acting Director-General, UNOG, a complaint against her direct supervisor, the Chief, CTPU, alleging that he had engaged in prohibited conduct under Secretary-General bulletin ST/SGB/2008/5 (Prohibition of discrimination,

harassment, including sexual harassment, and abuse of authority), with respect to her and to other members of the CTPU team. She further alleged that the Chief, CTS, her second reporting officer, had connived with the Chief, CTPU, and shielded him.

6. The Acting Director-General, UNOG, replied to her complaint by memorandum dated 27 May 2014, by which he decided not to investigate the allegations.

7. By memorandum dated 28 May 2014, the Senior Human Resources Officer, Human Resources Management Service, UNOG, informed the Applicant that her fixed-term appointment would not be renewed beyond its expiration date, i.e., 30 June 2014. In the memorandum it was stated that “[t]his decision is based on the reduction of work within the Chinese Text Processing Unit and the on-going workforce planning done by the Language Services”.

8. On 6 June 2014, the Applicant requested management evaluation of the non-renewal decision, and on 11 June 2014, she filed the present application for suspension of action concerning the same decision.

9. The application was transmitted to the Respondent for reply on 12 June 2014, along with Order No. 83 (GVA/2014). Pursuant to this Order, the Respondent submitted his reply on 16 June 2014.

10. On 18 June 2014, the Applicant submitted observations to the Respondent’s reply, without asking the Tribunal for leave to do so.

Parties’ contentions

11. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The decision is unlawful inasmuch as it is an act of retaliation for having challenged a managerial decision. It is also discriminatory because it affects the Applicant and one of her colleagues of the CTPU only and no

staff from any of the other Text Processing Units was affected. Hence, it runs contrary to ST/SGB/2002/13, ST/SGB/2008/5, ST/IC/2003/17, ST/AI/371 and ST/AI/371/Amend.1 and ST/AI/2004/3, as well as staff rules 1.2 and 10.1;

Urgency

b. The decision will take effect within three weeks;

Irreparable damage

c. The Applicant will be put in a desperate economic situation as the cutting off of her monthly income will impair her ability to support her son and her daughter's university studies, as well as her mother, who lives alone in China;

d. Without a salary, the Applicant will face difficulties to pay for instalments of her mortgage loan;

e. The decision would cause distress and harm to the Applicant and hinder her career prospects.

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

a. The decision is not *prima facie* unlawful. It was based on the reduction of work within the CTPU and the on-going workforce planning done by the LS. In this sense, the CTPU workload forecast for 2014 estimates a fall of over 7% with respect to the past year; the one-off task of verifying the alignment of bitexts dating back to 2010 is to be completed by mid-June; and the General Assembly decided in April 2014 to allocate a maximum of three official working languages for the work of human rights treaty bodies, which is anticipated to further reduce the CTPU workload by 25% as from 2015. The decision is the result of a change in working patterns in the text-processing units and the recent decisions of the Department for General Assembly and Conference Management;

b. The contested non-renewal decision is not retaliatory; contrary to the Applicant's contention, the contested decision was not taken by the Chief, CTPU, but by the Deputy Chief, LS;

c. The Applicant was identified, among the CTPU staff, as one of the two staff members whose contract would not be renewed at the end of June 2014, since—unlike the other remaining 12 employees, who were hired against regular budget posts—the Applicant and her colleague are the only ones in the unit at the G-3 level and they hold appointments limited to DCM. Further, they have passed the Administrative support Assessment Test in Chinese only. They are thus not eligible for redeployment to another service.

Consideration

13. The Tribunal shall rely on the application and the Respondent's reply, with all their annexes. The observations filed by the Applicant on 18 June 2014 were neither requested, nor considered relevant for the matters at stake. Also, the Tribunal restricts its findings to this case and will not assess other issues like the previous cancellation of posts or complaints about harassment.

14. Pursuant to art. 2.2 of its Statute and art. 13 of its Rules of Procedure, the Tribunal may order the suspension, during the pendency of management evaluation, of the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. If any one of these conditions is not met, suspension of action cannot be granted.

15. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does require serious and reasonable doubts about the legality of the contested decision (see *Hepworth* UNDT/2009/003, *Wang* UNDT/2012/080). An applicant needs to present a “fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its

decisions are proper and made in good faith.” (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

16. In addressing the legality of the challenged decision, it should generally be borne in mind that fixed-term appointments do not carry any expectancy of renewal or conversion to any other type of appointment (see e.g., *Appellee* 2013-UNAT-341; *Syed* 2010-UNAT-061); unless convincing countervailing circumstances exist, they come naturally to an end when the expiration date is reached. However, the Administration’s discretion in this respect, albeit large, is not unfettered. Indeed, a decision not to renew a staff member’s fixed-term appointment must not be arbitrary, procedurally deficient or tainted by improper motives (e.g. *Morsy* 2013-UNAT-298). Furthermore, when a justification is provided by the Administration for the exercise of its discretion, such justification must be supported by the facts (*Islam* 2011-UNAT-115).

17. The reason put forward by the Organization not to renew the Applicant’s appointment is essentially a significant decrease in the workload of the unit. This was expressly formulated in the memorandum of 28 May 2014 by which the Applicant was notified of the decision. In addition, this circumstance is stated in the email of the Chief, CTPU, to the Deputy Chief, LS, DCM, dated 27 May 2014. In fact, the Chief, CTPU, elaborates in some detail on the factors leading to such reduction of the workload. This state of fact was verified and confirmed by the Deputy Chief, LS, as reflected in his email of 27 May 2014 to the Human Resources Management Service, UNOG, by which he recommended that the appointments of the Applicant and another colleague performing identical functions not be renewed. The Deputy Chief, LS, explains this reduction in the workload by the completion of CTPU of the bitext alignment, a task that by itself alone accounted for the work of 1.8 staff members during 2013, the forecast of a 7% decrease in the CTPU backlog in 2014 as compared to 2013, and lastly, the likely expectation that the decision to reduce to three the number of official languages used by the human rights treaty bodies will result in a dramatic decrease of text-processing work as of 2015.

18. The steady decrease in the unit's workload is further supported by the findings of the audit report recently prepared by the Monitoring, Evaluation, Risk Management, and Statistical Verification Section, Central Planning and Coordination Service, titled *Review of working practices in the text-processing units at UNOG 2014*.

19. Hence, there is a solid and consistent record showing an important and current decrease in the CTPU workload, which is expected to further decrease in the near future. It should be noted that the Applicant does not deny this overall workload decrease as such. In addition, the file reveals that it is an Agency-wide trend to reduce the number of text processors with a view to achieve a ratio of one text processor for three translators and to increasingly resort to contractual translation and text processing. Notably, the Chief, LS, UNOG, in an email dated 22 May 2014, acknowledged that DCM was under further pressure to align itself with this trend, in the context of the approval of the budget for the biennium 2014-2015, which entailed cuts for temporary assistance for meetings, general temporary assistance and overtime, and an increase of DMC budget for contractual translation and text-processing.

20. In view of all the above, the Tribunal is satisfied that the justification given by the Administration for the contested decision is supported by the facts. Although there may be other ways to align to the reduction of work, the non-renewal of fixed term appointments lies certainly within the wide discretion the Secretary-General enjoys in matters relating to work organization.

21. The Applicant holds, nonetheless, that the decision is in fact based on improper motives, and in particular, that it is a form of retaliation for having formally spoken out about the managerial practices and decisions of the Chief, CTPU. It is settled law that the burden of proving an allegation of this kind rests with the applicant (e.g. *Obdeijn* 2012-UNAT-201). In the present case, the Applicant has not met this burden.

22. In this respect, the Tribunal is well aware of the tense working atmosphere within the Applicant's unit and the deteriorated relations between the Applicant and her supervisor, which have resulted in a previous request for management

evaluation of a different decision and in several complaints by the Applicant at various levels of her hierarchy. On the other hand, the respective emails of 27 May 2014 from the Chief, CTPU, and the Deputy Chief, LS, record that the Applicant's supervisor refused to make any recommendation concerning the renewal of her contract, mindful, precisely, of complaints brought against him. As a result, the decision was made at a higher level, namely by the Deputy Chief, LS. It is noteworthy that in the official chain of command, the decision was therefore taken even above the level of the Chief, CTS, who according to the Applicant had connived and condoned the alleged harassment by the Chief, CTPU.

23. In addition, upon the Tribunal's specific inquiry about the reasons to identify precisely the Applicant for non-renewal of her appointment (together with another colleague of her holding the same position and grade), the Respondent pointed out that they were the only two staff members in the unit at the G-3 level and holding a contract limited to DCM (not endorsed by a Central Review Body). Moreover, they have passed the Administrative Support Assessment Test in Chinese only. Hence they are not eligible for redeployment to another service.

24. A number of documents in the file, including the *Review of working practices in the text-processing units at UNOG 2014*, mention not only that an imminent decrease in the CTPU workload is expected, but also that the type of tasks that will further diminish are those typically performed by less qualified text-processors, which are assumed to be those with a lower grade. Also, as a matter of fact, the limitations germane to the Applicant's contractual status restrict flexibility to find solutions to retain her services by assigning her to another division.

25. Based on the above findings, the allegations of improper motivation for the non-renewal of the Applicant's appointment cannot be deemed established.

26. Hence, the Tribunal has not been presented with a fairly arguable case that the decision contested in this application is arbitrary, ill-motivated or defective. Consequently, the prerequisite of *prima facie* unlawfulness is not fulfilled.

27. Having concluded that the contested decision is not *prima facie* unlawful, there is no need to ascertain whether the other requisite conditions for granting a suspension of action—to wit, urgency and irreparable damage—are met in the present case.

Conclusion

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

(Signed)

Judge Thomas Laker

Dated this 19th day of June 2014

Entered in the Register on this 19th day of June 2014

(Signed)

René M. Vargas M., Registrar, Geneva