



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

FARHADI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Mohamed Abdou, OSLA

Counsel for Respondent:

Kara Nottingham, UNOG

Jérôme Blanchard, UNOG

Introduction

1. By application filed on 20 June 2017, the Applicant, a Programme Management Officer (P-4) working with the Division of Market Development (“DMD”), International Trade Centre (“ITC”), requests suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment (“FTA”) beyond 30 June 2017.

2. The application was served on the Respondent on 21 June 2017, who submitted his reply on 22 June 2017.

Facts

3. The Applicant joined the ITC on 3 May 2009 as a Senior Advisor (P-5), on a short-term appointment that was converted to a fixed-term appointment as of 1 July 2009. He then served on a series of FTAs, which were all funded through extra-budgetary funds.

4. By memorandum of 6 September 2016 from an Associate Human Resources Officer, Division of Programme Support, the Applicant was informed that by agreement between DBIS and DMD, Sector Competitiveness (“SC”), he had been laterally transferred with his post to DMD, SC, effective 1 July 2016. He was informed that as a result of that transfer, his first reporting Officer would be the Chief, Technical Advisor, Poor Communities and Trade Programme. Further, the Applicant was provided with the corresponding job description, which he was asked to sign and send back to Human Resources.

5. On 1 January 2017, the Applicant was granted an FTA as “Programme Management Officer”, ITC, at the P-4, step 99 level. The letter of appointment does not indicate with any more precision in which ITC department the Applicant had been appointed.

6. By email of 27 March 2017, the Applicant was informed by the Chief, Sustainable and Inclusive Value Chains, Division of Enterprises and Institutions, of the following:

Per our conversation, we have decided to talk (sic) you off the Pacific project effective today. For this, I need you to prepare a detailed handover note encompassing all the ongoing work and next steps (your NFF is a start) with accompanying documents... Please also include the full budget breakdown of what has been spent and what remains. I will draft an email to send out to all o the people involved in the project tomorrow.

...

As we discussed, I am also asking you to stop any work you are doing on the preparation of the Afghanistan EPFI project effective immediately. I take on board your points that you can play an important part in structuring and starting up the project between now and the end of the year. I will come back to you on that point and on what you will focus on between now and June.

7. On the same day, the Applicant was placed on certified sick leave.

8. On 28 April 2017, the Chief, Human Resources (“HR”), Division of Programme Support (“DPS”), informed the Applicant that his contract would not be renewed beyond 30 June 2017. After referring to a discussion the Applicant had with his supervisor, in which the latter had informed him that there were potential issues concerning the lack of availability of funding for the Applicant’s post after June 2017, the Chief, HR, DPS, confirmed to the Applicant that “despite the best efforts of management, a review of associated funding ha[d] confirmed that ... situation”. The Chief, FR, DPS, also conveyed to the Applicant that the budgetary reasons for the non-renewal were the following:

There will be a lack of Window 1 funding over the next months combined with a lack of Window 2 project detailing options that unfortunately will not allow for the organisation to continue funding your post. Your position begin Women and Trade Programme Officer in former SC section (as of July 2016) and current SIVC section has been funded as below:

2016: 6 months (July-December) – Pacific: Economic Empowerment of women project

2017: 3 months (January-March) – Pacific: Economic Empowerment of women project
3 months (April-June) – ITC PSC.

9. On 20 June 2017, the Applicant requested management evaluation of the decision not to renew his FTA and, on the same day, he filed the present application for suspension of action. The same day, he presented a sick leave certificate from his treating physician indicating that he was unfit for work until 31 July 2017.

10. The Respondent filed his reply on 22 June 2016 noting *inter alia* that in case the Medical Service endorses the Applicant’s medical certificate, his contract would be extended until the end of his certified sick leave, i.e. 31 July 2017.

Parties’ contentions

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

Prima facie unlawfulness

a. The contested decision relies on incorrect factual basis. Whilst the stated reason for the non-renewal of the Applicant’s FTA is the lack of funding for his post, the “Poor Communities and Trade Programme” to which the Applicant has been assigned has received new funding, including for his position. Furthermore, the Administration made no effort to secure funding for the Applicant’s position. Rather, the Applicant was specifically requested to refrain from seeking funds from the relevant donors;

b. Contrary to what is stated in the contested decision, the Administration made no efforts to assist the Applicant in finding another position;

- c. The contested decision was motivated by bias on the part of the Director of Division of Enterprises and Institutions, who adopted a pattern of conduct displaying his intent to separate the Applicant, notably by:
- i. Reassigning the Applicant to new functions without reasons on numerous occasions;
 - ii. Removing the Applicant on 27 March 2017 from the projects “Job creation for youth in Burkina Faso and Mali” and “Afghanistan – Countering migration to Europe with the EFI – Technical employment Development Program”, without any reason and prior consultation; and
 - iii. Using inappropriate language in respect of the Applicant’s activities;
- d. The Administration abused its authority and failed to act fairly, justly and transparently in dealing with the Applicant;
- e. The Applicant is entitled to exhaust his sick leave entitlements before he is separated. Furthermore, ST/AI/2005/3 prevents the Organisation from separating a staff member when on sick leave;

Urgency

- f. The Applicant will be separated from the Organisation on 30 June 2017 if the contested decision is not suspended;
- g. The Applicant could not obtain a renewal of his sick leave certification before 20 June 2017; and

Irreparable damage

- h. The Applicant will suffer irreparable damages in the form of loss of employment opportunities if the contested decision is implemented.

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

a. He does not accept the facts as presented by the Applicant in his application, and submits that some statements made by the Applicant are not accurate characterisations of email exchanges attached to the application;

Prima facie unlawfulness

b. The decision is not prima facie unlawful; FTAs do not carry any expectancy of renewal and no promise of renewal was made to the Applicant;

c. The reasons given for the non-renewal are valid and supported by the facts: the non-renewal is based on budgetary restrictions that do not allow the Organization to continue funding the Applicant's post; the funding situation was shared with the Applicant and is reflected in the budgetary documentation annexed to the reply;

d. ITC is funded by Regular Budget ("RB") funds and extra budgetary ("XB") resources; the latter is constituted of two categories, namely un-earmarked funds (window 1) and earmarked funds (window 2); funding for un-earmarked funds (window 1) has decreased from USD16.5m in 2012 to USD2m in 2017; the reduction of the funding has so far resulted in 2017 in the termination of contracts of two staff members and the non-renewal of the FTAs of two other staff members, including the Applicant,

e. His non-renewal is a consequence of the reduced extra budgetary funding availability and is not an isolated event;

f. The Applicant did not demonstrate that the decision was based on bias or otherwise improperly motivated;

g. No action has been taken with respect to the Applicant's separation prior to the exhaustion of his sick leave entitlements; therefore, should the medical certificate that the Applicant filed on 20 June 2017 be endorsed by the Medical Service, his contract would be extended until the end of his certified sick leave (31 July 2017), in accordance with ST/AI/2005/3, para. 3.9;

Urgency

h. The urgency is self-created since he knew since 28 April 2017 that his FTA would not be renewed, yet, he waited nearly two months to request management evaluation of the decision;

Irreparable damage

i. The Applicant failed to show irreparable damage in the present case; he was encouraged by ITC to apply to other vacancies, which shows that there is a possibility for being selected for another position; he was also offered to be put in contact with a consultant to support him to re-entry the job market; and

j. There was thus no indication that the Applicant will suffer irreparable damage in the present case.

Consideration

13. 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". These three requirements are cumulative and must, thus, all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014); *Essis* Order No. 89 (NBI/2015); *Carlton* Order No. 262 (NY/2014)).

14. With respect to the non-renewal of an FTA, the Tribunal recalls the established jurisprudence of the Appeals Tribunal according to which an FTA does not bear any expectancy of renewal (*Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). A non-renewal decision can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The staff member alleging that the decision was based on improper motives carries the burden of proof with respect to these allegations (*Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503).

15. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal further stressed that “a decision not to renew an FTA can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members”.

Prima facie unlawfulness

16. The Tribunal recalls that the threshold required for *prima facie* illegality is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

17. The Applicant raises several grounds to support his claim that the contested decision is unlawful; firstly, that it contravenes ST/AI/2005/3 as it could not be issued when the Applicant was on certified sick leave, secondly, that it was based on an incorrect factual basis, thirdly, that it was motivated by ulterior motives, and fourthly, that the Administration failed to act fairly, justly and transparently with him.

18. Concerning the first ground, the Respondent stressed in his reply that since the Applicant has not exhausted all his sick leave entitlements, and should the medical certificate submitted by the Applicant on 20 June 2017 be endorsed by

the Medical Service, his contract will be extended until 31 July 2017, in accordance with ST/AI/2005/3.

19. The Tribunal notes that the contested decision is that of 28 April 2017 not to renew the Applicant's FTA beyond 30 June 2017. At the time of that decision, the Administration was and could not have been aware that the Applicant's treating doctor would find him unable to work 100% from 1 through 31 July 2017. The medical certificate dated 20 June 2017 was filed by the Applicant only on that date, and is currently being assessed by the Medical Service. The Tribunal is satisfied that no determination has yet been made by the Administration to separate the Applicant while he is medically unfit to work, and that in case the medical certificate is endorsed by the Medical Service, his contract will be extended for administrative purposes, to allow him to use his sick leave entitlements. The contested decision does thus not constitute a violation of the Applicant's entitlement to exhaust his sick leave entitlements before separation.

20. On the second ground, the Applicant argues that the non-renewal letter (see para. 8 above) suggests that there is a lack of funding for his position in the whole SIVC section, and that that statement is incorrect. According to him, while he was initially assigned to the Women and Trade Programme, in July 2016 he was transferred to the Poor Communities and Trade Programme, which received new funding, including for his position.

21. From the documentation it received, the Tribunal is not in a position to ascertain against which project the Applicant was actually placed at the time of the contested decision, and on what grounds such placement had been made. The Respondent himself admitted that on 27 March 2017, the Applicant was being taken off the project he was working on, "for operational reasons". He was also asked not to perform any work anymore on the Afghanistan EPFI project, with immediate effect. The Respondent did not explain the operational reasons for which the Applicant was no longer allowed to perform the functions relating to these projects.

22. Furthermore, the Tribunal notes the two types of funding available, namely “window 1” (un-earmarked funds) and “window 2” (funds earmarked for specific projects). It also notes that the Applicant was assigned to specific projects, presumably financed by window 2, which, as per Annex 2 to the Respondent’s reply has suffered less reduction. There is even documentary evidence on file supporting that the Australian government was funding at least some of the projects in which the Applicant was involved.

23. The Respondent, however, did not file any evidence showing how the funding of the Applicant’s post in 2017 relates, concretely, to the reduction of ITC window 1 funding. In his reply, the Respondent, merely ascertained that a reduction of these funds resulted, *inter alia*, in the non-renewal of the Applicant’s post. Under the circumstances, a general statement that there was an important reduction of window 1 funding (from 2012 to 2017), which resulted in two contracts being terminated and two FTAs (including that of the Applicant) not being renewed in 2017, is not sufficient to show that it was indeed the funding of the Applicant’s post that was no longer available.

24. It is the duty of the Administration to provide contemporaneous evidence, which could be in the form of staffing tables reflecting the funding of each post, to allow the Tribunal to examine which post is funded through which source of funding (RB, XB – window 1 or 2, Programme Support Costs (“PSC”)), at a given moment in time. If decisions are taken to reduce or stop the funding of a certain XB funded project, with its consequent impact on project posts, they have to be duly documented, and reasoned. General statements concerning the reduction in XB funding (earmarked and not earmarked) as those made in the present case do not allow to establish that indeed, it was the Applicant’s (project-funded) post that was left without any funding available.

25. No reasons are either provided to explain why the funding of the Applicant’s position was being changed from “Pacific: Economic empowerment of women project” to PSC as of April 2017. The withdrawal of the Applicant from these projects, and that change in funding, appear to be all but transparent

and the Respondent did not use the opportunity to shed some light into what seems to be a rather opaque decision making.

26. Overall, the Tribunal is concerned about the lack of transparency shown by the Administration vis-à-vis the Applicant with respect to the funding of his position and about the fact that he was removed from several projects shortly before the non-renewal decision was taken. It recalls that the Respondent has a duty of care and of transparent dealing towards its staff members.

27. In view of the foregoing, and for the purpose of the present proceedings, the Tribunal is not satisfied that the budgetary reasons provided to justify the non-renewal decision are supported by the facts. It, therefore, finds that the non-renewal of the Applicant's FTA was *prima facie* unlawful and, as a result of this, it does not consider it necessary to examine the third and fourth grounds that the Applicant raised in connection to *prima facie* unlawfulness.

Urgency

28. This Tribunal has ruled in several instances that the requirement of particular urgency will not be satisfied if the urgency was created or caused by an applicant (*Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), *Lorand* Order No. 93 (GVA/2010), *Woinowsky-Krieger* No. 59 (GVA/2010), *Suliqi* UNDT/2011/120, *Maloka Mpacko* UNDT/2012/081, *Majoul-Hunter* UNDT/2012/117, *Longone* No. 27 (GVA/2013)).

29. The Tribunal has repeatedly held (*Maloka Mpacko* UNDT/2012/081, *Majoul-Hunter* UNDT/2012/117, *Longone* Order No. 27 (GVA/2013)) that:

Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions.

30. In assessing situations of urgency in the above-mentioned cases, the Tribunal generally considered as a key factor whether any delay attributable to the applicant had prevented the Tribunal from having sufficient time to examine the matter before the contested decision is implemented, and to ensure that the Respondent had a fair opportunity to respond to the application. This pragmatic approach is in line with the spirit of the applicable rules, which aim at striking a balance between the need for an urgent intervention of the Tribunal and respect of the rights of all parties involved.

31. In this connection, the Tribunal recalls that staff rule 11.2(c) gives staff members 60 days to submit a request for management evaluation to formally initiate a challenge against an administrative decision. Whilst extraordinary interim reliefs, such as a suspension of action, may warrant that appropriate action be taken before the expiry of this deadline, requiring as a rule that all applications for suspension of action be lodged immediately after the notification of the contested decision for it to be considered by the Tribunal would unduly undermine the rights of the staff members under the staff rules with respect to the 60-day period given to request management evaluation.

32. In the present case, the Tribunal is satisfied that it is urgent to suspend the implementation of the contested decision, which otherwise risks being implemented on 30 June 2017, and that this situation is not self-created by the Applicant. Whilst it is acknowledged that the Applicant could possibly have filed his request for management evaluation and the present application for suspension of action at an earlier time, his filing on 20 June 2017, namely 10 days before the expiry of his FTA, still gave the Tribunal sufficient time to consider the matter, within the timeline envisaged in its Statute, and to provide the Respondent with an opportunity to reply to the application.

33. Denying the Applicant's application on the sole ground that it could possibly have been filed earlier would result in unfairness towards the Applicant, especially in a context where he was on certified sick leave at the time of the contested decision and that he sought assistance from the Office of Staff Legal

Assistance to lodge his request for management evaluation and the present application, upon which he has no direct control.

Irreparable damage

34. The Tribunal is also satisfied that the non-renewal of the Applicant's FTA would cause more than mere economic harm to him, namely loss of career prospects, self-esteem and an unquantifiable potential harm to his reputation. Such cannot simply be compensated by the award of damages (cf. *Kasmani* UNDT/2009/017; *Diop* UNDT/2012/029).

35. Since the three cumulative conditions of art. 2.2 of the Statute are met, the request for suspension of action will be granted.

Conclusion

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

The decision of 28 April 2017 not to extend the Applicant's fixed-term appointment beyond 30 June 2017 be suspended pending the outcome of the management evaluation.

(Signed)

Judge Teresa Bravo

Dated this 27th day of June 2017

Entered in the Register on this 27th day of June 2017

(Signed)

René M. Vargas M., Registrar, Geneva