



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

EVIDENTE

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:**

Evelyn W. Kamau, OSLA

**Counsel for Respondent:**

Saidou N'Dow, UN-Habitat

Notice: This Order has been corrected in analogous application of art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. By application filed on 29 June 2017 with the Nairobi Registry of the Tribunal and forwarded to the correct Registry, being Geneva, the Applicant seeks suspension of action, pending management evaluation, of the decision not to renew her fixed-term appointment (“FTA”) upon its expiration on 30 June 2017 for lack of funding.

## **Facts**

2. The Applicant joined UN-Habitat in 2008 as a Business Process and Change Management Specialist (P-4), on an FTA. In 2011, she was laterally transferred to the UN-Habitat Country Office in Pakistan (“Pakistan Office”) as a Senior Programme Management Officer. On 2 January 2013, the Applicant was appointed Officer in Charge to the post of Country Programme Manager (P-5) (“OiC, CPM”), which led her to manage the Pakistan Office.

3. From at least 1 December 2016, discussions on funding for the staff of the Pakistan Office were regularly held with the Applicant and the financial plans for human resources updated on a monthly basis. The Applicant was fully engaged in the preparation of the resource plans.

4. From the time of her appointment as OiC, CPM, in January 2013, the Applicant was granted successive short term extensions, ranging from one to four months. She received 12 notices of non-renewal of her FTA between 30 October 2013 to 1 June 2017, advising her that her contract would not be renewed if the necessary funds were not secured.

5. By email of 31 May 2017, the Applicant provided a table indicating that an amount of USD17,897 was available for the extension of her FTA into June 2017, following the request of her First Reporting Officer, the Human Settlements Officer in the UN-Habitat Regional Office for Asia and the Pacific (“FRO”). By email of the same day, the Applicant’s FRO indicated that a total amount of USD73,141 was required to fund the extension of her FTA in June 2017, taking

into consideration the mandatory reserve necessary to cover the costs related to her separation.

6. By memorandum of 1 June 2017 from her Second Reporting Officer, the Director, UN-Habitat Regional Office for Asia and the Pacific (“SRO”), the Applicant was notified of the non-renewal of her FTA beyond 30 June 2017 as follows:

[A]t this point of time, it is my duty to notify you with much unease that project budgets are now available only for salary to cover your current contract until 30 June 2017, and that, should additional funds not be secured, UN-Habitat will not be able to extend your contract beyond that date.

We do note the availability of some funds in the budget tables which need to be allocated as a minimum share in the separation expenses, if separation has to happen. Accordingly, it is required to work on separation plan if funds are not available by 15<sup>th</sup> of June 2017 to cover the mandatory cost for separation.

In case the funding situation changes prior to the above mentioned date, I am willing to reconsider this decision, taking into consideration the future staffing needs of the country programme, and the new funding received.

7. By emails of 28 June 2017 to her FRO and the National Finance Officer, the Applicant recalled the content of a skype conversation she had the previous day with her FRO where she allegedly identified “additional funding” in the amount of USD37,617 that would cover her FTA beyond 30 June 2017, pending the finalization of other long term funding projects. In this respect, the Applicant identifies two long term projects coming up for review by the UN-Habitat Programme Advisory Group on 6 July 2017, one in the amount of USD224,989 scheduled to run from May 2017 to January 2018 and another for EUR250,000 scheduled to run for 14 months. By another email of the same day, the Applicant advised her FRO that she was unable to secure the reserve requested to cover the cost of her separation and voiced her concerns that this burden was unfairly put on her.

8. On 29 June 2017, the Applicant submitted a request for management evaluation of the decision not to renew her FTA and she filed the present application for suspension of action.

9. By Order No. 133 (GVA/2017) of 30 June 2017, the Tribunal ordered that the implementation of the decision not to renew the Applicant's FTA upon its expiration on 30 June 2017 be suspended until 7 July 2017, pending consideration of the application for suspension of action.

10. The Respondent was notified of the application for suspension of action on 30 June 2017 and he submitted his reply on 3 July 2017.

### **Parties' contentions**

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

#### *Prima facie unlawfulness*

- a. The contested decision is based on an incorrect factual basis as the Applicant identified funding to cater for her FTA until at least the end of July 2017 and possibly longer;
- b. The Organization placed an unfair burden on the Applicant in requesting her to secure additional funds to cover the cost of her own separation;
- c. The contested decision was motivated by bias on the part of her FRO and SRO, and was a culmination of discriminative, abusive, and harassing conduct by her supervisors, as evidenced by the following facts:
  - i. The Applicant's proposals to be sent on temporary missions on full cost recovery basis to other country offices, to be reassigned within the Pakistan Office or to be transferred to another office were not given any consideration, contrary to that of other colleagues;
  - ii. The Applicant is being punished for having voiced her frustration about UN-Habitat bureaucracy and the long delays for

signing donor agreements, for which her SRO took offense. The Applicant's SRO subsequently removed her from his skype contact list and requested a written apology. The SRO did not sign donor agreements, upon which the renewal of the Applicant's FTA was dependent until the Applicant sent him the requested apology on 31 May 2017; and

iii. Since the Applicant was appointed OiC at the P-5 level on 2 January 2013, she sought to discuss her special post allowance with her FRO and SRO but to no avail;

*Urgency*

- d. The Applicant's separation from the Organization is imminent;
- e. The urgency is not self-created as the Applicant identified funding for her post as requested, which ought to entail that her FTA would be extended. When she realised that this would not be the case, she immediately took action to challenge the decision not to extend her FTA;

*Irreparable damage*

f. Implementation of the contested decision would lead to the Applicant's separation from the Organization, which will render her ineligible to apply for other United Nations positions as an internal candidate, will cause her financial loss and impair her reputation and career prospects. These consequences cannot be remedied by financial compensation.

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

*Prima facie unlawfulness*

- a. The contested decision was motivated by a genuine lack of funds for the Applicant's post and a proper exercise of the Administration's discretion in the context of a precarious financial situation;

- b. Separation costs are to be factored when calculating funds for extension of appointments;
- c. An FTA does not carry any expectancy of renewal and the Applicant was well aware of the precarious nature of her position as evidenced by the short term extensions she had been granted since January 2013 and the numerous non-extension notices she received;
- d. The Applicant failed to show evidence of improper motive or any form of bias on the part of her FRO and/or her SRO. Rather, the evidence shows that efforts were made to secure the extension of her FTA;

*Urgency*

- e. The alleged urgency was created by the Applicant herself, as she failed to take action on 1 June 2017 when she was notified of the contested decision, or at the very least on 15 June 2017, when it became clear that no additional funding for her post had been identified;

*Irreparable damage*

- f. The Applicant failed to establish to the requisite standard that implementation of the contested decision would cause her irreparable harm.

**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 two grounds to support her claim that the contested is unlawful, which are interrelated; firstly, that the contested decision is based on an incorrect factual basis and, secondly, that it is motivated by bias on the part of her FRO and SRO.

18. As to the first ground, the Tribunal notes that the documentary evidence produced by both parties clearly shows that the UN-Habitat Pakistan Office, which essentially relies on projects for its funding, was under extreme financial pressure at the time of the contested decision. Emails exchanged between the Applicant, her FRO, her SRO and the National Finance Officer show that the extension of all contracts within the Pakistan Office, which comprises in addition to the Applicant’s post a National Finance Officer, a Procurement Officer, a Human Resource Assistant and a Security Assistant, was subject to a monthly

review and consideration from at least early December 2016. The Applicant herself was extended only for short term periods and received 12 notices of non-renewal from October 2013 to June 2017, repeatedly advising her that her contract would not be renewed if additional funding for her post was not found. As unfortunate as this situation may be, there is prima facie evidence that the Applicant's appointment was precarious and that she was aware of the situation.

19. The Tribunal further notes that the Applicant did not submit evidence that she generated additional funding after 1 June 2017 to cover the budget for her position, as required in the memorandum of 1 June 2017 from her SRO. She rather appears to have identified funds from existing projects to cover her salary for July 2017. In this connection, it is not disputed that the available budget of the Pakistan Office was sufficient to cover the Applicant's salary for July 2017, in the amount of approximately USD16,400, but that it was insufficient to cater for her separation related costs. According to the Respondent, these would represent an estimated amount of USD56,741.38.

20. The question boils down to whether the Organization unlawfully exercised its discretion in not renewing the Applicant's FTA given the unavailability of funds to cater for her separation costs, or whether this can otherwise be seen as a pretext to cover a decision based on ulterior motives.

21. The Tribunal notes that no specific rule or financial guideline have been produced by the Respondent establishing a formal requirement to meet the funding for the contractually required separation costs before renewing an FTA. However, this appears prima facie to be a reasonable and prudent financial practice, especially in the context of posts funded through projects and where there is a concrete risk of an imminent separation due to the lack of funds. The Tribunal recalls that it shall not interfere with the Organization's managerial discretion, especially when it concerns the management of its financial resources.

22. Most importantly, the requirement to secure funding for the Applicant's separation in order to extend her FTA does not appear to be an excuse fabricated to justify her separation. Contrary to the Applicant's assertion, this requirement could not have come as a surprise in late May 2017, as the issue was repeatedly



mentioned in her non-renewal notices, as early as of 21 March 2014. In this connection, the notice of non-renewal of 21 March 2014 stated: “[w]e note the availability of one more month salary in the budget tables, but for the time being we need to allocate these funds as a minimum share in the separation expenses, if separation is to happen”. Although this requirement may not have been strictly enforced when periodically renewing the Applicant’s contract, it was specifically recalled by the National Finance Officer in an email of 31 May 2017, at the time where the financial situation of the Pakistan Office appears to have been under particular pressure.

23. In view of the foregoing, there is no legitimate reason for this Tribunal to doubt that the Organization acted bona fide in requesting the Applicant, who is in charge of identifying funding for the various positions in the Pakistan Office, including her own, to identify funds to cover the expenses related to her eventual separation. Absent such funds being identified, there is no prima facie basis to conclude that the contested decision was erroneously grounded on a lack of funding.

24. As to the second ground, the Tribunal finds that no evidence has been adduced to support the conclusion that the contested decision was based on ulterior motives. In addition to the above, it appears from the documents produced by the Respondent that the Applicant’s FRO and SRO both made genuine efforts to renew her FTA. Amongst others, the Applicant’s SRO wrote to the Director, Programme Division, on 8 June 2017 to raise the financial challenges faced by the Pakistan Office and to request additional funding “to retain key staff members, including [the Applicant’s post] which [was] important at this point in time”. He explained that the Pakistan Office required approximately USD254,000 “to retain key staff members until September 2017” and that if two projects currently in the pipeline materialised they could cover approximately USD100,000 of this amount, leaving a deficit which he requested UN-Habitat to cover. Likewise, the documents show that the Applicant’s FRO worked on a monthly basis to extend the Applicant’s FTA. Furthermore, the Applicant was not the only staff member among those working in the Pakistan Office to suffer the consequences of the Office’s precarious financial situation as it appears from the documents submitted

by the Respondent that the appointment of other staff members working for the Country Office or on projects managed by it were equally at jeopardy during the same period or and there is no indication that she was specifically targeted for non-renewal.

25. The fact that the Applicant appears to have offended her SRO during a skype conversation on 11 May 2017 and that she subsequently made a written apology to him, whether or not it was requested by her FRO, is not sufficient to establish, even on a prima facie basis, that the contested decision was motivated by bias in the circumstances described above. There is no indication that the decision not to renew the Applicant's contract, which was already clearly in a precarious situation, was prompted by this incident. Likewise, there is no prima facie evidence that the Applicant's FRO and/or SRO unduly denied her opportunities to undertake missions or other assignments to cover the cost of her salary in contrast with other staff members. Whilst it may well be that some other staff members had different opportunities, it does not mean that the Applicant, who was in charge of the Pakistan Office and certainly in a different position than other staff members, was discriminated against or otherwise subject to an unlawful differential treatment.

26. In view of the foregoing, the Tribunal finds that it has not been established that the contested decision is prima facie unlawful. Given that the first condition to grant the application for suspension of action is not met, it is not necessary to examine the two others.

27. As the Tribunal has now ruled on the application for suspension of action, its Order No. 133 (GVA/2017), which suspended the implementation of the contested decision until 7 July 2017 to allow consideration of the application pursuant to the deadline set forth in art. 13.3 of its Rules of Procedure, ceases to have effect as of the date of the present decision.

**Conclusion**

28. In view of the foregoing, the application for suspension of action is rejected.
29. Order No. 133 (GVA/2017) of 30 June 2017 ceases to have effect.

*(Signed)*

Judge Rowan Downing

Dated this 5<sup>th</sup> day of July 2017

Entered in the Register on this 5<sup>th</sup> day of July 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva