



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Mohamed Abdou, OSLA

Counsel for Respondent:

Daniel Trup, WMO

Introduction

1. By application filed on 29 April 2020, the Applicant, a staff member of the World Meteorological Organization (“WMO”), requests suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment beyond 6 May 2020.
2. The application for suspension of action was served on the Respondent, who filed his reply on 4 May 2020.

Facts

3. The Applicant holds a fixed-term appointment with WMO as Chief of Procurement and Contract Management (P-5), Governance Services Department, since 7 May 2016 following his transfer from the UN Secretariat.
4. During the first half of June 2019, the World Meteorological Congress (“WMO Congress”), the governing body of WMO, passed a series of resolutions directing the WMO Secretary-General to implement reforms both to the structure of the Secretariat and the manner in which WMO delivered services to its Member States. In particular, WMO Congress requested to “identify efficiency gains in administrative work and processes to obtain savings in the regular budget corresponding to at least CHF 5.3 million in 2020-2023”. This prompted the WMO Secretary-General to undertake a review of posts and their requirements.
5. On 4 October 2019, the WMO Secretary-General convened a town hall meeting to inform WMO staff about the restructuring process and potential outcomes from it (e.g., staff reduction). Subsequent to the town hall, WMO held several consultation sessions with WMO staff representatives.
6. Also, in October 2019, the Director of Governance Services asked the Applicant to brief on the Procurement Section in terms of *inter alia* workload and annual statistics on procurement. The information sought was provided.

7. On 29 November 2019, the Applicant was informed that his post was amongst those that would be impacted by the restructuring in WMO.
8. On 4 December 2019, the Applicant received a second notice concerning the ongoing restructuring and the potential impact on the post he encumbered.
9. On 1 January 2020, the new general structure of the WMO Secretariat was announced, and the Applicant's reporting line changed from the Assistant Secretary-General, WMO, to the Director, Legal Counsel and Administration, WMO.
10. On 4 March 2020, the Applicant received notification of the abolition of the post he encumbered.
11. On 27 March 2020, WMO advertised a position of Procurement Officer (P-4 level) with the Governance Services Department, WMO.
12. On 27 April 2020, the Applicant requested management evaluation of the contested decision and, two days later, he filed the instant application for suspension of action.

Parties' contentions

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

Prima facie unlawfulness

- a. The contested decision is unlawful because:
 - i. There was no staff consultation regarding the restructuring process leading to the abolition of his post;
 - ii. The Applicant's advice was never sought concerning the future structure of procurement within WMO or of his responsibilities;
 - iii. The Applicant was never advised that the post he encumbered might be abolished and was presented with a *fait accompli* upon receipt of the notice of the non-renewal of his contract;

iv. Rules and procedures to reclassify his post from the P-5 to the P-4 level were not followed. Furthermore, by alleging that the process was one of abolition, the Applicant was denied procedural safeguards, such as appealing the outcome of the reclassification of his post, particularly when there is no doubt that his role continues to be required albeit at a lower level;

v. No efforts have been made to retain the Applicant against suitable available vacant posts and, for instance, he could have been reassigned to the reclassified P-4 post; and

vi. The Organization failed to afford him the preferential treatment due to internal candidates pursuant to the Dispute Tribunal's jurisprudence, referring to Judgment *Rosenberg* UNDT/2011/045;

Urgency

b. Implementation of the decision will entail the Applicant's separation of service effective 6 May 2020. The period between notification of the contested decision to the Applicant, 6 March 2020, and his filing of his application for suspension of action was due to the need to get familiar with the new internal justice system implemented at WMO. Indeed, it is only recently that WMO accepted the jurisdiction of the Dispute Tribunal and abolished its "Joint Appeals Board" structure. Little information was available about the new system, no clear guidance was received from management on the procedure for dispute resolution, and getting reliable information became more difficult due to the current pandemic. As such, the urgency is not self-created;

Irreparable damage

c. The non-renewal of the Applicant's fixed-term appointment would cause him "more than mere economic harm, namely loss of career prospects, self-esteem and an unquantifiable potential harm to his reputation", which cannot be compensated by the award of damages.

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

Prima facie unlawfulness

- a. The contested decision is not *prima facie* unlawful because:
 - i. The Applicant had full opportunity to engage in consultations with the Organization, which met its obligation to inform its staff and give them an opportunity to voice their views. In this connection, the Respondent refers to the town hall that the Secretary-General of WMO held on 4 October 2019, consultations held between WMO and WMO staff representatives, and consultations with/communications to the Applicant on 18 October, 29 November, and 4 December 2019 as well as on 4 March 2020;
 - ii. The advertised P-4 post of Procurement Officer does not result from a reclassification of the P-5 post encumbered by the Applicant. It is a newly created post to "meet the challenges of WMO post reorganisation";
 - iii. As per WMO Standing Instructions, reclassification of a post applies when there are changes to the duties and responsibilities attached to it. In the context of WMO's reorganization process, reclassification "was not the avenue by which [WMO] was solely obligated to pursue change", and it opted to create a new post and abolish the post that the Applicant encumbered; and
 - iv. There is no obligation to reassign fixed-term appointed staff encumbering posts to be abolished and, moreover, staff facing post abolition "must show an interest in a position" for which they are suitable to qualify. Also, French being one of the requirements for the post, the Organization did not consider the Applicant as immediately suitable and he is free to apply to the newly created P-4 post;

Urgency

b. The requirement of urgency is not met as it is self-created. WMO accepted the Dispute Tribunal's jurisdiction on 27 January 2020 and, since then, WMO staff have been informed about new processes and procedures to challenge administrative decisions. The Applicant received notification of the contested decision on 4 March 2020 and a virtual town hall on the internal justice system took place on 17 March 2020. Nevertheless, it was only on 30 April 2020, namely 5 working days before the implementation of the contested decision that the Applicant filed his application for suspension of action;

Irreparable damage

c. The Respondent did not address the issue of irreparable damage in his reply.

Consideration

15. Art. 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 case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative; in other words, they must all be met in order for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

Prima facie unlawfulness

16. The Tribunal recalls that the threshold required in assessing this condition 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. In the case at hand, the Applicant argues that the contested decision is unlawful on the following grounds:

- a. Lack of consultation with staff concerning WMO restructuring process and its impact;
- b. Lack of advice in relation to the abolition of the Applicant's post;
- c. Non-compliance with WMO procedural rules for the reclassification of the Applicant's post; and
- d. Lack of an effort from WMO to retain the Applicant against any suitable available position.

18. With respect to the alleged lack of consultation with staff members about the restructuring process, the Tribunal notes that paragraph 4.46.10 of the applicable legal framework, namely WMO Standing Instructions, recognizes as "highly important" to have "early open communication" with staff affected by a reorganization.

19. The evidence on file demonstrates that WMO did, indeed, communicate on several occasions its intentions to implement a restructuring process in its Secretariat, which included the Applicant's procurement department.

20. The Respondent filed documentary evidence showing that there was a town hall meeting held by the Secretary-General of WMO with WMO staff members on 4 October 2019 during which the restructuring process was announced and explained. Furthermore, WMO set up a dedicated consultation forum. All of this is supported by a WMO Service Note dated 16 October 2019, reading in its relevant part as follows:

Further to the SN No. 22/2019 issued on 28 June 2019, notifying all staff of my decision to restructure the WMO Secretariat in accordance with Resolution 11 (Cg-18) - WMO Reform - Next Phase - and the town hall meeting held in 4 October 2019, this Service Note advises staff of the designation of the Joint Consultative Committee (JCC) as the forum for the collective consultations on the restructuring proposals.

21. The Applicant also alleges that he was not advised that his post was to be abolished, that procedural rules in relation to reclassification of posts were not observed and that WMO has not made any efforts to reassign him to other available suitable positions. The Tribunal finds that these arguments are not supported by the available evidence on file.

22. In fact, contrary to what the Applicant argues, the documents filed by the Respondent show several email exchanges between WMO and him related to the restructuring process in the procurement section.

23. Moreover, an inter-office memorandum dated 4 December 2019 clearly informed the Applicant that his post was also included in the restructuring process and that his conditions of employment or service could change.

24. Finally, on 4 March 2020 the Applicant was formally notified, by inter-office memorandum, that his post was to be abolished.

25. The Tribunal finds that there is sufficient evidence supporting that the Applicant was perfectly aware of the ongoing changes within WMO, and that he was advised, in due course, that his post would soon be affected.

26. In relation to the alleged breach of procedural internal rules, the Respondent has also clarified that the ongoing restructuring exercise was not a mere reclassification of post but, rather, an abolition of post due to changing needs in WMO.

27. Contrary to what the Applicant has alleged, the Respondent has shown that the advertised P-4 position was, in fact, a new post with functions and skills/requirements reflecting the outcome of the restructuring.

28. The Respondent advances that WMO had no duty to immediately reassign the Applicant to the new P-4 position and, moreover, that reassignment was not an option for WMO. In support of this, the Respondent argues that French was considered an essential skill for the new P-4 post, a skill that the Applicant appears not to possess, and that, as a result, he was not considered “immediately suitable” for said position while at the same time pointing out that he can, nevertheless, apply for it.

29. The Tribunal therefore finds that the Applicant has not met the burden of proving that the contested decision is *prima facie* unlawful. Given the cumulative nature of the legal test related to the conditions to suspend contested decisions pending management evaluation, it is not necessary for the Tribunal to examine the remaining requirements of urgency and irreparable damage.

Conclusion

30. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Teresa Bravo

Dated this 6th day of May 2020

Entered in the Register on this 6th day of May 2020

(Signed)

René M. Vargas M., Registrar, Geneva