



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

RASUL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for applicant:
Esther Shamash, OSLA.

Counsel for respondent:
Stephen Margetts, ALU/OHRM.

1. The Applicant's Case

1.1 The applicant commenced duty on 7 May 2009 on a temporary duty contract (TDY) in MONUC. She had previously worked in the country in 2007/8. During this period she had developed a network of community and political contacts. She was asked to reactivate these initiatives. Having done so, it is her opinion that the Special Representative of the Secretary-General (SRSG) apparently perceived her as a threat and decided "to exclude and marginalize her" over the next three months. In her application for suspension of action she provides further particulars.

1.2 On 18 August 2009, her contract was converted to a three-month fixed-term contract following a recommendation by her supervisor. In addition she was promised that she would be given three opportunities to be interviewed in order to regularize her contract within MONUC to be placed on a fixed term basis.

1.3 An opportunity arose for her to apply for the post of Senior Political Affairs Officer. She was interviewed on 15 October 2009. She states that she was subsequently informed by the CCPO's office that of all the candidates interviewed she had scored the highest mark. Not surprisingly, this information raised her expectations and she awaited communication of the decision. To date she has heard nothing. In December 2009 she enquired as to the reason for delay. She was told that "there had been a delay in finalization." Hearing nothing she made a further enquiry in January 2010 and was told that the documents from the interview would only be finalized in late January or early February. The applicant asserts that despite the delay and her repeated requests she has not been provided with any explanation.

1.4 On 17 November 2009 her contract was extended for three months to expire on 17 February 2010. On 27 January 2010 she was informed that her contract would not be extended. She was given no reasons. On 5 February 2010 she received written notification of the termination of her contract which was referred to as a "conditional" contract.

1.5 On 27 January 2010, the applicant was told that her contract of employment

would not be extended. She received written confirmation of this on 5 February 2010.

1.6 On 12 February 2010 the applicant requested a management evaluation and also brought this application for suspension of action. In essence, she alleges that the decision not to renew or extend her contract was taken for improper reasons as evidenced by the attitude of the SRSG and the unexplained delay in finalizing the paperwork in relation to what she understands was her successful application for the vacancy of Senior Political Affairs Officer.

2. The Respondent's Case

2.1 The respondent opposes the application on the grounds first that the applicant's dilatory conduct in presenting a late application has resulted in a denial of due process to the respondent. Second, that in any event the application for suspension of action is misconceived at law and should be struck out.

3. Relevant Legal Principles

3.1 Applications for suspension of action are governed by article 2 of the Statute of the United Nations Dispute Tribunal and article 13 of the Tribunal's rules of procedure. Article 13 entitled 'suspension of action during a management evaluation' provides as follows:

“1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, 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.”

4. Considerations

Dilatory Conduct

4.1 It is correct that the applicant knew since 27 January 2010 that her fixed term

contract would not be renewed. She received written confirmation on 5 February 2010. A week later, on the 12th, she filed her application for suspension of action. On the first working day, with the weekend intervening, the respondent was served with the papers, on the 15th, giving them barely a working day to make the necessary enquiries and to present their response.

4.2 Whilst the Tribunal does not condone delay on the part of any party to proceedings, I do not consider that the mere fact of delay is a sufficient basis for rejecting the application for suspension. Had there been sufficient time I would have been inclined to grant the respondents request for a 24 hours' extension to enable them to put forward further grounds of objection. However, I am obliged to take into account the fact that on 17 February 2010 the decision not to grant an extension takes effect.

4.3 Those advising applicants should take note of the Tribunal's concern that suspension of action applications are urgent requests for interim relief and that such applications should be made without delay. If there is delay the application should be accompanied with an explanation. Respondents should not be placed at an unfair disadvantage simply on account of the dilatory presentation of an application. That said, I cannot in this case reject the application simply on the basis of delay nor does time allow me to grant the respondent's request for an extension of time. The matter is urgent.

4.4 The respondent's contention that the application is misconceived is presented conveniently under the three essential prerequisites to a suspension of action application under Article 2 of the Statute of the Dispute Tribunal and Article 13 of the Tribunal's Rules of Procedure.

a) Prima facie case

4.5 It is the respondent's contention that adequate performance cannot ground a legitimate expectation of renewal. Furthermore, the respondent relies on the fact that a fixed-term contract terminates at the end of the contractual period and does not automatically entitle an individual to an extension or to another appointment

4.6 The respondent's next argument is that the applicant's allegation of a breakdown in the relationship between her and the SRSG provides a basis for non-renewal. The respondent expresses concern that the applicant has revealed a lack of respect for the SRSG thereby justifying a non-renewal or extension of appointment on the grounds that it would adversely affect the efficient functioning of the mission.

4.7 Whilst these arguments may well be relevant to a substantive hearing on the merits of the decision not to extend or renew her contract, they do not really address the primary requirement that has to be satisfied namely that the decision being challenged "appears prima facie to be unlawful". Whilst a fixed-term contract cannot of itself carry an expectation of renewal, it is material to consider whether the reason for the non-renewal is genuine or whether it appears, on the basis of the available evidence and information, to suggest the possibility of being based on improper or unlawful motives. At this stage the Tribunal is not in a position to express a concluded factual finding but merely forming an assessment based on the available material as to whether the decision **appears** to be unlawful.

4.8 Based on the information before me, I find that the applicant has raised a prima facie case which will need to be rebutted by the respondent should the matter go to a judicial determination. Whether the decision maker had an ulterior or improper motive is a matter to be tested on the basis of oral and documentary evidence. One of the issues that will need to be addressed is the applicant's contention at paragraph 13 of her application. The respondent will need to explain the reasons for delay in concluding the paperwork in relation to the applicant's interview which took place on 15 October 2009 for the post of Senior Political Affairs Officer, particularly if she is correct in her understanding that she was the best candidate. The respondent will also need to rebut the applicant's assertions that her work was more than satisfactory and there was a continuing need for someone to do the work she had been doing.

b) Particular urgency

4.9 Whilst acknowledging that the applicant's fixed term appointment will expire

tomorrow, the respondent makes the point that had she acted in a timely manner, the application would not have had the urgency that it now has. Furthermore, the respondent says that the appointment had never been other than a fixed-term appointment, a fact which was always known to her and it gave her sufficient time to prepare for that eventuality.

4.10 I have to consider the application as it is presented albeit at the last minute. This is a case of particular urgency and a decision on the application has to be made today. In considering this aspect of the three pronged test under article 2 of the statute of the United Nations Dispute Tribunal and article 13 of the Tribunal's rules of procedure, an applicant who willfully delays in submitting the application should expect the Tribunal to factor into the equation any information or evidence that might call into question the applicant's motive. Where the application is insubstantial in relation to the element of unlawfulness and irreparable harm, it would be reasonable to give more weight to unexplained delay in presenting the application. In this case, I do not have any explanation for the delay nor do I find in the documents before me any indication that the delay was a deliberate act designed in some way to force the hand of the Tribunal. In the circumstances, I am satisfied that the test of particular urgency in this case has been made out.

c) Irreparable harm

4.11 The respondent asserts the fundamental principle that where an applicant can be fully compensated by a monetary award, a suspension of action should not be granted. The respondent acknowledges that at the suspension of action stage, no determination is being made on the merits. In consequence thereof, there would be cases where a staff member will continue on full pay which cannot be recouped in the event of a judicial determination on the merits going against that member. In brief the respondent quite properly makes the point that monetary loss does not, without more, constitute irreparable harm. The respondent's further argument is that the applicant has not alleged that there would be any harm to her career prospects or reputation.

4.12 Reading the application as a whole, including paragraph 28 of the application, it is clear that one of the primary concerns of the applicant is the fact that a non-renewal or failure to extend will result in damage to her career prospects within the UN. Furthermore she argues that once she is separated from service it would be more difficult for her to prosecute any case she might have regarding what she considers to be an unfair decision. Damage to legitimate career aspirations and prospects is not a matter that can be adequately compensated for by a monetary award. I find that the applicant satisfies this element of the requirement that she must show “irreparable harm”.

5. Conclusion

5.1 I find that the applicant has satisfied the three elements under article 13 of the Rules of Procedure in that the applicant has raised a prime facie case that the decision may have been motivated by improper considerations and arguably unlawful. I am further satisfied that this is a case of particular urgency given the imminent ending of her contract tomorrow. Should the application for a suspension of action be refused, I am satisfied that the damage to the applicant's career prospects within the UN cannot be adequately compensated by a monetary award.

6. Decision

6.1 The application for a suspension of action is granted. The suspension will lapse at the end of the management evaluation, if successful, or, if unsuccessful, a period of four weeks from the date that the outcome was communicated to the applicant, so as to allow the respondent sufficient time to conclude the administrative process in relation to the post of Senior Political Affairs Officer and for the applicant to seek an alternative posting within the UN. Should the applicant file a claim with the UNDT for a determination on its merits, it is recommended that the parties request an expedited hearing.

Case No.: UNDT/NBI/2010/046

Order No.: UNDT/NBI/O/2010/023

(Signed)

Judge Vinod Boolell

Dated this 16th day of February 2010

Entered in the Register on this 16th day of February 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi