



Before: Judge Vinod Boolell

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:
H. Esther Shamash, OSLA

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Mission in the Democratic Republic of the Congo (MONUC), filed an application for Suspension of Action on 15 July 2010 to contest the decision not to extend her contract beyond 17 July 2010. The Registrar of the United Nations Dispute Tribunal (UNDT) acknowledged receipt and served it on the Respondent on the same day.

2. By order dated 16 July 2010, the application for suspension of action was granted. The Tribunal indicated that written reasons would follow.

Facts

3. The Applicant, a Senior Political Affairs Officer, was deployed to the MONUC Political Affairs Division in February 2007, where she worked under the overall authority of the Special Representative of the Secretary-General (SRSG), and under the supervision of the Acting Director of the Political Affairs Division.

4. In August 2008, the Applicant interviewed for and was appointed to the post of Senior Political Affairs officer in the UN Office in Guinea Bissau (UNOGBIS) and left MONUC.

5. On 7 May 2009, the Applicant returned to MONUC on a Temporary Deployment Contract (TDY). The Acting Director of the Political Affairs Division had agreed that she be appointed on TDY until 17 August 2009.

6. On 18 August 2009, as the Applicant's TDY was coming to an end, and based on a request from the Acting Director of the Political Affairs Division that her services should be extended, the Applicant was converted to a three-month fixed-term contract, beginning on 18 August 2009.

7. From 1 August to 31 October 2009, the Applicant was offered a contract of 90 days, referred to as a "conditional appointment". In the email of offer dated 28 July

2009, the Officer-in-Charge of the Africa II Section at Headquarters advised the Applicant that “*the conditional appointment will give enough time to the mission to formally select and recommend you for a vacant MONUC P5*”. The Applicant accepted the offer.

8. During the week of 21 August, the Applicant traveled back to Guinea Bissau to collect her luggage and returned to MONUC.

9. On 3 September 2009, relying on the promises made to her to regularize her contract with MONUC through a regular fixed-term contract, the Applicant turned down an interview for the post of Head of Office (P5) with the United Nations Mission in Sudan (UNMIS).

10. On 15 October 2009, the Applicant was interviewed for the post of Senior Political Affairs Officer.

11. On 17 November 2009, the Applicant’s conditional appointment was extended for three months until 17 February 2010

12. In December 2009, the Applicant followed up with regard to the recruitment process for the post she had interviewed for in October 2009. In January 2010, the Applicant was advised that the process would only be finalized in late January or early February 2010.

13. On 27 January 2010, the Applicant was informed verbally by the Chief Civilian Personnel Officer (CCPO) that her contract would not be extended. No reasons were given to her.

14. On 4 February 2010, the Applicant received written notice of separation of service by Interoffice Memorandum from the CCPO.

15. On 12 February 2010, the Applicant filed a request for management evaluation with the Management Evaluation Unit together with a motion for suspension of action to the UN Dispute Tribunal.

16. On 16 February 2010, the Applicant was informed that her contract had been extended for a period of one month. Applicant accordingly withdrew her application for suspension of action.

17. On the same day, the Dispute Tribunal issued an order granting the suspension of action during the pendency of the management evaluation¹.

18. Between 16 February 2010 and 12 March 2010, the Applicant repeatedly made requests for information to MONUC Administration as to whether her contract would be renewed after 17 March 2010.

19. On 12 March 2010, the Applicant's contract was extended for one month, until 17 April 2010. She was given no written notice of the extension of her contract.

20. On 16 March 2010, the Applicant requested Rest and Recuperation (R&R) and annual leave, which were approved by the Administration.

21. On 21 March 2010, the Applicant's e-Pas was finalized with a performance rating of "frequently exceeds performance expectations".

22. The Applicant returned to MONUC in early April from leave. On 5 April 2010, the Respondent submitted an appeal with the United Nations Appeals Tribunal (UNAT) regarding the Order for Suspension of Action which had been granted by the UN Dispute Tribunal on 16 February 2010.

23. On 15 April 2010, the Applicant's contract was extended once again until 17 May 2010.

24. On 27 April 2010, and without any reference to the extension of her contract, the Applicant received a deployment order to a high hazard field post in Beni, North Kivu.

¹ Order No. 23 (NBI/2010)

25. On 30 April 2010, the Applicant took two and half days of annual leave and informed the Officer-in-Charge of her Division upon her return on 3 May 2010. On 11 May, she received a memorandum from the CCPO regarding unauthorized absence from the mission area from 28 April to 2 May 2010.

26. On 4 May 2010, the Applicant submitted her response to the Respondent's appeal before the UNAT.

27. On 13 May 2010, four days before the Applicant's contract was due to expire, she was informed that her contract would be extended for one month, until 17 June 2010. The Applicant requested that her contract be extended for a period of at least six (6) months to allow her to deploy to Beni in a professional manner.

28. During May 2010, the Applicant was twice asked to serve as the chairperson of Boards of Inquiry (BOI) and was later informed that the Chief of Staff's Office had refused to approve her participation in these Boards.

29. On 4 June 2010, the Applicant was informed verbally by the CCPO, and then in writing, that her contract would not be extended after 17 June. No reasons were provided for this non-extension.

30. On 7 June 2010, the Applicant sent an email to the Department of Field Support (DFS) in New York to request an extension of her contract. No reply has been received as yet.

31. On 14 June 2010, the Applicant filed a request for management evaluation with the Management Evaluation Unit together with a motion for suspension of action to the UN Dispute Tribunal. A hearing was scheduled for 4:00pm on 16 June (Nairobi time). In the morning of 16 June 2010, Counsel for the Respondent filed a motion to the Tribunal requesting that the hearing scheduled to take place that day be cancelled since the Respondent had been informed by DFS that the appointment of the Applicant had been extended until 17 July 2010 pending further discussions on her case.

32. The case was heard on that same day. Counsel for the Respondent stated that Applicant's contract had been extended until 17 July 2010, rendering the application for Suspension of Action moot. Counsel for the Applicant noted that the Applicant had now twice come before the UNDT to request suspension of action of a decision not to renew her contract. She further argued that repeatedly extending the Applicant's contract for one month did not render this request moot, but rather reinforced the Applicant's case that Respondent had no intention of acting in good faith. The Tribunal ruled on that matter on 17 and 22 June 2010².

33. On 17 June 2010, Applicant was informed that her contract had indeed been extended until 17 July 2010. Accordingly, on 18 June 2010, the Applicant withdrew her application for Suspension of Action.

34. Thereafter, the Applicant filed another application for Suspension of Action with the UNDT on 15 July 2010, having not received notice of extension beyond 17 July 2010. The application was acknowledge as received by the Registry on the same day and served on the Respondent.

35. In the morning of 16 July 2010, Counsel for the Respondent transmitted to the Registrar of the Dispute Tribunal a new Letter of Appointment for a fixed-term appointment, from 18 July until 17 August 2010.

Applicant's submissions

36. The Applicant submits that, despite Management's repeated last minute extensions of her contract since February 2010, the impugned decision shares the underlying rationale of the decision not to extend her appointment, issued on 4 February 2010, and as such, is unlawful as it breaches the Applicant's right to be provided with the reason for it, as well as a legitimate expectation to be renewed and to be afforded three opportunities to interview for fixed-term appointments in order to regularize her contractual status. Management should not be permitted to avoid

² Orders No. 108 and 106 (NBI/2010)

scrutiny of its original decision of 4 February 2010 simply by extending the Applicant's contract on a monthly basis, thereby distancing the original decision.

37. The Applicant further argues that the decision not to extend her contract can only have been motivated by improper considerations, and is unlawful. On the one hand, the post has not been abolished and there is an absence of legitimate reasons for non-extension despite her excellent performance. On the other hand, there is a pattern of marginalization to which the Applicant has been subjected.

38. Moreover, the Applicant avers that the decision not to provide her with a reason for the non-renewal of her fixed-term contract violates a basic principle of international civil service law that discretionary decisions affecting the rights and obligations of international civil servants cannot be arbitrary or based on substantial errors of law or fact. In numerous cases the International Labour Organization Administrative Tribunal (ILOAT) held that reasons must be given for the non-renewal of fixed-term appointments.

39. Additionally, the Applicant had a legitimate expectation that her contract would be renewed and was promised that she would be provided three opportunities to interview for fixed-term appointments. The non-extension of her contract is also a breach of this promise.

40. Finally, if the Applicant's contract is not extended, she will be forced to separate from service, which will cause her irreparable harm, as held by the Tribunal in the matter of *Kasmani*³.

Respondent's Case

41. The Respondent argues that there is no longer any action to suspend and as such, the matter is "moot" as the Applicant's appointment has been extended until 17 August 2010.

³ Order No. 17 (NBI/2009)

Considerations

42. Pursuant to Article 13.1 of the Rules of Procedure of the UNDT:

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.

43. Additionally, an application to suspend an administrative decision is in the nature of an interim measure. The Tribunal endorses the following, which was set out in the case of *Kasmani*:

In deciding whether an interim measure should be ordered, courts in most national jurisdictions are guided by the following principles:

- (i) There must be a serious issue to be tried and the claim must not be frivolous and vexatious;*
- (ii) The Tribunal should consider the balance of convenience. This requires the Tribunal to consider the adequacy of damages and whether, if the Applicant were to succeed on the merits of the case, he could be adequately compensated by an award of damages for the loss he would have sustained as a result of the action of the Respondent. If the Tribunal considers that damages would be an adequate remedy and the Respondent is capable of paying such damages then an injunction will not be granted.*

Prima Facie Unlawfulness of the Decision

47. The Tribunal notes that the Applicant has filed a request for management evaluation in respect of the contested decision. That request is still pending.

48. With respect to the first element of the test which needs to be met, the Tribunal firstly notes the Applicant's contention that she interviewed for the position of Senior Political Affairs Officer on 15 October 2009. When she enquired about the recruitment process she was informed that the process would be finalized in late

January or early February 2010. On 27 January 2010 the Applicant was informed verbally by the CCPO that her contract would not be extended. No reasons were given to her. She was not given any information about the recruitment process either.

49. None of the facts as adduced by the Applicant have been challenged by the Respondent and as such, the Court is entitled to accept the case as stated.

50. The Tribunal considers that the decision to terminate the employment of the Applicant without any reasons being given to her is unlawful. In the absence of any reasons from the Respondent the only inference that should be drawn is that the Respondent acted unlawfully.

Inherent in the duty to act with procedural fairness there is in some situations a limited implied obligation on administrative bodies to give reasoned decisions.⁴

When an applicant seeks to impugn a decision of an administrative authority by challenging the legality or rationality of the decision a failure by that authority to offer an answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers unlawfully.⁵

The silence of a party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus depending on the circumstances, a prima facie case may become a strong or even an overwhelming case.⁶

51. The need to give reasons on the termination of a contract was also emphasized by the United Nations Administrative Tribunal in the matter of *Howrani and 4 others against the Secretary General*⁷.

52. Further, from the facts presented to the Tribunal, it is abundantly clear that the Respondent has resorted to a colorable device in order to keep the Applicant in a situation of suspense by extending her contract for short periods immediately following an application for suspension of action by the Applicant. In this respect, the

⁴ *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 5th edition, paragraph 9-058.

⁵ *Idem*, paragraph 9-056

⁶ *Ibid.*

⁷ Cases Nos. 17 to 21 1951.

Tribunal notes that this is the third time that the Applicant has filed an application for suspension of action relating to the same issue. In the Tribunal's view, this constitutes an abuse of power and authority by the management, which unlawful, and should not be condoned. The Tribunal cannot accept a course of conduct by management that is tantamount to playing "hide and seek" with a staff member in blatant breach of the rules of the Organisation. Therefore, the Tribunal holds the view that this use of a sham device is equally unlawful.

52. The Tribunal therefore finds that the Applicant has made out the case that the Respondent's decision to terminate her appointment is *prima facie* unlawful.

The Urgency Element

53. On the question of urgency, the Applicant was never informed that her contract would be renewed beyond 17 July 2010. Subsequent to her filing of this current application for suspension of action, her contract was renewed for only another month, until 17 August 2010. This means that in a little less than four weeks, the Applicant will once again be on the cusp of separation, with the same complaint of non-renewal. This limited amount of time to the date of implementation of the next end of contract, 17 August 2010, and its foreseeable outcome, i.e. another suspension of action by 14 or 15 August 2010 make this matter one of "*particular urgency*".

54. The Tribunal therefore finds that the Applicant has made out the case that there is particular urgency in this case.

Irreparable Damage

55. In the case of *Tadonki v. The Secretary General*⁸ the Tribunal observed:

The well-established principle is that where damages can adequately compensate an Applicant, if he is successful on the substantive case, an interim measure should not

⁸ *Georges Tadonki v. Secretary-General of the United Nations*, Order issued on 1 September 2009, Case No. UNDT/NBI/2009/36.

be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

56. The Applicant was on a temporary fixed-term appointment. The evidence given by the Applicant, and unrebutted by the Respondent, shows that she turned down an interview for the post of Head of Office at the P5 level with the United Mission in Sudan (UNMIS) because she relied on the promises made to her to regularise her contract with MONUC through a regular fixed term contract.

A staff member is entitled to be treated fairly according to due process and rule of law principles. It is not open to dispute that a fixed term appointment dies a natural death at the end of the period of the contract. But there may be circumstances that where the non renewal may be due to factors that adversely affect a staff member to such an extent that monetary compensation is no answer. Whilst management has discretion not to renew, that discretion must be used judiciously and in good faith. That discretion cannot be considered to be an unfettered one in the sense that it would always dispense the decision maker with the need to carefully weigh in the balance the consequences of the decision. The myth of unfettered discretion is inimical to the rule of law principles⁹.

57. The facts do establish the creation of a great expectation of renewal or recruitment following the interview process. That was dashed by the unilateral and unexplained decision of the Respondent. That kind of loss cannot be quantified by damages only.

58. Having considered the facts presented in the documents and arguments submitted by both parties to the Tribunal and having regard also to the fact that management evaluation is still pending on the contested decision, the Tribunal, pursuant to article 13.1 of the Rules of Procedure of the United Nations Dispute Tribunal,

⁹ Georges Tadonki v. Secretary-General of the United Nations, Order issued on 1 September 2009, Case No. UNDT/NBI/2009/36.

GRANTS the Applicant's Motion; and

ORDERS the suspension of the Respondent's decision not to renew the Applicant's appointment.

(Signed)

Judge Vinod Boolell

Dated this 26th day of July 2010

Entered in the Register on this 26th day of July 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi