



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/007
Order No.: 012 (NBI/2014)
Date: 24 January 2014
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

GILRUTH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Daniel Trup, OSLA
Brian Gorlick, OSLA

Counsel for the Respondent:

Katya Melliush, UNON (for UNEP)

Introduction

1. The Applicant is a staff member of the United Nations Environment Programme (UNEP). On 18 January 2014¹, he filed the current Application for suspension of action, pursuant to art. 2.2 of the Statute of the Dispute Tribunal, seeking to suspend the decision not to renew his contract beyond 2 February 2014.

2. The Application was served on the Respondent on 20 January 2014 and the Respondent submitted a Reply on 21 January 2014. On 22 January 2014, the Tribunal held a brief hearing with Counsel to receive further submissions on the legal contentions that had been raised in their pleadings.

Facts

3. The Applicant joined the Division of Early Warning and Assessment (DEWA), UNEP, in Nairobi as a Director at the D-2 level on 3 February 2007 on a fixed-term appointment (FTA) for a two year term. His FTA was subsequently extended until 2 February 2014.

4. The Applicant's Letter of Appointment, dated 28 February 2011, referred to the provisions of staff regulation 1.2(c) and section 4.2(d) of ST/AI/2006/3 (Staff selection system) relating to mobility and maximum post occupancy under the title "Special Conditions".

5. Subsequently, the Applicant was made aware that his contract would not be extended due to the expiration of the six-year period of service in one post. Consequently, in May 2012 he was encouraged to begin applying for alternative D-2 posts. Whilst he made genuine attempts at applying for other positions, he has not as yet been successful.

6. On 27 December 2013, the Applicant sent an email to Mr. Michele Candotti, Chief, Executive Office & Principal Advisor to the Executive Director, UNEP,

¹ 18 January 2014 was a Saturday.

outlining the outcome of a meeting he had had with the Office of Staff Legal Assistance (OSLA) in Nairobi regarding his contract renewal. His email stated, *inter alia*, that he had informed OSLA of:

[T]he NY decision not to renew my contract on my current post, and that you and I had discussed options including: a) other contract possibilities, b) an early retirement package, or c) to put my case formally to the OSLA for transmission to the Management Evaluation Unit in NY for possible submission to the UNDT.

7. Mr. Candotti responded to the Applicant the same day as follows:

Many thanks for your email and for your information. I shall inform ED accordingly. In the meantime, for the record, it is important to note that EOSG has not yet taken a final decision not to extend your contract, although indications for similar contract extensions for staff members at D2 and above are that mobility remains a firm principle for management. I shall keep you posted.

8. According to the Applicant, on 7 January 2014, the Executive Director of UNEP (ED/UNEP) informed him orally that his appointment would not be extended beyond 2 February 2014.

9. The Applicant filed a request for management evaluation on 17 January 2014.

10. By a memorandum dated 17 January 2014 addressed to the Secretary-General, the ED/UNEP requested approval for a one year and 10 month extension of contract for the Applicant through his mandatory retirement date on 30 November 2015. The memorandum indicated that the Applicant had successfully met performance expectations during the reporting period.

11. The Applicant filed the current application for suspension of action on 18 January 2014.

12. By a memorandum dated 20 January 2014, the Human Resources Management Service of the United Nations Office at Nairobi (HRMS/UNON) forwarded the ED/UNEP's memorandum to the Secretary-General to the Office of Human Resources Management (OHRM) in New York.

Parties' submissions

Applicant's submissions

13. The Applicant submits the following:
- a) The reason provided for the impugned decision, mobility, has no basis in law and is therefore *prima facie* unlawful;
 - b) A decision not to renew must be based on the organisation's rules and not on an error of law or fact;
 - c) There is currently no managed mobility or career management system in place to guide staff in the Secretariat;
 - d) No provisions in the Charter of the United Nations or the Staff Rules mandate mobility or make it obligatory to the extent that failure to rotate to another position after a specified period of time should lead to a staff member's appointment not being renewed;
 - e) No other conditions of non-renewal apply thus the Administration has failed to provide justified reasons for its decisions;
 - f) The matter is urgent in that the Applicant's separation from service will take effect on 2 February 2014;
 - g) If the decision is implemented, the Applicant will suffer irreparable harm in that he will be left without a position in the United Nations, which will render him ineligible to apply for other positions with the Organization as an internal candidate. Additionally, the sudden separation will result in a loss of his personal integrity and economy, his reputation and his career prospects, which cannot be compensated for by a monetary award.

Respondent's submissions

14. The Respondent submits the following:
- a) A final decision is still pending on UNEP's request for a further exceptional extension of the Applicant's contract. Thus, the Application is premature as there is no decision to suspend;
 - b) An FTA carries no expectancy of renewal thus *prima facie*, a decision not to renew such an appointment is a lawful decision;
 - c) the Secretary-General's policies on mobility are not arbitrary or capricious and represent a valid exercise of managerial authority;
 - d) The Applicant's assertion that the absence of provisions in the United Nations Charter or Staff Rules which mandate mobility and that a decision not to renew a contract on this basis is unlawful is fallacious. The decision not to renew a contract is discretionary and may be lawfully based on any number of factors which are not prescribed in the Charter or Staff Rules;
 - e) The Applicant has been provided with reasons for the purported decision in that he has been clearly made aware of the Secretary-General's policy on mobility and of the requirement that staff at the D-2 level will not be maintained in post *ad infinitum* but are expected to take control of their own careers and move;
 - f) There is no urgency as it is likely that the Applicant's appointment will be renewed for a further year;
 - g) Since no decision has been made not to renew the Applicant's appointment, there is no evidence of irreparable harm.

Considerations

15. Applications for suspension of action are governed by art. 2.2 of the Statute of the Tribunal and art. 13 of the Rules of Procedure. Article 2.2 provides, in relevant part, as follows:

The Dispute Tribunal shall be competent to hear and pass judgment 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.

16. The three statutory prerequisites contained in articles 2.2 and 13.1 of the Statute and Rules of Procedure, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must all be satisfied for an application for suspension of action to be granted. In addition to the three statutory prerequisites cited above, the applicant must also show that there is an administrative decision that he or she is contesting. The current application must therefore be reviewed against all the prerequisites outlined in the Tribunal's Statute and Rules of Procedure.

17. The Respondent maintains that there is no administrative decision to be suspended in light of the fact that the Secretary-General has yet to render a decision on the Applicant's contract and as such, the current Application is premature.

18. Pursuant to Annex I of ST/AI/234/Rev. 1 (Administration of the staff regulations and staff rules), the authority to appoint and grant extensions of one year or more to staff members at the D-2 level is reserved solely to the Secretary-General. No evidence has been placed before the Tribunal to evince that this authority has been delegated to the ED/UNEP. Consequently, for this Tribunal to maintain jurisdiction over this Application, there has to be evidence that the Secretary-General, not the ED/UNEP or any other individual, has made a decision not to renew the Applicant's appointment.

19. According to the Applicant, the ED/UNEP informed him on 7 January 2014 that a decision had been made not to renew his appointment beyond 2 February 2014. The Respondent disputes this because no written notification of this decision has been sent to the Applicant.

20. The undisputed evidence that the Tribunal does have before it is that there was communication from Mr. Candotti on 27 December 2013 to the Applicant that the Executive Office of the Secretary-General (EOSG) had not taken a final decision on his contract extension. There is also evidence that on 20 January 2014, the ED/UNEP's request for an extension of the Applicant's contract from 3 February 2014 to 30 November 2015 was forwarded to OHRM with a request that OHRM "kindly obtain the Secretary-General's approval of this extension".

21. Even if the Tribunal accepts the Applicant's contention that the ED/UNEP orally informed him of the non-renewal of his FTA on 7 January 2014, it appears that the ED's actions subsequent to this discussion clearly indicate that: (a) the decision to renew or not renew the Applicant's appointment does not lie in his hands; and (b) the decision is still outstanding by the ultimate decision-maker, the Secretary-General.

22. In light of the foregoing, the Tribunal has no choice but to find that there is no administrative decision for it to suspend.

23. The Tribunal sincerely sympathizes with the Applicant who will now live in the unenviable world of uncertainty for the next couple of days until the Secretary-General decides on his fate. However, the General Assembly has reiterated that the Dispute and Appeals Tribunals shall not have any powers beyond those conferred under their respective statutes.² This means the Dispute Tribunal would be acting *ultra vires* if it granted a suspension of action at this stage in anticipation of a negative response from the Secretary-General.

² A/C.5/68/L.7 (Administration of justice at the United Nations).

24. The Tribunal however wishes to register its concern at the repeated emphasis being placed on mobility for D-2 staff members, particularly the Applicant, in the context of contract renewals³ in the absence of a legal framework prescribed by the Charter or Staff Rules. This view notwithstanding, the Tribunal will not engage in a discussion of the *prima facie* lawfulness or unlawfulness or any of the other statutory prerequisites that govern applications for suspension of action in the absence of an administrative decision.

Decision

25. The Application for suspension of action is dismissed.

(Signed)

Judge Vinod Boolell

Dated this 24th day of January 2014

Entered in the Register on this 24th day of January 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi

³ See Mr. Candotti's email at paragraph 7 and Counsel for Respondent's submissions at paragraph 14.