



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/039

Order No.: 126 (NBI/2014)

Date: 23 May 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GUZMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is the Chief, Conduct and Discipline Unit at the P-4 level in the United Nations Assistance Mission for Afghanistan (UNAMA). On 16 May 2014, she filed an Application for suspension of the decision dated 15 May 2014 not to renew her appointment as a Conduct and Discipline Officer (CDO) at UNAMA.

2. The Respondent filed a Reply to the Application on 19 May 2014.

Facts

3. On 15 December 2013, the Applicant filed two Applications:

a. An application on the merits contesting a decision taken by the UNAMA Chief Civilian Personnel Officer (CCPO), Jeanie Fraser, to separate her from service effective 31 December 2013 and sought rescission of the contested decision.

b. An application for Interim Measures Pending Proceedings under art. 10.2 of the Statute of the Dispute Tribunal seeking an order for the suspension of the contested decision.

4. On 20 December 2013, the Tribunal issued Order No. 264 (NBI/2013) in which it ordered that the implementation of the decision to separate the Applicant from service on 31 December 2013 be suspended pending the substantive hearing and determination of her application on the merits.

5. On 8 January 2014, Vincent Smith, Chief, Mission Support, UNAMA, informed the Applicant that she would not be separated from the Organization on 31 December 2013 and that the General Assembly had approved the reclassification of the P-4 post she encumbered to the P-5 level in the 2014 budget.

6. In January 2014, the Applicant participated, as the incumbent, in the reclassification exercise for post number 61573 from P-4 to P-5.

7. On 15 May 2014, the Applicant received a memorandum from the UNAMA Chief Civilian Personnel Officer (CCPO), Niramol Jirapokakul, informing her as follows

1. As you have been previously informed, the post formerly used to finance your appointment as a P-4 Conduct and Discipline Officer has been reclassified to Chief Conduct and Discipline Officer at the P-5 level, in accordance with ST/AI/1998/9.
2. The position of P-5 Chief Conduct and Discipline Officer will be filled from the roster, once the selection exercise of the Generic Job Opening (GJO) of P-5 Chief Conduct and Discipline Officer has been completed. We note that you have applied for the GJO and that your application is currently under consideration.
3. Given that the budget no longer includes a P-4 Conduct and Discipline Officer post, please be informed that your current fixed-term appointment will not be renewed when it expires on 30 June 2014. However, in view of the UNDT Order No. 264 (NBI/2013) ... your separation will not be implemented while the Order remains in force.

8. The Applicant requested management evaluation of the decision on 16 May 2014.

9. The Applicant filed the present Application on 16 May 2014. The Respondent filed a Reply on 19 May 2014. The Tribunal heard the case on the same day.

Applicant's submissions

10. The Applicant's case may be summarized as follows:

Prima facie unlawfulness

a. The UNAMA Administration has acted in breach of her appointment and contractual terms as well as ST/AI/1998/9 (System for the classification of posts).

b. Her general and employment rights as a UN staff member have been violated, namely, protection from retaliation, harassment and discrimination.

c. The Applicant reiterates the submissions she made in Case Number UNDT/NBI/2014/037. These submissions are specified in the Order issued in relation to that case.

Urgency

d. If the Management Evaluation Unit (MEU) extends its deadline, then the contested decision will take effect on 30 June 2014.

e. The contested decision impacts negatively on her chances to be nominated and selected for the SMART training of which submission for nomination is due on 20 May 2014. Her failure to attend the training will be detrimental to her professional development and her career future.

Irreparable damage

f. She will lose opportunities for professional growth and career advancement and suffer economic damage due to no further job placement and recruitment opportunities.

g. She has been placed on a “black list” because of filing requests for management evaluation and for arguing her cases before the Tribunal.

h. She has suffered damage to her professional reputation and career as well as moral and emotional injuries and physical stress. The decisions have had a negative impact on her social status and have unnecessarily damaged her relations with her colleagues.

Respondent’s submissions

11. The Respondent’s case may be summarized as follows:

Prima facie unlawfulness

a. The decision not to renew the Applicant’s appointment was lawful. A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service.

b. The Applicant has failed to demonstrate that the Administration's discretion not to renew her appointment was exercised in a flawed manner. The post previously used to finance the Applicant's P-4 CDO position has been reclassified to the P-5 level in accordance with ST/AI/1998/9 and following on from the approval of the General Assembly.

c. Contrary to the Applicant's arguments, ST/AI/1998/9 does not require that her appointment be renewed beyond its expiration. Section 4.2 provides that the classification of a post shall not negatively affect the incumbent staff member's existing contractual status, salary or other entitlements. This provision grants the Applicant a right to continue to be paid her benefits and entitlements for the service rendered to the Organization during the term of her appointment. In this vein, the UNAMA Administration undertook to the Applicant that she would continue to perform her P-4 CDO functions in relation to UNAMA and UNMOGIP in accordance with the terms of her appointment.

d. Section 4.2 of ST/AI/1998/9 does not entitle the Applicant to a future contractual status, meaning that it does not grant her a right to have her appointment renewed for a new term, beyond 30 June 2014. Rather, once the term of the Applicant's appointment expires, the principle established in staff regulation 4.5(c); staff rule 4.13(c), as well as the explicit terms of the Applicant's appointment, determines that the Applicant does not have a right to have her appointment renewed.

e. The second part of section 4.2 of ST/AI/1998/9 clarifies that the incumbent of a post that is classified at a level above his or her current grade level may be considered for promotion in accordance with established procedures. This means that the recruitment for the position of P-5 Chief CDO has to take place in accordance with established procedures under ST/AI/2010/3 (Staff selection system). Pursuant to this ST/AI/1998/9, a generic job opening was advertised for the P-5 CDO. The Applicant has applied for the position and is currently under consideration.

The Applicant, together with other applicants, will be given full and fair consideration for the position.

f. The Applicant alleges that her rights have been violated, including a violation of her rights to protection from retaliation, harassment and discrimination but has not substantiated any of these claims.

g. The Applicant has provided no concrete evidence of any form of retaliatory behavior directed towards her nor has she provided any evidence to suggest that she may have engaged in any “protected activity” under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct).

h. There is no link between the Applicant’s applications to the Dispute Tribunal and the reclassification exercise and non-renewal of her appointment. On 10 April 2014, the Applicant complained to the Special Representative of the Secretary-General at UNAMA that she had suffered harassment from the Chief of Staff of UNAMA. The Applicant was requested to provide particulars of the allegations so that it could be assessed as a complaint under ST/SGB/2008/05 (Prohibition of discrimination, harassment, and abuse of authority). The Applicant stated that she did not wish to pursue a harassment complaint

Urgency

i. The decision not to renew the Applicant’s appointment was communicated to the Applicant on 15 May 2014. On 16 May 2014, she submitted a request for management evaluation. Under Staff Rules 11.2(d), the Management Evaluation Unit shall communicate the outcome of the management evaluation to the Applicant within 45 days, that is, on or before 30 June 2014. This is the same date the Applicant’s appointment will expire. Accordingly, the impact of any Dispute Tribunal decision to suspend the implementation of the decision during the pendency of the management evaluation is of little value, should the management evaluation uphold the contested decision.

j. Furthermore, the Applicant will not be separated from service as long as Order No. 264 (NBI/2013) in Case Number UNDT/NBI/2013/093 remains in force. The *status quo* will be maintained and the Applicant will continue to receive her benefits and entitlements in accordance with the terms of her appointment. She will continue to perform the functions of the CDO covering UNAMA and UNMOGIP. Accordingly, there is no urgency warranting the Dispute Tribunal to suspend the implementation of the contested decision.

k. UNAMA remains actively engaged with the Applicant and she continues to perform her CDO functions. The Applicant has a weekly telephone conference with the Office of the Chief of Staff to discuss relevant Mission developments and conduct and discipline matters. There is prompt consideration and reply to all email communication from the Applicant. She is considered for employment and capacity development opportunities; she was nominated for TDY with the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (“MINUSCA”) either as a P-4 Administrative Officer or as a P-4 CDO.

l. Contrary to her assertion in the Application, the Applicant was nominated for the SMART training program. The Applicant has been encouraged to apply to job openings at P-4 and P-5 level within her scope of competence. The Applicant has been informed of a visit by the UNAMA Chief of Staff to the Kuwait office where she is stationed on 26-27 May 2014 and an appointment has been arranged to meet with her to discuss her substantive work.

Irreparable damage

m. The implementation of the decision cannot result in irreparable harm.

Consideration

12. Article 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure provide that it may order the suspension, during the pendency of management evaluation, of the implementation of a contested administrative decision that is the subject of an on-going management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. The Tribunal shall proceed to determine whether the case meets the three requirements for the grant of a suspension of action as stipulated in the said art.13.

13. The Applicant submitted that the contested decisions were unlawful because the UNAMA Administration acted in breach of ST/AI/1998/9 and that her rights to protection from retaliation, harassment and discrimination had been violated.

14. It is not in contention that the Applicant's post has been reclassified. What is at issue in this case is the question of rights enjoyed by a staff member encumbering a reclassified post and whether those rights have been violated.

15. Section 4.2 and 4.3 of ST/AI/1998/9 are relevant in determining the issue. They provide as follows:

4.2 The classification of a post shall not negatively affect the existing contractual status, salary or other entitlement of the staff member encumbering the post. Staff members whose posts are classified at a level below their personal grade level will retain their current grade and salary level, on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.

4.3 Staff members whose posts are classified at a level above their current personal grade level in the same category may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement, where applicable.

16. The Tribunal has carefully reviewed the documentary and oral evidence adduced by the parties in this case and does not find any breach of the above-cited

applicable rule on classification. The Applicant has failed to adduce any evidence of the alleged retaliation, harassment and discrimination. Moreover, the Applicant's P-4 post has ceased to exist following the reclassification exercise.

17. The Applicant will not suffer irreparable harm since, in accordance with section 4.2 and 4.3 of ST/AI/1998/9, the classification of her post has not negatively affected her existing contractual status and she is currently being considered for promotion to the upgraded P-5 post.

Conclusion

18. In view of the foregoing, the Tribunal rejects the Application for suspension of action.

(Signed)

Judge Nkemdilim Izuako

Dated this 23rd day of May 2014

Entered in the Register on this 23rd day of May 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi