



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/068
Order No.: 232 (NBI/2015)
Date: 3 July 2015
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CLARKSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Marisa MacLennan, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM

Introduction

1. On 25 June 2015, the Applicant, an FS-4 Finance Assistant in the United Nations Mission in Liberia (UNMIL), filed an Application with the Dispute Tribunal seeking suspension of implementation of the decision not to renew his appointment.

2. The Respondent filed his Reply on 29 June 2015 in which he submitted that the Application was moot as the Applicant's fixed-term appointment has been renewed beyond 30 June 201[5]¹.

3. The Tribunal heard the matter on 30 June 2015. At the hearing, Counsel for the Respondent was ordered to make further submissions in respect to an email dated 29 June 2015. The said email on the one hand informed the Applicant that his appointment would be renewed for three months while also assuring him that his letter of appointment would be generated when Headquarters updated the staffing table to extend all posts at the mission through 30 June 2015.

4. The Respondent filed the said submissions on 30 June 2015. The Applicant filed his response to the submissions on the same day.

Facts

5. The Applicant joined the United Nations in 2009. He currently holds a fixed term contract at the FS4 level as Finance Assistant in UNMIL.

6. During the month of May 2015, UNMIL sent out notifications to affected staff members regarding a retrenchment exercise and the abolishment or nationalization of certain posts, subject to the approval of the General Assembly. The Applicant was not in receipt of such a memorandum.

¹ The Respondent's Reply indicates 30 June 2016. In an email dated 29 June 2015 addressed to the Tribunal and the Applicant, Counsel for the Respondent indicated that the correct date should be 30 June 2015 and not 30 June 2016.

7. On 18 June 2015, the Applicant was notified orally by the Chief Finance Officer, Mr. Anthony Azaglo, that he (Azaglo) had received an email from the Chief of Staff's Office regarding the abolishment of the Applicant's post.

8. Later that day, the Officer-In-Charge (OIC) of the Finance Section, Mr. Hanno Nidos, informed the Applicant that he (Nidos) had received communication that the Applicant's post would be abolished effective 30 June 2015. They then discussed the recent retirement of another staff member in the Finance Section which meant that there was a vacant post in his section. The Applicant was told that the vacant post had been lent to another section.

9. Mr Nidos met with the Chief of Administrative Services and thereafter on 19 June 2015, he told the Applicant that he could not be recruited to the vacant post because it had been lent to another section and was pending the recruitment of someone else.

10. The Applicant, having received no information regarding the extension of his appointment beyond 30 June 2015, requested management evaluation on 25 June 2015. He then filed this Application.

11. On 29 June 2015, the Applicant received an email from Ms. Barbara Klopp, (OIC), Mission Support, UNMIL which stated as follows:

As you [are] aware, an FS4 post was located late last week that will be used for the purpose of extending your appointment for a three-month period. The formal post loaning form was completed by all parties on Thursday/Friday, 26/27 Jun 15, and action will be taken to extend your appointment through 30 September 2015. The three-month extension period is due to the fact that the post against which you will be extended is borrowed, and the fact that the organization has carried you forward on various posts during the past year, in light of your post being retrenched in 2013/14. You will need to apply for and be selected for vacancies to be extended beyond 30 September 2015.

Currently however, the system is still reflecting all posts as expiring on 30 June 2015. As soon as Headquarters updates the staffing table online, to extend all posts for Missions through 30 June 2016 in accordance with the Budget for 2015/16 (approved on Thursday, 25 June 15), HR will take action to generate your letter

of Appointment and the “extended appointment” personnel action that goes with it.

In the interim period, this email[s] serves as confirmation of the extension of your appointment as per the above.

12. On 30 June 2015 pursuant to the Tribunal’s direction, the Respondent filed further submissions to clarify Ms. Klopp’s email and UNMIL Administration’s position. These further submissions showed that the Applicant’s extension of contract beyond 30 June 2015 was for three months only and that the extension of all posts at the mission through 30 June 2016 would not apply to him. The said further submissions are reproduced below:

...Posts for Field Missions are budgeted for on a yearly basis from 1 July until 30 June. Consequently, all posts expire automatically on 30 June.

Upon approval of the Mission’s budget by the General Assembly, the Field Personnel Division (FPD) of the Department of Field Support (DFS) takes action in the Integrated Management Information System (IMIS), a computer-based programme, to discontinue all abolished posts and extend the remaining approved posts until 30 June the next year. FPD has not yet taken action to extend the posts in IMIS for the 2015/2016 budget cycle, given that the 2015/2016 budget was only just approved by the General Assembly on 25 June 2015, but is in the process of extending the posts.

Once this is done, the UNMIL Human Resources Management Section (HRMS) will take necessary action to generate Letters of Appointment and the accompanying “extend appointment” personnel action for all staff members including Mr. Clarkson.

As stated in, Mr. Clarkson’s Letter of Appointment and the “extend appointment” personnel actions that goes with it will confirm his extension through 30 September 2015. My 29 June 2015 e-mail was intended to serve as a guarantee on this point, in lieu of not being able to issue a Letter of Appointment and related action for the reasons as stated above.

Applicant’s Submissions

Prima Facie Unlawfulness

13. Although he heard informally about the possibility of the abolishment of his post, the Applicant has not been notified formally about the status of his contract, which was to expire on 30 June 2015, despite following up with his

supervisors and Human Resources. Therefore, it is reasonable for the Applicant to assume that his contract was not being renewed.

14. There is a duty on the Administration to respond to staff member's reasonable requests for information, assistance, and action, and to inform staff members of administrative decisions affecting them in a timely manner.

15. It is a general principle of administrative law that where there is no time specified for the doing of an act, it should be done within a reasonable time. The reasons for this include the need to have predictability, finality and speedy resolution of issues, which is clearly in the interests of both parties. What constitutes a reasonable time of course depends on a number of factors, including the length of delay and the reasons therefor.

16. The Applicant has spoken with his superiors about the alleged abolishment of his post and been told to await further information. As 30 June 2015 approached, UNMIL had not communicated any decision to him regarding his contract. The failure to act can be seen as an administrative decision.

17. The UNDT considered the proper procedures to be adhered to prior to the abolishment of a post in the case of *Al-Alamy* UNDT/2012/090. A decision to abolish a post should follow a thorough staffing review taking account of the views of those best placed to consider office structuring. Once posts have been identified for abolishment a comparative review of staff members operating at the same level should be conducted according to pre-approved guidelines in order to identify those staff members who will lose their employment.

18. In *Adundo et al* UNDT/2012/118 it was stated that whilst it is recognized that an employer may restructure or reorganize its workforce for legitimate reasons and based on its operational requirements, fair, reasonable and equitable procedures must be followed. This includes a full and meaningful consultation process. It is generally accepted that employers that intend to embark on a retrenchment exercise are required to carry out effective consultations with their employees or their representatives.

19. The Administration cannot abolish a post and terminate a staff member's fixed appointment arbitrarily. It must conduct an objective assessment and provide objectively verifiable reasons. The Applicant in this case also does not know whether this is the case or whether he should have been subject to comparative review. The Applicant is aware that another FS-5 Finance Assistant in his section was notified in May that her post was being abolished and she was reassigned to remain employed. The 2015/16 UNMIL proposed budget only lists one FS post to be abolished in the section, therefore, it remains in doubt whether any further Finance Assistants can even be abolished and/or whether there should first have been a comparative review.

20. Furthermore, the Administration failed to provide any cogent reasons as to why the Applicant's contract would not be renewed with only three more business days left until 30 June 2015. The Secretary-General has an obligation to state the reasons for an administrative decision.

21. In response to the clarification email from Ms. Klopp filed on 30 June 2015, the Applicant submits:

a. The "offer" to extend the Applicant's contract is still conditional and does not render the SOA moot; the only way an appointment, extension, or renewal can be official is with the signed letter of appointment as per staff rule 4.1.

b. If, as the mission says, all posts are extended on a yearly basis until 30 June of the next year, then this raises a question as to why the Applicant's contract is not being extended for one year.

c. The email states that the "extend appointment" personnel will be generated for all staff members, including Mr. Clarkson, and that "posts for Field Missions are budgeted for on a yearly basis from 1 July to 30 June yet he would only be getting a three month renewal; this is contradictory and arbitrary.

d. The three month extension, as opposed to a one year extension, is evidence of irregularity because no basis has been given as to why another post had to be “located” to put him on (as described in 29 June 2015 email) and why he is only being renewed three months and not one year; this raises further doubt about whether the post he is on was to be abolished (as he was previously told orally by his superiors).

e. The three month extension is unlawful because it deprives the Applicant of the right to challenge the underlying non-renewal of his contract for one year or removal from his current post, which affects his contractual status (because in 90 days at the end of the alleged three month renewal, he will be time barred from challenging the initial reasons, or it will be considered moot), and because by doing so the mission avoids any attack on the underlying reasons why it did not renew the Applicant’s contract for one year.

f. The three month extension offer comes after a previous oral promise to extend the Applicant for one year and after the Applicant filed a request for management evaluation and an application for suspension of action; therefore, it raises suspicion as to a retaliatory act.

g. The matter is still urgent because should the mission be allowed to proceed, the Applicant will lose the right to challenge the underlying circumstances of his abolishment or non-renewal, or reason why he was only renewed three months; it is the only way the to guarantee the Management Evaluation Unit (MEU) will be able to look into the matter (otherwise they will also find it moot) and for the Applicant to preserve his rights.

h. The mission cannot “guarantee” an extension to render an SOA moot; already one promise to extend the Applicant for one year, which was made on 25 June 2015 has been abandoned; therefore, the signed letter of appointment for one year can be the only indication of a lawful extension or renewal;

- i. The Respondent cannot benefit from the removal of the urgency element needed for a suspension of action by its own unlawful act.

Respondent's submissions

22. The Respondent submits that this Application is moot as the Applicant's fixed-term appointment has been renewed beyond 30 June 2015.

23. The Respondent cites *Gehr* 2013-UNAT-328 and *Castelli* UNDT/2015/057 as authority for his submission that where an impugned decision has been reversed, corrected or superseded, it is in the power of the Tribunal to find that the challenge is moot and therefore not receivable.

24. In this case, the contested decision has been superseded by the decision to renew the Applicant's appointment for three months. As a consequence, the Application for suspension of action has been rendered moot and there is no aspect of the contested decisions remaining to be adjudicated.

Considerations

25. This Tribunal is not persuaded by the Respondent's submission that this Application has been rendered moot because he, the Respondent, corrected and reversed a previous decision not to extend the Applicant's fixed term appointment by extending the same contract by three months.

Prima facie unlawfulness

26. It is not contested that the Applicant has been on a one-year fixed term appointment in the UNMIL mission. The Applicant stated in his pleadings that he was told orally by his supervisors on 18 and 19 June 2015 that his fixed term contract would not be renewed beyond 30 June 2015 due to abolition of post and the Respondent did not challenge this fact as pleaded.

27. When the Applicant received no formal notice in writing regarding the extension of his contract days before it would expire, on 25 June 2015 he sent the mandatory request for management evaluation before filing this Application.

28. The Respondent thereupon on 29 June 2015 sent Annex R1 to the Applicant granting him a three month extension of his appointment.

29. It is the Applicant's case that the 2014/2015 UNMIL budget had indicated the abolition of one FS post in the Applicant's Finance section following which a FS5 staff member in the section was formally notified of the abolition of her post. The Applicant did not receive such a notification and the UNMIL budget which according to the Respondent's Annex R2 was approved by the General Assembly on 25 June 2015 does not indicate abolition of the Applicant's post.

30. It was submitted on behalf of the Applicant that there are proper procedures to be adhered to with regard to the abolition of posts. This Tribunal agrees with this submission and considers that a thorough staffing review followed, where necessary, by a comparative review of staff members at the same level must be conducted in order to ensure fairness and transparency in the restructuring and reorganization of a work force during downsizing.

31. This Tribunal finds that the non-adherence to proper procedures regarding the abolishment of the Applicant's post in this case means that the Applicant has met the threshold of *prima facie* unlawfulness which is one of the three conditions for the grant of this Application.

32. The Tribunal finds this Application to be urgent in the circumstances contrary to the submissions of the Respondent. The Respondent's submission that due to his extending the Applicant's yearly fixed term appointment by three months, there is no longer a dispute to be adjudicated is rejected. This is because this Tribunal recognizes the inherent mischief in this unwarranted short and piecemeal extension of appointment which is bound to give rise to continued unhealthy and protracted litigation of the self-same issues when the same Respondent in his capacity to hold a management evaluation upholds his impugned decision.

33. The Tribunal finds also that the Applicant will suffer irreparable harm if this Application is refused.

CONCLUSIONS

34. The Application for suspension of action in this case is successful.

35. It is accordingly **ORDERED** that the decision not to grant the Applicant one year extension of his appointment is suspended pending management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 3rd day of July 2015

Entered in the Register on this 3rd day of July 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi