



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/074

Order No.: 113 (NBI/2018)

Date: 30 July 2018

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

OSMAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for Applicant:**

Jeffrey C. Dahl

**Counsel for Respondent:**

HRLU, UNOG

## **Introduction**

1. By application filed on 26 July 2018, the Applicant, a Project Manager (P-4) working for the Drug Research Center, United Nations Office on Drugs and Crime (“UNODC”), requests suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment beyond 31 July 2018 and the failure to respond to his request for Special Leave Without Pay (SLWOP).
2. The application was served on the Respondent on the same day for his information and he was advised that no response was required.

## **Facts**

3. The Applicant works for the Drug Research Center, UNODC, on projects that are dependent on external funding. He currently works on the Afghan Opiate Trade Project, which, at the time of the application, was funded until 31 July 2018.
4. According to the Applicant’s submissions, the standard practice when funding is expiring and new funding is expected but not yet finalized is to renew the affected staff member’s appointment for a short period and to allow him or her to apply for special leave without pay (“SLWOP”) until the funding is officially renewed.
5. On 30 May 2018, the Applicant had filed a complaint of harassment and abuse of authority against his first reporting officer, the Chief, Drug Research Center, UNODC (“FRO”) under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).
6. By email of 20 June 2018 to the Applicant, the FRO confirmed a previous conversation of 30 May 2018 whereby she and the Applicant’s second reporting officer informed him that his appointment would not be renewed upon its expiry on 31 July 2018 if no funding for his project was received by the end of July 2018. She further advised him that to ensure that he be given a one-month notice, she would ask the Human Resource Management Section to initiate the necessary procedure in June 2018.

7. By email of 26 June 2018, the FRO formally informed the Applicant that “UNODC intended to allow his contract to expire on 31 July 2018”.

8. In a letter dated 27 June 2018, a representative of the Bureau for International Narcotics and Law Enforcement Affairs, United States Department of State, informed the Applicant that new funding for the Afghan Opiate Trade Project was underway and would likely be finalised by the end of July 2018. He provided a further update by email on 12 July 2018, confirming that the approval process was progressing and that he did not anticipate any difficulty.

9. The Applicant updated the FRO in an email on 18 July 2018 on the funding situation of the Afghan Opiate Trade Project and requested a two-month SLWOP to cover any potential gap before finalisation of the funding.

10. On the same day, the Applicant received a further email from the representative of the Bureau for International Narcotics and Law Enforcement Affairs, United States Department of State, confirming again that the approval process for the funding was progressing.

11. On 19 July 2018, the Applicant reiterated his request for SLWOP. This request remains unanswered as at today.

12. On 25 July 2018, the Applicant requested management evaluation of the decisions not to renew his appointment and not to grant his request for SLWOP.

### **Applicant’s submissions**

13. It is the Applicant’s case that the decisions not to renew his appointment and the failure to grant his request for SLWOP are *prima facie* unlawful. Firstly, they are discriminatory as the standard practice to renew the appointment for a short period and to grant SLWOP pending finalization of funding was not followed.

14. Secondly, the deviation from the standard practice must be understood in a pattern of behaviour from the FRO who attempted to force the Applicant to resign, thereby amounting to constructive termination.

15. Thirdly, the FRO's discriminatory treatment of the Applicant is retaliation for the complaint he made against her.

16. The Applicant further asserts that the matter is urgent as his appointment will expire on 31 July 2018. He also asserts that he will suffer irreparable harm if the contested decisions are implemented as he will lose his employment and the FRO, using the synchronicity of funding delays and short term appointments, will achieve her illegal purpose of forcing his separation from service.

### **Considerations**

17. Applications for suspension of action are governed by art. 2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure. Article 13 provides as follows (emphasis added):

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.*

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

18. While the Tribunal is under a duty to transmit a copy of the suspension of action application to the Respondent, there is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to wait for the Respondent's response before the application is considered. Even in the absence of a reply by the Respondent, the Tribunal must rule on an application for suspension of action within five working days.

19. Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for suspending, in appropriate cases, an administrative decision which may have been wrongly made, to give the Management Evaluation Unit sufficient time to consider the matter and to advise management. The process itself should not become unduly complex, time-consuming and costly for the Organization or its staff members.

20. The Tribunal approves of its position in *Wilson*<sup>1</sup> as enunciated thus:

[A]pplications for suspension of action have to be dealt with on an urgent basis and the decision should, in most cases, be in summary form. There is no requirement to provide, and the parties should not expect to be provided with, an elaborately reasoned decision either on the facts or the law. To do so would defeat the underlying purpose of a speedy and cost-effective mechanism. Moreover, the time, effort and costs thereby saved by all those involved in the formal system of internal justice could be utilised to facilitate the disposal of other cases.

21. The impugned decision must be shown to be *prima facie* unlawful, that the matter must be particularly urgently and implementation of the decision would cause the applicant irreparable harm. All three elements must be satisfied for the Court to grant the injunction being sought, as the test is a cumulative one.

22. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he or she can show that *prima facie*, the case he or she has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.<sup>2</sup>

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<sup>1</sup> Order No. 327 (NY/2014).

<sup>2</sup> See for example *Omondi* Order No. UNDT/NBI/O/2010/017; *Newland* Order No. 494 (NBI/2016).

*Prima Facie Unlawfulness*

23. At this stage, the Applicant needs only to show *prima facie* unlawfulness. The threshold required is that of “serious and reasonable doubts” about the lawfulness of the impugned decision.<sup>3</sup> Put another way, does it appear to the Tribunal that, unless it is satisfactorily rebutted by evidence, the claim of unlawfulness will succeed?<sup>4</sup>

24. With respect to the non-renewal of a fixed-term appointment, the Tribunal has regard to the established jurisprudence of the Appeals Tribunal according to which a fixed-term appointment does not bear any expectancy of renewal.<sup>5</sup> A non-renewal decision however, can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation.<sup>6</sup>

25. The staff member alleging that the decision was based on improper motives carries the burden of proof with respect to these allegations.<sup>7</sup> In *Obdeijn*<sup>8</sup>, the Appeals Tribunal further stressed that “a decision not to renew [a fixed-term appointment] can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members”.

26. As to requests for SLWOP, staff rule 5.3(a)(i) provides that (emphasis added):

Special leave may be granted at the request of a staff member holding a fixed-term or continuing appointment for advanced study or research in the interest of the United Nations, in cases of extended

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<sup>3</sup> See for example *Hepworth* UNDT/2009/003, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015).

<sup>4</sup> *Wilson* Order No. 327 (NY/2014).

<sup>5</sup> See for example *Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341.

<sup>6</sup> See for example *Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534.

<sup>7</sup> See for example *Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503.

<sup>8</sup> 2012-UNAT-201.

illness, for childcare *or for other important reasons for such period of time as the Secretary-General may prescribe.*

27. On the facts before it, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness. The documentary evidence produced by the Applicant establishes on a *prima facie* basis that funding for the Afghan Opiate Trade Project on which he is working is underway and would most likely be finalised imminently.

28. Despite this expected funding, the FRO has taken no action to extend the Applicant's appointment, which will otherwise expire on 31 July 2018, and has not answered his request for SLWOP. Although no formal response has been provided thus far to this request, the absence of a response at this point may be interpreted as a refusal given the imminent expiry of the Applicant's appointment.

29. Since the FRO confirmed in an email of 20 June 2018 that the Applicant's renewal was dependent on the renewed funding of the Afghan Opiate Trade, there seems to be no reason to depart from the standard practice which would entail renewing the Applicant's appointment for a short period and/or to grant him a SLWOP pending finalisation of the funding, pursuant to staff rule 5.3. This would indeed ensure his retention pending finalisation of the funding of the project on which he was working and avoid unnecessary recruitment and relocation costs, which are not insignificant in the context where the Applicant was internationally recruited. The Applicant appears not to have been treated in the same way as other staff members in a similar situation, thus not justly and fairly.

30. Further, the filing of a complaint of harassment and abuse of authority against the FRO a few weeks before the expiry of his appointment raises serious and reasonable doubts about the possible motivation of the FRO in considering the extension of the Applicant's appointment and/or the granting of his request for SLWOP, which warrant maintaining the *status quo* pending a further review of the matter.

31. The Applicant details in his complaint a series of events that, if proven, could reveal an intent of the FRO to ensure his separation from service on grounds other

than unavailability of funding and thus constitute ulterior motives. Further, the apparent unequal treatment of the Applicant's appointment pending finalisation of funding may possibly be in retaliation for the filing of his complaint against the FRO.

32. Therefore, the Tribunal finds that the decisions not to renew the Applicant's appointment beyond 31 July 2018 and not to grant him SLWOP to avoid his separation from service pending finalisation of funding for the Afghan Opiate Trade Project are *prima facie* unlawful.

33. The Tribunal notes that the Applicant requests the suspension of both the decision not to renew his appointment and not to grant him SLWOP. In his request of 18 July 2018, he requested to be placed on SLWOP as of the end of July 2018, for a period of two months. The Tribunal understands that the Applicant accepts that renewal of his appointment at this stage, pending finalisation of the funding for the Afghan Opiate Trade Project, would be without pay. It will thus consider whether to suspend these two decisions, in light of the two additional criteria.

#### *Urgency*

34. The urgency of this application is obvious given that the Applicant's appointment will end on 31 July 2018, which would result in his separation from service.

35. The Tribunal notes that the Applicant was formally notified on 26 June 2018 that his appointment would not be renewed and did not file his application until 26 July 2018, a few days before the expiry of his appointment. However, in the evolving context of the funding situation for the Afghan Opiate Trade Project, the FRO's suggestion in her email of 20 June 2018 that the renewal of the Applicant's appointment was dependent upon receipt of funding by the end of July 2018 and the practice of granting SLWOP to cover the gap when extension of a fixed-term appointment cannot be secured prior to the finalisation of a funding agreement, the Tribunal finds that it was not unreasonable for the Applicant to wait until his request for SLWOP was considered before formally challenging the non-renewal of his appointment. The urgency is therefore not self-created.



*Irreparable Harm*

36. Irreparable harm is generally defined as harm that cannot be compensated for.

37. As there is little that cannot be monetarily compensated for, the Tribunal has previously held that the concept is a little more nuanced than the question of money alone. In *Tadonki*, the court held as follows:

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.<sup>9</sup>

38. In the circumstances presented by the Applicant in this case where he may lose his employment with the Organization, the Tribunal finds that the requirement of irreparable damage is satisfied.

**ORDER**

39. The decision of 26 June 2018 not to extend the Applicant's appointment beyond 31 July 2018 and the implied decision not to grant him SLWOP as of 1 August 2018 are suspended pending the outcome of the management evaluation.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 30<sup>th</sup> day of July 2018

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<sup>9</sup> UNDT-2009-016.

Entered in the Register on this 30<sup>th</sup> day of July 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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