



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/125
Order No.: 192 (NBI/2018)
Date: 27 December 2018
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TORRES SIBILLE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Mohamed Abdou, OSLA

Counsel for the Respondent:
Saidou N'Dow, UN-Habitat

Introduction

1. The Applicant is a staff member of the United Nations (UN-Habitat). On 19 December 2018, she filed an application for suspension of action, pending management evaluation, with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi to suspend the decision not to renew her fixed-term appointment (FTA) beyond 31 December 2018.

2. The Respondent filed a reply on 24 December 2018.

Background facts

3. The Applicant entered into service with UN-Habitat on 7 September 2016 as a Programme Coordinator at the P-3 level in Bukavu, Democratic Republic of the Congo (DRC), for the project, *Community Participatory Land use Planning, 2016-2018, North Kivu, South Kivu and Ituri*. This Project, which was funded by the Department for International Development (DFID) and UN-Habitat, commenced on 26 June 2018 for a duration of 30 months.

4. By a memorandum dated 7 August 2018, Mr. Abel K. Walendom, Chief Technical Adviser, UN-Habitat, DRC, informed all UN-Habitat staff members in DRC that the DFID project was undergoing a performance improvement plan and that as a result appointments would not be renewed beyond October 2018.

5. On 28 August 2018, the Applicant received a memorandum dated 27 August 2018 from Mr. Naison Mutizwa-Mangiza, Director of the UN-Habitat Regional Office for Africa, informing her of the non-renewal of her FTA beyond 6 October 2018 due to lack of funding and the fact that the Applicant's position had only been provided funding for two years.

6. On 19 September 2018, the Applicant requested management evaluation of the decision not to renew her FTA beyond 6 October 2018 and on 27 September, she filed an application for suspension of action with UNDT. On 4 October 2018, the Applicant filed a motion to withdraw her application for suspension of action on the basis that the Respondent had undertaken to extend

her FTA to 31 December 2018. The Tribunal granted the motion and struck Case No. UNDT/NBI/2018/100 off its docket on 4 October 2018.

7. On 5 December 2018, the Applicant received a memorandum dated 29 November 2018 from Mr. Mutizwa-Mangiza informing her that her FTA would not be renewed upon its expiry on 31 December 2018 due to the absence of funding for her post.

8. On 19 December 2018, the Applicant requested management evaluation and filed the current application seeking suspension of the decision not to renew her FTA beyond 31 December 2018.

Considerations

9. Applications for suspension of action are to be decided in accordance with art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of the Tribunal's Rules of Procedure. Article 2.2:

The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

10. Article 13 of the Rules of Procedure:

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.

11. The Tribunal will grant urgent injunctive relief where the Applicant satisfies the three cumulative requirements in art. 2.2 of the Statute and art. 13 of the Tribunal's Rules of Procedure, namely that the decision appears to be *prima facie* unlawful, that the matter appears of particular urgency, and that the implementation of the decision would appear to cause irreparable damage.

12. In considering an application for urgent injunctive relief, the Tribunal is not required to make a conclusive finding but merely to apply the statutory test by forming and expressing an opinion based on the material presented in support of the application.

13. The first issue before the Tribunal is whether the decision not to renew the Applicant's FTA beyond 31 December 2018 is *prima facie* unlawful.

14. The Applicant submits that the contested decision is *prima facie* unlawful for the following reasons:

- a. Mr. Mutizwa-Mangiza's assertion in his 29 November 2018 memorandum regarding lack of funding is incorrect and unsubstantiated because the initial funding for her post allows for the extension of her appointment at least until 31 March 2019. Additionally, while the project is subject to a no-cost extension until December 2019, donors appear to have released additional funds into the project. Further, recent documents indicate that there is sufficient funding for the payment of international staff at least during the first quarter of 2019. The financial report does not envisage any downsizing in international staff positions on the project.
- b. Her post of Programme Coordinator in Bukavu is still required. This is supported by the fact that another staff member has been designated to assume her functions without any proper basis or justification.
- c. The impugned decision was vitiated by improper considerations and ulterior motives.

15. The Respondent submits that the contested decision is lawful for the following reasons:

- a. The Applicant was recruited for a DFID project that was funded for a duration of 30 months, commencing 26 June 2016 to 31 December 2018. Although she was recruited three months after the project began, on 7 September 2016, the project's end date was still 31 December 2018. Thus, her assertion that her appointment should end at the end of March 2019 is unsubstantiated.
- b. The MoU between DFID and UN-Habitat was extended, at no additional cost, up to September 2019. Since DFID is not providing any additional funding, it is not possible to extend appointments beyond 31 December 2018 for contracts ending on this date.
- c. There is no need for the programme coordinator post since only planning activities will be conducted.
- d. The Applicant's contention that donors appear to have released additional funds into the project is based on conjecture and is not supported by the evidence.
- e. The Applicant has failed to adduce any compelling evidence to substantiate her claim that the impugned decision was informed by improper motives or countervailing factors.

16. The crux of the Applicant's case is her belief that she has a right to a contract extension until at least the end of March 2019 because she was appointed to the Programme Coordinator post three months after the commencement of the project. It is also her case that there is additional funding for the Project and that her position is still required.

17. The Tribunal finds however that it was the Project, not her appointment, that had a defined life span of 30 months (i.e. from 26 June 2016 to 31 December 2018). Thus, the Applicant's FTA was tied in with the Project's 31 December 2018 end date even though she was recruited on 7 September 2016. The three-month delay did not automatically set her contract end date to the end of March 2019 in the absence of additional funding being infused into the Project by DFID.

18. With respect to the Applicant's contention that there is additional funding for the Project and her post, she relies on a chain of emails between Ms. Amy Ballard, Programme Manager, DFID DRC, Mr. Walendom, Chief Technical Adviser, UN-Habitat DRC and others within UN-Habitat. One of the emails from Ms. Ballard, dated 20 August 2018, states that "[t]he 6 month PIP is due to finish at the end of September where we can then make a decision about a no cost extension and extending the project for another 6-12 months". The Tribunal could not find any evidence in these emails of DFID's intent to allocate additional funds to the Project. However, Ms. Ballard's email of 20 August 2018 bolsters the Respondent's position that DFID extended the project on a no cost basis.

19. Further, the Applicant did not provide any evidence to substantiate her claim that her post of Programme Coordinator in Bukavu is still required after 31 December 2018. It is not sufficient for the Applicant, who bears the burden of proving her claims, to merely allege that another staff member has been designated to assume her functions. The Tribunal accepts the Respondent's evidence¹ that the only international position that will remain in Bukavu after 31 December 2018 is that of the Conflict Sensitivity Adviser, who will be the head of this sub-office.

20. Having examined the documentary evidence provided by the parties, the decision not to extend the Applicant's FTA beyond 31 December 2018 does not, without more, give the appearance of an unlawful or otherwise impermissible exercise of discretion on the part of the Respondent. Further, there is nothing in the Applicant's submissions to support a finding or inference that the decision-maker was motivated by improper or impermissible motives.

21. Based on the facts before it, the Tribunal concludes that the Applicant has not made out a case of *prima facie* unlawfulness.

22. Since the threefold test is cumulative, it is not necessary for the Tribunal to examine whether the other two limbs of the test for a successful application for suspension of action have been met.

¹ Respondent's reply, annex 13.

ORDER

23. The application for suspension of action is accordingly refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 27th day of December 2018

Entered in the Register on this 27th day of December 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi