



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2020/023

Order No.: 064 (NBI/2020)

Date: 30 March 2020

Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

QASSEM

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 the Applicant:**  
Mohamed Abdou, OSLA

**Counsel for the Respondent:**  
Esther Shamash, UNDP

## **Introduction**

1. By an application filed on 23 March 2020, the Applicant requests suspension of action pending management evaluation of the United Nations Development Programme (UNDP) Programme of Assistance to the Palestinian People's (PAPP) decision not to renew his fixed-term appointment beyond 31 March 2020.
2. The Respondent filed a reply on 25 March 2020.
3. For the reasons detailed further below, the application is granted.

## **Facts**

4. The Applicant joined the UNDP/PAPP Office in Jerusalem in April 2003 on a Special Service Agreement until January 2004. On 11 November 2011, the Applicant was granted a fixed-term appointment as Administrative Clerk/Dispatcher, G-3, encumbering post number 4476 and duty station registered as East Jerusalem. The Applicant currently holds the same position, with the same post number and duty station, at the G-3 Level, Step 10.
5. In 2015 the Applicant complained to the then-Special Representative of the Administrator in UNDP/PAPP, Mr. Roberto Valent, about a work conflict with the then-Deputy Special Representative. As a result the then-Special Representative decided that the Applicant would be moved from East Jerusalem to Ramallah effective 11 November 2015.<sup>1</sup>
6. In 2018, UNDP/PAPP underwent a restructuring exercise based on a transformation plan. The Applicant's post was amongst those which were within the scope of the restructuring exercise. On 24 July 2018, the Applicant emailed the Human Resources Advisor, Margaret Cameron, and requested that the restructuring not affect his post. On 25 July 2018, Ms. Cameron replied to the Applicant that his

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<sup>1</sup> Reply, annex 3.

post would remain unchanged and further clarified that, while his duty station remained East Jerusalem, his work station was Ramallah. She indicated that there were no plans to change this situation. On the same day, 25 July 2018, the then-Special Representative also emailed the Applicant, reiterating that the Applicant was to continue performing his functions in Ramallah.<sup>2</sup>

7. On 18 September 2018, the Applicant received a letter from Mr. Valent notifying him of the outcome of a restructuring process. The letter confirmed that he would retain his current position and that his terms of appointment would remain unchanged. In that letter, the Applicant was requested to convey his formal acceptance of a detailed job description outlining the post information, key functions and responsibilities, and the organizational context for the position to the Human Resources Unit by 21 September 2018. On 19 September 2018, the Applicant responded to the email, indicating his acceptance of post 4476 and attaching the 'No-Change' letter with his signature and date<sup>3</sup>

8. On 2 October 2018, the Applicant emailed Ms. Cameron and requested that UNDP/PAPP move him to East Jerusalem. On 3 October 2018, the Applicant received responses from Ms. Cameron and from the Deputy Special Representative, Geoffrey Prewitt, informing him that while his duty station was East Jerusalem, his work station was to remain Ramallah.<sup>4</sup>

9. The Applicant argued his case throughout October, involving the Special Representative, Deputy Special Representative and Ms. Cameron, while refusing to return to his assigned work station in Ramallah<sup>5</sup>.

10. On 18 April 2019, the Applicant submitted a formal complaint to Ahmad Al Hammal, Operations and Services Manager, indicating that he was effectively precluded from exercising the functions of his post. In his request, the Applicant

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<sup>2</sup> Reply, annex 5.

<sup>3</sup> Application, para. 7, annex 1 and reply, annex 6.

<sup>4</sup> Reply, annex 7.

<sup>5</sup> Reply, annexes 8 and 9.

specified the tasks and activities which were no longer being carried out by him and which formed part of the Job Description for his post. On 8 May 2019, Mr. Al Hammal responded to the Applicant's complaint informing him that his post had not changed.<sup>6</sup>

11. The dispute relating to the decision designating the Applicant's duty station as Ramallah is the subject of other proceedings before the UNDT under case No. UNDT/NBI/2019/146.<sup>7</sup> The Manager indicated as responsible for the impugned decision in that case is Mr. Al Hammal.

12. On 25 October 2019, Mr. Al Hammal wrote to the Regional Bureau for Arab States (RBAS) in Headquarters, noting that PAPP was trying to further consolidate its overall office structure and reduce staff costs from USD4,262,375 by USD440,784 in 2020 and a total overall reduction of USD504,000 by 2021. On 11 December 2019, RBAS approved the proposed budget, which envisioned the abolition of six staff posts.<sup>8</sup> The document presented by the Respondent, however, does not clearly indicate that the post encumbered by the Applicant was among them.

13. On 14 December 2019, the Applicant wrote to the UNDP Ethics Office to report an incident of retaliation against Mr. Al Hammal. He informed the Ethics Office that he had filed a UNDT application on 18 October 2019 challenging the decision not to reassign him to a post in Jerusalem, to strip him of his core functions. He alleged that Mr. Al Hammal was the actual decision maker and that he took no action to preserve the Applicant's rights as a staff member.<sup>9</sup> Mr. Peter Liria, Director of the Ethics Office, replied indicating, inter alia, that the UNDP Protection against Retaliation Policy does not cover alleged retaliation for having filed an action in the UNDT or UNAT and that he should either contact the Office of Staff Legal

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<sup>6</sup> Application, annex 2.

<sup>7</sup> Application, annexes 3, 4 and 6.

<sup>8</sup> Reply, annex 18(2).

<sup>9</sup> Application, annex 8.

Assistance (OSLA) or approach the Judge in his matter directly through his legal counsel.<sup>10</sup>

14. On 16 December 2019, the Applicant attended a staff meeting with Ms. Yvonne Helle, Special Representative, during which she explained the financial situation the office was in due to low delivery and the reduced budget for 2020. The Special Representative provided staff with an overview of the impact this would have, including the abolition of posts encumbered by Permanent and Fixed-Term Appointees, and Service Contractors' positions, in both core functions and project functions. During the meeting, Ms. Helle mentioned that staff who received three months' extensions of appointment should prepare themselves for abolishment of post. The Applicant received a three-months' contract extension on 17 December 2019.<sup>11</sup>

15. On 20 December 2019, Mr. Al Hammal informed the Applicant by email that his post had been identified as one of a number of permanent and fixed-term posts to be abolished in 2020 as a result of substantial financial limitations faced by the office due to the low delivery and the associated cuts within the Administrative budget for 2020.<sup>12</sup>

16. Since the beginning of 2020, the Applicant has been on sick leave.<sup>13</sup>

17. By letter dated 24 January 2020, Mr. Prewitt informed the Applicant that his assignment with UNDP/PAPP would reach completion upon expiration of his fixed-term appointment on 31 March 2020.<sup>14</sup> The Applicant sought management evaluation of this decision on 23 March 2020.<sup>15</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> Reply, annexes 19(1) and (2).

<sup>12</sup> Application, annex 9 and reply annex 21.

<sup>13</sup> Reply, para. 19.

<sup>14</sup> Application, annex 10.

<sup>15</sup> Application, annex 14.

## **Applicant's submissions**

### *Unlawfulness*

18. The reasons provided by the Administration to justify the non-renewal of his appointment are not supported by the facts. In his 20 December 2019 communication, Mr. Al Hammal specifically indicated that the abolishment of the Applicant's post had been proposed in view of the need to review all office functions across Programme and operations in order to finalize the office re-alignment process. Mr. Al Hammal suggested that there were substantial financial limitations currently faced by the office due to the low delivery and the associated cuts within the Administrative budget for 2020.

19. The two reasons put forward by Mr. Al Hammal are entirely fallacious, misleading and untruthful.

a. The post encumbered by the Applicant has already been subject to a thorough and objective review in the context of a restructuring process undertaken by a Management Consulting Team (MCT) from New York in 2018. The restructuring process, which was completed in September 2018, resulted in the Applicant's post being maintained without any change. It is therefore disingenuous to suggest that the abolition of the Applicant's post is part of the re-alignment process which had already been finalized and resulted in the retention of the Applicant's post.

b. The re-alignment process was guided by clear terms of reference and was carried out by the MCT Team, not the PAPP Country Office. The process was concluded in September 2018 and all recommendations concerning changes to the Office structure were made at the time in the MCT report. Mr. Al Hammal, as a Manager in the PAPP Country Office, has no authority to unilaterally amend the outcome of the restructuring process after its conclusion without any proper basis or clear necessity.

20. Mr. Al Hammal's proposal to abolish the Applicant's post is inconsistent with the Administration's position regarding the continued need for the Applicant's post. Just a few weeks prior to Mr. Al Hammal's email, UNDP made unequivocal submissions to the UNDT in the reply to Case No. UNDT/NBI/2019/146:

[f]ollowing the restructuring, the Applicant was expected to undertake his functions for the larger West Bank region. The Applicant is in fact one of three vehicle dispatchers in UNDP PAPP- there being one dispatcher per work station. As such, the Applicant is the main fleet manager and vehicle dispatcher in the West Bank.<sup>16</sup>

These representations were made on 20 November 2019 - four weeks prior to Mr. Al Hammal's email. The radical change reflected in Mr. Al Hammal's statement cannot be attributed to objective factors affecting the Applicant's post. Indeed, a change of circumstances is inconceivable in this very limited period of time.

21. Mr. Al Hammal's general reference to financial difficulties is without merit. Mr. Al Hammal has not provided any specific information about the PAPP budget or the proposed cuts.

22. Notwithstanding the unavailability of financial information, the financial difficulties do not require the abolition of his post.

a. UNDP did not make any reference or allude to these difficulties in their 20 November 2019 submissions to the UNDT.

b. The version of the personnel action report in the possession of the Applicant for the year 2018 indicates that the source of funding is "XB GMS funds" while the relevant annex to the Respondent's reply in UNDT/NBI/2019/146 states "PAPP Core Programme". This change indicates that the Applicant was moved from the Administrative budget to the Programming budget even though he was informed that his position had remained unchanged.

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<sup>16</sup> Application, annex 7, para. 45.

c. This change of funding source again contradicts Mr. Al Hammal's assertion that the abolition of the Applicant's post is due to the "associated cuts within [the] Admin budget for 2020".

23. The Applicant is the only staff member to be separated by way of non-renewal while all other staff members recently separated had been offered separation packages. This demonstrates the lack of objectivity and the retaliatory nature of the decision. More importantly, it shows that additional funds are available to cover for the costs of separation packages.

24. It is forecasted that the financial difficulties encountered by PAPP in the year 2020 would be readjusted and result in a surplus in the year 2021 without the need to abolish any post in the PAPP Office. This indicates that the recent abolitions were not justified by any compelling financial reason.

25. While the Administration previously indicated in case No. UNDT/NBI/2019/146 that the Applicant's post is still required and indicated that the Applicant is the "main fleet manager and vehicle dispatcher" in his duty station, his functions have been reassigned to Ahmad Dweidat, Service Contractor.

26. The Applicant's eviction from his post is inconsistent with UNDP Policy on Individual Contractors which makes it clear that individual contractors may only be used to perform time-bound and non-staff tasks aimed at delivering clear and quantifiable outputs. Furthermore, the replacement of the Applicant with an individual contractor is a clear indication of availability of funds.

27. The non-renewal decision is vitiated by bias and other improper motives. There is a long history of conflict between the Applicant and Mr. Al Hammal. Throughout the year 2019, several meetings were held with Mr. Al Hammal to discuss the outcome of the restructuring and the implementation of the matching decision. As these informal discussions proved to be unfruitful, the Applicant had no choice but to file a request for management evaluation and a UNDT application against the removal of his functions. In his UNDT application, the Applicant



identified Mr. Al Hammal as being the main official behind the non-implementation of the outcome of the restructuring, which effectively left him without any substantive work to perform.

28. On 13 December 2019, Mr. Al Hammal threatened to abolish the Applicant's position notwithstanding the outcome of the restructuring process, indicating a causal link with the case filed before the UNDT. The Applicant sought protection against retaliation from the Ethics Office who declined action. Ultimately, Mr. Al Hammal carried out his threat and proceeded with the abolition.

#### *Urgency*

29. If the decision is implemented, the Applicant will separate from the Organization on 31 March 2020. The urgency is not self-created as the Applicant was only notified of the decision on 27 January 2020. The Applicant was unable to file a request for management evaluation immediately after being notified of the contested as he has since been on sick leave. His health problems are partly attributed to harassment at workplace but have been exacerbated by the unfortunate death of his mother.

#### *Irreparable harm*

30. The non-renewal of his fixed-term appointment would cause more than mere economic harm, namely loss of career prospects, self-esteem and an unquantifiable potential harm to his reputation. Such a harm is irreparable and cannot simply be compensated by the award of damages.

### **Respondent's submissions**

#### *Unlawfulness*

31. The abolition of the staff member's position is a valid reason for the non-renewal of a fixed-term appointment. The decision not to renew the Applicant's post on that basis was lawful.

32. The Applicant's claim that Mr. Al Hammal has acted in bad faith is unfounded. To the contrary, Mr. Al Hammal went out of his way to try to secure a termination indemnity for the Applicant, over and above his legal entitlement. There is no basis, and no evidence, for a claim of bad faith.

### *Urgency*

33. The urgency is self-created. The Applicant was informed of the impugned decision, to extend his appointment for only three months, on 17 December 2019. Three days later, on 20 December 2019, he was notified in writing that his position would be abolished. On 24 January 2020, the Applicant was again formally informed that his fixed-term appointment was coming to an end. Even after that, the Applicant waited almost two months to appeal the decision which he now claims is urgent.

### **Considerations**

34. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides, in the relevant part:

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.

35. All three elements of the test must be satisfied before the impugned decision can be stayed. Accordingly, an application for the suspension of action must be adjudicated against the stipulated cumulative test, in that an applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

36. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an

applicant to show that there is a triable issue before the court.<sup>17</sup>

*Whether the decision is prima facie unlawful*

37. The Tribunal recalls the well settled jurisprudence that “an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”, therefore, the Tribunal “will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like any other administrative decision, the administration has the duty to act fairly, justly and transparently in dealing with its staff members”.<sup>18</sup> In practical terms, there are situations in which - while there are available funds - the functions of a staff member are no longer required. That can be due to a reduction in workload in a particular department or programme, or due to the fact that the functions of a staff member have been subsumed by changes in a restructuring process. A non-renewal decision can be justified in such a scenario.<sup>19</sup> However, the obligation is on the Respondent to prove the changes in the operational realities or the restructuring exercise that justify the non-renewal.

38. The Tribunal moreover recalls that in *Toure*, the Appeals Tribunal confirmed that also in the case of restructuring, as part of judicial review, it is necessary to determine whether the decision on non-extension was vitiated by bias or bad faith, that is, if it was taken for an improper purpose.<sup>20</sup>

39. Noting that on the evidentiary plane, the staff member has the burden of proving that improper factors played a role in the administrative decision,<sup>21</sup> the Tribunal finds that the following facts authorize it to draw adverse inferences that the

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<sup>17</sup> See *Hepworth* UNDT/2009/003 at para. 10; *Corcoran* UNDT/2009/071 at para. 45; *Berger* UNDT/2011/134 at para. 10; *Chattopadhyay* UNDT/2011/198 at para. 31; and *Wang* UNDT/2012/080 at para. 18.

<sup>18</sup> *Hersh* 2014-UNAT-433-Corr.1 paras. 16-17 and references cited therein.

<sup>19</sup> E.g., *Filippova* UNDT/2016/008, *Ding* Order No. 88 (GVA/2014).

<sup>20</sup> *Toure* 2016-UNAT-660, para. 30.

<sup>21</sup> *Liu* 2016-UNAT-659; *Assale* 2015-UNAT-534; *Said* 2015-UNAT-500; *Pirnea* 2013-UNAT-311.

Applicant's non-renewal had an improper purpose:

- a. contradiction between the Respondent's representations on the utility of the Applicant's post made in case No. UNDT/NBI/2019/146 with the abolition of post announced four weeks later;
- b. designation of a contractor to perform the same function;
- c. obscurity surrounding the change of the funding source for the Applicant's position between 2018 and 2019; and
- d. designation of the Applicant's post for abolition made by the Manager indicated as author of a decision impugned in case No. UNDT/NBI/2019/146 and a background of a long-going dispute in this connection.

40. Based on the aforesaid, the decision is *prima facie* unlawful.

#### *Urgency*

41. The Applicant has been on sick leave since the beginning of 2020. The complexity of his case which has a history spanning over three years required him to obtain legal assistance to present his arguments. This was certainly a time-consuming endeavour for a sick person. The Tribunal accordingly finds that the urgency in this case is not self-created.

#### *Irreparable damage*

42. Recalling that the Respondent to date has never reinstated a wrongly separated staff member, the Tribunal agrees that, should the decision be implemented, the Applicant faces irreparable damage in the terms of economic loss and loss of career prospects.

**Conclusion**

43. In conclusion, the application is granted.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 30<sup>th</sup> day of March 2020

Entered in the Register on this 30<sup>th</sup> day of March 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi