



**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

AL-BAKRY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON THE APPLICANT'S MOTION  
FOR SUSPENSION OF ACTION  
PENDING MANAGEMENT  
EVALUATION**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Angela Arroyo, UNDP

## **Introduction**

1. The Applicant is a Partnerships and Development Finance Officer at the Office of the Resident Coordinator in Riyadh, Saudi Arabia. She serves on a fixed term appointment as a National Officer - C level.

## **Procedural History**

2. On 10 June 2020, the Applicant filed the subject application seeking to suspend the decision the Respondent made on 14 May 2020, not to renew her contract when it expires on 30 June 2020.

3. The Respondent filed his reply to the application on 12 June 2020, as directed by the Tribunal.

## **Facts and Submissions**

4. The Applicant contends that she and her immediate supervisor, the Resident Coordinator, have a difficult working relationship in which she was subject to abuse and harassment. This has been the case, she says, since July 2019. In December 2019, the Applicant informed her supervisor that given the difficulties between them she would not like to be renewed on her current appointment. Her supervisor agreed.

5. On 8 April 2020, the Applicant informed her supervisor that she had changed her mind and would, in fact, like for her contract to be extended. This she contends was met with yelling and shouting by her supervisor, which behaviour was commonplace. The Applicant started seeking advice from the Ethics Office on 6 May 2020 and by email correspondence she received advice to proceed in either an official or an unofficial way regarding the harassment she was experiencing.

6. On 14 May 2020, the Applicant was informed that her contract was not going to be renewed upon its expiry on 30 June 2020.

7. On 15 May 2020, the Applicant filed a complaint of abuse of authority and harassment against her supervisor.

8. On 3 June 2020, the Applicant sought management evaluation of the Respondent's decision not to renew her appointment.

9. On 4 June 2020, she wrote to the Ethics Office for protection against retaliation.

10. It is the Applicant's case that the impugned decision is *prima facie* unlawful, in that the Respondent is obliged to tell her why he is not renewing her contract when she has expressly indicated her desire that it be renewed. She submits that allowing the impugned decision to subsist will cause her irreparable harm, and that the imminent date of implementation of the impugned decision satisfies the element of urgency in the tripartite test for an application for suspension of action.

11. As a preliminary point, the Respondent takes issue with the short timeline he was given to respond to the application. The Respondent also submits that the Applicant has not met the burden of demonstrating that the impugned decision was either *prima facie* unlawful or that it is of such particular urgency as to meet the cumulative test for a successful application for suspension of action.

### **Considerations**

12. Applications for suspension of action are governed by art. 2.2 of the Statute of the United Nations Dispute Tribunal and art. 13 of the Tribunal's Rules of Procedure.

13. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

14. This Tribunal has previously held that<sup>1</sup>:

A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

15. This remedy is not available in situations where the impugned decision has been implemented. It is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.<sup>2</sup>

16. The Tribunal must therefore consider the parties' submissions against the test stipulated in art. 2.2 of the Statute and art. 13 of the Rules of Procedure.

17. It has been variously held that the Respondent's exercise of its broad discretionary authority must not be "tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision".<sup>3</sup>

18. The Applicant bears the burden of showing that the Respondent did not properly exercise his discretion. 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 the Applicant to show that there is a triable issue before the Tribunal.<sup>4</sup>

19. Dealing first with the Respondent's complaint that he was not given enough time to file his reply to the application, the Tribunal reminds the Respondent that the

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<sup>1</sup> See, *inter alia*, Applicant Order No. 087 (NBI/2014); *Dalgamouni* Order Nos. 137 and 224 (NBI/2014).

<sup>2</sup> See for example, *Tadonki* UNDT/2009/016; Applicant UNDT/2011/158; *Kweka* UNDT/2011/122; *Tiwathia* UNDT/2012/109; *Laurenti* Order No. 243 (NBI/2013).

<sup>3</sup> Former United Nations Administrative Tribunal Judgment No. 885, *Handelsman* (1998).

<sup>4</sup> See also: *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; *Wang* UNDT/2012/080 at para. 18.

Tribunal is required to render its decision on applications for suspension of action “within five working days of the service of the application on the respondent.”<sup>5</sup> This stricture binds the Tribunal regardless of the date on which the impugned decision is to be implemented.

20. The Respondent further states that as a result of the short time he was given to file a reply, he has had limited ability to coordinate with his Office in Saudi Arabia to address “some of the Applicant’s specific claims.”

21. The Tribunal notes that these “specific claims” are not unique to the Applicant’s motion for suspension of action. The substance of her claims have also been raised in her request for management evaluation which the Respondent’s Management Evaluation Unit (“MEU”) is currently considering.

### ***Prima Facie* unlawfulness**

22. At this stage, the Applicant need only show *prima facie* unlawfulness. The legal presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process, and consideration of irrelevant material or extraneous factors.<sup>6</sup> The Applicant bears the burden of showing such irregularity in the impugned decision, and/or the circumstances surrounding it, so that there is doubt as to the lawfulness of the process.

23. The Respondent’s submission that the decision to not renew her contract is based on the exigencies of “business continuity” because she has informed UNDP in December 2019 that she did not want to be renewed suggests that the Organization did not heed the fact that the Applicant changed her mind and informed her supervisor accordingly. The interpersonal strife between the Applicant and her supervisor is a factor to be taken into account by the Organization, particularly in

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<sup>5</sup> Article 13.3 Rules of Procedure of the United Nations Dispute Tribunal.

<sup>6</sup> *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang, Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

light of the fact that the Applicant has submitted a complaint on harassment and abuse of authority. Nothing in the Respondent's submissions disputes the existence of this complaint, but seems rather to be saying that the decision is based on the Applicant's stated intention in December 2019 and that her change of mind is irrelevant.

24. On the facts before it, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness. It is clear from the Applicant's submissions that her *prima facie* case is that the impugned decision is likely inspired by improper motives arising from the interpersonal difficulties that define the relationship she has with the Resident Coordinator.

### **Urgency**

25. The Respondent argues that Applicant has not satisfied the urgency requirement of the test for suspension of action.

26. The Tribunal is satisfied with the timeliness of the Applicant's actions. She has sought management evaluation in good time; within two weeks of the impugned decision and came to the Tribunal a week later for suspension of action.

27. There is also no stipulation that an injunction must be sought immediately upon receipt of the impugned decision for it to be considered timely. A decision to challenge a grievance through the internal justice system should be given due consideration rather than being hastily considered. The Applicant cannot be faulted in that regard.

### **Irreparable Harm**

28. This Tribunal recalls the position it espoused in previous cases that where *prima facie* unlawfulness was established<sup>7</sup>:

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<sup>7</sup> *Tadonki* UNDT-2009-016. See also *Corna* Order No. 80 (GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096.

[I]t 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.

29. The Tribunal is satisfied that allowing the impugned decision to stand will cause the Applicant irreparable harm.

### **Observations**

30. Given the facts of this case, the Tribunal strongly believes that while the MEU carries out its review of the Applicant's request, the parties should engage in meaningful consultations towards having this matter resolved. The effects of this case will concern more than just the Secretary-General and the Applicant; it can potentially affect the atmosphere in the Office of the Resident Coordinator as a whole. An amicable resolution will avert potentially adverse consequences for both parties to this dispute.

31. In *Cranfield*,<sup>8</sup> the Appeals Tribunal stated:

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility thereof and act with due expedition once alerted to the unlawful act.

32. While the Management Evaluation Unit carries out its review, it is recommended pursuant to arts. 10.3 of the Statute and 15.1 of the Rules of Procedure of the Dispute Tribunal that in the interest of efficient use of the Tribunal's resources and the expeditious conduct of these (and potentially future) proceedings, the parties

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<sup>8</sup> 2013-UNAT-367, at para. 36. See also *Das* 2014-UNAT-421.

should consult in good faith on having this matter informally resolved.

33. A conducive and productive working relationship between the employer and an employee demands nothing less.

34. It, of course, remains open to the Applicant to have this matter litigated on the merits should amicable resolution attempts be unsuccessful.

35. The Tribunal is also of the view that the services of counsel will assist the Applicant and the Tribunal in the management and conduct of this case should it proceed further.

36. To this end, the Applicant is advised to seek legal counsel for the conduct of her case. Information on legal assistance is available at <https://www.un.org/en/internaljustice/osla/contact.shtml>

### **Conclusion**

37. The application for suspension of action is **GRANTED** pending management evaluation.

*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 16<sup>th</sup> day of June 2020

Entered in the Register on this 16<sup>th</sup> day of June 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, UNDT, Nairobi