



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2024/082
Order No.: 1 (NBI/2025)
Date: 6 January 2025
Original: English

Before: Judge Sun Xiangzhuang

Registry: Nairobi

Registrar: Wanda L. Carter

MUSAMBAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Shubha Suresh Naik, OSLA

Counsel for Respondent:

Aleksandra Gjorgieska, HRLU/UNOG

Introduction

1. By application filed on 27 December 2024, the Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), requests suspension of action, pending management evaluation, of the decision not to renew his appointment beyond 31 December 24.
2. The application for suspension of action was served on the Respondent on 30 December 2024 and the reply was filed on 2 January 2025.

Facts

3. The Applicant joined UNODC in March 2016 on a temporary appointment as a Team Assistant at the G-4 level at the Regional Office in Eastern Africa, Nairobi.
4. Effective 2 March 2018, the Applicant was selected to the position of Team Assistant at the G-4 level on a fixed-term appointment (“FTA”) with the same office.
5. The Applicant’s most recent FTA was valid for a year and due to expire on 31 December 2024.
6. On 12 July 2023, the Applicant was informed that, following a report of possible fraud on his part, a fact-finding panel was appointed to investigate the matter, pursuant to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). The investigation is pending.
7. On 28 November 2024, the Deputy Regional Representative of UNODC Regional Office for Eastern Africa, notified the Applicant of the decision not to extend his FTA beyond 31 December 2024, due to the end of existing grants which resulted in a funding shortage.
8. On 27 December 2024, the Applicant filed a request for management evaluation of the decision not to extend his FTA, and the present suspension of action.

9. Effective 1 January 2025, the Applicant's FTA was extended to allow time for the suspension of action procedure to be finalized, following the Tribunal's instruction.

Parties' contentions

10. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The reason given for the non-renewal of his FTA is the ending of four grants within the Transnational Organised Crime ("TOC") pillar. The Applicant submits that this reason is not supported by facts and therefore is not a sound one. There is lack of transparency surrounding the non-renewal of his appointment.

b. For the year 2024, his position was funded from two grants/funds namely, XEAUW10 (also called Better Migration Management Programme) and Global Program against Money Laundering ("GPML grant"). Out of these two grants, the GPML grant still continues and the XEAU/BMMP grant is expected to close on 28 February 2025.

c. However, about eight staff members are still receiving salaries from XEAU/BMMP, including activities being conducted from it. Although the notice for non-renewal mentions that four grants are going to end, there is no other staff who is being separated, except for him. It is puzzling that ending of four grants results in only one staff member losing his job. Moreover, with the GPML grant still continuing, it begs the question as to why his G-4 level salary could not have been accommodated.

d. His work as Team Assistant still remains and has not become redundant. He is being let go as a Team Assistant even though he caters to the whole of the TOC pillar and his work is not limited to functions within a specific grant.

e. His work continues despite the grants ending as there are other grants and projects that continue. The contracts of other Administrative Assistants in his section who are at higher levels than he is and paid from the same grants continue. The other Administrative Assistants are being given his former finance, procurement, travel administration, daily subsistence allowance (“DSA”) custodian and meeting support services roles while on mission, while he was left with the role of creating consultant and individual contractor shopping carts for recruitment purposes, as well as service entry sheets for payment of consultants. The Applicant avers that the office does this to justify the importance of the roles of other administrative staff; yet these staff members still come to him for training on how to perform these roles.

f. He has been requested to procure two vehicles for different programs. He has also drafted terms of reference and other budget documents for the construction/repairs of buildings worth over USD100,000 and has been requested severally to engage in other non-formal solicitations for goods, which he facilitated procurement successfully for other projects within the pillar. He has performed all these tasks successfully, yet the other administrative staff are preferred over him in terms of job retention and career advancement.

g. The onus is on the UNODC Administration to prove the lack of funds by providing supporting documentation. In this case, the reasoning provided by the Administration is not supported by evidence.

h. He is being singled out because of his workplace issues and the pending investigation. The Administration is trying to get rid of him conveniently, without awaiting the outcome of the investigation. The Administration, seeing that they could not task him with finance functions, chose the route of not renewing his FTA, purportedly due to lack of funds, and will perhaps then get a chance to engage another candidate for the role. The non-renewal is a disguised disciplinary sanction.

Urgency

i. In the instant case the decision has been made and the non-renewal letter issued. This means that his separation from service is imminent. Once such separation is effected on 31 December 24, the decision will be deemed to have been implemented and incapable of suspension.

j. If a suspension of action is not granted, the Administration will implement the impugned decision to separate him from service without proper justification, thereby significantly undermining his career prospects with the United Nations. This is also not a case of self- created urgency, as after consultation with the Office of Staff Legal Assistance legal counsel, he immediately took steps to file the management evaluation request (“MER”). However, as it occurs in cases of non-renewal based on funding issues, he took considerable efforts to get evidence of the budget which resulted in the filing of the MER only on 27 December 24. Thereafter, he filed the suspension of action on the same day

Irreparable damage

k. If the impugned decision is implemented, he will suffer harm due to the loss of employment, and in relation to his career prospects. Such harm cannot be compensated by a monetary award. Moreover, the Tribunal has held that deprivation of employment for no apparent reason constitutes irreparable moral harm that cannot be compensated by an award of damages.

l. His contractual uncertainty has caused him enormous stress especially as he is the sole breadwinner in his family. He needs to take care of his two children’s education and upkeep. His third child who is one year old has a condition which requires medical attention resulting in more financial outgoings. Therefore, if he separates before the decision of the Management Advice and Evaluation Section (“MAES”) he will have difficulty managing the medical requirements of this child which cannot be later compensated. He also has pending loans with the United Nations SACCO and the United Nations Federal Credit Union. The stress will continue through any

continuing uncertainty until final adjudication. Such harm cannot be quantified.

m. Likewise, damage to reputation and family stress occasioned by a loss of income are often recognized as irreparable.

11. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The Applicant did not present at least an arguable case that the decision not to renew his FTA was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith.

b. Staff regulation 4.5(c) and staff rule 4.13 provide that an FTA does not carry any expectancy, legal or otherwise, of renewal. If based on valid reasons and in compliance with procedural requirements, FTAs may not be renewed. Moreover, separation resulting from an FTA expiration takes place automatically, without prior notice, on the expiration date specified in the letter of appointment and the staff member challenging the decision must demonstrate that improper factors played a role in the decision. Here, the Applicant has failed to do so.

c. The decision not to renew the Applicant's FTA was based on valid and objective reasons, namely, budgetary restrictions, which would not allow for the Organization to have continued funding for his post.

d. Specifically, in 2024 the Applicant was funded by two separate grants: the BMM project January - June M1-32FSB-002642 (due to expire on 28 February 2025) and the Gender project July-December 2024 - M1-32FSB-002991, which expired on 31 December 2024.

e. The Applicant's FTA cannot be extended under the BMM project, running until 28 February 2025, because: (i) the funding under the staff

budget class is already fully allocated, and (ii) the project is implementing very few activities in the remaining months and does not require more than the existing staff members; otherwise, that would result in duplication of roles.

f. The Applicant's position was identified for non-renewal, as opposed to other administrative staff members, because his contract was due to expire towards the projects' ends. The other comparable staff members have contracts that are also set to end within the next two months, that is, within the timeframe of the expiring grants. Thus, the Administration decided to allow all these contracts to end according to their natural timeframes. Otherwise, it would have been forced to end some contracts early to accommodate extensions for others.

g. Additionally, other comparable staff members (all of whom hold more senior posts than the Applicant) hold *Umoja* roles and perform tasks that the Applicant does not. These roles, which the Applicant lacks, are critical to the closing of the BMM project, and due to the short time remaining, require only one staff member to administer.

h. With respect to the Applicant's claims that the decision is a disguised separation because of the investigation into the fraud allegations, the Respondent submits that the Applicant has not shown, on a *prima facie* basis, that that played a role in the decision. In any event, the Respondent submits that the ongoing investigation is a separate procedure and is irrelevant for the matter at hand, which concerns a lawful non-extension of an FTA for budgetary reasons.

Urgency

i. The Applicant was notified of the contested decision on 28 November 2024. Despite his knowledge of the short and strict suspension of action deadlines and the expiration of his contract on 31 December 2024, the Applicant waited for a whole month to file his management evaluation request and the present suspension on 27 December 2024.

j. The Applicant did not provide a valid explanation for doing so, except that he took considerable efforts to get evidence of the budget. The Respondent submits that this cannot be considered a satisfactory explanation as to why the delay in filing a suspension of action to the Tribunal should not be attributable to him.

k. Moreover, the Applicant, who is assisted by counsel, must have been aware that a suspension of action disrupts the normal day-to-day business of the Tribunal and the parties' schedules and diverts the Tribunal's attention from considering other cases filed under standard application procedures. That is especially so in the current period during which the workforce is traditionally reduced due to the official holidays, thus putting undue pressure on the Administration and the Respondent, as well as on the Tribunal.

l. The Respondent submits that the urgency was self-created and this requirement is not met in the present case.

Consideration

12. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative. In other words, they must all be met in order for a suspension of action to be granted. Furthermore, the burden of proof rests with the Applicant.

Prima facie unlawfulness

13. The Tribunal recalls that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

14. The Tribunal is convinced by the Respondent's submission that the decision not to renew the Applicant's FTA was based on budgetary restrictions which would not allow for the Organization to have continued funding for his post. The Respondent further submitted that in 2024 the Applicant's post was funded by two separate grants: the BMM project January - June M1-32FSB-002642, due to expire on 28 February 2025, and the Gender project July-December 2024 - M1-32FSB-002991, which expired on 31 December 2024.

15. In view of this, the Applicant has failed to establish that the non-renewal decision is *prima facie* unlawful. Given the cumulative nature of the conditions to be met for the granting of a suspension of action, the Tribunal does not find it necessary to consider whether the contested decision is urgent or whether it would cause irreparable damage (*Evangelista* UNDT/2011/212; *Dougherty* UNDT/2011/133).

Conclusion

16. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Sun Xiangzhuang

Dated this 6th day of January 2025

Entered in the Register on this 6th day of January 2025

(Signed)

Wanda L. Carter, Registrar, Nairobi