



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

CHOLLET

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
George Irving

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 20 January 2014, the Applicant, a P-4 level Functional Analyst, Management Support Section, Umoja, Department of Management (“DM”), filed an application for suspension of action, pending completion of management evaluation, of the decision not to renew his fixed-term contract upon its expiry on 31 January 2014.

Background

2. On 19 June 2013, the Assistant Secretary-General (“ASG”), Enterprise Resource Planning (“ERP”), informed the Applicant via email that following a series of meetings regarding the Applicant’s work, and due to the evolution of the Umoja project to a new phase that “the situation of your functions ... and given the sparse resources available to Umoja, the functions for which you were hired in Umoja are not projected to be required in 2014. ... I wish to assure you that the conclusion regarding your functions, as in all other cases we manage, has been arrived at in the best interest of the Organization ...”.

3. On 21 November 2013, the ASG/ERP, sent an email to the Applicant stating that “as reflected in my email to you dated 19 June 2013, this is to reconfirm that your Fixed-Term Appointment with Umoja expires on 30/01/2014”.

4. On 6 December 2013, the Applicant received a letter from an Executive Officer, DM, informing him that “[r]eference is made to the email notifications of 19 June 2013 and 21 November 2013 ... informing you that your Fixed-Term Appointment will not be extended beyond 31 January 2014”.

5. On 15 January 2014, the Applicant requested management evaluation of three decisions, namely the “official” decision not to renew his fixed-term appointment that was conveyed to him on 6 December 2013, comments related to the content of his electronic performance appraisal report and as well as a related alleged breach of staff

rules regarding a sharing of confidential information regarding his performance evaluation. As part of his request for management evaluation the Applicant also requested that the management evaluation unit suspend his separation from service pending management evaluation pursuant to staff rule 11.3(b)(ii).

6. On 20 January 2014, the Applicant filed the present application for suspension of action, pending completion of management evaluation. The Respondent filed his reply as directed on 23 January 2014.

Consideration

7. This is an application for suspension of action pending management evaluation. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five working days of the service of the application on the Respondent (art. 13.3 of the Rules of Procedure). It is interim relief intended to preserve the status quo pending management evaluation and is not meant to make a final determination on the substantive claims.

8. Pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Applicant's application for suspension must satisfy the following cumulative conditions to succeed:

- a. The application is receivable because it concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The contested decision has not yet been implemented;
- c. The Applicant has submitted a request for management evaluation of the contested decision, which evaluation is currently pending;
- d. The impugned administrative decision appears prima facie to be unlawful;

- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable damage.

9. The present request for suspension of action concerns a non-renewal decision, which is an administrative decision that may properly be suspended by the Tribunal (see *Obdeijn* UNDT/2011/032 and 2012-UNAT-201). The decision has yet to be implemented as the Applicant's contract is set to expire on 31 January 2014 and its evaluation is currently pending.

10. The Tribunal notes that the Applicant, as part of his request for management evaluation, also requested that the Management Evaluation Unit ("MEU") suspend the decision pending its review. The Tribunal it is not aware as to whether the MEU has pronounced itself on this aspect of his request.

11. The request for management evaluation is ongoing and that is the requirement that has to be met for the Tribunal to consider the merits of the Applicant's request for suspension of action. The Respondent's submission regarding whether or not the request for management evaluation was filed within 60 days from receiving the notification of the decision is to be addressed by the MEU and therefore need not be addressed by this Tribunal.

12. The 6 December 2013 communication informing the Applicant of the non-renewal of his appointment indicates that it makes reference to the 19 June 2013 and 21 November 2013 emails which, per the letter, previously informed the Applicant that his fixed-term appointment was not going to be renewed. A review of the 19 June 2013 email indicates that it stated that due to the evolution of Umoja into a new phase they had concluded that the Applicant's functions were "not **projected** to be required in 2014". (emphasis added)

13. The language of the 19 June 2013 email clearly brings to the Applicant's attention that there is a risk, and therefore an intent, that his post may not be renewed upon the conclusion of his appointment on 31 January 2014. Further, on

21 November 2013, the Applicant received an email that stated that it was “reconfirm[ing] that [his] Fixed-Term Appointment with Umoja expires on 30/01/2014”. While such language is more definitive than the 19 June 2013 communication, it falls short from actually stating that his contract will not be renewed following its expiry.

14. The Tribunal, after analyzing the content of the correspondence between the parties, considers that the only decision containing a clear reference to a non-renewal of the Applicant’s contract is the one contained in the 6 December 2013 memorandum.

Urgency

15. According to arts. 13 and 14 of the Dispute Tribunal’s Rules of Procedure a suspension of action is to be filed in cases of particular urgency.

16. The Applicant submits that while he received the “official” notification of the decision not to renew his contract on 6 December 2013, he was not in a position to file his request for management evaluation prior to 15 January 2014 and the ensuing request for suspension of action until the following week, due to his need to retain counsel, gather information, await responses from potential witnesses and that English was not his mother tongue. As such, the Applicant contends that he “had a little more than a week to finalise [his] request for evaluation”. The Applicant also indicates that he could not previously contest any of the negative comments regarding his performance evaluation as “the rebuttal process is not an option when the rating is “A- Exceeds expectations”.

17. In *Maloka Mpacko* UNDT/2012/081, *Longone* Order No. 27 (GVA/2013) and *Enan* Order No. 130 (NY/2013), the Dispute Tribunal reiterated that:

Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal’s assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking

the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206).

18. While not identified by this Tribunal as a notification of the non-renewal of his fixed-term appointment, the emails of 19 June 2013 and 21 November 2013, which followed discussions between the parties, informed the Applicant of the unstable nature of his contractual relationship with Umoja and, per his own request for management evaluation, the Organization's "intention to terminate [his] appointment". Further, these communications also recommended that he pursue other opportunities within the Organization, a recommendation which, per his application he heeded.

19. In view of the particular circumstances of this case, the Tribunal considers that, at the latest, the Applicant had knowledge of the impending decision not to renew his fixed-term appointment at least two months prior to the filing of the present application

20. The foregoing notwithstanding, the Applicant, in contrast to the cited jurisprudence, provided the Tribunal with reasons as to why he waited nearly six weeks to request management evaluation and a few additional days for the present application, including: having to obtain counsel during a holiday period; not being able to meet with potential witnesses until 8 January 2014 (with another witness not returning to the office prior to 9 January 2014); his request for management evaluation contained 37 annexes; and that "English not being [his] mother tongue [he] preferred not submit a report in French because the documentation was in English".

21. The Tribunal finds that the Applicant's justifications for the delays incurred by him in filing the present application in a more timely manner unconvincing as the delays appear to all be of his own doing. The Applicant could have submitted an

application in French, which is an official language of the Organization and this Tribunal. Similarly, all of the documents annexed to his request for management evaluation were available to him at the time he was notified of the non-renewal of his appointment. Finally, the Tribunal is unconvinced of the need to delay a process meant to look into such an important decision until the return of one or two witnesses considering that his request identified 31 potential witnesses or that the request for management evaluation could always be substantiated prior to a final decision being taken by the MEU. It is also unclear whether the delays incurred were the result of gathering evidence related to the non-renewal of his appointment and/or the other decisions currently under review by the MEU.

22. The Tribunal concludes that in the light of the relevant jurisprudence, the urgency in the present case is self-created. The Applicant filed the application for suspension of action six weeks after being notified of the decision and less than two weeks prior to the non-renewal of his fixed-term appointment. The Applicant therefore fails to meet the test of urgency under art. 2.2 of the Tribunal's Statute.

23. Since one of the cumulative conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal does not need to examine the two remaining conditions, namely prima facie unlawfulness and irreparable damage.

Conclusion

24. The application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 27th day of January 2014