



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

AMARNATH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
George Irving

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Notice: This Order has been corrected in accordance with the Rules of Procedure of the Dispute Tribunal.

Introduction

1. The Applicant requests a suspension of action pending management evaluation of the 24 November 2014 decision by the Executive Officer, Department of Management (“DM”) not to renew his fixed-term appointment on 31 December 2014 in accordance with art. 2.2 of the Dispute Tribunal’s Statute and art. 13 from the Dispute Tribunal’s Rule of Procedure.

Relevant background

1. The Applicant alleges that in 2009 the General Assembly recommended that his post be loaned from DM to Umoja for the duration of the project and that this project is far from being over.

2. On 24 November 2014, DM advised the Applicant that his fixed-term appointment would not be extended beyond 31 December 2014.

3. On 26 November 2014, the Applicant contacted his Counsel informing him that he “will look forward to filing with the [Management Evaluation Unit (“MEU”)] and [Dispute Tribunal] on 1st Dec.”.

4. On 2 December 2014, the Applicant filed a request for management evaluation with the MEU contesting the “non-extension of fixed-term contract that ends 31st Dec. 2014”. The Applicant’s management evaluation request included a request that the contested decision be suspended by the Secretary-General pending the completion of management evaluation.

5. The Applicant submitted that, on 11 December 2014, he “ascertained” that his request that the Secretary-General suspend the decision to separate him from service pending the completion of management evaluation would be denied.

6. On 12 December 2014, the Applicant filed a separate request for suspension of action with the Dispute Tribunal in New York. The Registry acknowledged receipt

of the application and, on behalf of the Tribunal, ordered the Respondent to submit his reply by 5:00 p.m., 16 December 2014. The Respondent did so.

7. On 16 December 2014, at 6:30 p.m., the Applicant received, via email, a memorandum dated 15 December 2014 from the Chef de Cabinet of the Secretary-General officially informing him that the Secretary-General had decided to deny his request that he suspend the decision to separate him from service pending the completion of management evaluation.

8. On 17 December 2014, the Tribunal, by Order No. 343 (NY/2014), for a fair disposal of the case, ordered the parties to attend a Case Management Discussion (“CMD”) that same day. During the CMD, the parties agreed to file a joint submission by 11:00 a.m. on 18 December 2014 clarifying aspects related to the legality of the contested decision. Following the CMD, on 17 December 2014, the Applicant filed the MEU’s 15 December 2014 response to his request for suspension of action and a 26 November 2014 email communication between the Applicant and his Counsel regarding contesting his non-renewal. On 18 December 2014, the Respondent filed a request for extension of time until 1:00 p.m. to enable the parties to finalize their joint submission. This request was granted by the Tribunal and the parties duly filed their joint submission by 1:00 p.m. On the same day, the Respondent filed a response to the 26 November 2014 email between the Applicant and his Counsel.

Consideration

The competence of the Dispute Tribunal

9. The United Nations Appeals Tribunal ruled in *O’Neill* 2011-UNAT-182 (affirming UNDT/2010/203) that “the UNDT is competent to review its own jurisdiction, whether or not it has been raised by the parties”. The Tribunal is therefore mandated to review its competence at its own initiative.

10. Regarding the jurisdiction of the Dispute Tribunal concerning an application for case on suspension of action, art. 2.2 of its Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment 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 ...

11. Article 13.1 of the Tribunal's Rules of Procedure states that:

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.

12. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following cumulative conditions:

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

Procedural conditions

13. In his request for management evaluation and his application to the Tribunal for suspension of action, the Applicant contests the administrative decision not to renew his contract after 31 December 2014, an administrative decision which can be properly suspended by the Tribunal since it affects his contractual status. The first requirement is therefore satisfied. The parties confirmed during the CMD that this aspect is not in contention.

14. It follows from the standard form for requests for management evaluation, which the Applicant submitted to the MEU on 2 December 2014, that he has requested that the contested decision undergo management evaluation. In the absence of any information that a decision has been issued by the MEU in the Applicant's case, the Tribunal therefore finds that management evaluation is currently ongoing and that the second requirement is satisfied.

15. Following an application for suspension of action, pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Tribunal may “*suspend*, during the pendency of the management evaluation, *the implementation* of a contested administrative decision” (emphasis added). This means that if the contested administrative decision has already been “implemented” there no longer is a decision that the Tribunal can suspend. In the present case, the Tribunal finds that the decision has yet to be implemented as it will not come into effect until 31 December 2014.

16. In conclusion, the Tribunal finds that the first three procedural conditions for the application to be receivable are fulfilled.

Substantive conditions

Prima facie unlawfulness

17. Concerning *prima facie* unlawfulness, the Applicant contends that the contested decision is illegal since it is the result of a pattern of procedurally flawed and improperly motivated actions. His post, which is part of the regular

budget of Management Support Services (“MSS”), DM, regular budget, has been budgeted until the end of 2015 and has been loaned pursuant to a General Assembly Resolution to Umoja until the end of the Umoja project. The Applicant indicated that he is the longest serving staff member in Umoja with similar prior experience in the private sector and his electronic performance evaluations (“ePAS”), with the exception of the one for the 2012-2013 cycle which is currently being rebutted, have been rated as meeting expectations or exceeding expectations. The rebuttal of his ePAS is also an element of a request for protection from retaliation currently with the Ethics Office. The Applicant has been employed on successive fixed-term appointments with the United Nations since 2006, the last being a 2-year extension through 31 December 2014. None of his reporting officers have ever suggested that his contract would not be renewed and he was not provided with a minimal notice.

18. In the 18 December 2014 joint submission filed by the parties, the Respondent submits that the reason for non-renewal is that there is no need in the Umoja project for support from MSS since no requests have been made for MSS services over the last 18 months. On the other hand, the Applicant stated that “he has two outstanding assignments awaiting completion ... the assertion that Umoja no longer needs his services is not supported with any documents or explanation ... even if it were true that Umoja no longer needs his services, there is no explanation why he is not being returned to DM with his post or reassigned with his post as his colleagues have been”. The Applicant contends that “it was only in late 2014 that he became aware of the report of the [Advisory Committee on Administrative and Budgetary Questions (“ACABQ”)] to the [General Assembly] mentioning the redeployment of his post to the Executive Office”. The Applicant further stated that “document A/68/6 (sect. 29A) in its Annex 1 clearly lists his P-5 post, along with three other posts, as part of MSS which is distinct from the posts under the Enterprise resource Planning Project,(Umoja). The only MSS posts proposed for abolition was a vacant P-2 and one GS post. ... The same is confirmed in section S.29A.19 of document A/68/6 (sect. 29A)”.

19. The Respondent further submits that

3. There were three written submissions that went before the 68th Session of the General Assembly concerning the redeployment of a post to the Executive Office of the Department of Management. A submission from the ACABQ and two submissions from the Secretary-General. The submission from the ACABQ mistakenly referred to the post being redeployed as the post financing the Applicant's position ... However, following enquiries from the General Assembly and discussions concerning the redeployment of the post, supplemental information was provided by the Secretary-General to the ACABQ on 18 April 2013, referring to the 'outward redeployment' of a P-5 post to the Executive Office (... A/68/6 (Sect. 29A), para. S.29A.18). This is a reference to the outward redeployment of a P-5 post from Umoja, it is not a reference to the post within MSS, encumbered by the Applicant. Accordingly, in the course of the General Assembly's consideration of the redeployment of the post, it was made clear to the ACABQ and the General Assembly by the Secretary-General that the post to be redeployed was from Umoja. Furthermore, the initial submission from the Secretary-General referred correctly to a post from Umoja, not an MSS post, being redeployed ... On 17 January 2014, the General Assembly adopted its resolution approving the redeployment of the post, and referencing as the basis for its decision the two reports of the Secretary-General, not the report of the ACABQ (... See footnote 1). Accordingly, the General Assembly authorized the redeployment of the Umoja post, not the post financing the Applicant's position.

4. In any event, even if it were the case that the Applicant's post was redeployed to the Executive Office, this would make no difference to the decision not to renew the Applicant's appointment. The reason his appointment has not been renewed is that his position has been abolished. Whether the post that formerly utilised to finance this position remains within Umoja or is assigned to the Executive Office makes no difference to the reason for decision. In fact, the post financing the Applicant's position has now been absorbed into Umoja and will be utilized to support functions necessary to the Umoja project. Accordingly, the issue of the continuation or abolition of the post formerly used to finance the Applicant's position is not the issue in this case. The issue is that the functions performed by the Applicant are no longer required by the Umoja project. In fact, these functions have not been required for over 18 months and for this reason the Applicant has been performing temporary assignments. The Applicant is well aware of the nature of his position and the short-term nature of the assignments he has been performing.

5. Further and in any event, concerning the post redeployed to the Executive Office, the functions to be performed against this post are different to the functions performed by the Applicant. Whether it is the post formerly utilised to finance his position, or another post, that is assigned to the Executive Office of the Department of Management has no impact on whether or not the Applicant's functions are required. Notably, the functions to be financed by the post following its redeployment to the Executive Office will be that of a Senior Budget and Finance Officer post (P-5), which includes: (1) assist the Executive Officer in providing support in finance and budget related matters to programme managers in carrying out their responsibilities under the Financial Regulations and Rules and related administrative instructions in formulating their proposed programme budgets and in implementing their programmes of work; (2) liaise with the Office of Programme Planning, Budget and Accounts and the Office of Central Support Services on matters relating to financial and other services on behalf of the Department; and, (3) certifies expenditures against funds allocated to the Department. These functions differ from the duties performed by the Applicant.

20. In *Hepworth* UNDT/2009/003, the Dispute Tribunal underlined what constitutes *prima facie* unlawfulness in the case of suspension of action:

10. Further explanation is needed for the criteria that the contested decision “appears *prima facie* to be unlawful”. The Latin expression “*prima facie*” might be translated as “at first sight” and can have as such at least two meanings: it seems arguable that ‘at first sight’ means that the unlawfulness of the decision is that clear and far beyond every doubt that it can be discovered already at first sight. On the other hand—with accentuation of the word *first*—it implies that one can have *second* thoughts about it upon closer inspection which can lead to a different result from the first sight. It seems clear that these different approaches may lead to different results. Since the suspension of action is only an interim measure and not the final decision of a case it may be more appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision. This understanding can also rely on the fact, that Art. 2.2 of the UNDT Statute only requires that the contested decision “appears” *prima facie* to be unlawful.

21. Similarly, in *Corna* Order No. 90 (UNDT/2010), the Dispute Tribunal discussed *prima facie* unlawfulness stating:

28. As the Tribunal held in *Buckley* UNDT/2009/064 and *Miyazaki* UNDT/2009/1076, the combination of the words “appears” and “prima facie” shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case maybe open to some doubt. This was echoed in *Corcoran* UNDT/2009/071, in which the Tribunal held that “since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that prima facie [unlawfulness] in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision”. In *Utkina* UNDT/2009/096, the Tribunal also stated that as long as the Applicant can demonstrate that the decision was contrary to the Administration’s obligations to ensure that its decisions are proper and made in good faith, the test for prima facie unlawfulness will be satisfied.

22. As results from the parties’ submissions, the Tribunal notes that the Applicant was provided with differing explanations regarding the basis on which the decision not to renew his appointment was taken.

23. The Tribunal notes that, on 16 December 2014, the Applicant received a 15 December 2014 memorandum from the Secretary-General denying the Applicant’s request for suspension of action, pending management evaluation, that was included in his request for management evaluation. The Secretary-General memorandum stated that he had decided to follow the MEU’s recommendation and that:

The MEU noted that you did not support this assertion [that “there is no evidence of MSS skills being redundant to Umoja, or not required for future Umoja usage”]. By contrast, the decision you contest is in line with developments in MSS over the past few years. In September 2010, MSS was “loaned” from the OUSG/DM to Umoja for a period during which MSS would complement the Umoja project, while continuing to carry out its mandate to provide advice and assistance in the Secretariat on optimizing internal operations using best practices, process involvement and self-evaluation. In 2013, at the 68th session of the General Assembly, the Secretary-General proposed the reduction of two MSS posts – 1 P-2 and 1 GS OL – commenting that the Enterprise Resource Planning Project and the MSS have many complementary activities, including leading change management activities, improving management practices, and re-engineering business processes (A168/6, sect. 29A). In this context,

in the past 18 months, MSS has had no departmental requests for MSS services. Consequently, MSS staff have been assigned independent projects associated with Umoja activities rather than MSS-mandated tasks. The MEU took note that your P-5 post has been employed internally on a number of Umoja projects, the last of which will be completed by 31 December 2014.

The documentation from 2009 discussing the integration of MSS into the Umoja project bears out your assertion that, upon the liquidation of the Umoja project, the post and non-post resources of MSS were to return to OUSG-DM. However, it appears that the developments since then have amended that intent to some degree. One MSS P-4 was indeed re-assigned back to OUSG-DM carrying out Umoja-related and OICT functions that fall within the OUSG-DM's purview, while another is employed with the Umoja deployment realization team. At the same time, the MSS D-1 was assigned to the Department of Field Support and more recently to the Office of Information and Communications Technology involved in Umoja mainstreaming activities for all initial twelve month period, with all expectation that this work will continue through 2016 in accordance with the timetable established within the mainstreaming plan. The MEU noted the Administration's intention to redeploy the P-5 post you encumber to one of the high priority areas in the DM, such as Enterprise Risk Management, business readiness for Umoja deployment, and mobility implementation. Discussions are currently ongoing in this regard.

24. The Tribunal considers that contradictory explanations are being provided in support the contested decision. On 15 December 2014, the MEU noted the Administration's intention to redeploy the P-5 post encumbered by the Applicant to one of the areas in DM. It results that the Applicant's post is considered to still exist and discussions "are currently ongoing in this regard". On 18 December 2014, only three days later, the Respondent stated in the parties' joint submissions that "the reason his appointment has not been renewed is that his post has been abolished [...]. In fact, the post financing the Applicant's position has now been absorbed into Umoja and will be utilized to support functions necessary to the Umoja project. [...] Further and in any event, concerning the post redeployed to the Executive Office, the functions to be performed against this post are different to the functions performed by the Applicant".

25. In the light of these statements, it is unclear whether the Applicant's MSS post is, or will be, absorbed by Umoja, redeployed to the Executive Office, DM, or, as stated by the Respondent represents the redeployment of the Applicant's post from Umoja to DM and not from MSS to DM.

26. There is no evidence before the Tribunal that the Applicant's post, or other P-5 posts with functions other than the ones performed by the Applicant, were redeployed from Umoja to the Executive Office, DM, or that the Applicant's position was officially abolished prior to the contested decision being taken. A post cannot exist in two different departments at the same time, either it is redeployed to the Executive Office, DM, or it is absorbed in Umoja "to support functions necessary to the Umoja project". Further, there is no evidence before the Tribunal that MSS had no assignments in the last 18 months or that the functions performed by the Applicant are no longer required by the Umoja project after the expiration of his appointment on 31 December 2014.

27. The Tribunal concludes that in light of all these aspects, the contested decision appears to be *prima facie* unlawful.

Urgency

28. The Applicant considers that the present application is urgent because his contract is ending on 31 December 2014.

29. The Respondent stated that the urgency in the application for suspension of action is self-created as a result of the Applicant's delay in requesting management evaluation. By not requesting management evaluation until 2 December 2014, any "response would fall due on 1 January 2015, one day after the expiration of [the Applicant's] fixed-term appointment". Had the Applicant filed a timely request, any response by the MEU would have been provided to the Applicant prior to the expiration of his appointment.

30. 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.

31. 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).

32. The Dispute Tribunal has stated in a number of rulings that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the party seeking interim relief.

33. In the present case, the Applicant was informed of the non-renewal of his fixed-term appointment on 24 November 2014 and he requested management evaluation of the decision 2 December 2014. In his request for management evaluation, the Applicant included a request for suspension, addressed to the Secretary-General, of the contested decision pending management evaluation. The response denying his request for suspension was officially notified to him on behalf of the Secretary-General via email on 16 December 2014.

34. It results from the Secretary-General's 15 December 2014 decision denying the Applicant's request for suspension of action that there have been, including during the period the MEU considered the Applicant's request (2–15 December 2014), ongoing discussions regarding the Administration's intention to redeploy the Applicant's post to one of the areas in DM.

35. During the CMD held on 17 December 2014, the Applicant informed the Tribunal that he was made aware on approximately 9 December 2014 that his MEU request for suspension of action was going to be denied with an official notification to follow. In his application, he indicated that he was aware of this denial on 11 December 2014. On 12 December 2014 the Applicant filed the suspension of action before the Tribunal.

36. The Tribunal notes that in accordance with staff rule 9.1(iii) the expiration of an appointment constitutes a separation from service. Further, staff rule 11.3(b)(ii) states that:

In cases involving separation from service, a staff member may opt to first request the Secretary-General to suspend the implementation of the decision until the management evaluation has been completed and the staff member has received notification of the outcome. The Secretary-General may suspend the implementation of a decision where he or she determines that the contested decision has not yet been implemented, the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage to the staff member's rights. If the Secretary-General rejects the request, the staff member may then submit a request for suspension of action to the Dispute Tribunal ...

37. The Tribunal observes that, unlike a request for suspension of action filed with the Dispute Tribunal (art. 13.3 of the Dispute Tribunal Rules of Procedure), there is no mandatory deadline by which the Secretary-General is required to consider a request for suspension of action of the implementation of a decision during the pendency of the management evaluation of that decision.

38. Taking into consideration the particular circumstances of the present case, the Tribunal considers that the Applicant acted diligently and in good faith, and exercised his right to request that the Secretary-General suspend the implementation of the contested decision. The Applicant waited for the Secretary-General's decision on his request for suspension of the implementation of the contested decision in the light of the ongoing discussions related to his post. Upon being made aware that the Secretary-General would deny his request, the Applicant diligently (within 1-

3 days) filed the present application for suspension before the Dispute Tribunal. The Applicant respected rule 11.3(b)(ii), and the urgency was not self-created or caused by him. Since the Applicant's appointment is set to expire on 31 December 2014 the condition of urgency is fulfilled.

Irreparable harm

39. As part of his application for suspension of action, the Applicant stated that

14. [He] will incur serious and irreparable harm insofar as his [United Nations] career will be permanently damaged and even if he prevails in his claims, he will be unable to resume his prior career path. While awaiting adjudication, he will be forced to repatriate to his home country disrupting his personal and professional life. As the object of a disguised disciplinary action and a constructive termination, the Applicant's professional reputation will be permanently affected.

15. In addition, the premature separation from service will render any results of the rebuttal and the determinations by the Ethics Office moot and unenforceable.

16. Separation from service will eliminate his status as an internal candidate for vacancies and unable to benefit from a potential lateral transfer. Coming as it has in such a precipitous manner, he has not had an opportunity to seek other assignments. Moreover, the lack of finality in regard to his penultimate performance evaluation hinders his ability to apply for other posts.

40. In his reply, the Respondent stated:

22. There is no basis for asserting that a decision based on changing operational needs of the Organization would call into question the Applicant's integrity, or affect his reputation or career prospects with future employers. Further, contrary to the Applicant's assertion, under the new staff selection system, internal candidates are granted no priority or preference for vacancies (see ST/AI/2010/3). Nor will his nonrenewal affect his right to pursue the rebuttal of his 2012/2013 e-PAS, which is ongoing. Notably, he has been appraised in his 2013/2014 cycle as having successfully met performance expectations.

23. Lastly, on 21 November 2014, a day before the Applicant was formally notified of the Decision, he submitted a request for protection to the Ethics Office. The Applicant does not allege that there is any

connection between the Decision and his complaint to the Ethics Office. Accordingly, his complaint is irrelevant.

41. The Tribunal considers that loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.

42. Pursuant to art.13 from the Rules of Procedure,

IT IS ORDERED THAT;

43. The application for suspension of action is granted and the implementation of the contested decision not to renew Applicant's appointment upon its expiration on 31 December 2014 is suspended pending the completion of management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 19th day of December 2014