UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2015/064
Order No.:	301 (NY/2015)
Date:	8 December 2015
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

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

Introduction

1. On 3 December 2015, the Applicant, a D-1 level staff member in the Department for General Assembly and Conference Management ("DGACM"), submitted an application for suspension of action, pending management evaluation, of the decision of DGACM "not to renew [his] fixed-term appointment on 31 December 2015".

2. With respect to the *prima facie* unlawfulness of the contested decision, the Applicant states that he has a "legitimate and confirmed expectation" of renewal of appointment based on the express assurances and promises given to him by the Under-Secretary-General ("USG"), DGACM, that the Applicant's contract would not be discontinued. He further submits that, contrary to DGACM's explanations that his functions are no longer required, he has performed a lot of work since the beginning of the year and his services are still needed by DGACM. With regard to the requirements of particular urgency of the matter, the Applicant submits that this is not a case of self-created urgency and that his separation would take place on 1 January 2016, unless the contested decision is suspended. With regard to irreparable harm, the Applicant submits that the contested decision would result in loss of employment, which satisfies the requirement of irreparable damage.

3. In his reply, the Respondent made no submissions regarding the requirement of irreparable harm. The Respondent states that he does not accept the Applicant's assertions that the contested decision is *prima facie* unlawful, as fixed-term appointments do not carry any expectation of renewal, and that the functions performed by the Applicant are no longer required beyond 31 December 2015. The Respondent further submits that the requirement of particular urgency is also not satisfied in view of the assurances received by the Respondent from the Management Evaluation Unit ("MEU") that its response to the Applicant's request for

management evaluation would be finalized by 31 December 2015. The Respondent submits that, based on this assurance of the MEU, no management evaluation would be pending at the time of implementation of the decision, and thus no order for suspension could be made.

4. The Tribunal notes that, in his submission to the Tribunal, the Respondent states that the reply addresses only the requirement of urgency "in view of the deadline to file the Reply". The Tribunal notes that, by their nature, interim relief proceedings require urgent attention. Given the urgency of such proceedings, applications and replies should address the Tribunal on the main pertinent points to allow it to render a decision, keeping in mind that such proceedings are not at the merits stage. Notably, in this case, the application was served on the Respondent at 10:41 a.m. on Thursday, 3 December 2015, and the Respondent duly filed his reply by 10 a.m. on Monday, 7 December 2015. This allowed almost two full working days for the Respondent to formulate his views and to file a submission addressing, albeit briefly, the main points raised in the application. As the matter stands now, the Tribunal has to consider the application based on the papers filed before it.

Background

5. The following background information is based on the parties' written submissions and the record.

6. The Applicant states that, in September 2013, he was reassigned from his position of Chief, Office of the USG/DGACM to a project within DGACM. He states that he was the only reassigned person in the Office and that this reassignment was contrary to promises he had been given by the USG/DGACM during a meeting held in June 2013. The Applicant nevertheless complied with the reassignment and has successfully performed his duties. His appointment was extended twice since

then, first for seven months at the end of 2013, and then for one year until the end of 2015.

7. The Applicant submits, since 2013, he has unsuccessfully applied to several positions in conference services, which fall under the authority of the USG/DGACM. He states that his non-selection for those positions suggests bias against him and indicates that the USG/DGACM wanted to remove the Applicant from DGACM generally.

8. The Applicant states that, although he continued to perform all tasks assigned to him, he remained throughout 2015 without any specific performance work plan. The Applicant submits that on three occasions—9 June, 11 June, and 29 June 2015—his first reporting officer (Assistant Secretary-General ("ASG"), DGACM) scheduled meetings at the request of the Applicant to discuss a work plan, only to cancel them on short notice.

9. The Applicant submits that he finally had a meeting with the ASG/DGACM on 2 October 2015 to discuss his mid-point performance review. In this meeting, the ASG/DGACM informed the Applicant that his appointment would not be renewed beyond 31 December 2015 because his initial assignment was *ad hoc* and there was no work for him in DGACM since the beginning of the year. The Applicant states that there was no performance discussion and the ASG/DGACM had no work plan to offer to the Applicant.

10. On 6 October 2015, the Applicant was also verbally informed by USG/DGACM that he contract would not be renewed.

11. The Applicant submits that both the USG/DGACM and the ASG/DGACM declined to provide the Applicant copies of the records of the meetings of 2 and

6 October 2015, indicating that the meetings were informal and he would be receiving a formal notification regarding the renewal of appointment.

12. On 12 November 2015, the Applicant received a memorandum, dated 6 November 2015, informing him that his contract would not be renewed beyond 31 December 2015. On the same day, the Applicant wrote to the Secretary-General, copying his supervisors and seeking the Secretary-General's intervention in the matter, but has received no response.

13. The Applicant requested management evaluation of the contested decision on 2 December 2015 and is still awaiting the outcome.

Consideration

14. An application for a suspension of action pending management evaluation is an extraordinary discretionary relief, 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). Such applications disrupt the normal day-to-day business of the Tribunal and the parties' schedules. They also divert the Tribunal's attention from considering other cases filed under standard application procedures, some of which are long outstanding. Therefore, parties approaching the Tribunal must do so on genuine urgency basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, but also bearing in mind that a matter is not at the merits stage by this time.

15. Article 2.2 of the Statute of the Tribunal provides that it may 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. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

16. The Tribunal will now turn to the consideration of the three requirements of art. 2.2 of its Statute.

Prima facie *unlawfulness*

17. For the *prima facie* unlawfulness test to be satisfied, it is enough for the Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011), *Villamoran* UNDT/2011/126).

18. Although staff members do not have an automatic right to renewal, they have a right to a fair consideration for renewal and for a decision based on proper reasons (*Obdeijn* UNDT/2011/032, affirmed in *Obdeijn* 2012-UNAT-201).

19. As noted above, the Tribunal notes that the Respondent did not address the Applicant's submissions regarding the *prima facie* unlawfulness of the contested decision, other than making a general statement that as fixed-term appointments do not carry any expectation of renewal, and that the functions performed by the Applicant are no longer required and hence his contract will not be renewed beyond 31 December 2015.

20. The Applicant claims that he has a "legitimate and confirmed expectation of renewal of appointment based on the express promises" and that he has made his supervisors aware of his claims in this respect. He states that the non-renewal of his

contract is based on "an abuse of discretion including bias, prejudice, and other discrimination against [him]". The papers before the Tribunal indicate that there is also an apparent dispute as to whether the Applicant's functions are indeed no longer required, which was the reason on which the non-renewal decision allegedly was based. In addition, the Applicant raises the issue of the alleged failure to adhere to standard performance evaluation procedures leading to his non-renewal. None of these issues have been addressed or even averred to by the Respondent in his reply.

21. The claims raised by the Applicant will have to be fully canvassed as part of substantive proceedings on the merits, if any, and it may well be that all of his claims will be fully addressed by the Respondent in the context of such further proceedings. However, at this point the Tribunal has to consider the submission presently before it.

22. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Particular urgency

23. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. 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 (see, e.g., *Villamoran* UNDT/2011/126 and *Dougherty* UNDT/2011/133).

24. The Respondent submits that, in this case, the 30-day deadline to complete the management evaluation falls on 1 January 2016, which is an official holiday. The Respondent states that the MEU has informed Respondent's Counsel by email, that, where the deadline to complete the evaluation falls on a holiday, MEU considers that the evaluation should be sent by the last working day prior to the

deadline. As such, the management evaluation is due to be completed by the MEU and notified to the Applicant by 31 December 2015, the last day of his fixed-term appointment. The Respondent thus submits that, as the management evaluation is due to be completed on or before the expiry of the Applicant's appointment, the Tribunal has no competence to suspend the contested decision since the management evaluation would end before the implementation of the contested decision.

25. The suggested practice of the MEU, as expressed in the MEU's email to Counsel for the Respondent, has no relevance to the determination of the issue of urgency.

26. Indeed, the suggested practice is contradicted by the actual letter from the MEU acknowledging receipt of the Applicant's request for management evaluation. The MEU's letter states:

> Please also note that, pursuant to Staff Rule 11.2(d), the management evaluation in your case is to be completed within 30 days of receipt of your request, or no later than 1 January 2016. If there is any delay in completing the management evaluation, the MEU will contact you to so advise.

27. Thus, the letter from the MEU not only lacks confirmation that the management evaluation would be finalized by 31 December 2015, but actually envisages the possibility of a delay beyond 1 January 2016 in completing the management evaluation request.

28. Further, the Tribunal is well aware of numerous instances in which management evaluation was extended well beyond the established deadlines, with or without the proper reasons as provided for in staff rule 11.2. The Dispute Tribunal has expressed its concerns with the practice of delayed management evaluations in a number of orders and judgments, most recently in *Babiker* UNDT/2015/108 (concerning United Nations Development Programme's handling of management

evaluation requests). It was also this ongoing practice of delayed management evaluation requests that has led to the pronouncements of the United Nations Appeals Tribunal ("UNAT") in *Neault* 2013-UNAT-345. In *Neault*, the UNAT held that, if at any point during the 90-day time period for the filing of her application with the Dispute Tribunal the applicant were to receive a belated management evaluation, it would have resulted in resetting the 90-day deadline for the filing of her application.

29. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention, the Applicant having filed the present application approximately three weeks after the notification of the contested decision and less than four weeks before its implementation.

30. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

31. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. In each case, the Tribunal has to look at the particular factual circumstances.

32. The Tribunal finds that, if the Applicant's contract is not extended, he will lose his employment with the United Nations. It is established law that loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013)). As the Tribunal stated in *Kananura* UNDT/2011/176,

> [l]oss 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.

33. The Tribunal finds that the reasons articulated in *Kananura* are applicable to the present case. Noting further that the Respondent has made no submissions regarding the issue of irreparable harm, the Tribunal finds that the implementation of the contested decision would cause the Applicant irreparable harm.

34. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable harm to be satisfied.

Conclusion

35. The three conditions for the granting of an interim measure under art. 2.2 of the Tribunal's Statute have been met. In view of the Tribunal's finding that all three requirements of art. 2.2 of the Tribunal's Statute are satisfied, the Tribunal will order that the decision not to extend the Applicant's contract beyond 31 December 2015 be suspended during the pendency of the management evaluation.

36. The issues raised in the application may well give rise to a substantial dispute of facts which cannot be reconciled on the papers, and which would need to be addressed in substantive proceedings, if any are to follow.

37. The Tribunal invites the parties to carefully consider the particular circumstances of this case and to attempt resolving this situation amicably. Based on the documents before the Tribunal, the Applicant is a dedicated staff member with a good performance record. The Tribunal finds that this matter is well-suited to

amicable resolution between the parties and encourages the parties to attempt such resolution.

Order

38. The Tribunal orders suspension, during the pendency of the management evaluation, of the implementation of the decision not to renew the Applicant's contract.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th day of December 2015