



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

NOUINOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

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

Introduction

1. On 19 October 2016, the Applicant, an Assistant to the Director of Investigations, the Office of Internal Oversight Services (“OIOS”), filed an application for suspension of action pending management evaluation of the decision of the Under-Secretary-General of OIOS to refuse “to extend [her] two years fixed-term contract for two months—under zero incumbency—to re-assign [her] on a short-term position with CTED [i.e., the Counter-Terrorism Committee Executive Directorate] until 31 December 2016”.

Relevant factual and procedural background

2. On 7 September 2016, the Applicant was informed verbally that her fixed-term contract with OIOS would not be extended and, on the same day, she received an official notification from the OIOS Executive Office, referring to the procedures concerning her separation from OIOS upon expiration of her fixed-term appointment, effective at close of business on 28 October 2016.

3. On 7 September 2016, the Applicant filed a request for management evaluation and, on 8 September 2016, an application for suspension of action with the Dispute Tribunal regarding the non-renewal decision.

4. On 9 September 2016, the Dispute Tribunal (Judge Hunter) rendered its decision on the 8 September 2016 application for suspension of action and rejected the application, stating, among others, that (para. 15):

... The contested decision is due to be implemented on 28 October 2016, by which time the decision will no longer be pending management evaluation. Either the Applicant would have received a response from management or the 30-day response period would have expired. The Tribunal does not have jurisdiction to suspend the implementation of a contested decision beyond the pendency of management evaluation (*Igbinedion* 2014-UNAT-410, para. 21). The application must therefore be rejected.

5. On 3 October 2016, at 9:50 a.m., CTED informed the Applicant that she was selected for a temporary position at the G-4 level. On the same day, at 11:42 a.m., the Applicant informed CTED that she was “thrilled” to join CTED and be part of the team. Later the same date, at 5:22 p.m., the Applicant was informed by CTED that, according to the information available in UMOJA, she has a fixed-term appointment through 28 October 2016 and that CTED would request OIOS “to release her on assignment from Executive Office OIOS to CTED” until 31 December 2016.

6. On 4 October 2014, the Applicant received the management evaluation decision informing her that the Secretary-General has decided to uphold the decision not to renew her contract beyond 28 October 2016 due to lack of funding.

7. On 5 October, at 1:07 pm, CTED informed the Applicant that the OIOS Executive Office had stated that her “fixed-term appointment expiring on 28 October 2016 [would] not be extended” and that CTED would have “to re-appoint her on a temporary contract, since [she was] selected against a [temporary job opening]”. Later the same date, at 1:15 p.m., the Applicant informed the USG/OIOS, the ASG/OIOS and the OIOS Executive Office that CTED had selected her for a G-4 level position, that she accepted the offer and that CTED would contact OIOS to request her release on assignment as she had a fixed-term appointment and the CTED position was temporary. At 6:08 p.m. on the same date, the Applicant wrote to the USG/OIOS that, “since she had been informed that the reason for not renewing her contract with ID/OIOS was a lack of funds, she would “highly appreciate if [the USG/OIOS] could consider granting CTED’s request since this could be helpful for [her] protecting [her] fixed-term contract by extending it to at least the end of the period of the short-term CTED 31 December 2016 especially that will cost OIOS nothing because [she would] be paid by CTED”.

8. On 12 October 2016, at 11:13 a.m., CTED informed the Applicant that, since she could not be released on assignment, it had no other option than to rescind the offer for the position. At 11:30 a.m. on the same date, the Applicant informed

CTED that she was prepared to terminate her fixed-term appointment with OIOS to work with CTED on a temporary basis and that she “really want[ed] the position”. Later the same date, at 1:05 p.m., she requested the USG/OIOS to extend her contract under zero incumbency as permitted by OHRM. On the same day, at 3:09 pm, the Applicant informed CTED that she had contacted OHRM and was told that, in relation to 5.1 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments) and the 31-day break-in-service rule, the hiring department or office can request, if needed, a shorter break-in-service or a waiver of the break-in-service between the fixed-term and the temporary appointment and that CTED could hire her on assignment if OIOS would extend her fixed-term appointment. Later the same date, at 4:07 p.m., CTED informed the Applicant that it will accept staff members on fixed-term, continuing or permanent appointments on assignment for this position as it only lasts through 31 December 2016, at which time she would have to be re-absorbed by OIOS, and recommended for her to discuss with USG/OIOS to have her appointment extended accordingly.

9. On 13 October 2016, on behalf of the USG/OIOS, her Special Assistant forwarded the Applicant a response to her 12 October 2016 request, stating that the office was not in a position to extend her appointment beyond 28 October 2016. On the same day, the Applicant asked the USG/OIOS to reconsider her decision. The Applicant also wrote to CTED to inform them that her contract would not be extended beyond 28 October 2016 and that OIOS therefore could not release her on assignment. Later on the same date, she was informed by the Administration and Information Office, CTED, that “decisions are made by CTED’s senior management and it is [the Office’s] responsibility to allow them to have a further discussion and [the Office would] revert”.

10. On 14 October 2016, the Applicant filed a request for management evaluation relevant to the present application for suspension of action.

11. On 19 October 2016, the Applicant filed the application for suspension of action. The same date, the case was assigned to the undersigned Judge. In accordance

with the instructions of the Judge, the New York Registry of the Dispute Tribunal transmitted the application to the Respondent, directing that a reply be filed by 2:00 p.m. on 21 October 2016.

12. On 21 October 2016, the Respondent filed a reply to the application for suspension of action. The Respondent submitted, *inter alia*, that the application is not receivable because she had once before requested management evaluation of the same decision not to renew her appointment beyond 28 October 2016 and for which she received a management evaluation response on 4 October 2016. Alternatively, the Respondent contended that the application is without merit, arguing that the Applicant has failed to demonstrate that the contested decision is *prima facie* unlawful.

13. On 24 October 2016, the Applicant filed an objection to the Respondent's reply.

14. By Order No. 249 (NY/2016) dated 24 October 2016, the Tribunal instructed the parties to file the following information, by 25 October 2016:

... The relevant 3 October 2016 offer from CTED to the Applicant of a temporary assignment is still valid or has been rescinded by CTED;

... If OHRM had been requested by any of the involved offices to shorten or waive the (alleged) prerequisite for a 31-day break-in-service for the Applicant to assume the position with CTED;

... If OIOS had discussed and/or agreed any options to allow her to immediately assume the position with CTED.

15. On 25 October 2016, both parties filed their submissions in response to Order No. 249 (NY/2016).

16. In his response to Order No. 249 (NY/2016), the Respondent indicated that:

- a. The 3 October 2016 offer of a temporary assignment was no longer valid and that, on 24 October 2016, CTED had notified the Applicant that another candidate had been selected for the position;
 - b. No office had requested a waiver from OHRM in relation to the 31-day break-in-service requirement and that OIOS had suggested the Applicant be immediately reappointed by CTED following the expiration of her appointment on 28 October 2016;
 - c. The Applicant received a certification from Medical Services Division for sick leave from 17 October 2016 to 11 November 2016 and that her contract would accordingly be extended through to 11 November 2016 in accordance with section 4.9 of ST/AI/2013/1 (Administration of fixed-term appointments).
17. The Applicant stated in her his response to Order No. 249 (NY/2016) that:
- a. The Applicant had contacted CTED regarding the offer for a temporary appointment on 21 and 24 October 2016. On 21 October, the offer was still valid but, on 24 October 2016, she was informed that the offer had been rescinded. CTED had also informed her that it would not request to waive or shorten the prerequisite for a 31-day break-in-service between her fixed-term and temporary assignments;
 - b. She had approached the Chef de Cabinet “in order to precipitate in gaining the CTED position once she knew that it was still available and no candidate had been hired yet on 21 October 2016”.
 - c. She was not aware that OIOS had suggested for her to be immediately re-appointed by CTED following the expiration of her fixed-term appointment on 28 October 2016.

18. Later the same date, the Applicant filed an additional submission (labeled motion) in response to the Respondent's reply in accordance with Order No. 249 (NY/2016) in which she requested OIOS, as relief for her moral damages, to renew her two-year fixed-term appointment for another two years to allow her flexibility in order to restore her health and secure a position outside OIOS, where she can be reappointed or reassigned based on United Nations Regulations and Rules.

19. Later on 25 October 2016, the Applicant filed another submission (labeled "motion") requesting the Tribunal to confirm that her former supervisor "has not been banned from providing Reference to his Former United Nations Staff Members; if such Agreement had been made the Applicant would like to know why and whether this will affect her UN Career Development, being linked to [her former supervisor]...".

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

20. Article 2.2 of the Dispute Tribunal's Statute states:

The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

21. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required;

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

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.

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

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Whether the application concerns an administrative decision that may properly be suspended by the Tribunal

24. As the Dispute Tribunal stated in *Wilkinson et al.* UNDT/2009/089 (not appealed) and *Ishak* UNDT/2010/085 (affirmed in *Ishak* 2011-UNAT-152), in order for the Tribunal to suspend an administrative decision, the contested decision must be a unilateral decision taken by the Administration in a precise individual case which produces direct legal consequences to the legal order, including the Applicant's rights. The Tribunal has the competence to determine whether the contested decision is an administrative decision that is appealable under the Statute of the Dispute

Tribunal (see, for instance, *O'Neill* 2011-UNAT-182 read together with *Planas* 2010-UNAT-049).

25. The Respondent claims that the application for suspension of action is not receivable. He argues that the principle of *functus officio* applies and refers to the Applicant's 8 September 2016 request for management evaluation of the 7 September 2016 decision not to renew her fixed-term appointment beyond 28 October 2016 and to the Respondent's 4 October 2016 decision to uphold the alleged contested decision. He submits that the Applicant has now submitted a second request for management evaluation of the initial decision not to renew her appointment beyond 28 October 2016 and that the Applicant may not make repeated requests for management evaluation of the same (alleged) contested decision. As the management evaluation of the contested decision has been completed on 4 October 2016, the Management Evaluation Unit (MEU) is *functus officio*, and the jurisdictional requirement of an ongoing and pending management evaluation is not satisfied (*Mohamed* Order No. 123 (NY/2016)).

26. The Respondent further contends that the decision, notified to her on 6 October 2016 and 13 October 2016, is not a new decision because the original decision, notified to the Applicant on 7 September 2016, remains in place and that no new decision concerning the terms of her appointment has been made. He submits that the inability of OIOS to release her on assignment to the CTED is a direct and logical outcome of the original decision not to renew her appointment and not a new administrative decision (*Squassoni* UNDT/2011/070) and that staff members cannot be assigned to another position for a period exceeding the duration of their fixed-term appointment, in accordance with section 3.7 of ST/AI/2010/4/rev.1 (Administration of temporary appointments). Since the Applicant's appointment expires on 28 October 2016, the Respondent states that she cannot be released on assignment beyond that date. Additionally, section 6.14 of ST/AI/2016/1 (Staff selection and managed mobility system) provides that a staff member released on assignment will keep a lien against their post. The releasing office remains responsible for

reabsorbing the staff member at the end of the assignment. OIOS cannot grant the Applicant a lien on the post she currently encumbers as the funding for the post is no longer available. Lastly, OIOS' "Guidelines for temporary jobs and secondments", provides that the minimum duration of an assignment outside of OIOS at the same duty station must be six months.

27. In result, the Respondent contends that, rather than a new decision, on 6 October 2016 and 13 October 2016, OIOS notified the Applicant of the direct and logical consequences of a previous administrative decision not to renew her appointment; that this information carried no new legal consequences to the Applicant; and that, as a reiteration of an existing decision, it does not allow the Applicant to restart the appeals process (*McCloskey* UNDT/2012/022).

28. In response, the Applicant contends that the contested decision indeed is a new decision and relates to the decision taken by the USG/OIOS, in consultation with the OIOS Director of Investigations and the OIOS Executive Officer, on 4, 5, 6, 12 or 13 October 2016 concerning her "Request for Extension of her Two Years Fixed-Term Contract that expires on 28 October 2016—under zero incumbency—for only Two Months until 31 December 2016, in order to allow for flexibility in assigning her with CTED where she has been selected for a Short-Term Position effective immediately through 31 December 2016".

29. The Tribunal notes that the principle of *functus officio* applies to a request for management evaluation, and therefore also to an application for suspension of action, and that a staff member therefore cannot request management evaluation of the same administrative decision twice. In line herewith, by simply resubmitting the same administrative decision for a review by Management Evaluation Unit and/or the Dispute Tribunal, this does not create a new and separate appeal process. In the present case, the question for the Tribunal to determine is therefore whether the USG/OIOS's decision of 13 October 2016 not to grant the request for the Applicant's release on assignment with the CTED, which the Applicant requests to be suspended, is actually the same decision as that of the decision not to renew her

fixed-term appointment taken on 7 September 2016 and which was upheld by the management evaluation decision issued on 4 October 2016.

30. The Tribunal considers the following uncontested factual circumstances to be defining the contested administrative decision in the present case:

a. The Applicant is currently serving on a two-year fixed-term appointment that is to expire on 28 October 2016. In this regard, the Tribunal notes that the decision not to renew the Applicant's contract was taken by OIOS on 7 September 2016. The Applicant requested a management evaluation of this decision on 7 September 2016 and she was notified on 4 October 2016 that the decision was upheld and that the non-renewal of her fixed-term appointment contract is justified by the lack of funds;

b. On 3 October 2016, the Applicant was informed by CTED that she was selected for a temporary G-4 level position until 31 December 2016 and she subsequently accepted the offer;

c. On 5 October 2016, both CTED and the Applicant requested OIOS to release the Applicant on assignment for CTED and to extend her contract for additional two months until the end of the temporary position on 31 December 2016;

d. On 13 October 2016, the Applicant was informed by email that her contract would not be extended as requested until 31 December 2016. The reasons for this decision were provided on 21 October 2016 and were, as per the Respondent's reply, as follows:

... The inability of OIOS to release her on assignment to the CTED, is a direct and logical outcome of the original decision not to renew her. It is not a new administrative decision ... Staff members cannot be assigned to another position for a period exceeding the duration of their fixed-term appointment, in accordance with section 3.7 of ST/AI/2010/4/rev.1

Administration of temporary appointments. Since the Applicant's appointment expires on 28 October 2016, she cannot be released on assignment beyond that date.

... Additionally, section 6.14 of ST/AI/2016/1 Staff selection and managed mobility system provides that a staff member released on assignment will keep a lien against their post. The releasing office remains responsible for reabsorbing the staff member at the end of the assignment ... OIOS cannot grant the Applicant a lien on the post she currently encumbers as the funding for the post is no longer available. Lastly, OIOS' "Guidelines for temporary jobs and secondments", provides that the minimum duration of an assignment outside of OIOS at the same duty station must be six months... ."

31. The Tribunal finds that contested decision in the present case can be defined as the 13 October 2016 decision not to release the Applicant on assignment for CTED and not to extend her contract for additional two months until the end of the temporary position on 31 December 2016. This is not a reiteration of the decision not to renew the Applicant's contract made on 7 September 2016, but a completely new decision.

32. The Tribunal considers that the decision not to renew the Applicant's fixed-term appointment with OIOS beyond 28 October 2016 that was taken on 7 September 2016 represents actually the first reason/explanation provided for the decision not to release the Applicant on assignment for CTED until 31 December 2016 and is not the contested decision itself. Furthermore, the Tribunal considers that the non-renewal of the Applicant's contract for two months until 31 December 2016, which is considered by the Respondent to be a reiteration of the non-renewal decision from 7 September 2016, is part of the contested decision not to assign the Applicant to CTED and is directly and exclusively determined by the rejection of the release on temporary assignment as results from the reasons provided by the Respondent. It is therefore not a reiteration of a prior decision based on completely different factual and legal circumstances.

33. The Tribunal observes that, in any event, even if the 13 October 2016 decision not to extend the Applicant's contract until 31 December 2016 could have been considered part of the 7 September 2016 non-renewal decision, the requests of the Applicant, and therefore also their contexts, were entirely different. In this regard, in light of such new circumstances unknown to the parties at the moment when the first non-renewal of her fixed-term appointment based on lack of funds was made, if all other prerequisites were satisfied, nothing impeded the Respondent from exercising its discretion by reviewing his previous decision. In general, the Tribunal is of the view that pending its implementation, any decision can be subject to a review/revision, based on new circumstances unknown at the date of its issuance as an exercise of the decision-maker's discretion. This review/revision can be made *ex officio* at the initiative of the decision-maker or be requested by the concerned staff member and the result might be a new decision.

34. Accordingly, the Applicant is not challenging the same decision as that which already underwent management evaluation, but another and new decision, and the application concerns an administrative decision that may be properly suspended by the Tribunal. Consequently, the Respondent's claim that this application is not receivable is therefore to be dismissed, and the Tribunal will conclude that the first condition is fulfilled.

Ongoing management evaluation

35. An application under art. 2.2 of the Dispute Tribunal's Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that she filed a request for management evaluation on 14 October 2016 and this aspect is not contested by the Respondent. Accordingly, the Tribunal notes that the request for management evaluation was initiated within 60 days from the date of notification on 13 October 2016 and that there is no evidence on the record that the management evaluation has been completed. The Tribunal therefore finds that

the Applicant's request for such evaluation is still pending and that the second condition is fulfilled.

Implementation of the contested decision

36. 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". This means that if the contested administrative decision has already been implemented, there no longer is a decision that the Tribunal can suspend.

37. In the online Oxford dictionary (www.oxforddictionaries.com) the word "implementation" is defined as "the process of putting a decision or plan into effect; execution".

38. On 25 October 2016, both parties informed the Tribunal that, on 24 October 2016, CTED rescinded the 3 October 2016 offer for the G-4 level temporary position made to the Applicant and another candidate was instead selected for the post. The Tribunal considers that the rescission of the offer and CTED's selection of another candidate are the effects of the implementation of the contested decision not to release the Applicant on a temporary assignment and not to extend her contract until 31 December 2016. The Tribunal concludes that the contested decision produced legal effects regarding the Applicant and CTED and was therefore implemented on 24 October 2016. Moreover, the Tribunal observes that the date indicated by the Applicant as being the date of implementation of the non-renewal decision, notably 28 October 2016, is no longer valid, since her contract was extended until 11 November 2016 pursuant to sec. 4.9 of ST/AI/2013/1.

39. Accordingly, the Tribunal finds that one of the cumulative conditions for suspending the contested decision is not fulfilled. It is therefore not necessary for the Tribunal to further examine if the remaining statutory requirements specified in

art. 2.2 of its Statute, namely *prima facie* unlawfulness, particular urgency and irreparable damage have been met in the case at hand.

40. Regarding the Applicant's 25 October 2016 submissions, the Tribunal notes that it falls outside its competence and the scope of the present case to provide any such relief as requested by the Applicant.

Conclusion

41. In the light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 26th day of October 2016