



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

DUVERNÉ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Miles Hastie, UNICEF

Introduction

1. On 2 October 2017, the Applicant, a former Ethics Specialist, at the P-3 level, step 9, in the United Nations Children's Fund ("UNICEF") Ethics Office in New York, filed an application for suspension of action pending management evaluation of the decision to "[t]erminat[e] ...[her] fixed-term contract following a 'low achievement' rating [she] received for the 2016 Performance Appraisal, the result of assessments relating to allegations of retaliation and a Management Evaluation".

2. On 2 October 2017, the Registry acknowledged receipt of the application and transmitted it to the Respondent, directing him, upon the instructions of the Tribunal, to file a reply by 4 October 2017.

3. On 2 October 2017, the Respondent filed his reply contending that the Application is not receivable, or in the alternative, it is without merit.

Background

4. The Applicant's fixed-term appointment with UNICEF began on 1 April 2010 and expired on 31 March 2017. It was subsequently renewed until 10 August 2017.

5. The request for management evaluation of the contested decision, namely the non-renewal of the Applicant's contract, was filed on 6 April 2017.

6. On 16 June 2017, the Applicant lodged a formal complaint of retaliation against her supervisor. She alleged that following two reports of misconduct against her that she filed with UNICEF's Office of Internal Audit ("OIA"), her supervisor gave her a "low achievement" grading in her 2016 performance appraisal ("PER") which eventually led to the non-extension of her contract.

7. After conducting a preliminary assessment of the complaint, at the request of UNICEF, the United Nations High Commissioner for Refugees ("UNHCR") Ethics Office concluded that the Applicant's 8 July 2016 and 22 December 2016

communications with OIA did not constitute a proper report of misconduct and that the Applicant's allegations that the poor grading in her PER and subsequent non-extension of her contract were retaliatory were not substantiated. The UNHCR Ethics Office also concluded that there was no evidence to suggest that the Applicant's supervisor was aware of the alleged protected activity and, therefore, there was no evidence of a connection between the alleged reports of misconduct and the alleged retaliation.

8. On 24 July 2017, upon request by UNICEF, the UNHCR Ethics Office completed the initial review of the Applicant's request for protection against retaliation claiming retaliation by her supervisor. On 27 July 2017 and pursuant to Section 4 of UNICEF's protection against retaliation policy, Executive Directive CF/EXD/2007-005 Revision 2 of 6 February 2015 and Section 4.3 of the ST/SGB/2007/11, the Applicant requested a review the UNHCR Ethics Office's initial review of 24 July 2017 on her request for protection against retaliation. The Applicant did not raise any particular grounds on her request for review.

9. On 26 July 2017, the management evaluation of her request dated 6 April 2017 concerning the non-renewal of her contract was finalized. The Deputy Executive Secretary for Management concluded that the Rebuttal Panel's Review of her arguments against her performance evaluation report was sufficient and that her allegations of extraneous considerations in the decision on her separation were unsubstantiated. On the same day the Applicant was thereby notified that the Deputy Executive Director upheld the decision not to renew her fixed-term appointment. Accordingly, the Applicant was separated from UNICEF on 10 August 2017.

10. As mandated by Section 4.3 of ST/SGB/2007/11, the Chairperson of the Ethics Panel of the United Nations conducted an independent review of the entire matter, including all the relevant supporting evidence and concluded on 14 September 2017 that the Applicant's request did not support a credible case of retaliation. The decision was notified to the Applicant on the same day, 14 September 2017.

The submissions of the parties

11. The Applicant's principal contentions and allegations as included in the application for suspension of action may be summarized as follows:

Prima facie unlawfulness

a. The Applicant's fixed term contract, which was systematically renewed every two years, was extended only for a year, after the Principal Adviser of the Ethics Office (the Applicant's supervisor) joined UNICEF in February 2016. No investigation in regard to the Applicant's allegations of misconduct and retaliation by her supervisor was conducted. However, the allegations were cited in the management evaluation report as part of the retaliation allegations and used in the rationale to confirm that the Applicant's contract would not be renewed. There were other inaccuracies in the management evaluation, particularly information relating to the informal resolution efforts, which were also unsuccessful and procedurally flawed;

b. The decision not to renew her contract was procedurally flawed and unlawful and the non-renewal of her contract is linked to allegations of retaliation and discrimination that she reported to UNICEF. Three allegations were submitted by the Applicant to UNICEF for assessment. The first allegation relates to the unlawful termination of the Applicant's fixed-term contract based on the bias assessment of the Applicant's 2016 PER. The second allegation relates to retaliatory acts following the Applicant's contact with UNICEF's Office of Internal Audit and Investigation ("OIAI") in July 2016 and December 2016. The Applicant was put on a Performance Improvement Plan ("PIP") on 1 November 2016. The third allegation relates to bias and discriminatory behaviour to which the Applicant was subjected since February 2016. They have all contributed to the termination of the Applicant's contract on 10 August 2017, but it does not seem that they

have been examined in the context of the Applicant's PER assessment and the report of the management evaluation;

c. The management evaluation failed to identify inconsistencies in the retaliation report assessment by the Ethics Office of the UNHCR and the United Nations, as well as the conflict resolution process. The process of the management evaluation was not followed in accordance with staff rule 11.2(c). In violation of staff rule 11.1(d), the conditions of mediation were not stipulated at the time of the proceedings;

d. The report of the retaliation assessment was submitted by the Ethics Office of UNHCR on 24 July 2017 and the final assessment of the same allegation was concluded on 14 September 2017 by the United Nations' Ethics Office, after the management evaluation. Both reports asserted that the Principal Adviser was not aware of the fact that the allegations were reported to OIAI and concluded that the Applicant's contacts with OIAI did not constitute a protected activity. Therefore, they could not substantiate the *prima facie* case of retaliation. However, the Principal Adviser was informed of the Applicant's contacts with OIAI on 3 January 2017 and that information was provided to the Ethics Offices in the documents the Applicant submitted for review.

Urgency

e. The Applicant's contract on 10 August 2017. The termination is in direct contradiction with staff rule 10.3(b), which states that, "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". The rating of the Applicant's PER is disproportionate to the disciplinary action considering that the allegations were not investigated, the conflict resolution process was procedurally flawed and the management evaluation failed to identify these errors;

Irreparable damage

f. The non-renewal of the Applicant's contract was tainted by bias. It would set a negative precedent for the Tribunal and future administrative proceedings. Furthermore, the former violates staff rule 1.2(c), which requires staff members to report breaches of the rules and regulations without being retaliated against. Most importantly, the procedures followed by UNICEF in the review process of the complaints would deprive the Applicant of the ability to fully enjoy the rights afforded to other applicants of the Tribunal, if the Applicant was to file an application before the Tribunal.

Respondent's submissions

12. The Respondent's principal contentions may be summarized as follows:

Receivability

a. The Dispute Tribunal does not have jurisdiction to issue an order suspending the contested decision because the Applicant's request is no longer pending management evaluation, and the contested decision has been implemented;

b. There is no pending management evaluation. Management evaluation is complete: it is acknowledged to have been received in the application and is appended as an annex to the application. Pursuant to art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may only suspend the implementation of a decision "during the pendency of the management evaluation" (*Igbinedion* 2011-UNAT-159, para. 23);

c. The contested decision has been implemented. A suspension of action can only be sought to suspend the implementation of a decision that has not yet been implemented (see *Kawas* Order No. 297 (NY/2014), *Smoljan* Order No. 43

(GVA/2013), and *Applicant* Order No. 167 (NBI/2014)). A non-renewal decision is fully implemented at the date of separation (see Order No. 43 (GVA/2015), at para. 11). In her application, the Applicant admits the decision was implemented and that she was separated on 10 August 2017 by non-renewal.

Prima facie unlawfulness

d. The Applicant's contract was not renewed following a low achievement on a Performance Evaluation Report. The Applicant received two consecutive "sub-par" performance evaluations, and was unsuccessful in improving performance during a Performance Improvement Plan;

e. The non-specific allegation that the Applicant's performance appraisal was unfair. The Applicant initiated a rebuttal, submitting 110 pages of documentation, and the independent rebuttal reviewer upheld the overall appraisal in 10 pages of detailed analysis;

f. There was no discriminatory, retaliatory or biased behavior. The Applicant took the opportunity to report some allegations to OIAI, which concluded that there was little to investigate among the Applicant's unusual and seemingly speculative allegations;

g. The Applicant availed herself of the opportunity to have an independent Ethics Office (UNHCR) review her complaint. UNICEF extended the Applicant's contract pending that review, and did not issue its management evaluation until after the review was concluded on 24 July 2017. That review concluded that the Applicant's complaint was unfounded, on numerous grounds. A further review by the Ethics Panel affirmed the finding of no retaliation.

Urgency

h. As the Applicant has been separated and management evaluation concluded, there is no urgency in “suspending” the implementation, pending management evaluation.

Irreparable damage

i. As the administrative decision has already been implemented, no question of further irreparable harm associated with the implementation of the decision arises.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

13. 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.

14. 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”.

15. 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.

16. 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 Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

17. It follows from art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has duly been requested and is still ongoing (see, for instance, *Igbinedion* 2011-UNAT-159 and *Benchebbak* 2012-UNAT-256).

18. The Tribunal notes that, as results from the case record, the Applicant submitted her request for management evaluation on 6 April 2017, requesting a management evaluation of the decision to not renew her fixed-term appointment, which is an administrative decision subject to a legal review by the Dispute Tribunal.

19. The Tribunal further notes that, as indicated by both parties, UNICEF completed its review of the request for management evaluation on 26 July 2017 and informed the Applicant that it upheld the contested decision.

Whether the contested decision has not yet been implemented

20. The Tribunal notes that the Applicant indicated that she was separated on 10 August 2017 and therefore it results that the administrative decision was already implemented.

21. Consequently, as the management evaluation in this case has been completed and is no longer pending, and the contested administrative decision was already implemented, two of the cumulative and mandatory conditions presented above are not fulfilled.

22. The Tribunal considers that since two of the cumulative and mandatory conditions for a suspension of action are not fulfilled, there is no need for the Tribunal to further analyze the remaining conditions will therefore not examine if the remaining condition, notably *prima facie* unlawfulness, urgency and irreparable damage.

Conclusion

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

The application for suspension of action is dismissed.

Observation

24. Observing that the arguments presented in the present application appear to relate to an application on the merits, the Tribunal notes that an appeal against a contested administrative decision, if any, is to be filed before the Dispute Tribunal,

within 90 days from the date of notification of the management evaluation, respectively in the present case 90 days starting from 26 July 2017.

(Signed)

Judge Alessandra Greceanu

Dated this 6th day of October 2017