Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Pallavi Sekhri, Officer-in-Charge

PENA CORREA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON AN APPLICATION FOR SUSPENSION OF ACTION PURSUANT ART. 2.2 OF THE DISPUTE TRIBUNAL'S STATUTE

Counsel for Applicant:
Marisa Maclennan, OSLA

Counsel for Respondent:
Elizabeth Gall, Administrative Law Section, OHRM

Introduction

1. On 24 May 2018, at 4:21 p.m., the Applicant, a Field Security Assistant at the GS-5 level, step 7, on a fixed-term appointment with the United Nations Verification Mission ("UNVMC") in Barrancabermeja, Colombia, filed an application for suspension of action during management evaluation pursuant to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, requesting suspension of the administrative decision consisting in the Administration's "[n]on-renewal, contract expiring 27 May 2018".

Factual and procedural background

2. In the application for suspension of action, the Applicant presents the fact as follows (references to annexes omitted):

> … [The Applicant] joined the [UNVMC] in Columbia on 28 February 2017. He currently holds a fixed term appointment at the GS[-]5 level as Field Security Assistant. His duty station is Barrancabermeja.
>
> … On 27 October 2017, [the Applicant] received notification that he was the subject of an investigation into an allegation of providing false information in response to [q]uestion 32 on his P[-]11 form […].
>
> … On 1 November 2017, he provided a statement to investigators about why he answered "no" to the question on his 16 October 2016 dated P[-]11 form, which asked whether he had been arrested, summoned or cited as a criminal defendant before a court of law […]. [The Applicant] explained that one is not formally accused until there is a hearing with the prosecutor. As such, at the time of his P[-]11, he was only under investigation and not formally accused.
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> … On 3 November 2017, UNVMC sent a letter to the prosecutor's office asking specifically whether [the Applicant] was under any criminal process as a defendant as of 16 October 2016 […].
>
> … On 14 November 2017, the prosecutor's office responded stating that [the Applicant] was "*imputado*" on 27 April 2015 and cited a case number […]. There was no mention of what the allegation was or what the facts of the investigation were. The letter went on to say that after a delay in the process, the investigation was assigned a different number, and the hearing where he was accused did not

> actually happen until 8 and 9 August 2017. No further information was provided.
>
> … On 16 November 2017, [the Applicant] was asked to give a second written statement, which he provided […]. He maintained, as put forth in his earlier statement, that because he was only under investigation as of 16 October 2016, and the "accusation" hearing only happened in August 2017, he answered "no" to question 32 on his P[-]11 form.
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> … On 16 May 2018, [the Applicant] received an email with a memo, dated 26 April 2018 […]. The email appeared to have been sent on 2 May, but [the Applicant] was on annual leave until 16 May, and also due to migration of email systems, he did not open the email until 16 May.
>
> … The memo from the [Chief Mission Support of the UNVMC] informed him of the non-renewal of his contract, which expire[d] on 27 May 2018. It stated that pursuant to [s]taff [r]ule 9.6(c)(v) and in accordance with an investigation conducted by the Mission, [the Applicant] had not provided information relevant to the suitability during the selection process – that, had the Mission known at that time of his appointment, "should have precluded" his appointment. It also noted that [the Applicant] "should have answered "yes" to question 32 on his P[-]11.

3. On the same date (24 May 2018), the case was assigned to the undersigned Judge. By email to the parties, sent out at 6:25 p.m. on the same date, the New York Registry acknowledged receipt of the application for suspension of action and requested the Respondent to file a reply by Tuesday, 29 May 2018, at 4:00 p.m.

4. As results from Order No. 104 (NY/2018) issued on 24 May 2018, the Tribunal noted that, in accordance with art. 13 of the Dispute Tribunal's Rules of Procedure, it has five (5) working days from the date of service of the application for suspension of action on the Respondent, namely on 24 May 2018, to consider the request for suspension of action pending management evaluation of the contested decision and that, in the present case, the Applicant's fixed-term appointment expired on 27 May 2018. Consequently, the Tribunal ordered, without prejudice to its determination of the application for the suspension of action, for the implementation of the contested decision to be suspended until the Tribunal has rendered its decision on this application or until further order.

5. On 29 May 2018, the Respondent filed his response to the application for suspension of action together with relevant documentation, including an *ex parte* investigation report. On 30 May 2018, the Tribunal instructed the Respondent via email to file all the documents related to the Applicant's contractual status between 27 February 2017 and 27 May 2018, if any, and to present a justification for the filing *ex parte* of the investigation report dated 22 November 2017. The Respondent duly filed the requested documentation and information on the same day at 1:00 p.m.

Parties' submissions

Applicant's submissions

6. The Applicant's contentions are as follows:

Prima facie *unlawfulness*

7. The Applicant has been notified of the non-renewal of his contract seemingly on the ground of "facts anterior". However, it does not appear that UNVMC is in possession of the full facts. It appears that UNVMC has concluded from the vaguely worded response from the Columbian prosecutor that the Applicant incorrectly answered question 32 in the P-11 form. First, this is debatable because it does not appear that the Applicant was formally accused until the August 2017 hearing. Second, the letter contains no details on what the charges or facts of the case were.

8. Essentially, UNVMC is stating that the prior facts taint his suitability, but it does not even know what those facts are. Rather, the non-renewal is a *de facto* punishment for an as yet concluded or even started disciplinary process on the heels of a poorly conducted investigation. The investigation has not established the fact that the Applicant was arrested, charged, or formally accused of a crime at the time he signed his P-11 form. UNVMC cannot use the investigation as the basis of the Applicant's non-renewal, nor can it use the P-11 form itself as the facts anterior.

9. If UNVMC wants to sanction the Applicant, it must complete the investigation, charge him, give him an opportunity to respond, and then sanction

him. None of that has occurred. Rather, the mission saw an earlier opportunity with the upcoming expiration of the Applicant's contract, and has acted hastily.

10. Additionally, given the Applicant's being on annual leave and due to the migration of the email systems, he has not even been given the requisite 30-days' notice.

11. Finally, the non-renewal letter itself is rife with inadequacies. It states a contradictory basis for the non-renewal – automatic and law based, in contrast with the termination specific reason of "facts anterior". Then, for good measure, the letter "notes" that the Applicant should have answered "yes" to question 32 of the P-11 form. It is a *de facto* reprimand and punitive measure which is premature and based on incomplete facts.

12. The Applicant respectfully requests rescission of the contested decision and renewal of his contract while the investigation proceeds.

Respondent's submissions

13. The Respondent's contentions are as follows:

Prima facie *unlawfulness*

14. The Dispute Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness requires that an applicant establish that there are serious and reasonable doubts about the lawfulness of the contested decision. An applicant needs to present a "fairly arguable case" that the contested decision is unlawful (*Jaen* Order No. 29 (NY/2011), para. 24, *Villamoran* UNDT/2011/126, para. 28). The Dispute Tribunal needs not find that the decision is incontrovertibly unlawful (*Mills-Aryee* UNDT/2011/051, para. 4).

15. A fixed-term appointment does not carry any expectancy of renewal, and expires automatically without prior notice (staff regulation 4.5(c) and staff rules 4.13(c) and 9.4). The Secretary-General has the discretion whether to renew

a fixed-term appointment. The reasons given for a non-renewal of appointment must be supported by facts (*Obdeijn* 2012-UNAT-201).

16. As the Secretary-General has power to terminate a fixed-term appointment for facts anterior under staff regulation 9.3(v) and staff rule 9.6(c)(v), it is axiomatic that the Secretary-General has the discretion not to renew a fixed-term appointment for the same reasons.

17. The process for non-renewal of appointment in facts anterior cases cannot be equated to the disciplinary process set out in the Staff Regulations and Rules (*Kamugisha* UNDT/2017/021, paras. 34 and 41). The Applicant's appointment has not been terminated under staff rule 9.6(c)(v). The scope of review of the Dispute Tribunal is limited to the following issues: (1) was the Applicant accorded due process; (2) was there sufficient evidence to support the factual findings of facts anterior; and (3) do the established facts amount to unsuitability according to the standards in the United Nations Charter and, if known, would they have precluded the staff member from being appointed.

18. It is not the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General regarding whether the facts anterior, if known, would have precluded the staff member's appointment. The Dispute Tribunal must accord deference to the Secretary-General's broad discretion to assess the facts anterior as against the standards of suitability under the United Nations Charter (*Sanwidi* 2010-UNAT-084, para. 40, *Michaud* 2017-UNAT-761, para. 61).

19. Integrity is a paramount consideration in the recruitment of staff, under art. 101(3) of the United Nations Charter. The Organization is extraordinarily dependent on the probity and honesty of those applying for appointments. The *onus* is on the job applicant to ensure that his or her job application does not contain inaccuracies. Each job applicant is required to certify the accuracy of the information provided. In a disciplinary process, the Organization is under no obligation to prove that a job applicant intended to mislead the Organization in cases of non-disclosure of information in a personal history profile (*Rajan* 2017-UNAT-781, paras. 39-43).

20. The Applicant applied for the position of Local Security Assistant with UNVMC in October 2017. The Applicant submitted a P-11 form in Spanish, dated 18 October 2016, in which he answered "no" to question 32 (unofficial translation):

> Have you ever been arrested, sued or required to appear before a judicial body as an accused in a criminal proceeding? Have you been convicted, fined or imprisoned for the violation of any law (except for minimal traffic-related violations)?

21. The Applicant received an offer of appointment for the position, dated 6 February 2017. The Applicant was appointed under a one-year fixed-term appointment to the position, effective 28 February 2017. The letter of appointment, signed by the Applicant on 20 November 2017, stated as follows (emphasis omitted):

> This appointment is offered on the basis, *inter alia*, of your certification of the accuracy of the information provided by you on the personal history profile. By accepting this appointment, you accordingly confirm and certify that all information relevant to your fitness and suitability to meet the highest standards of efficiency, competency and integrity and your ability to perform your functions, which you provided when applying for the position or thereafter in accordance with the offer you accepted, remains true and complete as at the date of your acceptance of this appointment.

22. On 19 October 2017, the UNVMC's Conduct and Discipline Unit ("CDU") was informed that the Applicant may have provided false information in his P-11 form. An investigation was conducted by the United Nations Department of Safety and Security ("UNDSS"), Special Investigations Unit ("SIU"), in Colombia. The investigation report was finalized on 22 November 2017.

23. The Applicant was interviewed twice during the investigation. During his interview on 1 November 2017, the Applicant explained why he answered "no" to question 32 on the P-11 form.

24. By email dated 27 April 2018, the Chief of Mission Support of the UNVMC informed the Applicant of the decision not to renew his fixed-term appointment beyond 27 May 2018. The attached letter stated that the reason for non-renewal was that the Applicant "had not provided information relevant to [his] suitability

during the selection process to the [UNVMC] which – if it had been known at the time of [his] appointment – should have precluded [his] appointment".

25. The Respondent contends that the decision not to renew the Applicant's appointment is lawful and the reasons given for the decision are supported by facts. These facts anterior are such that, if known, they would have precluded the Applicant from being appointed.

26. Had the UNVMC known these facts, the Mission would have determined that he was unsuitable for the position of Local Security Assistant. Due to the accusations against the Applicant, the reputation of the UNVMC and its ability to discharge its mandate is at risk due to the proceedings faced by the Applicant.

27. UNVMC conducted an investigation in response to a report that the Applicant may have provided false information in his P-11 form. The Applicant was interviewed twice, and thus given the opportunity on two occasions to comment on the information provided by the Colombian authorities, and to provide a full and frank explanation of the […] process that he faces.

28. The Applicant's contentions have no merit. The non-renewal decision is not a disguised disciplinary measure. A disciplinary process has not been conducted. The decision is based on facts anterior, namely the discovery of facts that were relevant to his suitability to be appointed to the Organization under the standards established by the United Nations Charter.

29. Contrary to the Applicant's contentions, UNVMC has acted on the basis of a full and complete investigation, in which evidence has been obtained from the Colombian authorities regarding the proceedings that the Applicant faces. Given the procedural history of the proceedings in Colombia, it is incongruous for the Applicant to allege in his Application that he is unaware of the facts anterior that call into his suitability for appointment to the Organization.

Urgency

30. The Applicant has not met his burden of demonstrating urgency as any urgency is self-created. The Dispute Tribunal has consistently held that the requirement of urgency will not be satisfied if the urgency was created or caused by the applicant. The Dispute Tribunal has stated that "if an applicant seeks the Tribunal's assistance on 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. The *onus* is on the Applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions" (*Jitsamruay* UNDT/2011/206, para. 26).

31. Accepting, *arguendo*, the Applicant's assertion that he only read the email dated 26 April 2018 from the Chief Mission Support of the UNVMC on 16 May 2018, the Applicant does not offer any explanation for the eight [8] day delay in filing the Application.

32. The Applicant is represented by OSLA, and the Application does not present complex factual or legal submissions. The Applicant has failed to meet his burden of establishing that he has acted in a timely manner. The urgency of the Applicant's request for the extraordinary and discretionary relief of suspension of action is self-created.

33. In view of the foregoing, the Respondent requests that the Dispute Tribunal reject the Application.

34. Further, upon instruction of the Tribunal on 30 May 2018, the Respondent filed additional information related to the Applicant's contractual status, namely the Applicant's Personal Action form and his Letter of Appointment from 28 February 2018 to 27 May 2018 which is dated 23 February 2018 and that the Applicant signed on 30 May 2018, on the same day the Tribunal requested it.

35. The Respondent also submitted that the investigation report was filed on an *ex parte* basis because investigation reports into alleged misconduct are confidential and because confidentiality is required in order to protect the integrity of

the investigation process, which includes providing anonymity to witnesses to encourage them to cooperate and provide relevant evidence. The Respondent further submitted that the subjects of an investigation are not provided with a copy of the investigation report unless they are charged in a subsequent disciplinary process. The Applicant has not been the subject of a disciplinary process.

36. The Respondent added that he has endeavored to provide unofficial translations of key documents within the time constraints, and filed these documents on an *inter partes* basis. The documents include the information provided to the UNVMC through official channels from the Colombian authorities, and an Order from the Supreme Court.

Considerations

37. 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.

38. Article 8.1(c) of the Dispute 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".

39. Article 13.1 of the Dispute Tribunal's Rules of Procedure provides:

> 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.

40. 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 be properly suspended by the Tribunal

41. The Tribunal notes that in the present case, the contested decision is the non-renewal of the Applicant's contract which was due to expire on 27 May 2018. As stated by the Appeals Tribunal in *Obdeijn* 2012-UNAT-201, para. 31, "[…] where the applicable [s]taff [r]egulation and [r]ules provide that a [fixed-term appointment] does not carry an expectancy of renewal and is *ipso facto* extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal".

42. The Tribunal concludes that the application concerns an administrative decision that may properly be suspended by the Tribunal, and the first condition is fulfilled.

Ongoing management evaluation

43. 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 he filed his request for management evaluation on 24 May 2018,

which is not contested by the Respondent. Accordingly, the Tribunal finds that the request for management evaluation was initiated prior to the filing of the suspension of action. The Tribunal notes that there is no evidence on record that the Management Evaluation Unit ("MEU") has completed its evaluation. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending and that the contested decision is the subject of an ongoing management evaluation for which reason the second condition is fulfilled.

Whether the contested administrative decision was implemented

44. By Order No. 104 (NY/2018), the Tribunal ordered the suspension of the implementation of the contested decision pending its consideration of the application due to the fact that the contested decision was to be implemented before the expiration of the period for the Tribunal to consider the present application for suspension of action. Therefore, the Tribunal concludes that the contested decision was not yet implemented.

45. Consequently, the first three cumulative and mandatory conditions presented above have been fulfilled.

Whether the impugned administrative decision appears prima facie *unlawful*

46. Having reviewed the parties' submissions, the Tribunal notes the following relevant aspects:

a. The Applicant was notified on 26 April 2018 that his fixed-term appointment expiring on 27 May 2018 would not be renewed, in line with staff regulation 4.5(c) and staff rule 9.4.

As the Respondent has confirmed in his reply to the application for suspension of action, the reason for the decision not to renew the Applicant's fixed-term appointment after its expiration on 27 May 2018 is the one indicated in the decision of the Chief of Mission Support of the UNVCM issued on 26 April 2018, namely that "[…] [r]eferring to [s]taff [r]ule 9.6 (c) (v) and in accordance with an investigation conducted

by the Mission, [the Applicant] had not provided information relevant to [the Applicant's] suitability during the selection process to the [UNVMC] which - if it had been known at the time of [the Applicant's] appointment - should have precluded [the Applicant's] appointment. It was noted that on the P[-]11 form, question 32 submitted to the then United Nations Mission in Colombia (UN[V]MC) on 18 October 2016, [the Applicant] should have answered "yes" […] but [the Applicant] had answered "no" […] to the question […]".

Regarding the reason for the non-renewal of the Applicant's fixed-term contract, the Tribunal notes that it makes reference to staff rule 9.6(c)(v) and to an investigation the UNVMC conducted due to the fact that the Applicant had not provided information relevant to his suitability during the selection process to the Mission which, if it had been known at that time, it should have precluded his appointment, namely that he incorrectly responded "no" to question 32 of the P-11 form on 16 October 2016 when he completed and signed it. This reason, according to staff regulation 9.3(a)(v) and staff rule 9.6 (c)(v), constitutes a reason for termination of a contract, which is distinct from the disciplinary reasons for termination established by staff rule 9.6(c)(iv). The decision to terminate the contract based on any of these legal provisions can be taken only by the Secretary-General.

The Tribunal further notes that, as results from staff rule 10.1(a) and (c), an investigation report, together with the evidence gathered during the investigation, can be used only for the institution of a disciplinary process, if any, and the imposition of disciplinary measures for misconduct. Such an investigation is not required in case of the termination of a contract pursuant to staff rule 9.6(c)(v). In case, during an investigation not followed by a disciplinary process and the imposition of a disciplinary measure, facts are discovered, which are anterior to the appointment of the investigated staff member, and if known at the time of his/her appointment should, under the standards established by the United Nations Charter, have precluded

his/her appointment, such facts are to be included in a different report, which is to be presented to the Secretary-General in order for him to exercise his discretion and decide if a termination decision is to be issued pursuant to staff rule 9.6(c)(v).

According to the provisions of staff rule 9.6(b), a separation as a result of expiration of an appointment is not to be regarded as a termination within the meaning of the staff rule. It results that the reasons specific to the termination of a contract, including the ones from staff rule 9.6(c)(v), can constitute a lawful reason only for a termination and not for the non-renewal of a contract as a result of its expiration.

The Tribunal concludes that the contested decision issued by the Chief of Mission Support of UNVMC and sent to the Applicant on 26 April 2018 appears to be not a non-renewal decision, but a termination decision pursuant to staff rule 9.6(c)(v). Since such a decision can be taken only by the Secretary-General and not by the Chief of Mission Support of UNVMC, the contested decision appears to be unlawful.

b. Furthermore, the Tribunal notes that the Applicant’s response to question 32 on the P-11 form in October 2016, which was considered as being crucial in relation to the contested decision, was given four (4) months before the Applicant’s Letter of Appointment was issued on 28 February 2017, and the Applicant explained and updated his previous response to question 32 during his investigation interview which took place between October and November 2017. The Applicant’s statement of 15 November 2017 appears to have been accepted by the Organization, since he signed his Letter of Appointment on 20 November 2017, only two (2) days before the issuance of the investigation report, and no disciplinary action was taken following the transmission of this report to the Special Representative of the Secretary-General of UNVMC. None of these aspects appear to have been considered by the Chief of Mission Support of UNVMC in the process of taking the contested decision.

c. In addition, the Tribunal notes that the Applicant's Letter of Appointment, extending his fixed-term appointment from 28 February 2018 to 27 May 2018, signed on 23 February 2018 by the Chief of Unit, Human Resources Management, Human Resources Unit, UNVCM, was signed by the Applicant on 30 May 2018, after the Tribunal requested a copy of it. The Applicant's Personnel Action form issued on 28 February 2018 included the following mentions: "Action Type: Renewal/Extension of Appointment" and "Reason for Action: Performance Improvement Plan". It appears that the Applicant's contract was extended on 28 February 2018 in order for him to complete a Performance Improvement Plan ("PIP"). This aspect appears not to have been addressed in the contested decision and it is unclear if the Applicant's performance was evaluated according to the mandatory legal provisions of ST/AI/2010/5 and if his e-PAS (the United Nations electronic performance appraisal system) was finalized before the contested decision was taken.

47. In light of the above, the Tribunal is therefore satisfied that the condition of *prima facie* unlawfulness is fulfilled.

Is there an urgency?

48. The Tribunal considers that the condition of urgency is fulfilled, since the Applicant's appointment is due to expire on the date the Tribunal rendered its decision on the application for suspension of action, pursuant to Order No. 104 (NY/2018) dated 24 May 2018. The Tribunal notes that the contested decision was notified to the Applicant on 26 April 2018, while he was on annual leave. The Applicant returned to the office on 16 May 2018 when he effectively acknowledged the content of the decision. The Tribunal considers that the Applicant filed the present application for suspension of action within a reasonable time–five (5) working days from the date when he returned to the office—and concludes that the urgency was not self-created.

Is there an irreparable harm to be caused by the implementation of the contested decision?

49. The Tribunal considers that the contested decision, with immediate effect, if implemented, has the potential to cause the Applicant irreparable harm since he would be separated from the Organization. In the circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled.

50. In light of the above,

IT IS ORDERED THAT:

51. The application for suspension of action is granted in relation to the decision not to renew the Applicant's fixed-term appointment and to separate him from the Organization, and the implementation of this decision is suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 31st day of May 2018