



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

NOUINOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On Sunday, 21 October 2018, the Applicant, a Programme Management Assistant at the G-5 level with the Office of Counter-Terrorism (“OCT”) in New York, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the decision by the Office of Counter-Terrorism not to renew her temporary appointment beyond the expiration date of 23 October 2018. The Applicant submits that the decision is *prima facie* unlawful because, *inter alia*, the decision not to renew her contract was taken due to her activities as a staff representative. She alleges, amongst others, that no reason for the decision was given to her and there has been no evaluation of her work on file.

2. On Monday, 22 October 2018, the application was registered and assigned to the undersigned Judge and served on the Respondent directing, upon the instructions of the assigned Judge, that a reply be filed by 4:00 p.m. on Tuesday, 23 October 2018.

3. On the same day (22 October 2018), by Order No. 203 (NY/2018), the Dispute Tribunal, without prejudice to its determination of the application for suspension of action under art. 2.2 of its Statute and art. 13 of its Rules of Procedure, ordered the suspension of the implementation of the contested decision until the Tribunal had rendered its decision on the application, or until further order.

4. On Tuesday, 23 October 2018, the Respondent duly filed a reply contending that the present application is without merit. The Respondent submits that the Applicant failed to show that the contested decision is *prima facie* unlawful as the Applicant was recruited against a temporary job opening, limited to six months, and the Organization selected a candidate to replace the Applicant. The Respondent further submits that any urgency was created by the Applicant since she failed to request management evaluation until 21 October 2018, two days prior to the

expiration of the Applicant's contract, despite the fact that she was notified of the contested decision on 5 October 2018.

5. On Wednesday, 24 October 2018, the Applicant, without leave of court, filed an objection to the Respondent's reply.

6. On Thursday, 25 October 2018, the Applicant, again without leave of court, filed a "motion for execution of Order No. 203 (NY/2018)". The Tribunal notes from this filing that her temporary appointment has been extended, for sick leave purposes only, until 1 November 2018, the United Nations Medical Services Division having now approved her sick leave from 17 October 2018 until 1 November 2018.

Background

7. On 16 January 2018, the Temporary Job Opening ("TJO") was posted for the Programme Management Assistant at the G-5 level with the OCT, which noted in the special notice that "[t]his position is available for six months".

8. On 24 April 2018, the Applicant was appointed as the Programme Management Assistant at the G-5 level with the OCT on a temporary basis for a period of six months with the expiration date of 23 October 2018. The Letter of Appointment provides that her temporary appointment "expires without prior notice on 23rd October 2018".

9. According to the emails provided by the Applicant, at least from May 2018, the Applicant started having interpersonal conflicts with her colleague in the OCT, an issue she raised with the Deputy Director of the OCT.

10. On 11 July 2018, the Applicant was elected as a staff representative for the OCT.

11. On 14 August 2018, the Applicant wrote an email to the Special Assistant to the Under-Secretary-General for the OCT ("USG/OCT"), regarding her conflict with her colleague in the OCT, in which she wrote that the Special Assistant told her twice

in June and August 2018 that she would lose her job if she did not mend conflicts with her colleague given that her colleague was the longest serving staff member in the office.

12. On 23 August 2018, the Applicant, as staff representative, sent an email to the Executive Office requesting a staffing table of the OCT.

13. On 17 September 2018, the Applicant, as staff representative, requested and had a meeting with the USG/OCT during which she brought up various issues concerning the staff members of the OCT.

14. On 28 September 2018, the Job Opening (“JO”) for the Programme Management Assistant at the G-5 level with the OCT, the post occupied by the Applicant, was advertised for the posting period of 28 September 2018-27 October 2018.

15. On 1 October 2018, the Applicant sent an email to several recipients stating that she should be consulted in any staff matters within the OCT as staff representative.

16. On 3 October 2018, the Applicant sent an email to senior management in the OCT protesting that her post was advertised without her knowledge.

17. On 4 October 2018, the Applicant wrote an email to her first reporting officer regarding her work plan and her contract that was set to expire on 23 October 2018. On the same day, the OCT recommended the selection of the rostered candidate for the position occupied by the Applicant.

18. On 5 October 2018, in the morning, the Applicant was invited to a competency-based interview on 9 October 2018 for another post within the OCT. In the afternoon, the Deputy Director of the OCT requested and had a meeting with the Applicant, during which the Applicant was informed that her contract would not be renewed and another staff member had been recruited for the post occupied by the Applicant. As a follow-up to the meeting, the Deputy Director of the OCT sent an

email to the Applicant explaining that she was granted a temporary appointment in accordance with ST/AI/2010/4/Rev.1 (Administration of temporary appointments) and that under sec. 2.2(d) a temporary appointment may be granted for specific short-term requirements to temporarily fill a vacant position pending the finalization of the regular selection process. Later that day, the Applicant was notified via email of her separation from the Organization effective 23 October 2018.

19. On 8 October 2018, at unknown time, the Applicant sent a memo to the USG/OCT regarding alleged mismanagement, abuse of power, conflict of interest and retaliation in the OCT, in which, *inter alia*, she claimed that the Deputy Director unjustly terminated her contract as a retaliation for having raised staff management issues and having complained about her colleague who is close to the Deputy Director of the OCT. She further claimed that her predecessor also had conflicts with the same colleague and her temporary contract was not renewed after reporting this conflict to the Deputy Director of the OCT. The Applicant then requested a meeting with the USG/OCT to discuss a possible extension of her temporary contract beyond 23 October 2018. At 3:02 p.m., the Applicant also sent an email to the Chief of Office of the OCT requesting a meeting with her regarding the decision not to renew her contract. At 4:36 p.m., the Applicant was notified that the interview scheduled for 9 October 2018 was cancelled due to unforeseen circumstances and tentatively rescheduled for 22 October 2018. At 6:49 p.m., the Applicant received a response from the Office of the USG/OCT that the USG/OCT would like to meet with her upon his return.

20. On 9 October 2018, a Human Resources Officer in the Executive Office wrote to the Applicant addressing various issues raised by her, including her separation and the meeting held on 5 October 2018.

21. On 11 October 2018, the Applicant had a meeting with her first reporting officer regarding the non-renewal of her contract, and was told to speak with the Chief of Office.

22. On 16 October 2018, the Applicant had a meeting with the USG/OCT, during which she presented a letter from the United Nations Staff Union who urged the USG/OCT to renew the Applicant's contract and to find a solution for the Applicant who was retaliated against due to her activities as staff representative. In this letter, it was claimed that her interview for a regular post in the same office had mysteriously been cancelled.

23. On 17 and 19 October 2018, the Applicant wrote emails requesting an update following her meeting with the USG/OCT.

24. On 19 October 2018, in the morning, the Applicant also followed up regarding the competency-based interview tentatively scheduled for 22 October 2018, and in the afternoon, she received a response and was asked to come for the interview on 23 October 2018, the last day of her contract. Later in the evening, the Applicant received a written response from the Chief of Office, OCT, which referred to the 9 October 2018 email from the Executive Office, in which she was advised that as per her letter of appointment, her appointment expires without notice on 23 October 2018 and that she was informed regarding her separation as soon as the OCT had made the selection for the job opening against the post she encumbers on temporary appointment.

25. On 21 October 2018, the Applicant filed the management evaluation request and the present application.

Applicant's Submissions

26. The Applicant's principal contentions may be summarized as follows:

Prima facie unlawfulness

a. The Applicant assumed her role as a staff representative during a critical moment in the OCT when the office was going through a transition as a new office, which has 90 per cent staff on temporary appointment and is in the process of regularizing posts. The Applicant tried to be part of the solution

to help address staff issues and assist the management in dealing with staff welfare and wellbeing. However, her initiative was not welcomed by some or most managers who might have felt offended or threatened by her approaching the USG/OCT directly to discuss staff issues without them and asking for the staffing table. The Applicant's activities as a staff representative led to negative consequences causing her to lose a job because as soon as she met with the USG/OCT and asked for the staffing table, she found herself in conflict with some managers who attempted to limit and restrict her rights and subjected her to measures of retaliation which culminated in the non-renewal decision;

b. The post the Applicant is currently occupying is not being abolished and its specific functions are still required. While the Applicant is on the roster for other posts and there is no evidence that she has not been performing satisfactorily, her post has been advertised and someone else has been recruited from the roster;

Urgency

c. The Applicant's contract would expire in two working days on 23 October 2018;

Irreparable damage

d. The Applicant joined the Organization in 2001 and has suffered retaliations in her previous jobs and facing another retaliation has caused her extreme anxiety and endless stress. This is causing irreparable harm to her United Nations career and to her life;

e. The Applicant is a primary provider of her household as she supports her spouse who needs medical care as well as her mother after losing her father last year.

Respondent's submissions

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

Prima facie unlawfulness

- a. The non-renewal of the Applicant's appointment is lawful. It is well established that an appointment with a finite term does not carry an expectation of renewal (staff regulation 4.5(b); staff rule 4.12(c); *Syed* 2010-UNAT-061; *Balestrieri* 2010-UNAT-041);
- b. Temporary appointments may be granted for a period of less than one year for specific short-term requirements. This includes temporarily filling a vacant position pending the finalization of the regular selection process. Temporary appointments should not be used to fill needs that are expected to last for more than one year (staff rule 4.12(a); sec. 2 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments));
- c. Pursuant to sec. 9.4 of ST/AI/2010/3 (Staff selection system), following the issuance of a job opening, heads of office have the discretion to select a candidate from the roster, without reviewing all non-rostered candidates (*Charles* 2014-UNAT-416);
- d. On 16 January 2018, a TJO was issued for the position of Programme Management Assistant, at the G-5 level, with the OCT. The TJO specified that the position was available for six months only. This was to allow the OCT to fill the position expeditiously. The OCT then intended to proceed with a selection exercise conducted under ST/AI/2010/3;
- e. The Applicant was selected for the TJO. On 24 April 2018, she was issued with a temporary appointment for six months. As a result, her appointment expires on 23 October 2018;

f. The OCT foresaw a need for the functions performed by the Applicant to last for more than one year. It was therefore required to issue a JO in accordance with the provisions of ST/AI/2010/3. Accordingly, on 28 September 2018, the OCT issued a JO for the position. On 4 October 2018, a candidate was selected from the roster of pre-approved candidates of Programme Management Assistants at the G-5 level. The Applicant did not apply for this JO, nor is she on the relevant roster of pre-approved candidates;

g. On 5 October 2018, the Applicant was informed in person that a candidate had been selected for the JO and that her appointment would not be renewed. Written confirmation of her separation from service was sent on that day;

h. The Organization was entitled to recruit a candidate from the roster to fill the JO. As a candidate has now been selected for the position occupied by the Applicant, there is no basis to renew her temporary appointment;

i. The Applicant has the burden of establishing that the contested decision was based on extraneous factors or improper motivation (*Hepworth* 2015-UNAT-503). The existence of a prior workplace disagreement is not, in and of itself, evidence that the contested decision was motivated by an improper purpose (*Bye* UNDT/2009/083, para. 61). The Applicant has not adduced any evidence to show that the contested decision was tainted by extraneous considerations, nor has she provided any evidence to show that her status as a staff representative was relevant. In particular, the Applicant's request for the staffing tables of the OCT was not relevant to the contested decision. The Applicant's speculation and belief do not amount to evidence;

Urgency

j. Self-created urgency does not satisfy the requirements for suspension of an administrative decision (*Villamoran* UNDT/2011/126; *Dougherty*

UNDT/2011/133; *Jitsamruay* UNDT/2011/206; *Maloka Mpacko*
UNDT/2012/081);

k. The Applicant knew from 5 October 2018 that her temporary appointment would not be renewed beyond 23 October 2018. The Applicant could have sought management evaluation of that decision then. Instead, she waited until 21 October 2018 to file a request for suspension of action. Any urgency has been created by the Applicant.

Consideration

Legal framework

28. Article 2.2 of the Statute of the Dispute Tribunal provides:

... 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.

29. 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.

30. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal 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 case of particular urgency, and where its implementation would cause

irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

31. Under art. 2.2 of the Statute, a suspension of action order is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of the contested decision.

32. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent 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, and be succinctly and precisely pleaded. Parties should bear in mind that the matter is not at the merits stage at this point of the proceedings, and that the luxury of time is unavailable. Urgent applications disrupt the normal day-to-day business of the Tribunal, thus delaying the disposal of other older outstanding cases. Parties should therefore be mindful and exercise circumspection in their filings. The manner and tone of a party's submissions are also of primary importance. A party should avoid excessive argumentative language in applications, replies and submissions, and pleadings should be in clear and concise language, to the point, and devoid of emotive language and conjecture.

33. In this instance, the Applicant filed an application with lengthy detail in over 72 paragraphs, much of which is not relevant to her application, together with over 400 pages of annexes, many of which were not material and relevant to the application. The application took up considerable resources of the Tribunal in the preparation of the file and consideration of the application at short notice. The Respondent must be commended for filing a concise reply in a very short space of time. The Tribunal appreciates that the Applicant is unrepresented, and observes that she could do with some legal representation or assistance, and recommends that she immediately seeks such assistance.

34. As the Respondent has not contested the irreparable harm aspect of the application, the Tribunal will now turn to the matter in hand and deal with this aspect first.

Irreparable damage

35. 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 (see, for instance, *Adundo et al.* UNDT/2012/077 and *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

36. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013) and *Finniss* Order No. 116 (GVA/2016)).

37. The Applicant submits that she joined the Organization in 2001 and has suffered retaliations in her previous jobs and facing another retaliation has caused her extreme anxiety and endless stress. She is concerned that after serving the Organization for such a long period of time on various types of contracts, her United Nations career prospects have been damaged. The Applicant further submits that she is a primary provider of her household as she supports her spouse who needs medical care as well as her mother after losing her father last year. The Applicant's submission on this issue has not been challenged by the Respondent.

38. The Tribunal accepts that the Applicant would suffer much more than mere economic loss as pleaded. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Prima facie unlawfulness

39. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an applicant to present a fairly arguable case that the contested decision was procedurally or substantively defective, was influenced by some improper considerations, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (see, for instance, *Jaen* Order No. 29 (NY/2011) and *Villamorán* UNDT/2011/126).

40. In this particular case, the Applicant has filed extensive submissions and copious documentation in order to advance her contentions that the contested decision was not made properly and in good faith and was based on extraneous factors and improper motives. She alleges, amongst other things, that she received short notification of the non-renewal, given no reason therefor, that she has received no evaluation to date, that her interview for another post in the same department was mysteriously canceled at the last minute, and that there was an understanding that she would be given the opportunity in the meantime to be looking around for other jobs.

41. The Respondent submits that the Applicant's temporary appointment as per her letter of appointment dated 23 April 2018 expressly provides for an expiration date of 23 October 2018 and states that there is no expectancy of renewal. The Tribunal observes that whilst a temporary appointment has an expiration date specified in the letter of appointment, subsequent to the initial temporary appointment, new and successful temporary appointments may be granted in the same office or in a different office any number of times, for any duration, provided that the length of service does not exceed the period of 364 calendar days, or exceptionally 729 days (sec. 2.5 of ST/AI/2010/4/Rev.1), at the end of which the staff member shall be required to separate from the Organization (sec. 2.7). Indeed the Tribunal observes a notation below the express expiry date on the Applicant's said letter of appointment, to the effect that "[a] Temporary Appointment shall normally not

exceed 364 calendar days”, the Respondent thereby conceding the effect of secs. 2.5 and 2.7 of ST/AI/2010/4/Rev.1 in the Applicant’s said letter of appointment.

42. The Tribunal observes also that, as in this instance, a temporary appointment may be granted to “temporarily fill a vacant position pending the *finalization* of the regular selection process” (sec. 2.2(d), emphasis added). The Tribunal notes that in this instance there was no pending finalization of a regular selection process when the Applicant was appointed or even shortly thereafter, but that the process was only commenced on 28 September 2018 when the JO for the position was issued, followed by the selection of a candidate on 4 October 2018 and notification to the Applicant on 5 October 2018 that her appointment would not be renewed and that she was to be separated. The Applicant suggests that this process was undertaken in bad faith without transparency and with undue haste, simply to frustrate any renewal of her temporary appointment even though she was performing satisfactorily.

43. The Applicant also complains that she was not issued a performance evaluation. In terms of sec. 6.1 of ST/AI/2010/4/Rev.1, the program manager shall issue a performance evaluation at the end of the temporary appointment regardless of its duration. And pursuant to sec. 6.2, a staff member who disagrees with the performance rating given at the end of his or her temporary appointment may, within seven calendar days of signing the completed performance appraisal form, submit a written explanatory statement to the respective executive office at headquarters. The performance evaluation form and the explanatory statement become part of the official status file of the staff member. The Tribunal notes that the administrative issuance does not state that the program manager will issue the evaluation “following” the end of the temporary appointment or “after” the end of the temporary appointment, but simply “at the end of the temporary appointment”. Surely in order to have any meaningful impact on a staff member’s future placement or opportunity, it must be that such performance evaluation should be completed shortly prior to the end of the appointment, which has not been done in this case.

44. The Applicant has raised a number of allegations such as to give rise to disputes of fact and interpretation that could possibly only be resolved following a full hearing on the merits, alternatively by the parties by way of amicable resolution. At the same time, she has raised several arguments and made allegations, all of which if taken together circumstantially, on the face of it, raise doubts as to whether the Administration's decision was proper and made in good faith, devoid of extraneous factors or improper purpose, and which at the very least, raise serious doubts regarding the non-renewal of her appointment.

45. Accordingly, on the papers currently before it, the Tribunal finds that the Applicant has made out a fairly arguable case that the contested decision is unlawful.

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

Urgency

47. According to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

48. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (see, for instance, *Villamoran* UNDT/2011/126, *Dougherty* UNDT/2011/133 and *Jitsamruay* UNDT/2011/206).

49. In the present case, the Applicant submits that while she received the notification of the contested decision on 5 October 2018, she requested a meeting with the USG/OCT to seek an extension of her contract and she had a meeting on 16 October 2018. The Applicant then waited for an update, which she received from the Chief of Office, OCT, on 19 October 2018. She then promptly filed the management evaluation request and the present application on 21 October 2018. The Applicant's

temporary appointment was extended for sick leave, but this also expires on 1 November 2018.

50. In the circumstances and on the papers before it, the Tribunal finds that the matter is urgent as the contested decision is impending and will be implemented before the management evaluation is rendered, and the Tribunal finds the requirement of particular urgency to be satisfied.

Conclusion

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

The application for suspension of action is granted and the contested decision is suspended pending management evaluation or until 1 November 2018, whichever is later.

(Signed)

Judge Ebrahim-Carstens

Dated this 26th day of October 2018