



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

SEXTON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On Friday, 26 October 2018, at 4:40 p.m., the Applicant, a Publishing Assistant at the G-4 level with the Department for General Assembly and Conference Management (“DGACM”) in New York, represented by the Office of Staff Legal Assistance (“OSLA”), 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 DGACM not to renew the Applicant’s fixed-term appointment beyond the expiration date of 31 October 2018 on grounds of project closure. The Applicant submits that the decision is *prima facie* unlawful because the reason given for the contested decision, namely the project closure, is untrue as there was remaining funding from the 1st phase of the digitalization project and DGACM obtained further funding for the 2nd phase of the project.

2. On the same day, the application was registered and assigned to the undersigned Judge and served on the Respondent at 6:13 p.m., directing, upon the instructions of the assigned Judge, that a reply be filed by 4:00 p.m. on Tuesday, 30 October 2018.

3. On 29 October 2018, by Order No. 211 (NY/2018), the Tribunal ordered the Respondent not to undertake any further steps regarding the non-renewal decision until the determination of the present suspension of action application.

4. On 30 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 reason given for the contested decision is true as supported by documentation submitted by the Respondent.

Background

5. The Applicant joined the United Nations 14 years ago and the DGACM publishing team in January 2014 as a Publishing Assistant when the 1st phase of “Project for digitalization with DGACM” was launched with the funding mainly provided by the State of Qatar. According to the Respondent, the project team consisted of 11 staff members, seven of them on permanent appointment and four on fixed-term appointment.

6. According to the Respondent, in view of the temporary nature of the project and the anticipated exhaustion of funding at the end of October 2018, DGACM held meetings with the affected staff members from 11 to 14 December 2017 and on 18 May 2018. DGACM also met with staff representatives. In addition, from 1 April 2018, the Applicant’s fixed-term appointment was no longer renewed on a one-year basis but renewed for three months (until 30 June 2018) and then for four months (until 31 October 2018). DGACM further reminded these staff members to identify training needs, to update their Personal History Profiles, and to apply for jobs, and sent emails to share regular job openings advertised in Inspira.

7. On 22 June 2018, DGACM submitted a detailed proposal for the implementation of the second phase of the digitalization project to the State of Qatar. According to the Respondent, negotiations are ongoing and the State of Qatar has not provided funding to the Organization for the proposed project.

8. On 26 September 2018, the Executive Officer, DGACM wrote to the affected staff members, including the Applicant, that their contracts were not to be extended beyond their expiry date, 31 October 2018. It was explained to them that the “digitalization project will come to closure on 31 October 2018”.

9. On 5 October 2018, the Applicant filed a management evaluation request seeking rescission of the decision of non-renewal or placement on an alternative suitable post outside of the competitive recruitment process.

10. On 23 October 2018, the Under-Secretary-General for General Assembly and Conference Management (“USG/DGACM”) held a meeting with the affected staff members and staff representatives. The Respondent and the Applicant provide different versions of what transpired at this meeting. The Respondent submits that at the meeting the USG/DGACM explained that: i) DGACM had approached the State of Qatar with a proposal for a new project and that dialogue was ongoing; ii) if the new project was to materialize, there was no guarantee that the modalities would be the same as for the current project; and iii) that no funding for the proposed project had been received.

11. In contrast, the Applicant contends that from the meeting she understood that there was still remaining funding from the 1st phase of the digitalization project and DGACM had obtained further funding from the State of Qatar for the 2nd phase of the digitalization project, but DGACM intended to hire independent contractors for the 2nd phase of the project.

12. According to the Applicant, on or about the same day, the Applicant discovered two documents pertaining to the 2nd phase of the project for digitalization with DGACM, namely, a project proposal from April 2018 and a draft project initiation document dated 4 February 2018. In particular, the draft project initiation document provided as follows:

1.2 As with the 1st phase, DGACM once again have obtained the funding from Qatar to digitize United Nations documents in pursuit of the objective set by the General Assembly. For 2nd phase, DCAGM will utilize five general service staff members and five general service WAE (when as employed) staff members with language and technical skills. The project is a cooperative one between DGACM and DPI. The remaining staff will be provided with a contract for one-year from July 2018 which would mark the beginning of the 2nd phase of the project.

13. In light of new information discovered on 23 October 2018, the Applicant amended her management evaluation request specifying that the non-renewal of her

contract was not based on a genuine reason, but it was a strategy to remove her from post, which is prohibited by ST/AI/2013/4.

Applicant's Submissions

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

Prima facie unlawfulness

a. While it is accepted that the Tribunal will not interfere with a genuine organizational restructuring even though it may result in the loss of employment of staff, the Administration nevertheless retains an obligation to act fairly, justly and transparently in dealing with staff members (*Matadi et al* 2015-UNAT-592; *Obdeijn* 2012-UNAT-201);

b. The Administration failed to act fairly, justly and transparently when it gave the project closure as a reason for a non-renewal decision when there was remaining funding from the 1st phase of the digitalization project and DGACM obtained further funding from the State of Qatar for the 2nd phase of the digitalization project;

c. In addition, sec. 3.3(b) of ST/AI/2013/4 (consultants and individual contractors) provides that consultants and individual contractors may be engaged only when the need for the required services cannot be met from within the current staff resources of the Secretariat owing to a lack of specialized knowledge and/or expertise or capacity. The Administration's decision is aimed to deprive her of an opportunity to challenge the Administration's failure to comply with its obligation under sec. 3.3(b) of ST/AI/2013/4;

d. Furthermore, the Applicant's performance was consistently rated as "successfully meets performance expectations" or "exceeds performance expectations" for the last 13 years, and reasonable managerial approach would have been taking all and any necessary steps to maintain such resources;

e. Alternatively, if the Applicant's post was lawfully being abolished, pursuant to staff rules 9.6(e) and 9.6(f), staff members holding fixed-term appointments shall be retained by preference to staff members with a lower level of protection. The Applicant applied to a number of vacancies within the United Nations Secretariat, 12 of which are pending, and 11 of pending applications are with DGACM. It cannot be said that there are no suitable alternative positions onto which she could be placed pursuant to staff rule 9.6;

Urgency

f. On 26 September 2018, the Applicant received a notification that her contract was not to be extended beyond 31 October 2018. On 5 October 2018, the Applicant filed a management evaluation request. However, on 23 October 2018, she learned that the reasons provided in the notification were not accurate;

g. In light of new information, on 26 October 2018, the Applicant amended her management evaluation request specifying that the non-renewal decision was not based on a genuine reason but was rather a strategy designed to remove her from post;

h. The matter is urgent as the non-renewal decision could be implemented by the time the management evaluation is due (4 November 2018);

i. It is not a case of self-created urgency since she only learned about the strategy and underlying facts on 23 October 2018;

Irreparable damage

j. It is trite law that loss which can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action. Nonetheless, this Tribunal has found that harm to career prospects

or sudden loss of employment may constitute irreparable damage (*Corcoran* UNDT/2009/071; *Calvani* UNDT/2009/092);

k. In the present case, if the impugned decision is implemented, the Applicant will suffer harm due to the loss of employment with the Organization and particularly her best chance to continue to be employed by DGACM and advance her career within the Organization. Such harm cannot be compensated for by a monetary award.

Respondent's submissions

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

Prima facie unlawfulness

a. 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; *Villamorán* UNDT/2011/126, para. 28). The Dispute Tribunal need not find that the decision is incontrovertibly unlawful (*Mills-Aryee* UNDT/2011/051, para. 4);

b. 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 the facts (*Obdeijn* 2012-UNAT-201, para. 5);

c. The Dispute and Appeals Tribunals have recognized that the non-renewal of appointment due to lack of available funding for the post that funds the position is lawful (for example, see *Liu* UNDT/2015/078 (affirmed

in 2016-UNAT-659); *Beqai* 2014-UNAT-434, para. 21). The Appeals Tribunal recognizes the broad discretion of the Secretary-General to determine the needs of the Organization, including organization of work, staffing and budgetary needs (*Lee* 2014-UNAT-481, para. 28). The Dispute Tribunal cannot substitute its own views for those of the Secretary-General on matters such as how to organize work and meet operational needs (*Sanwidi* 2010-UNAT-084, para. 40; *Pacheco* UNDT/2012/008, paras. 39-41). The Organization however has a duty to act fairly, justly and transparently in dealing with its staff members (*Fasenella* 2017-UNAT-765, para. 23; *Matadi et al.* 2015-UNAT-592, para. 16);

d. The Applicant has not established that the contested decision is *prima facie* unlawful. The Applicant's assertions of fact and law are mistaken. They do not form a sound basis for concluding that there are serious and reasonable doubts about the lawfulness of the contested decision;

e. Contrary to the Applicant's allegations, the reason given to the Applicant for the contested decisions is true. The assertions regarding the statements made by the USG/DGACM at the meeting on 23 October 2018 are incorrect. At the meeting, the USG/DGACM explained that the Government of Qatar had not provided the Organization with funding for the proposed project. The documents relied upon the Applicant in support of her allegations are internal working documents only, and do not represent the final version of the proposed project submitted by DGACM to the Government of Qatar in June 2018;

f. The Applicants' allegations that they are entitled to be accorded the rights set out in staff rule 9.6(c) and (e) upon termination of fixed-term appointment for abolition of post have no merit. Chapter IX of the Staff Rules (Separation from service) clearly distinguishes between separation of service due to expiration of appointment (non-renewal) and termination of appointment (staff rule 9.4 and 9.6). A staff member whose fixed-term

appointment expires (that is, non-renewed) due to abolition of post or reduction in staff is not entitled to the rights set out in staff rule 9.6(e) upon termination of fixed-term appointment due to abolition of post or reduction in staff;

g. Under staff rule 9.4, a fixed-term appointment expires automatically and without prior notice on the expiration date in the letter of appointment. Under staff rule 9.6(a), a termination of appointment is a separation from service initiated by the Secretary-General. Further, termination of appointment brings the appointment to an end, prior to the expiry date of the appointment. Staff rule 9.6(b) expressly provides that separation as a result of expiration of appointment “shall not be regarded as a termination with the meaning of the Staff Rules”;

h. The Dispute and Appeals Tribunal have recognized that separation from service as a result of termination of fixed-term appointment cannot be equated to separation as a result of non-renewal of a fixed-term appointment (*Badawi* 2012-UNAT-261, para. 32; *Pacheco* UNDT/2012/008, para. 74 (affirmed by 2013-UNAT-281)). In *Pacheco*, the Dispute Tribunal recognized that only staff members whose fixed-term appointments are terminated due to abolition of post or reduction in staff are entitled to invoke the provisions of staff rule 9.6(e): the rule does not apply to a staff member whose fixed-term appointments expire (See also *Obdeijn* UNDT/2011/032, para. 24; *Abundo* UNDT/2012/077, para. 34; *Dalipi* UNDT/2013/020, paras. 14 and 55; *Kotanyan* UNDT/2018/077, paras. 74 and 75);

Urgency

i. The Dispute Tribunal has consistently held that the requirement of urgency will not be satisfied if the urgency was created or caused by an 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*);

j. The Applicant admits that she became aware of the non-renewal decision on 26 September 2018 and thus was in a position to request suspension of action on 5 October 2018, the date by which she had prepared and submitted her request for management evaluation. The Applicant has not explained her three-week delay in filing the application;

k. That the Applicant discovered supplemental material on 26 October 2018 is irrelevant. The draft working documents relating to a new proposed project corroborate the reason given for the contested decision, that is, that funding for the existing project was exhausted. The Applicant ought to have filed her application for suspension of action with the Tribunal immediately upon submitting her request for management evaluation;

l. Had the Applicant acted with the appropriate urgency and exercised her right to seek management evaluation and suspension of action promptly, the management evaluation processes may well have been completed before the expiry of her appointment. The Applicant’s failure to act with the appropriate urgency has meant that judicial resources have been expended unnecessarily. Therefore, the Applicant does not meet her burden of demonstrating urgency.

Consideration

Legal framework

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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

22. 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.

23. 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)).

24. The Applicant submits she has served the Organization with an excellent performance record for some 14 years. If the impugned decision is implemented, not only would the Organization lose a good staff resource, but the Applicant will suffer harm due to the loss of employment with the Organization and particularly her best chance to continue to be employed by DGACM and advance her career within the Organization. Such harm cannot be compensated for by a monetary award.

25. 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

26. 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).

27. The reasons given for the nonrenewal of an appointment must be supported by the facts (*Obdeijn* 2012-UNAT-201). Furthermore, it is long established law that an administrative decision not to renew a fixed-term appointment can be challenged as being unreasonable on the grounds that the Administration has not acted fairly, justly or transparently, or was motivated by bias, prejudice or improper motive against a staff member. Such a challenge invariably will give rise to factual disputes (for example, see *He* 2016-UNAT-686, para. 39).

28. In the present case, this matter appears to have a substantial material dispute of fact as to the reason for the non-renewal decision. The email notification of the non-renewal states the reason for non-renewal as "the digitization project will come to closure on 31 October 2018". In the reply too, the Respondent speaks of a "new project" for which funding is being sourced, and that "there was no guarantee that the modalities would be the same as for the digitization project". However, the letter from the USG/DGACM dated 22 June 2018, to the donor country, speaks of the "proposal for the implementation of the second phase of the digitalization project". Indeed, all the supporting documentation provided by both parties illustrates that there is still work to be done on this very important United Nations document

preservation project and that there is still a second phase of the project to be completed. The detailed project initiation document, which one would presume is only prepared once funding has been received or secured, or at least an undertaking made, specifies that “DGACM would utilize five general service staff members for the second phase of the project”. Furthermore, it provides that “the remaining staff will be provided with a contract for one year from July 2018 which would mark the beginning of the second phase of the project”. This would make logical sense that institutional memory was retained into the second phase of the project. In all these circumstances, there is reasonable doubt as to whether the digitization project is complete and at closure stage, and the personnel no longer required.

29. In the reply, the Respondent suggests that the project has ended as funding for the digitization project has been exhausted. On the one hand, the Respondent submits that the project funding was exhausted by 31 October 2018 and thus the Administration lawfully decided not to renew the Applicant’s fixed-term appointment due to the lack of funding. On the other hand, the Applicant submits that there is still remaining funding from the 1st phase of the project and that the funding for the 2nd phase of the project has been obtained. The parties submitted different sets of documents to support their claims and gave a different version of what transpired at the meeting between the USG/DGACM and the affected staff members on 23 October 2018. The Applicant further submits that the contested decision was motivated by improper considerations, namely, as evident from the documentation, to use external consultants for the 2nd phase of the project, instead of staff members, in violation of sec. 3.3(b) of ST/AI/2013/4, and to preemptively deprive the Applicant of an opportunity to challenge such a decision.

30. In sum, the parties seriously dispute the true reason for the non-renewal of the Applicant’s contract, and these issues are matters that give rise to a substantial dispute of facts which cannot be reconciled on the papers, and which would need to be addressed in substantive proceedings, if any are to follow. These disputed facts

also raise serious and reasonable doubts about the lawfulness of the contested decision.

31. In the circumstances and on the papers before it, the Tribunal finds that the Applicant has made out a fairly arguable case that the contested decision is unlawful and the requirement of *prima facie* unlawfulness to be satisfied.

Urgency

32. 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.

33. 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, *Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133 and *Jitsamruay* UNDT/2011/206).

34. In the present case, the Tribunal notes that the expiration of the Applicant's fixed-term appointment was imminent and was to take effect on 31 October 2018, and thus the matter is urgent. In light thereof and on the facts before it, the Tribunal accepts the Applicant's submission that the urgency is not self-created as new underlying facts have recently arisen such that the Applicant, having initially filed a management evaluation request on 5 October 2018, was constrained to file an amended management evaluation request on 26 October 2018.

35. 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

36. 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.

(Signed)

Judge Ebrahim-Carstens

Dated this 2nd day of November 2018