



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/035  
Order No.: 78 (NY/2021)  
Date: 26 August 2021  
Original: English

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**Before:** Judge Joelle Adda  
**Registry:** New York  
**Registrar:** Nerea Suero Fontecha

KAMARA-JOYNER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON APPLICATION FOR SUSPENSION  
OF ACTION**

**AND**

**ON REQUEST FOR ANONYMITY**

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**Counsel for Applicant:**  
Evelyn W. Kamau, OSLA

**Counsel for Respondent:**  
Lucienne Pierre, ALD/OHR, UN Secretariat

## **Introduction**

1. On 20 August 2021, the Applicant, a Conflict Resolution Officer at the P-4 level with the Office of the United Nations Ombudsman and Mediation Services (“UNOMS”), filed an application requesting, under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, a suspension of action pending management evaluation of the decision not to renew her fixed-term appointment beyond its expiration on 31 August 2021.

## **Factual background**

2. The Applicant has served as a Conflict Resolution Officer at the P-4 level with UNOMS since September 2004.

3. The Applicant also acts as the President of the United Nations People of African Descent (“UNPAD”), an *ad hoc* special interest group created in 2016 to raise awareness about issues of racism in the United Nations.

4. In October 2019, in her capacity as President of UNPAD, the Applicant wrote to senior officials of the United Nations advocating on behalf of a staff member.

5. By email dated 24 October 2019, the Ombudsman informed the Applicant that she should step down immediately from any leadership role and active participation with UNPAD. The Ombudsman stated that “[her] role as president of UNPAD undermines the neutrality and independence of the office” whose role is not to advocate on behalf of any one individual employee. The Ombudsman wrote that there was a conflict of interest when the Applicant advocated for a staff member who was referred to UNOMS and there was a potential conflict of interest in future cases.

6. On 4 November 2019, the Ombudsman received an email from the Director of the Division of Healthcare-Management Occupational Safety and Health (“DHMOSH”) informing her that the Applicant, as a Conflict Resolution Officer in

UNOMS, was requesting a meeting concerning a staff member she had previously advocated for as President of UNPAD. The next day, the Ombudsman responded to the Director of DHMOSH that the Applicant was not acting on UNOMS's behalf and had no authority or standing to discuss such private sensitive issues.

7. On 1 April 2020, the Applicant began a temporary assignment with the United Nations Economic Commission for Africa.

8. In early March 2021, the Ombudsman was notified that the Applicant would be returning to UNOMS, effective 1 April 2021.

9. On 8 March 2021, the Ombudsman reached out to the Ethics Office to request an opinion as to whether the Applicant's service as President of UNPAD represents a conflict of interest with her duties as a Conflict Resolution Officer in UNOMS.

10. On 12 March 2021, the Director of the Ethics Office responded that it constituted a conflict of interest, stating that "the official duty of a UNOMS staff member to remain independent and neutral would conflict with leading and representing UNPAD and its staff special interest". The Director of the Ethics Office continued that "it is for the Head of Entity to assess whether a particular act or omission raises a potential conflict of interest" and that staff members are obliged "to follow instructions on how to resolve the situation, including to avoid and remove the conflict or the circumstances that make it a possible conflict".

11. On 15 April 2021, the Deputy to the Ombudsman wrote an email to the Applicant to discuss her work plan for the 2021-22 cycle. In the email, the Deputy to the Ombudsman wrote that the Applicant would directly report to him and that she would take over several focal point functions.

12. On 23 April 2021, the Ombudsman informed the Applicant that the Deputy had been placed on sick leave for the remainder of his tenure with UNOMS. Noting that the Deputy had started discussions with the Applicant on her work plan, the Ombudsman asked the Applicant to clarify whether she was still serving as President

of UNPAD in order to make an informed decision on her workplan. The Ombudsman reminded the Applicant that it had been determined that there is a conflict of interest between the work of a Conflict Resolution Officer in UNOMS and her position as President of UNPAD.

13. On 28 April 2021, the Ombudsman wrote an email to the Applicant. She stated that she understood that the Applicant was still the President of UNPAD and would not step down and asked the Applicant to clarify in writing. The Ombudsman warned that in the absence of any clarification in writing, she would proceed to take the administrative actions that she deemed appropriate.

14. On 30 April 2021, the Ombudsman wrote to the Applicant that until her status with UNPAD was clarified, the Ombudsman could not complete any discussions around work assignments and stated that she had not been given any assigned work.

15. On 12 May 2021, the Ombudsman issued a written reprimand to the Applicant for the continuation of the conflict of interest.

16. On 16 June 2021, the Applicant was notified that her fixed-term appointment would not be renewed beyond its expiration on 31 August 2021. The Applicant requested the reasons for the non-renewal decision and received the following response:

[The Ombudsman] advised that her decision not to renew your appointment is based on the ongoing conflict of interest with your role as President of UNPAD, which is in conflict with your position as a conflict resolution officer requiring neutrality as per the mandate of the Office of the Ombudsman. [The Ombudsman] further advised that she has repeatedly communicated the conflict of interest with you but that you have taken no action in this regard.

Due to this conflict of interest, [the Ombudsman] indicated that she has not been able to assign you any work related to conflict resolution, the role for which you were recruited. [The Ombudsman] stated that this has been the situation since your return from a temporary assignment 1 April 2020.

17. On 16 August 2021, the Applicant received the memorandum titled “Separation upon expiration of appointment” which provided relevant information on administrative procedures and pre-requisites for her separation.

18. On the same day (16 August 2021), the Applicant filed a request for management evaluation of the contested decision not to renew her fixed-term appointment beyond 31 August 2021.

19. On 20 August 2021, the Applicant filed the present application for suspension of action.

20. On 24 August 2021, the Respondent filed the reply.

21. On 25 August 2021, the Applicant filed the motion for leave to file observations in response to the Respondent’s Reply.

22. On 25 August 2021, the Respondent filed the motion for leave to file a response to the Applicant’s submission of 25 August 2021.

### **Consideration**

23. Under art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of the Rules of Procedure, 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 have been met.

24. Before addressing whether all three requirements have been met, the Tribunal will first review the Respondent’s argument that the application is not receivable.

25. The Respondent argues that the application is not receivable because the Applicant did not request management evaluation within the 60-day statutory period of staff rule 11.2(c). The Respondent submits that the Applicant was notified of the

contested decision on 16 June 2021 and thus the 60-day statutory period expired on 15 August 2021. Therefore, the request for management evaluation, which was filed on 16 August 2021, was one day late.

26. The Tribunal notes that 15 August 2021 was Sunday and finds that the filing of the request for management evaluation on the next working day (16 August 2021) was timely.

27. The Respondent refers to two judgments of the Appeals Tribunal, *Ten Have* 2015-UNAT-599 and *Mazen Qassem* 2021-UNAT-1132, to argue that a management evaluation request should be filed on weekend or beforehand if a deadline falls on weekend. However, having reviewed the cited judgments, the Tribunal finds that the Appeals Tribunal did not make such pronouncement in these two judgments.

28. In *Ten Have*, the Dispute Tribunal found the application receivable when the deadline for request for management evaluation fell on Saturday and the request for application was filed on the following working day (Monday). The Dispute Tribunal then ruled in favor of the Applicant on the merits. On appeal, the Appeals Tribunal vacated Judgment No. UNDT/2015/007 on the merits, not on the issue of receivability. Therefore, the Respondent's submission that *Ten Have* supports his argument is without merit.

29. In *Mazen Qassem*, the application was found not receivable as time-barred since a request for management evaluation was filed between 199 and 214 calendar days after the deadline. There was no discussion concerning the deadline that fell on weekend. Therefore, this judgment is also not supportive of the Respondent's receivability claim.

30. Accordingly, the Tribunal finds that the application is receivable.

*Prima facie unlawfulness*

31. In considering whether to suspend an administrative decision pending management evaluation, the Dispute Tribunal's Statute does not require the Tribunal to make a definitive finding that the decision is unlawful. The test is not particularly onerous since all the Tribunal is to do at this stage is to decide as to whether it appears that, if not rebutted, the claim will stand proven on a *prima facie* basis. Any such determination is not binding should the Applicant subsequently file an application on the merits and the matter would proceed to a full judicial review. It is merely an indication as to what appears to be the case at this preliminary stage.

32. Under the applicable legal framework, a fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member's request or the Tribunal's order, and, as the Appeals Tribunal held in *Islam* 2011-UNAT-115, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts".

33. The Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Matadi et al.* 2015-UNAT-592), and the validity of the exercise of discretionary authority is judged under the legal principles as set forth in *Sanwidi* 2010-UNAT-084, at para. 40:

... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

34. In this regard, "There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality,

procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

35. The Appeals Tribunal further held that “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (see *Sanwidi*, para. 42).

36. In this case, upon the Applicant’s request, a reason for a non-renewal decision was provided. In particular, the Administration explained to the Applicant that her contract was not renewed based on the ongoing conflict of interest with her role as President of UNPAD, which is in conflict with her position as a conflict resolution officer of UNOMS.

37. The Applicant argues that conflict of interest does not exist. She argues that under the applicable norms, a conflict of interest assumes engagement in an outside activity which jeopardizes a staff member’s ability to serve in their role. She avers that her involvement in UNPAD is not an outside activity or a private interest and therefore there is no conflict of interest with her role in UNOMS. Even if there was conflict, such conflict was mitigated through the assignment of new roles by the Deputy to the Applicant on 15 April 2021 and therefore alleged conflict of interest could not form a lawful basis of the contested decision.

38. Staff regulation 1.2(m) provides that “[a] conflict of interest occurs when, by act or omission, a staff member’s personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant” and “[w]hen an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization”.



39. Before taking the contested decision, the Ombudsman sought the Ethics Office's advice on this matter, and the Director of the Ethics Office provided advice that the Applicant's involvement in UNPAD constituted a conflict of interest, stating that "the official duty of a UNOMS staff member to remain independent and neutral would conflict with leading and representing UNPAD and its staff special interest".

40. The Applicant obviously does not agree with this analysis concerning her conflict of interest under the applicable norms, but the Tribunal finds that the Ombudsman reasonably relied on the Ethics Office's advice to conclude that a conflict of interest existed in the Applicant's case.

41. Regarding the Applicant's argument that such conflict was mitigated through the assignment of new tasks and thus could not form a lawful basis of the contested decision, the Tribunal notes that the Deputy's email of 15 April 2021 does not provide that new work assignment and reporting line discussed in the email are measures to mitigate a conflict of interest.

42. Further, as staff regulation 1.2(m) provides, it is the head of office who is tasked to mitigate and resolve such conflict in favour of the interests of the Organization. In the Ombudsman's email of 23 April 2021, the Ombudsman informed the Applicant that the Deputy went on sick leave for the remainder of his tenure with UNOMS and clarified that the Applicant's workplan and work assignments would not be finalized until it was clarified whether she was still serving as President of UNPAD.

43. Given the Ethics Office's advice, the Tribunal considers that the Ombudsman's decision that a conflict of interest can be mitigated only by the Applicant's resignation as President of UNPAD is reasonable. In light of the Applicant's refusal to resign from presidency of UNPAD, the Tribunal considers, on a *prima facie* basis, that the contested decision was a lawful exercise of the Administration's discretion.

44. The Applicant further argues that the impugned decision is a veiled disciplinary measure imposed on the Applicant for her refusal to resign from presidency of UNPAD. She argues that the Ombudsman essentially considered that the Applicant

had engaged in misconduct and sanctioned her without due process, and separating her in this manner without undertaking an investigation or disciplinary process violates her due process rights guaranteed under ST/AI/2017/1 (Unsatisfactory Conduct, Investigations and Disciplinary process).

45. The Tribunal notes that the proffered reason for the contested decision does not state that the Ombudsman considered that the Applicant had engaged in misconduct. Rather, the Ombudsman considered that due to conflict of interest, she was not able to assign the Applicant any work related to conflict resolution, the role for which she was recruited. Therefore, the Tribunal rejects the Applicant's argument that the contested decision is a veiled disciplinary measure in violation of her due process rights under ST/AI/2017/1.

46. The Applicant finally argues that the contested decision amounts to harassment and abuse of authority by the Ombudsman. The Tribunal further rejects this argument based on the above finding that the contested decision was a lawful exercise of the Administration's discretion.

47. Considering all the information before the Tribunal, the Tribunal finds, on a *prima facie* basis, that the proffered reason for the non-renewal is supported by evidence and that the Applicant has not established that the contested administrative decision was *prima facie* unlawful.

#### *Urgency*

48. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an 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 (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the

applicant (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

49. The Applicant submits that the case is particularly urgent since her contract is valid only until 31 August 2021. The Applicant submits that the parties had been engaged in mediation on the issue of the improper written reprimand, which was linked to the contested decision. She submits that she only realized that the contested decision would likely be implemented despite the ongoing mediation efforts when she received the separation notice on 16 August 2021.

50. In response, the Respondent submits that the prerequisite of urgency is not met since the Applicant was notified of the contested decision on 16 June 2021 and yet she waited until 20 August 2021, that is over two months, before filing the present application for suspension of action. The Respondent avers that the parties never engaged in formal mediation and the Ombudsman only had a few discussions with an external mediator with a view to explore if the matter would be suitable for mediation.

51. The Tribunal notes that the Applicant was indeed notified of the contested decision on 16 June 2021 and yet she only filed the present application on 20 August 2021. While the Applicant argues that she delayed the filing of the present application for suspension of action due to the ongoing mediation efforts, she did not present any evidence of the ongoing mediation efforts and the Respondent denies that the parties engaged in formal mediation.

52. Therefore, the Tribunal finds that the Applicant failed to come to the Tribunal at the first available opportunity and any urgency in this case was self-created.

53. Accordingly, the Tribunal finds that the requirement of particular urgency is not satisfied.

*Irreparable harm*

54. As the Applicant has not satisfied the requirement of *prima facie* unlawfulness and urgency, the application fails and there is no need to examine the condition of irreparable harm.

*Request for anonymity*

55. The Applicant requests anonymity on the grounds that the nature of the issues in dispute could cause the damage to the reputation and credibility of UNOMS and she does not want any unwarranted attention to this matter due to the fact that she serves as President of UNPAD.

56. The Respondent opposes to the Applicant's request for anonymity arguing that this case concerns a routine administrative employment dispute and there is no reason for anonymity.

57. Article 11.6 of the Dispute Tribunal's Statute and art. 26 of its Rules of Procedure provide that the judgments of the Dispute Tribunal shall protect personal data and shall be made available by the Registry of the Dispute Tribunal. The Appeals Tribunal has held in this regard that "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability" (*Lee* 2014-UNAT-481). The Appeals Tribunal's practice establishes that the principle of publicity can only be departed from where the applicant shows "greater need than any other litigant for confidentiality" (*Pirnea* 2014-UNAT-456) and that it is for the party making the claim of confidentiality to establish the grounds upon which the claim is based (*Bertucci* 2011-UNAT-121).

58. As stated above, anonymity is granted to protect personal data or when the applicant shows greater need for confidentiality. In this case, the case does not concern any personal data of the Applicant that requires protection.

59. Further, in this case, the fact that the Applicant served as President of UNPAD as well as a Conflict Resolution Officer of UNOMS are the crux of the case and therefore the case cannot be properly analyzed without providing such details.

60. In light of the above, the Applicant's request for anonymity is rejected.

IT IS ORDERED THAT:

61. In light of the above, the Tribunal orders that:

- a. The application for suspension of action is rejected; and
- b. The Applicant's request for anonymity is rejected.

*(Signed)*

Judge Joelle Adda

Dated this 26<sup>th</sup> day of August 2021