
Case No.: UNDT/GVA/2017/115

Order No.: 259 (GVA/2017)

Date: 22 December 2017

UNITED NATIONS DISPUTE TRIBUNAL

Original: English



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

LOOSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Bettina Gerber, UNOG
Cornelius Fischer, UNOG

Introduction

1. By application filed on 15 December 2017, the Applicant requests suspension of action, pending management evaluation, of the decision not to renew her fixed-term contract beyond 31 December 2017.
2. The application was served to the Respondent who filed his reply on 19 December 2017.

Facts

3. The Applicant joined the Organization on 5 May 2011 as a Political Affairs Officer (P-3), Implementation Support Unit (“ISU”), Convention on Certain Conventional Weapons (“CCW”), United Nations Office of Disarmament Affairs (“UNODA”), under an initial fixed-term appointment (“FTA”) of two years.
4. The CCW High Contracting Parties established the ISU in 2009 to facilitate CCW’s work by mandating it with preparing and organizing its regular meetings. The ISU is staffed with two posts, one of which the Applicant currently encumbers, exclusively funded from extra-budgetary resources derived from State Parties’ contributions. Both staff members of ISU, CCW, are administered by the Human Resources Management Service (“HRMS”), United Nations Office at Geneva (“UNOG”).
5. On 17 January 2017, as a result of continuing financial difficulties, further evidenced by the United Nations’ implementation of a new Enterprise Resource Planning System, namely UMOJA, the then Acting Director, Conference on Disarmament and Conference Support Branch, UNODA, the Chief, HRMS, UNOG, and the Chief, Financial Resources Management Service (“FRMS”), UNOG, held a meeting on “the implications of the financial challenges facing the Convention on Biological Weapons (BWC) and the Convention on Certain Conventional Weapons (CCW) and for their respective Implementation Support Units (ISU) hosted by the Geneva Branch of the Office for Disarmament

Affairs”. Staff members from CCW and BWC ISUs, the Applicant included, attended this meeting.

6. From the “Note to the File” of said meeting it transpires that, during it, the Chief, FRMS, UNOG, explained that, according to the Organization’s rules, financial contributions for CCW, which are extra-budgetary in nature, have to be received and recorded before any activity can proceed.

7. He also shared with the meeting participants that CCW started the year with a deficit of USD137,000 and that, should CCW’s financial situation not improve, “current fund levels [would] not allow the continuation of contracts beyond their current expiration date”. Finally, he also explained that “States that overpaid in 2016 in order to allow the organization of meetings may use their outstanding credit in 2017, which would exacerbate [the] shortfall in 2017 since this would result in less fresh cash coming into the trust funds”.

8. At the same meeting, the Chief, HRMS, UNOG, stated, *inter alia*, that although fixed-term appointments carry no expectancy of renewal, the Administration would inform affected staff as soon as possible by giving them one-month notice. She also explained that applications to job openings from affected staff could be marked as “from a downsizing entity” to allow their priority consideration if recommended for a position.

9. On 15 September 2017, UNODA management, joined by the Chief, HRMS, UNOG, met with the ISU, CCW staff. The Applicant was then verbally informed that her FTA would not be renewed for lack of funding.

10. By memorandum dated 19 September 2017, the Applicant received written notice of the non-renewal of her FTA beyond 31 December 2017 for “lack of funding”. She was also advised that OHRM had authorized to “mark [her] position as affected by downsizing in Inspira”.

11. In his 24 October 2017 report pursuant to Decision 6 of the Fifth Review Conference of the High Contracting Parties to the CCW (CCW/MSP/2017/2), the Chair, CCW, conveyed to the CCW High Contracting Parties that:

4. The [financial] crisis [continued] in 2017 with significant arrears from previous years remaining unpaid. Those [High Contracting Parties] who paid in 2016 are enjoying credits because of the cost-saving measures adopted then but, perversely, this is further reducing the cash flow. CCW meetings scheduled for April then August have had to be cancelled. The staff of the Implementation Support Unit, which constitute the Convention's Secretariat, had to initially have their contracts extended a month at a time.

12. As an annex to his above-mentioned report, the Chair, CCW, submitted a "set of draft financial rules for the meetings held under the Convention and its annexed protocols".

13. On 17 November 2017, the Applicant requested management evaluation of the decision not to renew her FTA beyond 31 December 2017.

Parties' contentions

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

Prima facie unlawfulness

a. The 19 September 2017 non-renewal decision is not supported by the facts, is superfluous and premature, is *ultra vires* and cannot be justified by any operational purpose;

b. On the first ground, it should be noted that, on 22 September 2017, one CCW State Party, namely Brazil, paid its arrears. This resulted, *inter alia*, in a surplus to secure payment of salaries in 2018 for the staff at ISU, CCW. Furthermore, in November 2017, the CCW High Contracting Parties approved the 2018 budgets for Amended Protocol II and Protocol V, which provide for a P-3 post within ISU;

c. On the second ground, fixed-term appointments do not require non-renewal notices, much less months prior to the expiration of a contract. Also, a determination on the availability of funds to finance the Applicant's post can only be made at the end of the financial year, following a "comprehensive assessment of member states' contributions and outstanding

arrears” and not on an evaluation of the financial situation made on 17 January 2017. Finally, the Administration did not wait for States Parties to make an informed decision but immediately initiated a non-renewal and abolition process without properly considering a possible financial recovery at the end of the Applicant’s contract. Nor did it deem it appropriate to reconsider its decision following Brazil’s payment of its assessed contributions and the subsequent allocation of funds for the Applicant’s post in the 2018 budgets for Protocols II and V;

d. On the third ground, since the Applicant’s post was created by decision of CCW State Parties, it may not be abolished without seeking their approval. OHRM’s authorization alone is insufficient;

e. On the fourth ground, a non-renewal letter was also sent to the other ISU staff member, namely the ISU Head, who holds a continuing appointment. Therefore, the “non-renewal letters, taken collectively, demonstrate the Administration’s unequivocal intention to abolish the ISU. To do so without seeking the approval of CCW [State] parties is not only unlawful *per se*, but cannot be justified by any operational purpose”. Furthermore, “abolishing the ISU, particularly without providing [State] Parties sufficient information or a chance to deliberate on the matter during the upcoming annual conference is irreconcilable with the overarching policy objectives [that] justified [its] creation”;

Urgency

f. If the contested decision is implemented, the Applicant will be separated from service on 31 December 2017;

Irreparable damage

g. Recalling *Kasmani* UNDT/2009/017 and *Diop* UNDT/2012/029, the non-renewal of the Applicant’s FTA would cause, in addition to economic harm, a loss of career prospects, of self-esteem and an unquantifiable potential harm to her reputation. Such a harm is irreparable and cannot be compensated by the award of damages.

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

Prima facie unlawfulness

a. The contested decision is not *prima facie* unlawful. Not only did the Applicant's appointment not carry any expectancy of renewal but, also, on the one hand, she was provided with a valid reason for the non-renewal of her FTA and, on the other hand, the budgetary issues ultimately behind it were shared with her long before the contested decision was taken. Furthermore, the Administration informed her of the non-renewal more than 30 days before the expiration of her contract;

b. Lack of funding was a "valid and objective reason" for the non-renewal of the Applicant's FTA. In this connection, "an administrative decision has to be assessed considering the situation at the moment of the decision", and the contested decision was taken based on available information at the time and on a prognosis of CCW's financial situation;

c. Furthermore, CCW approves estimated costs for the following year, which serve as basis for billing State Parties for their contribution. In other words, financial commitments can only be entered into once funds have been received, and the previous practice of proceeding with activities under an expectancy of incoming funds is no longer possible under UMOJA;

d. Lack of funding remains a "valid and objective reason" in support of the contested decision even after receipt of arrears from a State Party. A "surplus [at] the end of ... 2017 due to cost-saving measures and payment of arrears [is] not suitable" to fund the Applicant's post in 2018 and, on 25 November 2017, CCW High Contracting Parties "decided to hold meetings of the CCW over the payment of staff costs". The contested decision would have been rescinded "if the financial situation of the CCW had changed to a degree, which would [have allowed] for both the continued staffing of the ISU and [ensuring] meetings and activities of the CCW in 2018";

e. The contested decision was not premature but the result of a process that began in January 2017, and during which the Applicant was kept informed of CCW's financial situation and of its possible implications on her FTA;

f. The contested decision is not *ultra vires* because the Administration "acted within the realm of its authority as authorized by the CCW" to handle staffing and personnel issues concerning staff members—whose contracts are governed by the United Nations Staff Rules and Regulations—especially if insufficient funds do not permit the continuation of a contract;

g. There has been no decision to abolish the ISU, which would require the express consent of the CCW. The Administration is merely assisting the CCW in the implementation of its decision to prioritize the holding of its meetings and to operate without the ISU staff support, "relying on ... support from its [C]hair and ... services provided, among others, by the Department of Conference Management, UNOG";

Urgency

h. The urgency requirement has not been met because the Applicant filed a request for management evaluation nearly two-months after having been informed of the contested decision. As per the UN Dispute Tribunal previous holdings, "an applicant [seeking] the Tribunal's assistance on an urgent basis ... must come to [it] at the first available opportunity";

Irreparable damage

i. There is no irreparable harm. The Tribunal has held that "mere economic loss only is not enough to satisfy the requirement of irreparable harm". The Applicant did not provide supporting evidence for her allegation that the contested decision would cause, in addition to economic harm, loss of career prospects, self-esteem and an unquantifiable harm to her reputation.

Consideration

16. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of a management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. These three conditions are cumulative and must, thus, all be met to grant an application for suspension of action (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

Prima facie unlawfulness

17. The Tribunal recalls that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

18. In the case at hand, the examination of this condition hinges on asserting whether:

- a. the reason provided in support of the contested decision, namely a lack of funding, can be reasonably questioned;
- b. the contested decision was premature;
- c. the contested decision was *ultra vires*; and
- d. the contested decision was not supported by any operational purpose.

19. On the first issue, the Tribunal notes that, as pointed out by the Respondent, its examination must focus on the elements available at the time of the contested decision, namely on 19 September 2017.

20. Upon consideration of the parties' submissions and the available evidence, the Tribunal is satisfied that on 19 September 2017, the financial situation of CCW justified the Administration's decision not to renew the Applicant's FTA beyond 31 December 2017 for lack of funding.

21. Indeed, as early as January 2017, discussions took place to share with all concerned the potential impact of a CCW financial shortfall. Also, during 2017, CCW meetings had to be, first, postponed and, subsequently, cancelled. Concerns about CCW's financial situation were also voiced with/by the CCW Chair and conveyed to the High Contracting Parties.

22. The Tribunal notes that the above conclusion would be no different even if it were to entertain developments that occurred after the date of the contested decision. The Respondent has conceded that, indeed, a CCW State Party (Brazil) paid its arrears shortly after notification of the contested decision to the Applicant. However, he does not share the Applicant's inference that the surplus generated, *inter alia*, by this payment suffices to fund the ISU post she encumbers. The Tribunal considers that this conclusion is reasonable and supported by the record. Moreover, the Respondent advanced that had his prognosis of CCW's financial situation showed that there were enough funds to finance the Applicant's post, the contested decision would have been rescinded. While this is beyond the scope of the present application, the Tribunal has no reason to doubt this statement.

23. The Tribunal also recalls that the Chief, FRMS, UNOG, consistently explained at different times to CCW staff and High Contracting Parties how critical CCW's financial situation was, and why a surplus could not be considered as an inflow of funds sufficient to cover the cost of meetings and of staffing. This is also reflected in the 24 October 2017 report of the CCW Chair (see para. 11 above).

24. While reiterating that the legality of the contested decision has to be assessed on the basis of the elements available at the time it was taken, the Tribunal is satisfied that the above record shows that the Administration acted in good faith, before and after September 2017, and that the decision was indeed justified by lack of financial resources to fund the Applicant's contract in 2018.

25. On the second issue, and in the same line of consideration, the Tribunal is of the view that the contested decision was not premature. By keeping the Applicant, as well as other affected staff members, abreast of CCW's/BWC's financial situation, and giving advance notice to the Applicant about the non-renewal of her contract, the Administration has acted fairly and lawfully. Contrary to the assertions of the Applicant, an assessment of CCW's financial situation in order to determine whether her appointment would be extended beyond 31 December 2017 was not made in January 2017. A general assessment of the financial situation of CCW merely started at that time and the situation was monitored since then. A final assessment and prognosis, including on the available funding for the Applicant's contract in 2018, was made in September 2017, at which time the contested decision was taken and notified to the Applicant.

26. On the third and fourth issues, the Tribunal finds that the contested decision was not *ultra vires*. The Respondent conceded that a decision to abolish ISU posts requires the approval of CCW's High Contracting Parties, which has not been sought in the case at hand. The Tribunal notes, however, that the contested decision not to renew the Applicant's FTA is not based on the abolition of the post she encumbers. Rather, it is based on the unavailability of funds to cover the cost of a post exclusively financed by extra-budgetary resources, which cannot be equated to an abolition of post as could be entertained in cases involving the non-renewal of appointments linked to regular budget posts.

27. Therefore, the approval of the CCW's High Contracting Parties was not required in the case at hand, and the Tribunal is satisfied that the available evidence clearly supports the conclusion of a lack of funds to cover both CCW meetings and staffing needs. It follows that the decision not to extend the Applicant's appointment was based on operational reasons and justified by the lack of available funding.

28. As a result of the above, the Tribunal finds that the requirement of prima facie unlawfulness is not met in the present case. As the first condition to grant an application for suspension of action is not met, the Tribunal does not need to address the two other cumulative conditions.

Conclusion

29. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 22nd day of December 2017

Entered in the Register on this 22nd day of December 2017

(Signed)

René M. Vargas M., Registrar, Geneva