



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

CARTIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION PENDING THE
CONSIDERATION OF AN
APPLICATION FOR SUSPENSION OF
ACTION UNDER ART. 2.2 OF THE
DISPUTE TRIBUNAL'S STATUTE**

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Thomas Jacob, UNDP

Introduction

1. On 4 October 2018, at 2:27 p.m., the Applicant, a Local Security Adviser, at the G-6 level, on a fixed-term appointment with the United Nations Development Programme (“UNDP”), Costa Rica, filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure, requesting that the decision not to renew his fixed-term appointment beyond 6 October 2018, which was notified to him on 11 September 2018 and scheduled to be implemented on 6 October 2018, be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant art. 19 and 36 of the Dispute Tribunal’s Rules of Procedure requesting the Tribunal to suspend the implementation of the contested decision pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute.

2. On 4 October 2018, the case was assigned to the undersigned Judge.

3. On 4 October 2017, at 3:46 p.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 4:00 p.m. on 8 October 2018.

4. The Tribunal further informed the parties that, due to the urgency of the matter (the deadline for the implementation of the contested decision being 6 October 2018) and pursuant to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the Applicant’s motion on suspension pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute was granted and that a reasoned written Order is to follow, which is the present Order.

Background

5. In the application for suspension of action, the Applicant submitted as follows regarding the facts to be relied on (references to annexes omitted):

... The Applicant joined UNDP Office in Costa Rica as a part-time consultant in 2004.

... On 23 September 2014, the Applicant was selected for a fixed-term position as Local Security Adviser (LSA), G-6, UNDP, Costa Rica. His appointment has since been renewed on an annual basis.

... In April 2018, the Applicant was informed that his position will be converted into a consultancy (individual contract) and that he will be required to go through a competitive selection process. The terms of reference for the consultancy were posted on the UNDP website.

... On 11 September 2018, the Applicant was informed that no suitable candidate had been identified for the consultancy and that it will be readvertised in due course.

... On the same day, the Applicant was informed that his fixed-term appointment would not be extended beyond 6 October 2018. The non-renewal notice does not identify any specific reason for the decision but merely refers to staff Rule 4.13 regarding non-expectancy of renewal.

... On 2 and 3 October 2018, the Applicant wrote to his supervisor and UNDP/HR seeking further clarity regarding the reasons for non-renewal. No further details were provided and the same generic explanation regarding was given.

Applicant's submissions

6. The Applicant's principal contentions are as follows:

Prima facie unlawfulness

Prohibition on the use of consultants to perform staff functions

- a. UNDP Individual Contract Policy makes it clear that "the Individual ontract modality is used for the procurement of services of an individual to perform time-bound and non-staff tasks aimed at delivering clear and quantifiable outputs which must be clearly identified in the contract and directly linked to payment";

- b. The Administration may therefore only resort to the Individual Contract modality in cases where the assignment in question “requires the performance of duties that are not normally performed by a UNDP staff”. Moreover, prior to resorting to this modality, it must be established that “the services cannot be provided by utilizing the existing staff resources due to lack of internal specialized knowledge and/or expertise”;
- c. As to the nature of the assignment, it must be “results-oriented” and may “be completed, either within or outside of the UNDP premises, within a defined period of time”. In any event, “the payments are directly linked to deliverables/outputs”;
- d. UNDP Policy includes detailed provisions guarding against the “incorrect use of the Individual Contract”;
- e. The contested decision is based on a clear violation of the Policy on Individual Contract. The same functions performed by the Applicant since 2014 were converted and readvertised as a consultancy. The terms of reference for the new consultancy, now classified as ICS-6, bear the same job title. The duties and responsibilities, the minimum requirements and qualifications remain unchanged;
- f. Moreover, contrary to the requirements set out in the Policy, the consultancy announcement does not identify any specific assignment for which an Individual Contract may be issued. Rather, the nature of the duties are similar to those performed by staff members. First, the Applicant has effectively been performing the advertised functions as a staff member since 2014. Second, the very existence of the Applicant’s fixed-term position is a clear indication that “the work [can] be sourced within the internal capacity of UNDP”. Third, the terms of reference for the consultancy do not include any quantifiable

and measurable “outputs” as required by the Policy. An output is “one-time and definitive – once it is delivered/completed, there is no foreseen further need for such work”. Instead, the terms of reference include “routine” staff tasks that are not restricted to any particular time or event. Fourth, an Individual Contract does not require daily presence in the office while the advertised vacancy appears to require daily presence, not least to ensure adequate reporting of “security incidents affecting UN staff, offices and assets”;

Failure to provide specific reasons for non-renewal

- g. While the Applicant recognizes that a fixed-term appointment does not carry any expectancy of renewal, it is well established that a non-renewal decision can be challenged on the grounds that it is arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The staff member alleging that the decision was based on improper motives carries the burden of proof with respect to these allegations (*Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503);
- h. It is well established that staff members have a right to challenge a non-renewal decision on the grounds that it is unlawful or vitiated by improper motives. This contractual right would be meaningless if the Administration were not required to disclose all relevant facts and circumstances to the Applicant. For staff members to be in a position to identify the concrete aspects of non-compliance with the terms of appointment, the Administration must communicate specific and detailed reasons. A generic reference to staff rule 4.13 regarding the non-expectancy of renewal of fixed-term appointments is clearly insufficient;

- i. The consequences of a non-renewal decision on the Applicant's career and the related financial and personal implications are so significant as to require formal communication of the detailed reasons for non-renewal. The International Labour Organization's Administrative Tribunal recently ruled in Judgment No. 3838(2017) that:

It is a general principle of international civil service law that there must be a valid reason for the non-renewal of any contract, and the official must be informed of that reason explicitly in a decision against which she or he can appeal. This principle also applies to the non-renewal of a fixed-term appointment which, under the staff regulations or by agreement between the parties, ends automatically upon its expiry. This approach is justified by the fact that international organisations frequently resort to fixed-term contracts and the fact that the legitimate career expectations of those entering the service of these organisations would otherwise be denied. It follows that an official who holds a fixed-term contract that automatically ends upon expiry must be informed of the true reasons for not renewing that contract and must receive reasonable notice thereof [...].

- j. In the instant case, the Administration failed to adequately respond to the Applicant's repeated queries regarding his contractual situation. Notwithstanding his requests for further clarity regarding the reasons for the non-renewal of his appointment he did not receive any specific feedback;
- k. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal held that:

32. An administrative decision not to renew an FTA must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment.

33. Like any other administrative decision, a decision not to renew an FTA can be challenged as the

Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

[...]

37. It follows from the above that the Administration cannot legally refuse to state the reasons for a decision that creates adverse effects on the staff member, such as a decision not to renew an FTA, where the staff member requests it or, a fortiori, the Tribunal orders it.

38. Whereas, normally, a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives, the refusal to disclose the reasons for the contested decision shifts the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives.

39. However, if the Administration does not comply with a Tribunal's order to disclose the reasons for an administrative decision as such, the Tribunal cannot automatically conclude that the decision was arbitrary. But it is entitled to draw an adverse inference from the refusal.

1. The Appeals Tribunal jurisprudence makes it clear that the failure to provide adequate feedback in situations where the staff member so requests shifts the burden of proof to the Administration and allows the Tribunal to draw an adverse inference from such failure. It is therefore for the Administration to establish that the refusal to provide specific feedback was justified and that the contested decision is lawful;

Absence of proper reasons for not extending the Applicant's appointment

- m. The Applicant further notes that there is no proper reason for not extending the Applicant's contract. The conversion of the Applicant's post into a consultancy is a clear indication that there is sufficient funding for the post and that the Applicant's functions are still

required. There is therefore no proper reasons for not renewing the Applicant's appointment;

Ulterior motives

- n. The Applicant's submits that the non-renewal decision is vitiated by ulterior motives, particularly in view of the following: a. the failure to disclose the specific reasons for non-renewal; b. the attempt to circumvent relevant rules by converting a staff position into a consultancy; and c. the non-selection of the Applicant for the advertised consultancy, notwithstanding the fact that he already performed the same functions and the fact that no other candidate was deemed suitable for the consultancy. The Applicant's performance has always been satisfactory. In these circumstances, the non-selection demonstrates the Administration's intent to specifically exclude the Applicant;

Urgency

- o. If the decision is implemented, the Applicant will separate from the Organization on 6 October 2018. The Applicant regrets that his Application could not be filed earlier;
- p. The Applicant urges the Tribunal to consider his personal circumstances when assessing this prong. First, the Applicant is only able to communicate in Spanish which creates significant impediments, not least the possibility to obtain timely information. In this regard, the Applicant notes that the translation of OAJ's website into other UN official languages is yet to be completed. Second, the Applicant is a local staff member based in Costa Rica. Communication with OSLA counsel has proved difficult and not always feasible due to the difference in time zones. Third, notwithstanding this delay the

matter would have still been urgent. The Applicant was only notified of the decision on 11 September 2018. This is significantly less than the 45-day normally required for the MEU to issue its decision;

Request for suspension pending proceedings on suspension of action

- q. The circumstances of the case are of such urgency that the Applicant respectfully requests an order be made as in *Villamorán* 2011-UNAT-160 such that implementation of the decision be suspended pending a decision on this application for suspension of action;
- r. It should be noted that without such order the contested decisions will be implemented on 6 October 2018;

Irreparable damage

- a. The Applicant submits that the non-renewal of his fixed-term appointment would cause him more than mere economic harm, namely loss of career prospects, self-esteem and an unquantifiable potential harm to his reputation. Such a harm is irreparable and cannot simply be compensated by the award of damages (*Kasmani* UNDT/2009/017; *Diop* UNDT/2012/029).

Consideration

7. Articles 13.3, 19 and 36.1 of the Dispute Tribunal's Rules of Procedure state as follows:

Article 13 Suspension of action during a management evaluation

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

...

Article 19 Case management

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

Article 36 Procedural matters not covered in the rules of procedure

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

8. In *Villamorán* Order No. 171 (NY/2011) dated 7 July 2011, the Dispute Tribunal suspended the implementation of two decisions pending its consideration of an application for suspension of action concerning those decisions filed before the Tribunal on 5 July 2011. The Tribunal stated:

7. In view of the fact that 7 July 2011 is the last working day before the Applicant's separation, I directed at the hearing, before 5 p.m. (close of business in New York), that the implementation of the contested decisions be suspended until further order.

8. Having considered the facts before it and the submissions made by both parties, the Tribunal determines that, in view of the complex issues in the present case, further submissions are required for the fair and expeditious disposal of the application and to do justice to the parties.

9. The Tribunal further considers that, given that the contested administrative decisions are due to be implemented today, it is appropriate, in the special circumstances of the present case, to order the suspension of the implementation of the contested decisions pending the final determination of the present application for suspension of action.

9. The Tribunal ordered that the implementation of the contested decisions be suspended until 5:00 p.m. on 12 July 2011, the deadline for the Tribunal to consider and decide on the application for suspension of action in accordance with art. 13 of the Rules of Procedure. The Respondent appealed the order.

10. In *Villamorán* 2011-UNAT-160, the Appeals Tribunal stated:

36. The Appeals Tribunal has consistently emphasized that appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence [footnote omitted].

...

43. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

44. The Secretary-General contends that “[t]he last minute submission of an application for a suspension of action does not provide a legally sustainable basis to grant such a suspension, as was the approach of the Dispute Tribunal in the present case”. While we agree that the UNDT should have explicitly addressed this matter, a review of the record reveals that the decision to impose a break in service following the expiration of Villamoran’s fixed-term appointment was notified to her only on 23 June 2011. She made her request for management evaluation the same day and filed her request for suspension one week later, on 1 July 2011. The UNDT Registry informed her that she had used the wrong form and Villamoran refiled her submission, using the correct form, on 5 July 2011, two days prior to the date the decision would be implemented. In light of the foregoing, we do not find that the urgency was self-created.

...

46. It follows from the above that the UNDT’s decision to order a preliminary suspension of five days pending its consideration of the suspension request under Article 13 of the UNDT Rules was properly based on Articles 19 and 36 of the UNDT Rules. We find that the UNDT did not exceed its jurisdiction in rendering the impugned Order. The interlocutory appeal is therefore not receivable.

11. The Tribunal is of the view that, in accordance with the Appeals Tribunal’s jurisprudence in *Villamoran* 2011-UNAT-160, the Dispute Tribunal has

the competence to order a preliminary suspension of a contested administrative decision for up to five days pending its consideration of a suspension request under art. 13 of the Rules of Procedure in cases where the following cumulative conditions are fulfilled:

- a. The implementation of the contested administrative decision is imminent, that is, it will take place before the five days provided for under art. 13 of the Rules of Procedure have elapsed;
- b. The contested administrative decision is subject to the management evaluation review, which is ongoing; and
- c. The contested administration decision subject to a preliminary suspension is the same administrative decision that is the subject of the application for suspension of action pending management evaluation.

12. Regarding the first condition, the Tribunal notes that, in accordance with art. 13 of the Rules of Procedure, the Tribunal has five working days from the date of service of the application for suspension of action on the Respondent, namely on 11 October 2018, to consider the request for suspension of action pending management evaluation of the contested decision. In the present case, the effective date of the Applicant's separation is Saturday, 6 October 2018, before the deadline provided for the Tribunal to consider the application for suspension of action and therefore the implementation is imminent.

13. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 4 October 2018, which is still ongoing.

14. In the form for the Applicant's request for management evaluation, he identified the decision subject to management evaluation as "[t]he decision not to renew the Applicant's fixed-term appointment beyond 6 October 2018". In the application for suspension of action, the Applicant requested the suspension of the

implementation pending management evaluation of the same decision: the decision not to renew his fixed term contract beyond 6 October 2018.

15. It results that the contested administration decision subject to management evaluation is the same administrative decision as the one that is subject of the present application for suspension of action.

16. The Applicant indicated that, if the implementation of contested administrative decision is not be suspended, his contract is to be terminated and he is to be separated from the Organization on Saturday, 6 October 2018 and the urgency appears not to be self-created. The Tribunal underlines that this matter is not at the merits stage.

17. The second and third conditions are therefore satisfied.

18. Pursuant to arts. 19 and 36.1 of the Dispute Tribunal's Rules of Procedure,

IT IS ORDERED THAT:

19. Without prejudice to the Tribunal's determination of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute, the implementation of the decision not to renew the Applicant's fixed-term appointment beyond 6 October 2018 shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

(Signed)

Judge Alessandra Greceanu

Dated this 5th day of October 2018