



Before: Judge Vinod Boolell

Registrar: Jean-Pelé Fomété

MOHAMMED RIZWAN KASMANI

v.

SECRETARY-GENERAL OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION FILED ON
15 OCTOBER 2009
and
DECISION ON APPLICATION FOR INTERPRETATION FILED ON 30 OCTOBER
2009**

JUDGMENT UNDT/2009/63

Counsel for the Applicant:

**Katya Melluish
Bart Willemsen**

Counsel for the Respondent:

**Steven Dietrich
Joerg Weich**

APPEARANCES/LEGAL REPRESENTATION

1. The Applicant was represented in the present application by Ms. Katya Melliush and Mr Bart Willemsen of the Office of Staff Legal Assistance in Nairobi and New York, respectively.
2. The Respondent was represented by Mr. Joerg Weich of the Human Resources Management Services at the United Nations Office in Nairobi (UNON).

CASE BACKGROUND and SUMMARY OF FACTS

3. The Applicant joined the United Nations on 4 June 2009, as a Procurement Assistant within the Procurement, Travel and Shipping Section (PTSS) in UNON at the G-4 level on a 3-month fixed-term appointment against a General Temporary Assistance (GTA) post.
4. On 25 August 2009, the Chief Purchasing Unit of the PTSS and supervisor of the Applicant wrote to the Chief of PTSS/DAS asking if she could update him on the status of the Appellant's contract.
5. On the same day, the Applicant received an email from the Human Resources Management Services (HRMS) of UNON, informing him that his clearance had been sent to the clearing units on the same day and that he was required to take several steps in order to proceed with his separation from service.
6. On 28 August 2009, the Applicant sent his request for management evaluation to the Secretary-General, on "the decision dated 25 August 2009 not to extend his fixed-term appointment beyond 3 September 2009".
7. On 28 August 2009, the Applicant moved the Tribunal to suspend the implementation of the administrative decision of the Chief PTSS, Ms Diana Mills-Ariyee, not to renew his

fixed-term appointment beyond 3 September 2009. The renewal of his contract was recommended by Mr. Felix Nartey, who recruited the Applicant, as Officer-in-Charge (OIC) of the Section at the time, and is also his immediate supervisor.

8. On 2 September 2009, UNDT Nairobi heard the matter. The Applicant and a witness called on his behalf (Mr. Felix Nartey) were heard and cross-examined by the Respondent.

9. On 3 September 2009, the Tribunal granted the Applicant's motion and suspended the decision not to renew the Applicant. The Tribunal held that the applicant had made out a case of *prima facie* unlawfulness, urgency and irreparable damage required by Article 13 of the Rules of Procedure and Evidence.

10. On 9 October 2009, the Applicant received an interoffice memorandum from the Under-Secretary-General for Management advising the Applicant that the Department of Management has decided to compensate the Applicant in the amount of three months' net base salary.

11. On 15 of October 2009, the Applicant was notified by UNON that he will be separated from the United Nations as of close of business on 16 October 2009. It is worth noting that 16 October 2009 was a Friday, so that close of business in UNON was at 2 pm.

12. On the morning of 16 October 2009, the Registry received the instant application for suspension of action in respect of the administrative decision which was to be effected that afternoon. The Applicant's motion for suspension of action was also copied to the Respondent.

13. On 16 October 2009, the Tribunal granted the applicant's motion and suspended the decision of 15 October 2009 until further notice. The exigencies of the circumstances at the time made it necessary for the Tribunal to rule on the Applicant's motion before hearing the Respondent. At the time, the Respondent was still being represented by Counsel from the

Administrative Law Unit in New York. Few hours separated the receipt and registration of the application by the Tribunal and the end of the Applicant's contract.

14. On 21 October 2009, the Respondent filed its Reply to the instant Motion.

15. On 30 October 2009, the Registry received an Application for Interpretation from the Applicant. The Respondent's Reply to this Application was filed on 2 November 2009.

16. This Decision is rendered following careful consideration of the written submissions of both the Applicant and the Respondent in respect of both the suspension of action and the interpretation.

SUMMARY OF SUBMISSIONS

17. Citing the Tribunal's Order of 11 September 2009, the Applicant contends that the circumstance which led the court to find that there were "countervailing circumstances" in the non renewal of the Applicant's contract then, have not changed.

18. While the Applicant concedes that a fixed term appointment does not carry an expectancy of renewal or of conversion to any other type of appointment, a staff member on such an appointment is nevertheless entitled to expect that decisions taken in respect of his or her appointment are made fairly and in good faith, with due consideration of the principles of due process. The exercise of discretion by the Administration is not unfettered and can be subject to scrutiny for bias, prejudice, impropriety or lack of due process.

19. The Applicant avers that the decision to separate the Applicant on 16 October 2009, on 24 hours notice, when his contract was in fact extended to 3 November 2009, on the basis of the Tribunal's previous Order and the operational demands of the section, cannot be seen as a decision taken in good faith.

20. The workload within the section, the substantial overtime payments made, seen together with the Applicant's performance in the workplace all lead to the suggestion that the only reasons for his separation in such a manner, are those factors which the court has previously found to be extraneous and countervailing. Not only has no reason been offered by the Respondent for the Impugned Decision, the Applicant also points out that he remains the "only staff member in the Procurement Section not receiving overtime payments."

21. On the element of *prima facie* unlawfulness, the Applicant contends that the requirements of due process and the rule of law cannot be reconciled with the suggestion that the Administration may decide not to renew a staff member with no explanation whatsoever. Not requiring an explanation from the Administration would effectively allow the latter to make an unlawful decision while being careful that the basis for the decision is not apparent.

22. On the issue of irreparable damage, the Applicant submits that being separated on the basis of an unlawful decision will cause the Applicant harm that cannot be compensated monetarily. The Applicant will be jobless having been made "collateral damage" in the personal conflict between his first and second supervisors. Absent a showing of poor performance and bearing in mind the operational demands of the Section, the separation of the Applicant will leave a blemish on the Applicant's performance record which is unjust.

23. The Applicant maintains that the Respondent should not be allowed to use damages as a means for compensating a staff member for a decision which is clearly "arbitrary, capricious" and unlawful. To allow a Respondent to intentionally proceed with an unlawful decision on the basis that such a decision can be remedied monetarily, is not a position which can withstand "legal scrutiny nor the test of fairness and good faiths."

24. In reply to the Applicant's motion, the Respondent deals extensively with the purpose of the process of management evaluation and the import of Management's decision in respect of the Applicant.

25. The Respondent contends that the decision to separate the Applicant on 16 October 2009 was proper given that the Administration had found the Applicant's qualifications wanting in respect of the grade of the post, and had decided to compensate him for the promise made to him by Mr Nartey, and which promise he "detrimentally relied" upon.

26. The Respondent further submits that the decision of the Administration is "proper because the period for the Applicant's management evaluation has ended." According to the Respondent, there is no legal basis for the Applicant to suggest that the workload of the Section warrant a renewal of his appointment, particularly in light of the Secretary-General's finding that the Applicant does not meet the requirements of the post.

27. The Respondent avers that the Tribunal has no jurisdiction over the instant application as the Applicant has not filed his request for management evaluation in respect of the Administration's decision of 15 October 2009.

APPLICATION FOR INTERPRETATION

28. The Applicant requested that the Tribunal clarify whether the Order of 16 October subsists beyond 3 November 2009, which is the date on which the Applicant's current contract is set to expire.

29. The Respondent submits that the Applicant should not be allowed to use a temporary relief measure to have his current appointment extended beyond 3 November 2009. The Respondent contends that the Tribunal would be acting *ultra vires* if an extension of contract beyond the "stipulated contractual terms and ensuing management evaluation" is made possible by a suspension of action order.

APPLICABLE LAW

The Effect of a Management Evaluation on Suspension of Action and Subsequent Proceedings

30. Article 13(1) of the Rules provides that for an application for suspension of action to succeed, an Applicant must show that the:

- (a) decision appears prima facie to be unlawful;
- (b) is of particular urgency; and
- © that implementation of the decision will cause irreparable damage.

31. In addition to the three elements above, the contested administrative decision must not have been implemented at the time of the application of suspension.

32. Rule 11.4 (a) of the Staff Rules provides that

“A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier”

33. Given the crux of the Respondent’s submission in respect of the duration of a suspension Order, the Tribunal reiterates, as it held in *Tadonki v Secretary General of the United Nations* that the length of a suspension is to be “decided by the Tribunal depending on the nature and circumstances of the case.”¹

34. The Applicant in the instant case sought and obtained an *interim* order of suspension on 16 October 2009.

35. Article 13 of the Rules of Procedure read together with Article 11.4 of the Staff Rules clearly indicate that a determination by management following formal evaluation by the Management Evaluation Unit does not debar an Applicant from filing a substantive application with the Tribunal. The instant Applicant did this on 29 October 2009.

¹ See *In The Matter Of Interpretation On An Order Issued On 1 September 2009*, Judgment UNDT/2009/058 at para. 9.6.

36. The Tribunal will now move to consider whether the case at hand merits further suspension based on the written submissions of the Parties.

***Prima Facie* Unlawfulness of the Decision**

37. The Tribunal notes that the Applicant has filed a request for management evaluation in respect of the contested decision, which request is still pending.

38. With respect to the first element of the test which needs to be met, the Tribunal notes that the first management evaluation decision dealt with the issue of the promise made to the Applicant and granted him compensation of three months salary *in lieu* of further performance of his contract of employment. That decision itself as mentioned earlier does not prevent the Applicant from filing an appeal in respect of the same subject matter that is the non renewal of his contract.

39. The Tribunal notes that the Applicant's contentions in respect of this element are largely similar to that of his previous application for suspension of action.

40. Whereas Management has considered the issue of Mr Nartey's express promise to the Applicant and decided that monetary compensation was sufficient remedy, the Tribunal recalls that it found the "circumstances surrounding the non-renewal [then] to be curious." In so finding, the Tribunal relied on testimony pertaining to the workload in the Section as well the substantial overtime payments being made to meet that workload. The Tribunal was also presented with testimony as to satisfactory performance of the Applicant.

41. In addition to the fact that the circumstances in PTSS appear unchanged, the Tribunal is troubled by the Applicant's contention that the latter remains the only staff member within the Section to have been denied his overtime payments.

42. In its Order of 11 September 2009, the Tribunal found that as none of the facts adduced by the Applicant was challenged by the Respondent, the Court was entitled to accept

the Applicant's case as stated. In the present application, the Tribunal notes that the Applicant's contentions in respect of the *prima facie* unlawfulness surrounding the Impugned Decision have not been addressed by the Respondent. There is nothing in the Respondent's Reply which rebuts the Applicant's contention that the latter is in fact being victimised for a personal conflict between his first and second reporting supervisors. Given the Tribunal's previous finding on this element, and given the Applicant's submissions that the circumstances surrounding this non-renewal are much the same as those previously adduced, the Tribunal is perplexed by the Respondent's silence on the issues raised.

43. The Tribunal accordingly finds this element of the test to have been satisfied.

The Urgency Element

44. On the question of urgency, the Applicant was informed on 15 October 2009 that he was to be separated from service at "close of business" the next day. His appointment was set to formally expire on 3 November 2009. With the issue of urgency patently clear, it is obvious that this element is amply met.

Irreparable damage

45. In the case of *Tadonki v. The Secretary General of the United Nations* the Tribunal observed that:

a well-established principle is that where damages can adequately compensate an Applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is

circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.²

46. In dealing with the Applicant's first motion for suspension of action, the Tribunal observed that

The Applicant was on a temporary fixed-term appointment of three months. The evidence given by the Applicant, and unrebutted by the Respondent, shows that he left a well-paid job and accepted that appointment. Of course he knew that there was a risk that his appointment would automatically end. He also was aware that a fixed term appointment does not give rise to an expectation of renewal or recruitment. However, a staff member under a fixed-term appointment is as any other staff member is also entitled to be treated fairly according to due process and rule of law principles. It is not open to dispute that a fixed term appointment dies a natural death at the end of the period of the contract. But there may be circumstances that where the non renewal may be due to factors that adversely affect a staff member to such an extent that monetary compensation is no answer. Whilst management has discretion not to renew, that discretion must be used judiciously and in good faith. That discretion cannot be considered to be an unfettered one in the sense that it would always dispense the decision maker with the need to carefully weigh in the balance the consequences of the decision. The myth of unfettered discretion is inimical to the rule of law principles.³

47. The Tribunal endorses the above reasoning for the purposes of the present application.

48. The reasons advanced by the Respondent in respect of the present non-renewal and the manner in which it was to be effected is most unsatisfactory and seem patently averse to the core values of the United Nations. Notwithstanding his performance within the Section, the applicant has been treated in a most humiliating manner and made to feel that he is not by any standard fit to continue in the service of the Organization. To say that damages alone can compensate the applicant who has been so victimised, would in effect be tantamount to allowing such behaviour to stand subject only to a decision on pecuniary compensation which will also be decided upon by the Respondent. Damages cannot compensate the applicant for the loss of the chance provoked in an unfair treatment meted out to him and which would be the basis of the non renewal of his contract.

² *Tadonki v. Secretary-General of the United Nations*, 1 September 2009, Case No. UNDT/NBI/2009/36.

³ *Kasmani v Secretary General of the United Nations*, 11 September 2009, Case No. UNDT/NBI/2009/67

49. The International Labour Organisation Administrative Tribunal (ILOAT) made the following observations in relation to fixed-term appointments:

Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an organisation that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly.⁴

50. The facts show that the Applicant was recruited at a time when there was a backlog in the section of the organisation where he was assigned. Many of his colleagues are allowed to work overtime but he is not allowed to do so. He has not been remunerated even in respect of overtime he has performed.

[A] fixed-term appointment will automatically cease to have effect upon expiry. But according to the case law a contract of service, even if for a fixed term, creates in law a relationship of employment; that relationship exists in an administrative context and is subject to a set of staff regulations; and there may therefore be requirements or consequences that go beyond the bounds of the contract as such. So the Tribunal may consider ordering the reinstatement even of someone who held a fixed-term appointment provided that the circumstances are exceptional. It may do so when an organisation makes a practice of granting fixed-term appointments for the performance of continuing administrative duties.⁵

51. Applying that principle the Tribunal takes the view that by resorting to the services of the Applicant albeit on a temporary fixed term appointment, the Respondent was only applying a practice that is inherent in the work of the Organisation and created consequences that went beyond the bounds of the fixed-term appointment.

⁴ *Peres de Castillo*, ILOAT Judgement 675, 1985.

⁵ *Amira*, ILOAT Judgment No. 1317, 1994.

52. The Tribunal again notes that there is nothing in the Respondent's submissions which challenge the Applicant's case in respect of the irreparable harm which he will suffer should the decision be implemented.

CONCLUSION

Having considered the facts presented in the submissions of both parties to the Tribunal and having regard also to the fact that management evaluation is still pending on the contested decision, pursuant to Article 13.1 of the Rules of Procedure of the United Nations Dispute Tribunal,

GRANTS the Applicant's Motion for Suspension of Action;

ORDERS the suspension of the Respondent's decision not to renew the Applicant's appointment until the substantive application is heard and determined; and

ORDERS that the Respondent file his Reply to the substantive application by 30 November 2009; and

DECIDES that the Application for Interpretation is moot.

Done in Nairobi, this 3rd day of November 2009

(signed)
Judge Vinod Boolell

Entered in the Register on 3 November 2009

(signed)
Jean-Pelé Fomété, Registrar

