



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/098
Order No.: 153 (NBI/2018)
Date: 28 September 2018
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

EL-AWAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Mohamed Abdou, OSLA

Counsel for the Respondent:
Saidou N'Dow, UN-Habitat

Introduction

1. The Applicant is a Senior Coordination Officer, P-5, with the Water and Sanitation Unit of the United Nations Settlements Programme (UN-Habitat) in Nairobi, Kenya.

2. On 20 September 2018, he filed an application to the United Nations Dispute Tribunal (UNDT) in Nairobi seeking suspension, pending management evaluation, of the decision not to renew his fixed-term appointment beyond 30 September 2018.

3. The Respondent filed a reply on 25 September 2018.

Facts

4. The Applicant joined UN-Habitat in May 2008 as a Programme Manager for the Global Water Operators Partnerships Alliance (GWOPA). In 2013, the GWOPA Secretariat was relocated to Barcelona, Spain. The Applicant continued to serve as the Programme Manager in Barcelona.

5. By memoranda dated 16 December 2014, the then Executive Director of UN-Habitat (ED/UN-Habitat), Dr. Joan Clos, granted the Applicant delegation of authority to: recruit consultants and individual contractors; sign UN-Habitat agreements and legal instruments; and approve procurement contracts to a limit of USD10,000 annually.

6. By memorandum dated 16 February 2017, Mr. Raf Tuts, the Director of UN-Habitat's Programme Division informed the Applicant that Management had decided to conduct a review of GWOPA with a view to strengthening it and the Secretariat in Barcelona. Considering the review, Mr. Tuts further informed the Applicant that he was not allowed to initiate any new procurements, hire consultants/individual contractors, enter any financial commitments or travel without his authorization.

7. By memorandum also dated 16 February 2017, Dr. Clos temporarily withdrew all the delegations of authority he had granted to the Applicant in December 2014.

8. According to the Applicant, the memoranda from Dr. Clos and Mr. Tuts followed directives from senior managers in October 2016 that he not engage with the Spanish Government on the renewal of GWOPA's hosting arrangement in Barcelona. The Applicant was also informed that GWOPA would transition to a "new business model" and that part of its funding in the 2017 budget would be reallocated to UN-Habitat's core funding.

9. On 24 February 2017, the Applicant requested management evaluation of the decision to strip him of his functions as reflected in the two memoranda dated 16 February 2018. He also filed an application for suspension of action with the UNDT on the same day. The UNDT in Geneva (UNDT GVA), by its Order No. 59 (GVA/2017) dated 28 February 2017, granted the application for suspension of action pending management evaluation.

10. By memorandum dated 9 March 2017, the Applicant's direct supervisor, Mr. Andre Dzikus, Coordinator of the Urban Basic Services Branch, UN-Habitat, requested his cooperation in establishing a working arrangement and set out the framework for his supervision.

11. On 20 March 2017, the Applicant filed an application with UNDT GVA requesting execution of Order No. 59. The Tribunal concluded in its Judgment No. UNDT/2017/023 dated 4 April 2017 that the UNDT Statute and Rules of Procedure do not grant it jurisdiction to enforce the execution of an order for suspension of action. Accordingly, the Tribunal rejected the application for execution.

12. By memorandum dated 19 April 2017, the Under-Secretary-General for Management informed the Applicant of the Secretary-General's decision to accept the recommendation of the Management Evaluation Unit to uphold the contested decision of 16 February 2017.

13. On 1 June 2017, the Applicant filed a substantive application with UNDT GVA seeking rescission of the decision to strip him of his functions.

14. On 29 June 2017, the Applicant filed a complaint against Dr. Clos under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). Dr. Clos responded to the complaint on 14 December 2017. According to the Respondent, the Applicant was informed on 19 April 2018 that an investigation into his complaint was not warranted and the matter was closed.

15. By memorandum dated 31 August 2017, Dr. Clos informed the Applicant of his decision to laterally reassign him to the Urban Basics Services Branch (UBSB) in Nairobi effective 1 October 2017. By email dated 6 September 2017, the Applicant accepted his reassignment but sought postponement of the start date until the end of December 2017. Dr. Clos rejected the Applicant's request.

16. Between 26 and 30 September 2017, the Applicant and Mr. Dzikus communicated regarding his travel to Nairobi. The Applicant reported for work in Nairobi on 5 November 2017.

17. By email dated 30 July 2018, Mr. Dzikus informed the Applicant that the water and sanitation project portfolio in UBSB was in a dire financial situation and that if this did not improve, his contract might not be renewed.

18. By memorandum dated 31 August 2018, Mr. Tuts informed the Applicant of the non-renewal of his fixed-term appointment beyond its expiry on 30 September 2018 due to "budgetary constraints facing the Water and Sanitation Unit [...]". Mr. Tuts further informed the Applicant that: "This decision is due to the fact that there are no resources available to fund your position even after efforts have been made to look for funding and suitable positions funded by other projects".

Considerations

19. Applications for suspension of action are governed by article 2 of the UNDT Statute and article 13 of the Tribunal's Rules of Procedure. Article 13.1 provides as follows:

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.

20. The current application must therefore be reviewed against the three essential prerequisites to a suspension of action application as outlined in article 2.2 of the Statute and article 13.1 of the Rules of Procedure.

a) Prima facie unlawfulness

Submissions

21. The Applicant's case is that the contested decision is unlawful for the following reasons:

- a. The UNDT previously found in its Order No. 059 that UN-Habitat's decision to strip him of his core duties as Head of GWOPA was unlawful.
- b. The decision to strip him of his core duties without a proper basis was retaliatory, tainted by improper motives and indicative of constructive dismissal.
- c. The decision to laterally reassign him was taken without any prior consultation and the justification provided is vague and generic
- d. UN-Habitat's subsequent actions against him demonstrate the existence of improper motives with respect to the decision not to renew his appointment.

e. He was not informed of his specific job description by Mr. Dzikus until 17 August 2018. Since his transfer, he has worked only with the general terms contained in the transfer decision without any specific directions or guidance. He finds himself isolated and practically unable to perform any meaningful work in Nairobi.

f. Prior to his reassignment to Nairobi, his supervisor, Mr. Dzikus, sent him emails, some of which were inappropriate in tone, directing him to report immediately although there did not appear to be any emergency or work necessity.

g. Since the reassignment, he has been tasked with two assignments, neither of which appear to be consistent with the transfer memorandum. Additionally, he has been stripped of all supervisory functions.

h. He doubts that funding is the reason for the contested decision because he has never been informed of the source of funding for his post in Nairobi and he is the only staff member in UBSB who has been notified of the non-renewal of his position.

22. The Respondent's case is that the contested decision is lawful for the following reasons.

a. The contested decision was motivated by a genuine lack of funding for the Applicant's post and a proper exercise of discretion in the face of the precarious financial situation of UN-Habitat.

b. The findings in Order No. 059 are not relevant to the current case because the Order decided on the decision to withdraw his delegation of authority whereas the decision in the current case relates to the non-extension of his contract due to the absence of funding. The Applicant must prove that the non-renewal decision is tainted by improper motive and not rely solely on a previous finding of *prima facie* unlawfulness in a separate matter.

- c. The decision to reassign the Applicant to Nairobi was based on a genuine need for a senior water and sanitation program officer to engage in rigorous resource mobilization to shore up the Water and Sanitation portfolio of UBSB that had been declining for the last seven years. The Applicant did not contest this decision.
- d. The Applicant's assertion that his assignments are inconsistent with the transfer memorandum is not supported by the evidence. UN-Habitat is exclusively funded from earmarked project funds which must be raised by program staff such as the Applicant. Thus, resource mobilization was an integral part of his work.
- e. The GWOPA projects that covered the salary of the Applicant would have run out of money by the first quarter of 2018. The Applicant was the only GWOPA staff member who had a contract extension beyond three months. He was given a twelve-month contract extension.
- f. Due to the financial situation of the Water and Sanitation portfolio, all project funded staff on fixed-term contracts in both professional and general service categories have been issued one, three or six-month contract extensions. Additionally, in instances where projects have ended due to the absence of funding, UBSB has not extended contracts.
- g. The Applicant was repeatedly informed of his specific job description. The reassignment letter from Dr. Clos contained detailed and a clear description of his duties. Additionally, his supervisor, Mr. Dzikus, met with him in November 2017 to develop a work plan with milestones. Subsequently, the Applicant ignored Mr. Dzikus' April 2018 emails for him to complete his 2018/2019 work plan. Mr. Dzikus sent him a further reminder on 14 August 2018. The Applicant then requested a meeting which Mr. Dzikus agreed to do during his annual leave.
- h. It was extremely difficult to supervise the Applicant and to achieve the objectives of his yearly work plan when he was away from Nairobi for 162 out of the 251 working days per year. He was on sick leave for 117

days, annual leave for 21 days, official travel for 5 days and remained in Barcelona for 19 days at the start of his reassignment.

i. The Applicant's request to be allowed to travel to a Global Water Partnership Conference was approved. He was informed that future travel requests could be approved if he has a concrete communication from a donor that he wishes to meet to potentially support a project.

j. The Applicant has been fully engaged in the work of UBSB. Mr. Dzikus gave him several assignments that required interaction and engagement with UBSB colleagues. Additionally, he has been included in all communications sent to UBSB staff.

k. Upon his arrival in Nairobi, Mr. Dzikus informed him that the funding for his post was being charged to the UBSB Central Project which had an allocation to cover his salary for 12 months. Mr. Dzikus further informed him that any extensions beyond this would be contingent on the availability of funds.

l. Mr. Dzikus' emails to the Applicant were informed by the exigencies of service rather than to put unjustified pressure on the Applicant.

Considerations

23. The crux of this application is the administrative decision to not extend the Applicant's contract beyond 30 September 2018 whose implementation the Applicant requests the Tribunal to suspend pending management evaluation.

24. The Tribunal has read the arguments and submissions of both parties.

25. In summary, the Applicant's case is that the non-renewal decision stems from improper motives and is retaliatory. He alleges that the withdrawal of the functions formerly delegated to him in 2014 meant that he was stripped of his core duties without proper basis. He also alleges that his lateral transfer/reassignment to Nairobi was done without consultation and that he was asked to report

immediately although there was no emergency or work necessity. He alleges further that lack of funding may not be the ground upon which his contract was not being renewed and that he was the only staff member in USBS who is not being renewed.

26. The Respondent on his part denies any improper motivation. It was his case that the Applicant's non-renewal was motivated by a genuine lack of funding for his post and was a proper exercise of discretion. He pled that the Applicant's reassignment to Nairobi was based on the need for a senior water and sanitation officer to engage in rigorous resource mobilization for the water and sanitation portfolio of UBSB which had been declining for many years.

27. The Respondent continued that resource mobilization was integral to the Applicant's work and that although other staff members in the GWOPA project were issued short term contract extensions, the Applicant was given a one year contract. Also, in the past year, the Applicant did not complete his work plan and was mostly out of his duty station of Nairobi for a total of 162 out of 257 working days and 117 of these were sick leave days.

28. Having reviewed the case made out for both parties, the Tribunal is mindful of the fact that the Applicant joined UN-Habitat in 2008 as a Program Manager for GWOPA, a project based in Nairobi and funded by donors.

29. GWOPA was relocated to Barcelona in 2013 and in December 2014, the then UN-Habitat Executive Director delegated authority to the Applicant to recruit consultants and individual contractors and to sign certain agreements and legal instruments and undertake procurement.

30. Following certain developments, the delegated authority granted the Applicant was withdrawn in February 2017. The Tribunal is not persuaded by the Applicant's case that the withdrawal of this delegated authority meant that he was stripped of his core duties. Similarly, the Applicant's claim that he was reassigned to Nairobi without consultation and was instructed to report immediately even though there was no emergency or work necessity is irresponsible especially since there is evidence that he did not report to Nairobi as instructed for a whole month.

31. Despite claiming that the motivation for the non-renewal of his contract was retaliatory and improper and may not be due to lack of funding, the Applicant did not show that funding for his position is available.

32. The Tribunal finds that the Applicant has made no *prima facie* worthy of the relief he seeks.

b) Particular urgency

34. The Applicant submits that the matter is urgent because he will be separated from service on 30 September 2018 and that the urgency is not self-created.

35. The Respondent submits that the urgency is self-created since the Applicant received the contested decision on 31 August 2018 but waited until 20 September 2018 to file an application for suspension of action. Thus, the Applicant has failed to meet the requisite threshold for urgency.

36. The Tribunal finds the urgency to be self-inflicted and of no consequence in this matter.

37. In view of its fore-going findings, the Tribunal will not address the third limb of irreparable damage.

Conclusion

38. This Application for suspension of action pending management evaluation is accordingly refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of September 2018

Entered in the Register on this 28th day of September 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi