



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/015

Order No.: 046 (NBI/2020)

Date: 25 February 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AFIFI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Shubha Naik, OSLA

Counsel for the Respondent:
Melissa Bullen, UN Women

Introduction

1. On 18 February 2020, the Applicant, a staff member at the NO-B/7 level with the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), in Cairo, Egypt, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the decision not to extend his contract beyond 27 February 2020 (the contested decision).

2. The Respondent filed a reply to the application on 21 February 2020.

Factual background

3. The Applicant has been employed with UN Women since 28 October 2018. He reports to Ragwa Marzouk, Regional Finance Specialist and to Yerkezhan Tabyldiyeva, Regional Operations Manager (ROM), Regional Office for Arab States (ROAS).

4. On 20 April 2019, the Applicant wrote an email to Ms. Marzouk copying Ms. Tabyldiyeva and others in which he complained of "professional harassment".¹ He specifically raised the following concerns:

- a. that, as per his terms of reference (TORs), he was supposed to report directly to the ROM and to the Chief of Accounts and not to Ms. Marzouk;
- b. even though his TORs do not include any bookkeeping or voucher creation duties, Ms. Marzouk insisted on assigning him such tasks whilst assigning tasks with "higher seniority" to colleagues on a lower grade; and
- c. he was yet to complete his induction training since Ms. Marzouk had failed to assist him in his daily tasks or to facilitate the training.

¹ Application, annex 2, page 8.

5. On 22 April 2019, the Applicant informed Janneke Kukler, Deputy Regional Director for Arab States (DRD) of his harassment allegations and sought a meeting with her to discuss them.²

6. The DRD convened a meeting with the Applicant in May 2019 following which she sent the Applicant an email summarizing what had been agreed upon:

a. the Applicant's reporting line would remain to the ROM as per his TORs.

b. he would continue to work in a team together with the Finance Specialist to ensure that the work assigned to him was implemented;

c. she would talk to Ms. Tabyldiyeva and Ms. Marzouk to address some of the concerns that the Applicant highlighted at their meeting;

d. she would call a three-way meeting to ensure that they all agreed on the office priorities moving forward in a professional work environment;

e. she would talk to Ms. Tabyldiyeva to ensure that his performance management document (PMD) for 2019 was completed; and

f. that the Applicant should let her and Bibi Mugure, Human Resources Business Partner (HR/BP) know if there are any issues that remained unaddressed after the above actions had been taken.

7. On 12 June 2019, another meeting was held between the Applicant, the Head of Finance and the MADAD Program Manager, to explain the Applicant's role to him, in addition to the Organization's expectations from him. On 16 June 2019, another meeting was held between the Applicant and the ROM to assign tasks to him under the Regional Office as had been requested by the Applicant.³

² Ibid., page 6.

³ Reply, para. 8 and annexes 2 and 3 of the reply.

8. On 26 August 2019, the Applicant filed a complaint of misconduct against Ms. Tabyldiyeva and Ms. Marzouk with the Office of Internal Oversight Services (OIOS).⁴ On 18 September and 27 December 2019, the allegations were found to be without merit by both OIOS and the Ethics Office.⁵

9. On 7 October 2019, proposed revisions to the Applicant's TORs, which had been discussed with the Applicant by a HR specialist in the preceding months, were explained to him. These revisions reflected that the Applicant, as Finance Analyst, would work 50% for the MADAD project and 50% for core-funded activities with the Regional Office. The revisions to the TORs clarified that in accordance with UN Women standards, the position would be supervised by the Finance Specialist.⁶

10. On 9 October 2019, a copy of the revised TORs was sent to the Applicant and also he was notified by the Operations Manager, that his contract would be extended to the end of February 2020, and that further renewal would be based on availability of funds.⁷

11. Between 9 and 2 November 2019, the Applicant engaged in an exchange of emails with his supervisors and the HR/BP regarding his TORs.⁸ The Applicant was opposed to reporting directly to Ms. Marzouk.

12. On 13 November 2019, the Applicant filed another complaint with OIOS and also sought protection from retaliation.⁹ OIOS advised the Applicant to submit his complaint of retaliation directly to the United Nations Ethics Office which he did.

13. On 31 December 2019, the Applicant sought management evaluation of the decisions to revise his TORs including his reporting lines. The Applicant also made reference to his complaints to OIOS.¹⁰

⁴ Application, annex 3.

⁵ Application, annexes 5 and 6.

⁶ Reply, para 11 and annex 7 of the reply.

⁷ Reply, para. 12 and annex 4 of the application.

⁸ Application, annex 4.

⁹ Application, annex 6, page 18.

14. On 16 January 2020, the Applicant was served notice of the non-renewal of his appointment beyond 27 February 2020 on the grounds of “significant cuts to the Regional Office’s resources”.¹¹

15. On 13 February 2020, he requested management evaluation of the decision not to extend his appointment.¹²

Applicant’s submissions

Unlawfulness

16. The contested decision was unlawful because it was predicated on improper motives. The UN Women Administration wanted to get rid of him and the reasoning of lack of funds has been used as a pretext to not extend his appointment.

17. The UN Women Administration wishes to remove him from the Organisation as evidenced by the fact that his TORs are similar to that of the Finance Specialist leading to conflict at work. Due to the ROM’s affinity to the Finance Specialist, they tried to coerce him to only work on the MADAD project so that the Finance Specialist could become his supervisor contrary to the job’s vacancy announcement. When he was due for extension of his appointment, the ROM made acceptance of the changed TORs and changed reporting lines a condition precedent for the extension.

18. The countervailing and surrounding circumstances lead to a reasonable conclusion that his appointment was not extended due to improper motives and for improper purpose.

- a. From the very first day that he reported to work, he was coerced by the ROM and the Finance Specialist to accept changed TORs to carry out work only on the MADAD project and to report to the Finance Specialist yet his job

¹⁰ Application, annex 7.

¹¹ Application, annex 9.

¹² Application, annex 10.

vacancy's TORs clearly stated that he was required to work 50% on MADAD project and 50% on regional office tasks. When he started objecting to the reporting lines and the changed TORs, the UN Women Administration tried to bulldoze him into accepting the changed TORs and reporting lines by keeping his extension of contract on hold in the month of October 2019. He was not permitted to enter the office. It was only upon the intervention from United Nations Headquarters was he allowed to enter the office and his appointment extended.

b. During this time, he submitted complaints to OIOS and to the Ethics Office. Considering his repeated objection to the untoward activities of the ROM and the Finance Specialist, the UN Women Administration sought to punish him for exercising his right to seek recourse for his grievance. The non-extension of his appointment on the grounds of cuts in regional funds is merely a façade. His position is funded 50% from the MADAD funds (European Union funds) and 50% from the UN Women ROAS funds. The UN Women Administration states that the regional funds are lacking and has made no reference to the MADAD funds.

c. When his appointment was last extended in October 2019, he was informed that the end date of his appointment was 27 February 20 considering that the MADAD program ended on 31 January 20. The MADAD programme is scheduled to end on 31 July 2020 yet the UN Women Administration has denied him a contract extension. The UN Women Administration chose to extend his appointment to 27 February 2020 taking into consideration the MADAD programme end date but now states the reasons for non-extension as cuts in the regional office resources. The conflicting reasoning is proof that the real reason for non-extension of his appointment is not on the grounds claimed in the notice of non-extension.

d. The UN Women Administration claims that there have been significant cuts in the regional resources yet ROAS management sent a

Finance Specialist for a mission in Tunisia from September 2019 to present. To replace that Finance Specialist, four finance colleagues were brought in from Headquarters and other offices and ROAS paid their salaries, daily subsistence allowance (DSA), terminals expenses and tickets costs.

e. The MADAD project manager requested the DRD to renew the Applicant's appointment until the end of the MADAD project because she needs his services. She had proposed that the 50% not funded by the European Union would be financed by Iraq under condition that the Applicant stayed until the end of MADAD project in Jordan. Her request was rejected without proper consideration.

Urgency

19. There is urgency in this case because the decision has been made and a termination letter issued to the Applicant. This means that his separation from service is imminent. Once such separation is effected on 27 February 2020, the decision will be deemed to have been implemented and incapable of suspension.

20. If a suspension of action is not granted, the UN Women Administration will implement the impugned decision to separate him from service without proper justification, thereby significantly undermining his career prospects with the United Nations.

21. This is not a case of self- created urgency because, upon receipt of the non-extension letter, he promptly consulted OSLA, filed a management evaluation request on 13 February 2020 and sought suspension of action pursuant to staff rule 11.3(b)(ii).

Irreparable harm

22. If the impugned decision is implemented, he will suffer harm due to the loss of employment and in relation to his career prospects. Such harm cannot be

compensated for by a monetary award.

23. Deprivation of employment for no apparent reason constitutes irreparable moral harm that cannot be compensated by an award of damages.

24. His contractual uncertainty has caused him enormous stress. The stress will continue through any continuing uncertainty until final adjudication. Such harm cannot be quantified. Likewise, damage to his reputation and family stress occasioned by a loss of income are irreparable.

Respondent's submissions

Unlawfulness

25. The Applicant's appointment was not renewed due to a lack of funding. The Applicant's post was comprised of functions relating to the MADAD project (50%) and those relating to supporting regional offices (50%). The funding for his position was divided accordingly - 50% of the funding came from the core/regular resources, and the remaining 50% came from project funding.

26. While 50% funding was available under the MADAD Project for the period of no-cost extension, February-July 2020, the Regional Office had insufficient core resources to cover the other 50%. This is because the core budget for the Regional Office was reduced by 62% from USD1,674,154 in 2019 to USD631,674 in 2020. In essence, the Regional Offices have been required to perform similar functions with fewer resources. In good faith, in order to provide the Applicant with employment for as long as was possible, the office extended the Applicant's contract for a three-month period using funds left over from the core budget for 2019 and extra-budgetary funds.

27. Consequently, while the 'regional support' functions will still be necessary going forward, there is no additional funding to perform them. Those functions have been redistributed amongst the Finance Specialist and the Programme Manager. As to

the MADAD Project, which comprised 50% of the Applicant's position, the project will remain in operation until 31 July 2020 with no additional funding but it is in the process of winding down. Activities have been reduced to a basic minimum during the period of an unfunded extension to 31 July 2020. The Regional Office agreed to provide the services required for the project on a cost recovery basis: existing staff will deliver financial services to MADAD and invoice MADAD for the actual time spent as opposed to having a staff member dedicated to the project. This ensures the most efficient use of remaining funds.

28. The Applicant has not met the burden of proving that the Organization operated with extraneous motives in not renewing his appointment. Neither OIOS, nor the Ethics Office found any merit in the Applicant's allegations of harassment against him.

29. The Applicant asserts that he was being coerced to perform functions only related to MADAD. This is incorrect. He was being given the opportunity to perform both sets of functions, those relating to MADAD and also to supporting the Regional Offices and constant efforts were being made for him to undertake additional tasks relating to the Regional Office.

30. The Applicant cites changes to the TORs as evidence of bad faith. The sole change of significance to the Applicant's TORs was the change of reporting line to the Finance Specialist. It was only this change to which the Applicant objected. He accepted the substance of the Revised TORs. The changes did not have any significant impact on the Applicant's duties or conditions of employment, nor does he allege this to be the case.

31. The change in reporting line to the Finance Specialist was necessary because it is the usual reporting line in roles of this nature within UN Women. The original reporting line to the ROM was in error. It was thus within the proper discretionary authority for the Executive Director, and the Applicant's supervisors to organize work and reporting lines appropriately, as reflected in the Revised TORs. There is no

evidence that the decision was taken for unlawful reasons.

32. The changes of the Applicant's TORs had no bearing on the contested decision, nor has the Applicant demonstrated any link between the changes and the contested decision.

33. The Applicant's contentions that the deployment of a Finance Associate demonstrates that the Organization has the necessary funds to extend his appointment is misconceived. The Regional Office has as its key mandate to support offices in the region with establishing and managing their operations. In this regard, support, through the deployment of a Finance Associate, was sent from the ROAS to the Tunisia/Libya office. This mission was fully funded by the Tunisia Office. In the same vein, a Procurement Associate from the Palestine Office also joined the Tunisia team for procurement support.

34. The three finance colleagues referred to by the Applicant from United Nations Headquarters were partially bridging the functional gap created by the deployment of the above-mentioned Finance Associate on mission to Tunisia. Salaries for these colleagues were paid by Headquarters Finance and DSA shared by ROAS/Tunisia. Given the continued needs in the Tunisia/Libya office a fourth colleague joined ROAS with a joint financial arrangement between the Tunisia office and the Regional Office. This arrangement will end on 31 March 2020, when it is expected that the Tunisia office will have hired a full-time staff member. These are matters within the discretion of the Organization depending on what it considers to be its operational needs and does not render the decision not to renew the Applicant's appointment unlawful.

35. As regards the Applicant's suggestion that there has been a request by the MADAD Project Manager to extend the Applicant's contract under Iraq Country Office funds, the Respondent, has at no point received from the MADAD Project Manager any such request for a contract extension. On the contrary, the Project Manager requested financial oversight coverage support from the Regional Office for

the period up to 31 July 2020 which resulted in the arrangement to cover the functions during the no-cost extension period until 31 July 2020, as described above. The Regional Office will not be seeking to recruit another individual to perform the functions that remain as part of the winding down of the MADAD project and the services provided by the Finance Unit will be charged to the MADAD project through the cost recovery policy.

Urgency

36. In October 2019, at the time of the last renewal of his appointment, the Applicant was informed of the funding issues surrounding his position. Therefore, the Applicant was already on advance notice that there may be some difficulty surrounding the renewal of his appointment at that point.

37. Moreover, as accepted by the Applicant, he was formally notified of the non-renewal of his appointment on 17 January 2020, over 30 days prior to the expiry of his appointment. He filed the present application on 18 February 2020, over one month later, and just nine days prior to the expiry of his appointment. Therefore, any urgency is self-created by the Applicant. Having waited over three weeks before taking any type of action, the Applicant did not comply with his obligation to seek relief from the Dispute Tribunal without delay.

Irreparable harm

38. The Applicant has not met the above burden of demonstrating that he would be occasioned irreparable harm. He fails to specify how his career prospects will be affected by the decision not to renew his appointment. This is not a case of long service to the Organization whereby the Applicant's career prospects may be more precarious upon non-renewal of a long-standing appointment.

39. The Applicant was recruited on an appointment, 50% of which was project based, relatively recently in October 2018. Further, there is no evidence, nor does the Applicant claim that his reputation will suffer any damage as a result of the non-

renewal of his appointment. If, which is denied, any damage results, it is not irreparable harm. It can be more than adequately compensated by a monetary award.

Considerations

40. The Dispute Tribunal has competence to hear and pass judgment on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the of the management evaluation, the implementation of a contested administrative decision that is subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage.¹³

41. The Dispute Tribunal is satisfied in this application that it has competence to adjudicate on this application for suspension of action because the Applicant has shown that he has filed a request for management evaluation of the contested decision.

Further the Dispute Tribunal is satisfied that the contested decision is reviewable under art.2 (1) of its statute.

42. Having satisfied itself that it has competence to hear and pass judgment on this application, the Dispute Tribunal shall consider the provisions of art.2.2 of its statute as read with art.13 of the UNDT Rules of Procedure to determine whether or not the Applicant has made out his case for the relief sought.

43. Article 13 of the UNDT Rules of Procedure provides that:

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.

¹³ Article 2.2 of the UNDT Statute.

44. It is important to stress that the Dispute Tribunal is not considering the application on its merits and therefore it shall refrain from evaluating the evidence as if it was dealing with an application on its merits. This is especially the case in this application where allegations have been made of disputes relating to the Applicant's 'terms of employment' especially in relation to his job description and reporting lines. This misunderstanding is, according to the Applicant, the basis of the decision not to renew to his contract beyond 27 February 2020. He believes that the decision was arrived at based on improper motives and therefore unlawful.

45. The Respondent on the other hand has disputed this reasoning and submitted that the Applicant's non-renewal of the contract beyond 27 February is lawful because it was made within the confines of the Applicant's fixed term contract which carries no expectation of renewal and the Respondent's broad discretion on management of resources.

46. The Respondent is under a legal obligation to give reasons for non-renewal of fixed contract so that an Applicant can challenge the reason if it is in contravention of rules and regulations.¹⁴

47. In an application for suspension of action pending management evaluation, it is mandatory for the Applicant to show not only that the decision is unlawful but also and crucially as a preliminary consideration that he has filed the application in good time to conform with the element of urgency stipulated in our Statute and the Rules of Procedure.

Particular Urgency

48. The Respondent has argued and the Applicant has not disputed that he was formally notified of the non-renewal of his appointment on 17 January 2020. This was more than 30 days to 27 February 2020. However, he only lodged the application for suspension of action 20 February 2020, seven days to implementation of the

¹⁴ See for example in *Obdeijn* 2012-UNAT-201 and *Pirnea* 2013-UNAT-311.

contested decision. The Applicant has not provided any reason why he did not take immediate steps to challenge the decision. No reason is given why he had to wait until the last minute to halt its implementation. The Respondent has therefore asked the Tribunal to dismiss the application citing jurisprudence where this Tribunal placed the burden on the Applicant to show that the matter is brought in a timely manner and that the urgency is not self-created.

49. In *Jitsamruay* UNDT/2011/206, the Tribunal held that:

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 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. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his action.¹⁵

50. The Tribunal proceeded to dismiss the application without considering the other elements because the Applicant did not furnish satisfactory reasons for filing his application 25 calendar days after notification of the contested decision and nine days to implementation of the decision.¹⁶

51. Similarly in *El-Awar* Order No. 153 (NBI/2018), the Tribunal was not convinced that the applicant was timely when it took him from 31 August 2018 when he was notified of the contested decision until 20 September 2018 to file his application for suspension of action. The Tribunal was of the view that the urgency was self-created and accordingly dismissed the application without considering the two other elements.

52. In *Dougherty* 2011/UNDT/133 the application was dismissed under similar circumstances, in that case the Applicant's excuse for the delay of several weeks was that he was pursuing amicable settlement of the dispute through communication with

¹⁵ At para. 26.

¹⁶ At para. 28.

the Director, Financial Information Operations Service and the Ombudsman's office was held to be unsatisfactory.¹⁷

ORDER

53. Based on the pleadings as contained in the Applicant's submission, the Respondent's reply, the Staff Regulations and Staff Rules and relevant jurisprudence, the Tribunal finds that the Applicant has failed to satisfy one of the three elements to obtain a ruling in his favour on an application for suspension of action. He did not bring the application in good time and no good reason has been given for the delay. His claim that the matter was urgent was self-created and hence he may not benefit from it. It is accordingly dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 25th day of February 2020

Entered in the Register on this 25th day of February 2020

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi

¹⁷ At para. 33.