



Before: Judge Agnieszka Klonowiecka-Milart
Registry: Nairobi
Registrar: Abena Kwakye-Berko

MENSAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Robert Nadelson, UNDP

Introduction

1. The Applicant is a Program Officer working with the United Nations Development Program (“UNDP”). She serves on a fixed-term appointment at the NOB-9 level, and is based in Benin.
2. On 2 June 2020, she filed an incomplete application for suspension of action (“SOA”) pending management evaluation before the United Nations Dispute Tribunal in Nairobi contesting the decision of UNDP not to renew her fixed-term appointment beyond 30 June 2020.¹ She completed her application on 8 June 2020.
3. The Respondent filed his reply to the application on 10 June 2020.
4. The Applicant requested management evaluation of what she termed as “unfair dismissal” on 2 June 2020.² The matter is pending.³

Facts

5. The Applicant joined UNDP in July 2011 working as a Program Officer. In 2016, the project she was attached to closed.⁴ Thereafter, the Applicant was tasked to work on other assignments, including mobilization of resources and recently to design projects on COVID-19.⁵ In February 2020, the Applicant’s appointment was extended for three months. On 29 May 2020, the Applicant was informed by the Acting Resident Representative of UNDP in Benin that her appointment, expiring normally on 17 June 2020, would be extended only until 30 June 2020, to enable her to plan for her exit. The communication does not state the reasons for not extending the appointment any further.⁶

¹ Application, section V.

² Application, annex 3.

³ Application, section VI.

⁴ Application, section VII.

⁵ Ibid.

⁶ Application, annex 2.

6. The Applicant submitted somehow unclear facts suggesting that there were performance issues and other work related problems and filed incomplete documents. However, the documents and the facts indicate that as of February 2020, the Administration had agreed on designing a performance framework, with clear milestones on the basis of which the Applicant would be granted a renewal of the contract for a period of three months. At the end of this period and if the monthly evaluation is conclusive, Management may consider a renewal of the contract or renew for a longer period. During the three-month period, the option of using a coaching formula remained available.⁷

Applicant's submissions

7. The Applicant's case is that the impugned decision is unfair. The decision does not take into account the "psychological prejudice" she experienced over the years while working at UNDP. She designed the projects and mobilized resources to facilitate such projects, however, the projects have been handed over to other staff members. With regard to urgency, the Applicant submits that she will be separated on 20 June 2020 and she is not sure when the response of her management evaluation will come out. For the irreparable harm, the Applicant submits that she will lose her job. Losing a job during this period of COVID-19 will cause her psychological harm.

Respondent's submissions

8. The Respondent's position is that the Applicant has not demonstrated that the criteria for granting a suspension of action have been met. The Applicant has neither provided evidence showing that the decision was flawed or improper nor is she arguing that the decision was flawed, but rather she cites "psychological prejudice" only. Therefore, while the Applicant may consider the situation unfair, she has not put forward a basis or met her burden of showing how the decision she contests is *prima facie* unlawful.

⁷ Application, section VII, Application, annex 5.

9. With regard to urgency, the Respondent submits that the application does not establish the requirement of particular urgency. It is unclear why the Applicant believes that the decision will be implemented on 20 June 2020, yet the letter on non-extension of her appointment indicates that the decision will be implemented on 30 June 2020, 10 days later. The mere recitation of the dates is not sufficient for the requirement of urgency.

10. The Respondent did not address the criterion of irreparable harm.

Considerations

11. Article 2 of the Statute and article 13 of the Rules of Procedure of the Tribunal require that an applicant seeking suspension of action satisfies the Court that;

- a. the impugned decision is *prima facie* unlawful,
- b. the matter appears to be of particular urgency, and
- c. the implementation of the decision would appear to cause irreparable damage.

12. All the three elements of the test must be satisfied before the impugned decision can be stayed.

Whether the impugned decision is *prima facie* unlawful.

13. The Applicant, who is unrepresented, exhibits difficulty in articulating her grievance. It appears, however, that no specific reason for the non-extension of the Applicant's appointment has been given. Whereas in February 2020, the Administration decided to review the Applicant's performance, extend her contract on a short or long period and even place her on a coaching program, if need be; no specific reason was given for change of this approach in the letter notifying the Applicant of the non-extension.

14. It is settled law that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment. However, it is also settled law that the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment when requested.

As held in *Obdeijn*:

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 [a fixed-term appointment], where the staff member requests it or, a fortiori, the Tribunal orders it.⁸

15. In the same vein in *Pirnea*, the Appeals Tribunal, in determining whether a non-renewal of a fixed-term appointment was based on a valid reason, held that:

An administrative decision not to renew [a fixed-term appointment] 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. Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals' ability to judicially review the validity of the Administration's decision.⁹

16. The Tribunal counted on the Respondent to provide the reasons for the impugned decision. Instead, the reply concentrates on the semantics of the application.

17. Based on the facts alleged and considering the resolve of the Administration to respond in a matter-of-fact fashion on the reasons for non-extension, the Tribunal concludes that a *prima facie* case of unlawfulness has been made out.

⁸ *Obdeijn* 2012-UNAT-201, para 37; see also *Lauritzen* 2013-UNAT-282, para 35.

⁹ *Pirnea* 2013-UNAT-311, para. 33 citing to *Obdeijn*, para. 32.

Urgency

18. Given that the Applicant's employment with UNDP will end on 30 June 2020, which is before the management evaluation is due, the urgency of the application is made out.

Irreparable Harm

19. Considering that as a result of the impugned decision the Applicant is about to lose her job, and that in the history of the UNDT there was not a single instance where the administration would have reinstated, under art. 10.5 (a) of the UNDT Statute, a wrongly separated staff member, the danger of irreparable harm is self-evident.

ORDER

20. The application is granted.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 12th day of June 2020

Entered in the Register on this 12th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi