



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

CARTIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

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.

2. With the application, the Applicant filed a motion pursuant to arts. 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, stating as follows:

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. It should be noted that without such order the contested decisions will be implemented on 6 October 2018.

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

4. On 4 October 2018, 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.

5. The Tribunal further informed the parties that, due to the urgency of the matter and pursuant to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the Applicant’s motion for 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 would follow.

6. By Order No. 195 (NY/2018) dated 5 October 2018, the Tribunal granted, 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 suspension of the implementation of the decision not to renew his fixed-term appointment beyond 6 October 2018 until the Tribunal rendered its decision on the application for suspension of action, or until further order.

7. On 8 October 2018, the Respondent filed his reply contending that the application for suspension of action should be denied as two of the conditions for granting an order for suspension of action under art. 2.2 of the Dispute Tribunal's Statute have not been met.

Background

8. 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 [S]taff [r]ule 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.

9. In his reply, the Respondent submitted as follows regarding the facts to be relied on (references to annexes omitted):

... On 23 September 2013, the Applicant was directly placed on a fixed-term appointment as a Local Security Assistant (LSA) for the United Nations Department for Safety and Security (UNDSS) under a contract administered by UNDP Costa Rica. The Applicant's letter of appointment reflects that this was a General Service (GS) 6-Grade position. The Respondent submits that the application for SOA incorrectly reflects this date as being 23 September 2014.

... In January 2018, UNDSS learned that the Applicant's 23 September 2013 appointment did not comply with applicable administrative Regulations and Rules, including that the Applicant did not undergo a competitive selection process and his candidacy was not approved by the Central Review Board (CRB). The discovery of this information resulted in the need for the Administration to remedy this illegal situation by ultimately advertising the position encumbered by the Applicant.

... On 8 March 2018, Mr. Carlos Frias, Regional Security Advisor (RSA), UNDSS informed the Applicant of *"the need to regularize the [Applicant]'s post LSA GS6 in Costa Rica."* The RSA, UNDSS' email further informed the Applicant that to enable the regularization of his post, the Organization *"w[ould] need to undertake a competitive recruitment process which was not followed when the post was established under the DSS regular budget funding. The post will subsequently be advertised, based on the generic JO established for LSA posts, and a full competitive recruitment process will be undertaken"*.

... On 16 March 2018, UNDP published vacancy announcement 17032 for a fixed-term LSA position (FTA Local), at the G6 Grade with UNDSS. This vacancy announcement had an application deadline of 7 April 2018. The application deadline for this position was later extended through 15 July 2018 due to a lack of applicants. As noted by the Applicant, and pursuant to the 8 March 2018 email to the Applicant, this vacancy announcement was for the post encumbered by the Applicant.

... The Respondent submits that the word version of the Terms of Reference (ToR) submitted by the Applicant in support of his SOA, which would not have been accessible via UNDP's application portal, do not correspond to vacancy announcement 17032.

... The Respondent further submits that there are substantial differences between vacancy announcement 17032 and the ToRs submitted by the Applicant as reflected by, *inter alia*, different reporting lines, functions, required years of experience.

... The Respondent submits that the application for SOA appears, incorrectly, to consider that the reference to ICS in the header of the word version of the ToR obtained by the Applicant stands for individual contractor. ICS stands for International Civil Service, the UN Common System reference for the classification of all UN positions. Had this position been a consultancy, this would have been specifically reflected in the announcement.

... On 24 March 2018, Ms. [WC] [name redacted for privacy], Human Resources Associate (HRA), UNDP Costa Rica sent an email to all UNDP Costa Rica staff members informing them of the publication of a vacancy announcement. This vacancy announcement, which was unrelated to the post encumbered by the Applicant, was for a G6 LSA position with UNDSS, job ID 15333, with an application deadline of 15 April 2018. Both the vacancy announcement and the P11 submitted by the Applicant reflect that this vacancy announcement was for a fixed-term G6 level post, and not a consultancy.

... The Respondent submits that although vacancy announcement 15333 was identified by the Applicant's Annex 2, this vacancy announcement is unrelated to the Applicant's post. The Respondent further submits that the post selection process for job ID 15333 did not move forward and no candidate was interviewed for this position. The foregoing notwithstanding, the Respondent submissions [above] would also apply to this vacancy announcement.

... On 29 June 2018, the Applicant applied for vacancy announcement 17032. The 'Job Opening Information' section of the P11 prepared and submitted by the Applicant in support of his application reflects that he was applying to: "Job ID: 17032 Local Security Assistant" and that this vacancy announcement was for a fixed-term this post graded at the G6 level.

... On 27 August 2018, the Applicant was interviewed for the G6 LSA vacancy announcement corresponding to Job ID 17032.

... On 10 September 2018, the HRA, UNDP sent an email to the Applicant informing him that he had not been selected for the G6 LSA vacancy announcement corresponding to Job ID 17032.

... On 11 September 2018, Mr.[FGL], Regional Security Advisor, UNDSS sent an email to the Applicant notifying him that his appointment would not be extended beyond 6 October 2018.

... On 2 and 3 October 2018, the Applicant requested further information as to the basis for the non-extension of his appointment. No prior communications were addressed to UNDP Costa Rica nor UNDP's Management. The Respondent acknowledges that the responses to these queries were insufficient.

... On 4 October 2018, the Applicant filed an SOA submitting, *inter alia*, that the contested decision was *prima facie* unlawful because it “*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. [...]*”(emphasis added); “*the Administration failed to adequately respond to the Applicant's repeated queries regarding his contractual situation*”. In addition, the Applicant also submits that the SOA is urgent because the Applicant “*is only able to communicate in Spanish which creates significant impediments, not least the possibility to obtain timely information [...] Communication with OSLA counsel has proved difficult and not always feasible due to the difference in time zones [...] The Applicant was only notified of the decision on 11 September 2018*”.

Parties' submissions

10. 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 Contract 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 advertised 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;

Irreparable damage

q. 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).

11. The Respondent's principal contentions are as follows:

The reason for the non-extension of the Applicant's appointment is lawful

a. The Respondent submits that the Dispute Tribunal cannot but find that the reason for the nonrenewal of the Applicant's appointment was proper.

b. Further to the discovery in January 2018 that the Applicant had been improperly placed against the post he encumbered (he did not undergo a competitive selection process and his candidacy was not approved by the CRB, the Administration determined that the only available course of action to regularize the illegal situation was to advertise the post he encumbered and enable the Applicant to compete for it, a decision notified to the Applicant on 8 March 2018. Pursuant to a properly completed selection process, the Applicant was not recommended for this position. The jurisprudence of the Appeal and Dispute Tribunals has repeatedly found that the Administration has a right and duty to correct its mistake and put an end to an illegal situation (see *Kongba* 2018-UNAT-849; *Cranfield* 2013-UNAT-367);

c. The Respondent submits that as a result of the Applicant not being recommended for this position, the Administration could not perpetuate an illegal situation and was required to inform the Applicant that his appointment would not be further extended, irrespective of the fact that no other candidate was recommended for the position;

d. The Respondent accepts that the above reason for the non-renewal of the Applicant's appointment was not properly communicated to the Applicant. However, the Respondent submits that any communication issue in informing the Applicant of the reason for his non-renewal is of no effect on the legality of the underlying decision. Further, the Respondent contends that, in view of the decisions notified to the Applicant on 8 March 2018 and 11 September 2018, the 2 October 2018 and 3 October 2018 communication issues are largely attributable to the Applicant's self-created urgency;

The Applicant's non-renewal is prima facie lawful

e. The Respondent submits that the application for suspension of action is replete with factual misrepresentations submitted for the purpose of supporting a claim that the non-extension of the Applicant's appointment was improperly motivated;

f. The Respondent submits that there are no documents on record reflecting that the Applicant's position was converted into a consultancy. Rather, the evidence reflects that the Applicant was duly informed by the Administration of its decision to advertise the GS-6, otherwise known as ICS-6, staff position encumbered by the Applicant. The evidence further reflects that the Applicant was notified of the purpose of the advertisement of the post he encumbered, to correct the illegality stemming from the Applicant encumbering this position;

g. More importantly, the Respondent submits that a plain reading of the vacancy announcement to which the Applicant applied uncontestably reflects that it was an internal GS-6 fixed-term appointment, and not a consultancy;

h. The Respondent further submits that the Applicant cannot reasonably claim that, having himself initially joined UNDP Costa Rica as a part-time consultant in 2004, and absent any reference to the words consultant, consultancy, contractor or any of the hallmarks of an advertisement for a consultancy, that the position to which he was applying was anything other than a fixed-term appointment. In addition, any such claim would be contradicted by the Applicant's own [personal history form ("P11")] submitted in support of his application for this vacancy announcement which reflected that he was applying to a GS-6 position;

i. The Respondent submits that the Dispute Tribunal cannot but find that the 28 March 2018 vacancy announcement was for a GS-6 fixed-term appointment, not a consultancy, and was proper;

The urgency is self-created

j. It is uncontested that the Applicant has known of the decision to post a vacancy announcement for the position he encumbered since at least 8 March 2018, over 7 months ago. It is further uncontested that the Applicant has also known of the contested decision, the non-renewal of his appointment, since 11 September 2018;

k. The record provided by the Applicant reflects that the Applicant took no formal or informal action with regard to the prior decision and he did not contact management with regard to the latter for 21 days. More importantly, the Applicant did not seek either management evaluation or the intervention of the Dispute Tribunal until 2 days prior to the implementation of the decision not to extend his appointment – 23 days after the decision was notified to him;

l. The jurisprudence of the Dispute Tribunal has consistently found that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126; and *Kennedy* UNDT/2017/044). In addition, the Dispute Tribunal has found that “[i]f an applicant seeks the Tribunal’s assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity [...]” and “attempts to have the issue clarified and, if possible, reconsidered” do not affect this requirement (*Evangelista* UNDT/2011/212; *Maloka Mpacko* UNDT/2012/081);

m. The Respondent submits that the Dispute Tribunal cannot but find that the record clearly reflects that in waiting over three weeks before taking any type of action, the Applicant did not avail himself of his obligation to timely seek the Dispute Tribunal’s assistance at the first available opportunity;

No justification for not timely seeking the Dispute Tribunal’s intervention

n. The Respondent contends that in urging the Dispute Tribunal to consider the Applicant's personal circumstances when reviewing the 'urgency' prong of the requirements for the granting of an application for suspension of action the Applicant recognizes that his request for suspension of action was not timely requested;

o. The Respondent submits that the justifications provided by the Applicant for the delays in him taking any action with respect to the contested decision (language impediment; time zones; length of management evaluation) are without merit. Indeed, the Dispute Tribunal has regularly held that it is the responsibility of each staff member to know the applicable rules and regulations of the Organization, including those that concern themselves with appeals of administrative decisions;

p. More specifically, the Respondent submits there was no language impediment in the Applicant communicating with UNDP's and UNDSS's management in Costa Rica with regard to the decision to advertise the post he encumbered or the contested decision at the first available opportunity. Yet the first communication on record provided by the Applicant is dated 2 October 2018, nearly 7 months after the decision to advertise the post he encumbered for a competitive process, and 22 days after the contested decision was taken and less than a week prior to the Applicant's separation. Further, the motivation paragraph written by the Applicant in his P11 reflects his understanding of English;

q. The Respondent also submits that any communication issues experienced between the Applicant and his counsel are solely of their own making and do not justify the delay in timely seeking a suspension of action, especially as there is only a four hours difference between Costa Rica and Geneva. More importantly, the Respondent submits that there is no evidence on record as to why the Office of Staff Legal Assistance could not avail themselves of a counsel located in their main office in New York, rather than

Geneva. The Respondent recalls that the Dispute Tribunal has regularly rejected motions for extension of time that are solely based on a parties' professional circumstances absent any evidence that the concerned party could not avail themselves of an alternate solution to meet the requirements of the legal proceedings (*Al Asmawi* Order No. 111 (NBI/2018)). Irrespective of the foregoing, it remained the Applicant's responsibility to ensure that he timely sought the Dispute Tribunal's assistance without waiting 23 days following the contested decision, two days prior to its implementation;

r. Finally, the Respondent submits that there is no merit to the Applicant's contention that the suspension of action should be granted on the basis that the contested decision will be implemented prior to the completion of the management evaluation. Fixed-term appointments expire on their own terms and there is no requirement in the rules and regulations of the Organization that a staff member on a fixed-term appointment be provided at least 45 days' notice of the non-renewal of his appointment. To consider a suspension of action urgent on this sole basis would result in all suspension of actions being urgent irrespective of, as in the case here, the lack of timely action being taken by the affected staff member;

s. The Respondent submits that that the Dispute Tribunal cannot but find that in waiting over three weeks to seek the Dispute Tribunal's intervention, two days prior to the implementation of the contested decision, the Applicant self-created the urgency of his suspension of action;

t. In view of the fact that at least one of the conditions for granting an order for suspension of action has not been met, the Respondent requests that the Dispute Tribunal reject the Applicant's application for suspension of action.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

12. Article 2.2 of the Dispute Tribunal's Statute states:

... The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

13. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

14. Article 13.1 of the Tribunal's Rules of Procedure states:

... 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.

15. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;

- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Whether the application concerns an administrative decision that may properly be suspended by the Tribunal

16. The Tribunal notes that it is uncontested that the contested decision in the present case, namely the decision not to renew the Applicant's fixed-term appointment beyond 6 October 2018, is an administrative decision subject to review by the Tribunal, including its implementation being suspended pending management evaluation. Consequently, the first cumulative and mandatory condition presented above is fulfilled.

Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

17. The Tribunal notes that it is uncontested that the Applicant filed a management evaluation request of the contested decision on 4 October 2018, within 60 days from the day of notification, and that the evaluation is currently pending. Consequently, the second cumulative and mandatory condition presented above is fulfilled.

Whether the contested decision has not yet been implemented

18. The Tribunal notes that pursuant to Order No. 195 (NY/2018) issued on 8 October 2017, the Tribunal suspended the contested decision until the Tribunal has rendered its decision on this application, or until further order. Therefore, the contested decision is not yet implemented. Consequently, the third cumulative and mandatory condition presented above is fulfilled.

Whether the impugned administrative decision appears prima facie unlawful

19. The Tribunal notes that the Respondent stated in his reply filed on 8 October 2018 that the reason for not renewing the Applicant's post beyond 6 October 2016 is the fact that UNDSS discovered in January 2018 that the Applicant's 23 September 2013 appointment did not comply with applicable administrative regulations and rules of the Organization, including that the Applicant did not undergo a competitive selection process and his candidacy was not approved by the Central Review Board ("CRB") in 2013. The Respondent stated that he accepted that this reason was not properly communicated to the Applicant.

20. The Tribunal takes notes that the Respondent did not contest the Applicant's position that no reason was presented to him for the non-renewal of his contract beyond 6 October 2018 between 11 September and October 2018, the date when he filed the application for suspension of action.

21. Moreover, the Tribunal notes that the Respondent admitted that the above-mentioned reason for non-renewal was not properly communicated to the Applicant and that the reason was presented for the first time before the Tribunal as part of the Respondent's reply filed on 8 October 2018. The Applicant was therefore informed officially of the reason for the non-renewal of his contract only on 8 October 2018 and the Tribunal notes that no other reason for non-renewal was included in the response to the application for suspension of action.

22. The Tribunal underlines that 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.

23. The Tribunal considers that the Respondent did disclose the reason for the non-renewal of the Applicant's fixed term contract beyond 6 October 2018, in his response filed on 8 October 2018.

24. The Tribunal will further consider if the decision not to renew the Applicant's contract because his 23 September 2013 appointment appears to be *prima facie* unlawful on the basis that it did not comply with applicable administrative regulations and rules, including that the Applicant did not undergo a competitive selection process and his candidacy was not approved by the CRB.

25. The Tribunal notes that it is uncontested that the Applicant was selected by UNDP in 2013 based on the recruitment standards effective 1 July 2009 as established in the document titled "Minimum Academic and Relevant Work Experience Requirements for Recruiting Staff in UNDP (Including Step Determination)" which states as follows in the relevant parts:

Academic Qualifications and Relevant Work Experience

4. The minimum academic standard for all recruitments and selections to Professional and higher level category posts (P, and National Officer (NO) is a completed, advanced university degree (Masters or

equivalent, and also inclusive of professional certifications (CPA etc.) and military/police rank equivalents).

5. The minimum standard for all support GS is completion of high school (secondary school) combined with a number of years relevant work experience. Selection to GS Fixed Term Appointment (FTA) positions at Headquarter locations requires passing a UN administered clerical test, unless conditions are met allowing the waiver of such a requirement.

6. For GS positions in New York, the UN clerical test will be waived for UNDP staff members previously holding 100-series appointments and/or holding an FTA appointment after 1 July 2009 who have a Bachelor's degree (or equivalent) from a recognized educational institution, for at least three years education after high school; or who do not have a Bachelor's degree or equivalent from a recognized educational institution, but have demonstrated satisfactory performance in GS posts in Country Offices, Regional Centres or Headquarters locations for at least five years previously under a 100-series appointment and/or an FTA after 1 July 2009. The same applies to staff members who are holding, or held, a 100-series appointment and/or an FTA after 1 July 2009 with the UN common system in their work history.

7. All external candidates (whether they are ALDs, SSAs, Service Contract holders, UNVs or staff appointed on Temporary Appointments (TAs)) will need to go through the clerical exam to qualify for Headquarters GS FTA positions.

9. Combined with academic qualifications are the number of years of relevant work experience required for the grade level of the post. Relevant work experience and minimum academic qualifications form the basis for UNDP's standard of a professional workforce.

Determining Relevant Experience

10. In determining the number of years of relevant work experience, OHR/HR practitioners will generally take into account any relevant experience gained after completion of the first university degree (Bachelors or equivalent) unless the candidate has undertaken, 'mid-

career' studies, in which case some flexibility may be exercised. Compulsory Military Service completed prior to a first university degree may also be taken into account provided that it is directly relevant to the position being recruited for and may be counted as 50% Full Time Equivalent (FTE). Determination of relevance of Military Service will be considered on a case-by-case basis.

11. In determining the 'relevancy' of experience, OHR/HR practitioners will make a determination based on the nature of the functions and the competencies required for the position as articulated in the vacancy announcement, or more generally on experience in the UN Common System.

12. Full-time consulting experience in the UN Common System, or like-institutions, may be counted at 'one-for-one' or 100% Full Time Equivalent (FTE). Formal volunteer work (for example UNV) may also be counted one-for-one. Non-UN Common System independent consulting, non-formal volunteer work, and remunerated teaching while pursuing academic study, in most cases, may not be counted at greater than 50% FTE unless it can be clearly substantiated that the work in question was, indeed, full time. Internships are not counted when determining months of relevant experience.

...

Academic Reference Checks

26. All selected candidates will be required to submit evidence of their academic qualifications and may be subject to academic reference checks. A signed Personal History form (P.11) is the official document by which OHR/HR establishes the professional and academic referees for this purpose. Candidates found to have falsified their academic credentials, or to have submitted qualifications from non-accredited academic institutions (sometimes referred to as 'diploma mills') may constitute a basis for withdrawing the offer of employment, or, if the employment has started, to terminate it without notice or indemnity.

27. The authority to determine whether degrees presented to UNDP by staff members and applicants constitute recognized academic qualifications lies with the Director, OHR. In making such determinations, the Director, OHR, is normally guided by the United Nations Educational, Scientific and Cultural Organization's

(UNESCO) listing (referred to as “the UNESCO list” [link]) of higher education institutions recognized or otherwise approved by competent authorities in participating countries.

26. It results from this document that only for the vacant General Service (“GS”) positions in New York, there is the requirement to undergo a clerical test. It appears that the Applicant who is a staff member at GS-6 level in Costa Rica and not in New York, was not required to undergo a clerical test and that he was correctly selected and appointed based on the evaluation of the Applicant’s high school diploma and his previous experience, including as UN contractor. It appears that the Administration made no error related to the Applicant’s recruitment in September 2013. In any case, even if such an error was made by UNDP in 2013, it was not imputable to the Applicant and is subject to the fundamental principle of law “*nemo auditur propriam turpitudinem allegans*” (no one can be heard to invoke his own turpitude/guilt).

27. The Tribunal underlines that a letter of appointment is a bilateral and consensual contract with binding legal effects for both parties. Any contractual error related to an already agreed and/or signed contract is subject to the fundamental legal principles “*pacta sunt servanda*” (agreements must be kept) and “*communis error facit jus*” (a common error makes the law). Any correction of error(s) /mistake(s) of an already agreed and/or signed contract/convention, including each and every clause within it, even the erroneous ones, can be made only based on the express consent of all parties and none of the parties can make correction(s) unilaterally. If the parties do not agree in this sense, any of them can subject the validity of the contract in its entirety or in relation to the relevant parts to a legal review by filing an application before the Tribunal within a specific period of time.

28. The Tribunal notes that in the present case, both the Resident Representative on behalf of UNDP Costa Rica, and Applicant signed the initial letter of appointment in September 2013. The initial letter of appointment which became a bilateral and consensual contract with binding legal effects for both parties on a common understanding/acceptance that the Applicant’s appointment was in accordance with

the existing requirements of the hiring organization-UNDP, subject to the fundamental legal principles mentioned above.

29. The Tribunal further notes that the Applicant's contract was subsequently renewed in the same conditions/terms every year, between 23 September 2014 and 22 September 2018 through new letters of appointment. The last renewal of the Applicant's contract was between 23 September and 6 October 2018. No error was identified between the period of September 2013 and January 2018 by UNDP or UNDSS and brought to the Applicant's attention and/or invoked before the Tribunal.

30. The Tribunal observes that no details related to the alleged error in relation to the Applicant's appointment in September 2013, which was known to UNDSS since January 2018 were included in the Respondent's response and is unclear if this error was communicated to UNDP before or after 11 September 2018.

31. Further, the Tribunal notes that a Rank-in-Post policy was adopted effective 31 May 2017 which states in the relevant parts as follows;

1. Rank-in-post is a system by which staff are graded and paid for their expected contribution.
2. Rank-in-post replaces the previous promotion policy which was based on personal promotion or "rank-in-person".
3. Rank-in-post is established to assist UNDP in attracting and retaining the best possible workforce in a constantly changing development environment. It also allows UNDP to align its human resources management more closely to United Nations common system partners thereby achieving greater harmonization, particularly in the context of inter-agency mobility.
4. Rank-in-post means that a serving staff member who is competitively selected for a post classified and budgeted at a higher level, for an expected period of one year or longer, is automatically promoted to that higher level immediately upon assumption of the higher level duties. There are no qualifying periods and no seniority requirements and no promotion bodies to recommend approval. Only candidates meeting the pre-defined requirements for a post as per the job description can be selected.

5. Rank-in-post is based on standardized classification of jobs and transparent recruitment and selection processes, with oversight exercised by the relevant Compliance Review Bodies i.e. Compliance Review Board (CRB) or Compliance Review Panel (CRP) (see paragraph 2.9 below). Hiring units will be responsible for strictly complying with the corporate procedures on classification, recruitment, reassignment and selection, to ensure that only candidates with “the highest standards of efficiency, competence and integrity” as required by the Charter of the United Nations and who possess the right skills, experience and competencies required for the properly classified and budgeted posts are selected.
6. Rank-in-post relies on a transparent and rigorous selection process. As such, it is expected that all recruitments and selections will strictly follow established rules and procedures as outlined in the UNDP Recruitment and Selection Framework.

Scope of Application

7. The Rank-in-post policy applies to the following post levels: General Service (GS/ICS 1–7), National Officers (NOA-D/ICS 8–11), Professional (P 1–6/ICS 8–13) and Director level 1 (D1/ICS 13). Rank-in-post applies equally to UNDP staff holding Permanent Appointments (PA), Continuing Appointments (CA) and Fixed-Term Appointments (FTA) for service with UNDP.

...

Consistency between the level of the post, the qualifications of the selected candidate and the level of appointment

8. It has become occasional practice to recruit an individual who does not meet all the requirements for a post in the expectation that he/she will eventually develop the necessary competencies or acquire the minimum qualifications for the post. As a result, hiring units have at times placed the selected candidate to a lower level than the post as classified and advertised. This practice is to be discontinued. Rank-in-post requires consistency between the level of the classified post, the qualifications of the selected candidate to that post and the grade to which he/she is placed. This is essential in order for UNDP to maintain corporate standards across its entire workforce for establishing consistent grade levels for comparable contributions. Therefore, in the event that a fully qualified candidate cannot be found following a competitive selection process, either the hiring unit re-advertises the post with the view of getting additional applications, or has the job description revised and reclassified at a lower grade and proceeds with a new advertisement and selection process.

...

Changing categories

12. The following will apply when setting steps for staff appointed to different categories:

a) All (PA, CA, FTA and TA) locally recruited staff members in country offices who are competitively selected and appointed to a different category (G to P and NO to P) will be given the level of the post for which they have been competitively selected, applying the same criteria established in Staff Rule 3.4 (b).

b) All staff on a Professional level post who are competitively selected for a Director level post will have their step set according to Staff Rule 3.4 (b).

c) GS staff in Headquarters offices who are selected to a higher-level position in the P category (G to P) will have their step set according to Staff Rule 3.4.

...

Post reclassifications

24. All posts reclassified must be advertised for competitive selection. The reason for reclassifying a position is dependent on requirements of the functions, and not about the incumbent. A job is designed based on complexity and the business needs of a unit and is classified in accordance with the ICSC job classification standards.

25. All classification requests must include a detailed justification and contextual information, including the budget, information pertaining to the approved numbers of positions; of the new business needs of the unit, as well as both the old and the new job description and an updated, detailed, organizational chart showing the affected post(s) in question and other posts impacted by the proposed action.

26. Post levels have budgetary implications and must be managed consistently across the Organization. Consequently, revised business processes have been put in place to strengthen the job classification system in UNDP. The budget clearance, along with position management (in terms of approved numbers), is a pre-requisite of any (re)classification request. Furthermore, the relevant units involved in centralized or decentralized classifications (OHR, OFRM, Executive Office, Headquarters Bureaux or Offices, Country Offices) will be accountable for consistently and transparently applying standardized classification criteria.

...

Appointment to a lower level post

34. When a staff member by his/her own choice applies for a lower level post than the post he/she is currently encumbering, he/she will be appointed at the level of the post to which he/she is selected.
35. However, the staff member will retain his/her personal grade for three months when (i) in the context of a realignment or abolishment of post or if unassigned he/she had no other choice than to apply for a lower level post to retain employment with the organization, or (ii) his/her profile is considered of critical value to meet an organizational need in a lower level post.

Compliance Review Body (CRB) and Compliance Review Panel (CRP)

36. Under Rank-in-Post policy, promotion to a higher level post and selection to a post of the same grade level (lateral move) are based on UNDPs recruitment and selection policies. The CRB/CRP checks the compliance of the selection process with the applicable Staff Rules, the UNDP Recruitment and Selection Framework and related policies.

37. When a recommended selection entails a promotion of more than one grade level (e.g. G4 to G6, or NOA to NOC, or P3 to P5, or P4 to D1/P6) the review will be broader and will consider, inter alia, whether other qualified staff one grade below were given due consideration. In a Rank-in-post environment, such cases are expected to be rare and exceptional.

...

32. The Respondent stated in his response filed on 8 October 2018 that the reason for not renewing the Applicant's post beyond 6 October 2016 is the fact that UNDSS discovered in January 2018 that the Applicant's 23 September 2013 appointment did not comply with applicable administrative regulations and rules, including that the Applicant did not undergo a competitive selection process and his candidacy was not approved by the CRB. The Tribunal observes that the policy invoked by the Respondent to support his assertion, as results from the copy filed by the Respondent, was effective only from 31 May 2017 and it appears, pursuant to the principle of non-retroactivity of the legal norms, not be applicable to Applicant's contract before its adoption, namely during the period 23 September 2013 and 30 May 2017.

33. The Tribunal notes that between 1 June 2017 and 22 September 2017 or between 23 September 2017 and 22 September 2018 Applicant's latest fixed-term

appointment, the provisions related to the new UNDP rank in post policy were not invoked.

34. Further, the Tribunal notes that pursuant to relevant provisions of paras. 12(a) and 24 of the Rank-in-Post Policy, a competitive selection is mandatory required and therefore applicable to: 1. “[a]ll (PA, CA, FTA and TA) locally recruited staff members in country offices who are competitively selected and appointed to a different category (G to P and NO to P)”, and 2. to all reclassified posts (para. 24).

35. The Tribunal considers, after reviewing the evidence on the record, that it does not appear that the Applicant, a locally recruited staff member with a fixed-term appointment, was to be appointed from the GS-6 level to a P (professional) level and that he was required to undergo a competitive selection process pursuant to para. 12(a).

36. Further the Tribunal notes, that there is no evidence to support: 1. there was a change in the requirements of the functions of the position/post occupied by the Applicant which could have justified a reclassification request; 2. that such a request was made which included all the cumulative and mandatory documentation pursuant to arts. 25-26, namely, a detailed justification and contextual information, including the budget, information pertaining to the approved numbers of positions; of the new business needs of the unit [UNDP], as well as both the old and the new job descriptions and an updated, detailed organizational chart showing the affected post and other posts impacted by the decision; 3. if there was a budget clearance, along with position management (in terms of approved numbers) prior a request for reclassification was submitted; 4. if standardized classification criteria were applied in a consistent and transparent manner by the relevant units in UNDP (OHR, Executive Office). Consequently, it does not appear that the Applicant’s position was posted for a competitive selection as a result of the reclassification of the post due to new requirements of the function “Local security assistant” (para. 24)

37. Consequently, the Tribunal concludes that the competitive selection process related to the Applicant post appears not to be related to the Applicant appointment to a different category (G to P) or to a reclassification of his post, but exclusively to the Applicant, as the current incumbent of this post. The Tribunal notes that the Applicant's contract with UNDP was renewed between September 2013 and October 2018 due to his satisfactory performance which appears not to be in contention.

38. Further the Tribunal notes that the following job opening were posted by UNDSS for San Jose, Costa Rica: JO 17032 "Local Security Assistant "with the vacancy end date on 7 April 2018. The Tribunal observes that this job opening in not including the grade/ level of the post. 2.JO 15333 "Local security Assistant" with the vacancy end date 15 April 2018 which mentioned the grade G 6.

39. Another job opening was published by UNDP for the post level "National Consultant" with closing date on 28 October 2018, with the location Nicosia, Cyprus.

40. The Tribunal observes that it is unclear which JO posted by UNDSS for the function identical with the Applicant's, namely legal security assistant related to the Applicant's post since both JOs were posted for the same function and one of them with an identical grade.

41. As results from the Respondent's response, the Applicant applied for JO 15333. Further, the Tribunal observes that despite performing satisfactorily in such a function at the grade G6 for almost 5 years, he was not selected for the post. No other candidate was found to be suitable.

42. The Tribunal notes that in such a situation, the Rank-on-post Policy states at para. 10 as follows: "in the event that a fully qualified candidate cannot be found following a competitive selection process, either the hiring unit re-advertises the post with the view of getting additional applications, or has the job revised an reclassified at a lower grade and proceeds with a new advertisement and selection process.

43. It appears that these aspects were not observed by UNDP when decided not to renew the Applicant's post.

44. In the light of the above considerations, the contested decision appears to be *prima facie* unlawful.

Is there an urgency?

45. The Tribunal considers that the condition of urgency is fulfilled for the following reasons:

46. The Applicant was initially informed that his contract was not to be renewed beyond 6 October on 11 September 2018, without any reason being provided to him. It appears that this decision was taken after his non-selection for JO15333, notified to him on 10 September 2018.

47. His contract was renewed on 23 September 2018 for two weeks until 6 October 2018, without any specific reasons why the renewal was for only two weeks and not for another year. The Tribunal considers that the Applicant in good faith waited to be officially informed in writing of the reasons for his non-renewal, which are generally expected to be provided in all cases before the expiration of a fixed-term appointment. On his own initiative, the Applicant requested clarifications from UNDP in this sense on 2 and 3 October 2018, but no reason was provided.

48. The Tribunal concludes, in the light of the particular circumstances of the present case, that the urgency is not self-created.

Is there an irreparable harm to be caused by the implementation of the contested decision?

49. The Tribunal considers that the contested decision, if implemented, has the potential to cause the Applicant irreparable harm since he would be separated from the Organization. In these circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled, which is not contested by the Respondent.

50. In light of the above,

IT IS ORDERED THAT:

51. The application for suspension of action is granted in relation to the decision not to renew the Applicant's fixed-term appointment beyond 6 October 2018, and the implementation of this decision is suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 11th day of October 2018