



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DIOP

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Alexandre Tavadian, OSLA
Louis-Philippe Lapicerella, OSLA

Counsel for the Respondent:

Sergei Agadjanov, HRMS, UNODC
Ingeborg Daamen-Mayerl, HRMS, UNODC

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime (UNODC), based in Bamako, Mali, is applying for a suspension of the decision to separate him from service on the expiry of his fixed-term contract on 29 February 2012.

2. The Applicant requested a management evaluation of this decision on 9 February 2012 and is awaiting the outcome. On 17 February 2012, pending management evaluation, the Applicant filed the present request for suspension of action pursuant to article 13 of the Rules of Procedure of the United Nations Dispute Tribunal (UNDT).

3. On 22 February 2012 the Respondent filed a Reply.

Facts

4. The Applicant joined UNODC on 12 January 2011 as Project Coordinator at the P4 level. The specific project he was to work on was “Assistance for the implementation of the National Integrated Programme for the control of illicit trafficking and organized crime in Mali” (“PNI”).

5. The Applicant asserts that he has performed satisfactorily, and has received no indication that there were any performance-related concerns. The Tribunal has seen no evidence to the contrary.

6. The Applicant’s position, when advertised, was described as “related to a project and initial appointment will be for one year. Any extension is subject to availability of funding.”

7. The budget for 2012, which included the Applicant’s post costs, was approved on 9 January 2012. The PNI is due to continue until 30 November 2012. Thus there is no indication that budgetary constraints or the discontinuance of the project prevent the renewal of the Applicant’s contract.

8. On 9 January 2012, the Applicant received an email notification from the Human Resources Management Service of UNODC in Vienna, advising him that his contract would be renewed until 29 February 2012.

9. On 11 January, the Applicant received a further email from his supervisor, Mr. Alexandre Schmidt, also in Vienna, which stated:

Dear Matar,

Please be hereby informed that your fixed-term appointment will not be renewed and will therefore expire on its terms effective 29 February 2012, pursuant to Staff Regulation 4.5 and Staff Rules 4.13 and 9.4.

For your information, Staff Regulation 4.5(c) states: “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;” corresponding Staff Rule 4.13 states in addition that fixed-term appointments have an expiration date as specified in the letter of appointment. Furthermore, staff Rule 9.4 stipulates: “[a] temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.” [Emphasis in original]

Best regards,

Alexandre Schmidt

10. On 13 January, Mr. Schmidt wrote again to the Applicant, advising that he had just received a very embarrassing email from the Minister of Justice of Mali which he had to keep confidential in view of the Applicant’s persistent position in relation to the Coordinator of PNI. He went on to state that this was the more regrettable because he had such esteem for the Applicant.¹

11. On 17 January the Applicant wrote to Mr. Schmidt requesting further clarification of the reasons behind the non-renewal of his contract, given that there was funding in

¹ Free translation from French. The original reads as follows: “Pour ton information je viens de recevoir un mail tres embarrassant du ministere de la justice du Mali que je dois garder interne pour confidentialite quant a ta position continue vis-à-vis du role du coordonateur du PNI. Je regrette au plus fort cette situation d’autant plus que je t’estime beaucoup.”

place, the work was being performed, and the project on-going. He has not received a response.

12. Receiving no further information from UNODC, the Applicant approached the Minister of Justice in Mali to enquire as to the nature of the complaint against him. The Minister expressed surprise and on 16 February 2012, sent the Applicant a formal letter stating that his office had never sent any email to UNODC complaining about the Applicant's work or asking that he be removed from his post.

13. The Minister of Justice of Mali also signed a testimonial, stating his complete satisfaction with the work of the Applicant.

The Applicant's submissions

Prima Facie unlawfulness

14. The Applicant contends that the decision not to renew his contract is based on the alleged written complaint referred to by Mr. Schmidt in his email of 13 January 2012. The Applicant has not been given any opportunity to respond to this complaint. It is a violation of the fundamental principles of administrative law and procedural fairness not to permit the Applicant that opportunity.

15. The Applicant further contends that the Respondent's refusal to explain the reason/s for the non-renewal permits the Tribunal to infer impropriety in the decision-making process. He further argues, relying on *Obdeijn* UNDT/2011/032, that the Respondent has an obligation to disclose the reason for the non-renewal.

16. The Applicant also argues that he was given a legitimate expectancy of renewal as a result, *inter alia*, of the indication on the vacancy announcement that renewal was dependent on funding; the continuance of the project at least until 31 November 2012; and the failure of the administration at any time to raise concerns regarding the Applicant's performance.

17. Finally, the Applicant argues that reliance on the supposed email from the Malian authorities as a basis for the non-renewal of the Applicant's contract is a countervailing circumstance which should not form part of the decision-making process. The staff of the United Nations enjoys independence in the exercise of their duties and this would be seriously compromised if the views of a Member State were taken into account when considering whether or not to renew a contract. Article 100 of the United Nations Charter states that the Secretary-General "shall not seek or receive instructions from any government" and that "[e]ach Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

Urgency

18. The Applicant's contract is due to expire on 29 February 2012. It was not until the Applicant received the letter from the Minister of Justice, on 16 February 2012, that he realized that the motivation behind the non-renewal of his contract was manifestly improper. The Respondent refused to divulge the reasons for the non-renewal, contributing to any delay in the Applicant seeking redress.

Irreparable harm

19. The Applicant argues that without a suspension of action, his rights cannot be preserved. Citing *Tadonki* UNDT/2009/016, paragraph 13.1, the Applicant argues that "a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in the decision-making process."

The Respondent's Submissions

20. The Respondent opposes the Application. The Respondent relies on the wording of the letter of appointment which clearly stipulates that the appointment was for a fixed-term; that the appointment would expire on the date stipulated therein; and that a fixed-term appointment does not carry any expectancy of renewal. Thus the Respondent asserts that the reason for the non-renewal is simply the expiry of the fixed-term contract, and nothing more.

21. The Respondent argues that since *Obdeijn* is under appeal before the United Nations Appeals Tribunal (UNAT), it has no force and should not be relied upon.

22. The Respondent further argues that the Applicant has not established that he will suffer irreparable harm, relying on *Utkina* UNDT/2009/096, paragraph 51, in which it was stated that “it is not the case that any loss to professional reputation or harm to career prospects or other damages will necessarily result in a finding of irreparable harm; in many cases should the applicant win the substantive case, the Tribunal will be able to repair the damage with an award of appropriate compensation.”

23. The Respondent relies on legal argument alone. He has not submitted any evidence to explain the decision or to counter the evidence presented by the Applicant.

Considerations

24. In view of the documentation filed by the Applicant and the Respondent and in light of the requirements of article 13.3 of the Tribunal's Rules of Procedure, the Tribunal does not consider it necessary to hold a hearing in this case.

25. Pursuant to article 13 of its Rules of Procedure, the 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.

Prima facie *unlawfulness*

26. The first question for the Tribunal is whether or not the Applicant has made out a *prima facie* case of unlawfulness in the decision not to renew his contract. The Respondent is correct that fixed-term appointments within the United Nations stipulate that they carry no expectancy of renewal and clearly state that they will expire on the date stated in the letter of appointment. However, the jurisprudence of this Tribunal and the former United Nations Administrative Tribunal is clear that, notwithstanding these provisions in the contract, a decision not to renew a fixed-term appointment may be unlawful where countervailing circumstances render it so. It is assumed that the Respondent acts in good faith when taking the decision not to renew a contract, and any indication that he has not, or that prejudice, bias, or other improper motives are at play will taint the whole decision making process and render it unlawful.²

27. In *Pirnea* UNDT/2011/059, the Tribunal stated:

The general rule is that a fixed-term contract has an expiry date and such contract does not carry any expectancy of renewal. From the case law of the former United Nations Administrative Tribunal and the United Nations Dispute Tribunal, two schools of thought have emerged. Firstly, there is no duty to give reasons for the non-renewal of a fixed-term appointment but if the Organization decides to give reasons these reasons must be supported by evidence or by facts. Secondly, there is an emerging jurisprudential thinking that when a contract is not renewed or terminated reasons must be given to the concerned staff member so that he or she is in a position to take any action as he or she deems fit.

[...]

Whether reasons should be given or not, when a contract is not being renewed should be decided on a case to case basis. It is the considered view of the Tribunal that the absence or failure to give reasons must be analysed by taking into account the context in which the decision was

² UN Administrative Tribunal Judgment No. 885, *Handelsman* (1998); *Azzouni* UNDT/2010/005; *Abdalla* UNDT/2010/140.

taken. There cannot be an absolute and general rule that the failure to give reasons would be an unlawful exercise of the discretion not to renew. Nor should there be a general rule that the Respondent should never give reasons.

The matter involves a delicate exercise of judgment in the decision making process. There may be cases where the contract lapses automatically at the end of its term. If no promise has been made to the staff member and if there are no extraneous factors pointing to improper motives there would be as a rule no need to give reasons because the staff member would be fully aware that the contract is due to come to an end at a specified date.³

28. In *Aboedra* Order No.10 (NBI/2011), the Tribunal found that “absence of a reasoned decision may amount to the unlawfulness of a decision.”⁴ In *Obdeijn* UNDT/2011/032, the Tribunal held that “there is a duty and requirement on institutions to act fairly, transparently, and justly in their dealings with staff members”⁵ and that part of that duty entails making reasoned decisions about the renewal of a staff member’s contract.⁶ That Judgment remains persuasive even though it is under appeal. While the Administration has the discretion not to renew a fixed-term contract that “discretionary power should not...be confused with arbitrary power.”⁷ The Administration should also bear in mind that “discretionary power is not absolute power.”⁸ In *Kasmani* UNDT/2009/017, the Tribunal held that the “myth of unfettered discretion is inimical to the rule of law principles.”⁹

29. In *Ballo*, the Administrative Tribunal of the International Labour Organization (“ILOAT”) was dealing with a decision not to renew a fixed-term contract, a matter regarded by ILOAT as a discretionary decision. The ILOAT stated that in dealing with such a situation it must determine:

³ UNDT/2011/059, paragraphs 28, 32-33.

⁴ Paragraph 23.

⁵ Paragraph 33.

⁶ Paragraph 55.

⁷ ILOAT Judgment No. 191 (1972), *Ballo*, at p.6.

⁸ WBAT Report (1981) Decision No. 1, *De Merode*, at p. 21.

⁹ UNDT/2009/017 at paragraph 9.5.2.2.

whether the decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organization's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority.¹⁰

30. Though there is a body of jurisprudence that, contrary to *Obdeijn*, has held that there is no need to give reasons for the non-renewal of a fixed-term contract, fairness would require that reasons be given, particularly when the employee specifically requests them. In a document prepared by the Office of the Under Secretary-General for Management, entitled "Lessons Learned from the Jurisprudence of the System of Administration of Justice: A Guide for Managers", when discussing the need to give reasons for a non-renewal, the Office sent a word of caution to managers by stating:

pending the UNAT's decision on the matter, managers should take care to ensure that the documentary record grounds a decision not to renew a FTA in objectively verifiable reasoning.¹¹

31. In the present case it does not appear that any reasons—let alone objectively verifiable reasons—were given to the Applicant for the non-renewal of his contract, and the Respondent's response does not elicit any, beyond the natural expiry of the contract. Furthermore, the Applicant specifically asked for reasons and was not provided with any.

32. At this stage, the Tribunal need only find a *prima facie* case of unlawfulness. It seems most peculiar that an apparently able, successfully performing staff member, whose post is said to depend upon funding, and for which further funding is available, should simply have his contract allowed to expire. This is not the way that the Respondent usually operates and reliance on this makes the situation appear all the more suspicious. There is the strongest implication that the motives behind the decision were improper, and thus that it was an abuse of discretion.

¹⁰ ILOAT Judgment No. 191 (1972), *Ballo*, at pp.6-7.

¹¹ August 2012, fn. 16.

33. It seems to the Tribunal that everything points to a suspect reason for the non-renewal, and the fact that no clear reason was given, even after the Applicant specifically requested it, makes this an easy inference to draw.

34. As to the supposed email from the Minister of Justice—if indeed Mr. Schmidt was suggesting that this was the reason behind the non-renewal decision—there can be no doubt that taking a decision based on this was unlawful. Whatever the email may have said, it would be an affront to natural justice to take a decision such as the non-renewal of a contract without even giving the Applicant a chance to review the allegation or criticism against him and to provide a response. It would appear that the Respondent took the email at its face value, if indeed such an email exists. This is very disturbing, the more so as the Minister himself expressed surprise at the suggestion of the email and denied that he was the author or sender of that document. This kind of approach coming from management is certainly not conducive to good employer/employee relationships and Mr. Schmidt should have known better. There are provisions in the Staff Regulations and Staff Rules for dealing with alleged misconduct and poor performance, neither of which have been followed in the present case. There can be no question that reliance on a mysterious message purporting to come from the Ministry of Justice of a Member State as a justification for non-renewal is unlawful, particularly in view of article 100 of the United Nations Charter. As stated in *Gaskins* UNDT/2010/119, at paragraph 25:

[w]hat is at issue here is whether it is consistent with the high standards set by the Charter of the United Nations, Bulletins and issuances of the Secretary-General and the staff regulations...to remove a staff member from his position and to deprive him of performing essential aspects of his duties solely as a response to an ultimatum by a project partner...

35. If any reliance was placed on an email purporting to come from the Minister of Justice of Mali in the decision-making process, it is morally offensive and unquestionably unlawful. Furthermore, reliance on a letter purportedly coming from the Ministry of Justice of a sovereign State which is a member of the Organization is not only embarrassing to the Organization itself, but could have far-reaching political and diplomatic consequences.

36. In all the circumstances of the case the Tribunal has no hesitation in finding that the decision not to renew the Applicant's contract was *prima facie* unlawful.

Urgency

37. The requirement for particular urgency is clearly met in this case, since the Applicant's contract will expire on 29 February 2012. The Applicant has not created the urgency himself, having approached the Tribunal as soon as possible after receiving confirmation from the Minister of Justice that no email impeaching the Applicant had emanated from that office. There are only a few days to go before the Applicant will be separated. The matter is clearly of particular urgency.

Irreparable Harm

38. As stated in *Tadonki* UNDT/2009/016:

a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.¹²

39. Whereas mere economic loss deriving from the loss of employment can be compensated in damages, there is more to the harm caused by the non-renewal of a contract than that. There is a loss of career prospects, loss of self-esteem, and unquantifiable potential harm to the Applicant's professional reputation.

40. This Tribunal has no difficulty in concluding, as it did in *Osman* UNDT/2009/008, and *Tranchant* Order No. 91 (GVA/2010), that the deprivation of

¹² Paragraph 13.1

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

Conclusion

41. The Application is granted. The Respondent is ordered to suspend the decision not to renew the Applicant's contract pending management evaluation of the decision.

(Signed)

Judge Vinod Boolell

Dated this 22nd day of February 2012

Entered in the Register on this 22nd day of February 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi