



Introduction

1. On 8 November 2012, the Applicant, a Programme Officer with the ICT and Science and Technology Division (“ISTD”) of the United Nations Economic Commission for Africa (“UNECA”), requested management evaluation of the decision not to renew his fixed-term appointment beyond 9 November 2012. On the same day, he filed the current application for suspension of action in relation to the same decision with the United Nations Dispute Tribunal (“the Tribunal”).
2. The Application was served on the Respondent the same day and he was

Additionally, the ANDI Secretariat is comprised of individuals recruited in accordance with UNECA Staff Rules and Regulations and employed under UNECA staff contracts.

5. On 30 March 2012, the Director, ISTD (“D/ISTD”), requested that the Chief of the UNECA Human Resources Services Section (“HRSS”) create the position of P-4 Program Officer for the ANDI Secretariat in ISTD. She indicated that the funding for the post would be made available by WHO in April 2012. On 12 April 2012, the Director, ISTD, completed a request for a vacancy announcement for the P-4 Programme Officer post within ANDI/ISTD. The duration of the vacancy announcement was for 6 months initially. The post was approved.

6. On 9 May 2012, the D/ISTD wrote to the Chief, UNECA HRSS, requesting that the Applicant be given a temporary appointment with effect from 15 May 2012 for a period of three months to “avoid a break in the essential duties inherent in the P4 position in the ANDI Secretariat [...]”. She explained that he was on secondment from WHO and that his contract with WHO was due to expire on 14 May 2012.

7. On 28 May 2012, the D/ISTD wrote to the Chief, ECA HRSS to inform him that the Chief of the UNECA Partnership and Technical Cooperation Office (“PATCO”)¹ had assured her that additional funds were being processed by WHO to cover the costs of the P-4 Programme Officer post, the Temporary Vacancy Announcement (“TVA”), as well as the programme implementation. She indicated that the funds were expected to be available by July 2012. On 13 June 2012, she

8. Effective 10 August 2012, the Applicant was offered a temporary appointment at the P-4 level as a Programme Officer with ISTD. The temporary appointment was for a period of three months with an expiration date of 9 November 2012.

9. In October 2012, the D/ISTD expressed her concerns regarding the management and productivity of ANDI and requested that the Director of the Division of Administration (D/DoA) terminate the MOU. The D/ISTD forwarded a draft notice to terminate to the PATCO on 16 October for his review and advice prior to finalization. On 5 November 2012, the PATCO expressed to the D/ITSD the need to handle the matter carefully and proposed that they meet with the Deputy Executive Secretary to “strategize on a common ECA position”. In responding to the PATCO on 7 November 2012, the D/ISTD pointed out that “[s]o the sooner we take a decision the better for ECA/WHO relationship [*sic*] as we cannot keep holding this decision”.

10. According to the Applicant, at approximately 1800 hours on 7 November 2012, the Director, ISTD, informed him verbally that his contract would not be renewed. He applied for management evaluation of the decision on 8 November and also filed an Application with the Tribunal.

Considerations

11. Applications for suspension of action are governed by article 2 of the Statute and article 13 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must all be satisfied for an application for suspension of action to be granted.

Prima facie unlawfulness

12. The Applicant submits a number of reasons for the unlawfulness of the contested decision, which include, *inter alia*, that he was not given reasons for the non-renewal.

13. The Respondent also submits several reasons regarding the lawfulness of the contested decision. This includes, *inter alia*, that: (i) the Applicant had been provided with a reason for the non-renewal of his contract in that the D/ITSD had informed him that “the D/ITSD decided not to issue a temporary job opening and advised the Applicant accordingly”; and (ii) an organizational review of ECA and the ANDI programme led to the decision that ECA would no longer host ANDI.

Considerations

14. The Tribunal refers to what was stated by Judge Ebrahim-Carstens in regard to the threshold of proof of the unlawfulness of a decision in the case of *Miyazaki* UNDT/2009/076:

The first of the three criteria required by this article [Article 10.2 of the Statute of the UNDT] is that the contested decision “appears prima facie to be unlawful.” The combination of the words “appears” and “prima facie” indicate that the threshold required to be met by

dated 5 November 2012, the PATCO reminded the D/ITSD again of the need to handle the matter carefully and reminded her of an earlier agreement to “follow all the laid down procedures on MOU [*sic*] towards settling the current challenge amicably”. He noted that since the Assistant Director General of WHO had requested a meeting with UNECA on the matter, it was necessary for the relevant UNECA offices (i.e. DoA, ISTD, PATCO and the Deputy Executive Secretary) to meet and “strategize on a common ECA position and the way forward before the requested meeting with WHO”.

21. At 1709 hours on 7 November 2012, the D/ISTD responded to the PATCO. She agreed that there was a need to handle the matter carefully but noted that “[o]ur taking time to ponder on a way forward will delay and will make it seem as if we are dithering on a concrete decision [...]”. She also pointed out that “[s]o the sooner we take a decision the better for ECA/WHO relationship [*sic*] as we cannot keep holding this decision”.

22. Based on the available evidence, it appears that only one person, the D/ITSD, had decided to terminate the MOU and end ANDI. However, it is quite clear from the PATCO’s email that the final decision to terminate did not lie solely with the D/ITSD. Thus, the Tribunal cannot conclude that by 22 October 2012, as submitted by the Respondent, ECA had **decided** to terminate the MOU and therefore bring the ANDI programme to an end. In actuality, the Tribunal can only conclude that as of 7 November 2012, UNECA lacked a common position on ANDI, that notice had not been given by UNECA to terminate the MOU, that the MOU is still in full effect and as such, it is mendacious for the Respondent to cite termination of the MOU as the basis for the decision not to extend the Applicant’s appointment.

23. Based on the foregoing, the Tribunal finds, in accordance with Article 2 of its Statute and Article 13 of its Rules of Procedure, that the Respondent’s decision not to renew the Applicant’s fixed-term appointment is *prima facie* unlawful having been motivated by an erroneous representation in regard to a non-existent decision on the

status of the MOU and ANDI. Thus, the Applicant has met his burden of proof in this respect by establishing that he has an arguable case of unlawfulness.

Particular urgency

these prospects away because of the ANDI project. The Tribunal has no reason to doubt this submission.

28. In addition the Tribunal would endorse what was said in the case of *Tadonki* UNDT/2009/016

The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But 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 make him whole.

(Signed)

Judge Vinod Boolell

Dated this 14th day of November 2012

Entered in the Register on this 14th day of November 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi