
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/034
Order No.: 154 (NY/2018)
Date: 7 August 2018
Original: English

Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Pallavi Sekhri, Officer-in-Charge

MALLICK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Thomas Jacob, UNDP

Introduction

1. On Tuesday, 31 July 2018, the Applicant, the Deputy Resident Representative (“DRR”) for the United Nations Development Programme (“UNDP”) based in Georgetown, Guyana, filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the decision by UNDP not to renew the Applicant’s fixed-term appointment beyond the expiration date of 16 August 2018. The Applicant u.98 Tm0 G[Pou0 G[9212 79

particular circumstances that needed to be addressed on urgent basis, the Tribunal, on exceptional basis, requested the Applicant to file a response addressing in particular the Respondent's submissions on *prima facie* unlawfulness by 3:00 p.m. on Friday, 3 August 2018 by Order No. 153 (NY/2018).

6. The Applicant

... [The Applicant] is a female from a developing country, with long experience in 'hardship' field duty stations, and is the

- ... On 8 May 2017, the RR/RC sent a further email to all staff notifying them that the HQ mission would take place from 10 May 2017 to 12 May 2017 to “help [UNDP Guyana] improve our office processes and climate with regards to staff issues and concerns”.
- ... On 7 June 2017, the MCT provided the RR/RC with a Letter of Understanding formalizing the purpose of its review of UNDP Guyana’s strategic positioning and organizational structure for optimal support to the government during the new programmatic cycle whilst ensuring financial sustainability of the office. This letter reflected that the MCT was requested further to “concerns over the findings of a recent audit which highlighted factors that would hinder its ability to deliver on the new programme”.
- ... From 21 June 2017 through 28 June 2017, the MCT team visited UNDP Guyana. On 3 August 2017, the MCT issued its suggested Transformation Plan. The Transformation plan reflects that the basis for this report was to “respond, primarily, to i) the need for a review of its strategic positioning driven by the new programming cycle; ii) the need to improve operational efficiency; and iii) issues of financial sustainability”.

Request to leave UNDP Guyana

- ... In October 2011, the Applicant was assessed as “Ready with Development” for Deputy-Resident Representative (DRR) assignments. [According to UNDP Guiding principles for Bureau Managers on the Candidates Pools within UNDP (2013),] “[c]andidates who have been competitively reviewed through a corporate assessment and have been found “ready” or “ready with development” [...] immediately becomes a member of the Pool they have been assessed for.” In addition, “[a]ll pool posts are rotational; as such pool members are expected to rotate according to the country office classification and to apply to posts accordingly.”
- ... On 17 August 2015, the Applicant started her assignment as DRR with UNDP Guyana at the P4-Grade. Georgetown, Guyana is classified as a “B” hardship duty station requiring that incumbents rotate from their assigned post every 4 years.
- ... On 12 May 2017, the Applicant met with [name redacted, Mr. DR] as part of the HQ mission to UNDP Guyana. During their discussions, the Applicant expressed her desire to leave UNDP Guyana.

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The obligation of the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Staff Rule, but it is inherent to the Tribunal's power to review the validity of such a Resolution A/RES/63/253 and the principle of accountability of managers that the Resolution advocates for.

c. The Organization's failure to provide reasons in support of a decision not to renew a staff member's contract does not automatically lead to the conclusion that the decision is unlawful. However, the jurisprudence is clear that the failure to provide reasons shifts the burden to the Administration to prove that the impugned decision was not arbitrary or tainted by improper motives;

d. There is a general principle of international civil service law that there must be a valid reason for the non-renewal of any contract and that the staff member must be informed of that reason explicitly in a decision, against which he or she can appeal. This principle, according to the Administrative Tribunal of the International Labour Organization ("ILOAT") *S. v. UNESCO* Judgment No. 3838 (2017), applies to the non-renewal of a fixed-term appointment which, under the staff regulations, ends automatically upon its expiry;

e. In *Assale* UNDT/2014/034, the Dispute Tribunal concluded that "[t]he myth that a fixed-term appointment comes to an end automatically without the Administration having to give any reason must be laid to rest. The Administration keeps relying on that vague defence to justify any situation of non-renewal of a fixed term appointment";

f. As a consequence, the Administration's failure to provide the Applicant with reasons for her non-renewal was unlawful. Moreover, this failure gives rise to an adverse inference that the reasons for not renewing the Applicant's appointment was tainted by improper motives. It should be noted that the need for the position of Deputy Resident Representative in

11. The Respondent's principal contentions may be summarized as follows:

Prima facie unlawfulness

a. The non-renewal of the Applicant's appointment is lawful. The Applicant is aware of the reason for the upcoming nonrenewal of her appointment as it is the direct result of her asking to leave the DRR post she encumbered, and not any improper motives. There is no evidence that the Applicant at any time requested and was denied the reason for the non-renewal of her appointment;

b. The Applicant's reference to *Obdeijn* 2012-UNAT-201 for the proposition that "the duty of procedural fairness requires a written explanation for a decision [and...] the failure to provide reasons shifts the burden to the Administration to prove that the impugned decision was not arbitrary or ta ä thefts

As regards the alleged absence of reasons as pointed above there is no general rule in the jurisprudential thinking of UNAT that reasons must be given failing which the non-renewal of the fixed term contract is unlawful. In the context of the application, the reason for the non-renewal is subsumed in the contract itself, namely, the expiry date. In the absence of a promise or a legitimate reason for renewal the Applicant is deemed to be aware that his contract is coming to an end [...].

d. A plain reading of *Obdeijn* reflects that the obligation identified by the Appeals Tribunal is that the Organization has to provide a reason – when requested to do so;

e. The Applicant, despite numerous interactions with UNDP senior management regarding her employment status, has provided no evidence that she requested, nor that the Organization refused to state, the reasons for the non-renewal of her fixed-term appointment;

f. Furthermore, the Applicant cannot reasonably submit that she was unaware of the reason for the non-renewal of her appointment, nor state that it was improperly motivated as all of the Organization's actions were consequent to the Applicant's requests;

g. Unlike normal staff positions, staff members on rotational position are aware that prior to the end of their rotation they are to find another position, absent which they will become displaced and their appointment will not be renewed;

h. As notified to the Applicant, the sole reason the DRR Guyana post was presented to the December 2017 TRE “outside of the normal cycle of recruitment” was further to the Applicant's requests to leave the DRR post for family reasons prior to the end of her 4-year rotation. Absent the Applicant's requests, the rotation for this position was not scheduled until August 2019 and her appointment could have been renewed against the DRR post until then;

- i. At no time has the Applicant contested the decision to place the DRR

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documentary or other. As held in *Balinge* UNDT/2012/180, “[t]his Application fails for the simple fact that it is entirely based on unsubstantiated allegations. There is absolutely no showing of any unlawfulness on the part of the Respondent beyond the mere assertions and allegations of the Applicant”;

q. The Applicant cannot request that the Organization take specific actions to support her, professionally and personally, in response to her requests to leave UNDP Guyana early and then claim that the actions of the Organization in response thereto are ill-motivated. The Applicant has at all time been aware of the reason for the non-renewal of her fixed-term appointment upon its natural expiry, a reason onto itself, that is that the Applicant has not been retained against another position further to the end of her rotation against the DRR post in UNDP Guyana.

12.

written notice of any kind was ever submitted. Certainly, no discussions were had with the Applicant regarding actual resignation or separation;

c. The Applicant legitimately raised her concerns and frustrations regarding UNDP Guyana. This is evidenced in her email correspondence. There was never any form of written notice which permitted UNDP to simply consider that the Applicant sought to separate from the Organization. The notification of separation dated 10 July 2018 does not state any reason for her separation, and does not state that the decision was predicated on her desire to leave UNDP;

d. The Applicant was aware that her position with UNDP Guyana was re-advertised. Whilst the Applicant applied for the post, she was not selected. Subsequently, an alternate candidate was given the post. However, instead of the Applicant being separated, she retained her position and functional responsibilities. The Applicant continued to perform the role of DRR. At the

i. In this case, the Applicant had retained her position as DRR, despite the fact that an alternate staff member had been selected. The Administration could have notified the Applicant that her appointment was to be terminated. Instead UNDP retained the Applicant's services based on the issues and difficulties she had previously experienced. At no point did UNDP indicate to the Applicant that she would be separated from service were she not able to find an alternative position. The Administration committed itself to a course of conduct that the Applicant relied upon;

j. It is accepted that, whilst valid reasons must be given for the non-extension of a contract, the case law does not specifically require that the reasons be stated in the text that gives notice of the non-extension. However, such reasons should not be provided simply after a lawful challenge by the Applicant's

and Director, Bureau for Management Services, had been delegated the authority by the Administrator to answer the request. On 24 July 2018, Ms. SM informed the Applicant by email “that UNDP management does not believe that the facts of the case merit suspension of action on the management decision taken”.

22. The decision on the Applicant’s management evaluation request is not due until 2 September 2018, after the expiration of the Applicant’s contract on 16 August 2018. The Applicant’s submission on this issue has commendably not been challenged by the Respondent.

23. In the circumstances and on the papers before it, the Tribunal finds that the matter is urgent as the contested decision is impending and will be implemented before the management evaluation is rendered, and the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

24. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (see, for instance, *Adundo et al.*

UNDT/2012/077 and *Gallinella et al.*) ~~Irreparable damage~~ (the) - (b) (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100) (101) (102) (103) (104) (105) (106) (107) (108) (109) (110) (111) (112) (113) (114) (115) (116) (117) (118) (119) (120) (121) (122) (123) (124) (125) (126) (127) (128) (129) (130) (131) (132) (133) (134) (135) (136) (137) (138) (139) (140) (141) (142) (143) (144) (145) (146) (147) (148) (149) (150) (151) (152) (153) (154) (155) (156) (157) (158) (159) (160) (161) (162) (163) (164) (165) (166) (167) (168) (169) (170) (171) (172) 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improper motives. The Appeals Tribunal in *Obdeijn* also reiterated that the Secretary-General has an obligation to state the reasons for an administrative decision as a consequence of the inherent power of the Tribunal to review the validity of such.

30. The Respondent on the other hand argues that *Obdeijn* only requires the Organization to provide a reason when requested and that the Applicant failed to show that she requested, and that the Organization refused, to state the reasons for the non-renewal. Furthermore, the Respondent argues that the Applicant was well aware of the reasons for the non-renewal of her fixed-term contract.

31. In *Ncube* 2017-UNAT-721, the Appeals Tribunal stated that “our case law requires the Secretary-General to provide a reasonable explanation when a staff member’s fixed-term appointment is not renewed”. Also in *He* 2018-UNAT-825, the Appeals Tribunal confirmed that “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”.

32. In *Assale* 2015-UNAT-534, the Appeals Tribunal stated that it is undisputed that a fixed-term appointment carries no expectancy of renewal or conversion, and citing *Said* 2015-UNAT-500, stated that “[n]evertheless an administrative decision not to renew a fixed-term appointment can be challenged on the grounds the Agency has not acted fairly, justly and transparently with the staff member or was motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving such factors played a role in the administrative decision”.

33. In *S. v. UNESCO* ILOAT Judgment No. 3838 (2017), it was held 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”. In ILOAT Judgment No. 1154, *In re Bluske* (1992), ILOAT did not accept the reasons for non-renewal provided orally as the substantive reasons for non-renewal, but on

expectation must lie within the powers of the person or body creating the expectation (*Candusso* UNDT/2013/090). In this instance one wonders for how long the Applicant would be allowed to search for an alternative job all during the double incumbency. The Tribunal notes that the Respondent acknowledged that the Applicant's rotation period in Guyana would only expire August 2019 and she was expected to remain in Guyana had she not requested to move from the hostile environment. In all the circumstances the Applicant may well have had an expectation that she was secured from separation even if she would be displaced from the Guyana office.

40. Accordingly, on the papers currently before it, the Tribunal finds that the Applicant has made out a fairly arguable case that the contested decision is unlawful.

41. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Conclusion

42. In light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is granted and the contested decision is suspended pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 7th day of August 2018