Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

UTKINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for applicant:
Kevin Petkos

Counsel for respondent:
Stephen Margetts, ALU

Introduction

1. The applicant is a programme officer in the United Nations Office for Disarmament Affairs (ODA). She is employed on a fixed-term contract expiring on 10 January 2010. However, on 5 November 2009, the applicant received a letter informing her that her contract would be terminated for financial and administrative reasons effective 31 December 2009. On 24 December 2009, the applicant filed an application for a suspension of action on the decision received on 5 November 2009. On the same day, the applicant filed a request for a management evaluation of the same decision.

The facts

2. In August 2007, while the applicant was employed by the United Nations Monitoring, Verification and Inspections Commission (UNMOVIC), she was involved in the discovery and containment of dangerous material in the United Nations archives. On verification that the material was hazardous she reported the discovery to the Department of Safety and Security. She subsequently cooperated with the investigations conducted by the United Nations and the United States law enforcement authorities.

3. On 7 September 2007, the applicant and several of her colleagues were notified by UNMOVIC that their contracts would not be renewed. However, the applicant's contract was subsequently renewed until February 2008. Based on the parties' submissions, on 8 February 2008, the Secretary-General issued a decision stating that five individuals, including the applicant, should be retained in order to assist ODA in carrying out its responsibilities more effectively and efficiently. The Secretary-General's decision further stated that the financial support for this would be provided through bridge funding from extra-budgetary resources and that regular budget funding should be sought to retain appropriate capacity after the initial period.

> UNMOVIC missions, they have gained skills, capacities [and] competencies that are transferable to other functions in the UN Secretariat.
>
> Given that their expertise and dedication have unquestionably served the United Nations extremely well over the years, and due to the downsizing affecting this project, we are seeking OHRM's kind consideration to grant these individuals, on an exceptional basis, status as internal candidates as per the recommendation made in para 1 above, allowing them to be considered as either 15 or 30 day candidates for vacancies under Galaxy.

11. On 24 December 2009, the applicant sub6(t1/P ﾍ Natexcapcan)6n m11.suspenns, of a

15. The applicant stated that she feels that she was sidelined by the ODA management and that her work responsibilities were gradually relegated to "technical support" functions without her consent. The applicant proffers that this is evidenced by the fact that her second reporting officer

Case

not be recoverable by the respondent from the applicant should the respondent successfully defend the claim.

Contested administrative decisions

22. There are some preliminary matters I wish to address. Firstly, in her application of 24 December 2009, the applicant requested suspension of action on two separate decisions—the decision to terminate her appointment effective 31 December 2009 and the decision not to renew her contract beyond 10 January 2010. The applicant's request for management evaluation, filed on 24 December 2009, also covered both administrative decisions.

23. The Tribunal therefore intended to examine both administrative decisions. On 28 December 2009, after its examination of the parties' submissions, the Tribunal issued an order directing the respondent to

> file and serve a submission—with supporting documentation—addressing the following questions:
>
> – Who made the decision to terminate the applicant's contract?
>
> – Did the decision-maker have the delegated authority to terminate the applicant's contract?

24. On 29 December 2009, the respondent filed a response to the Tribunal's order, stating:

> The Decision [to terminate the applicant's contract] was made by . . . [the] Executive Officer, . . . [ODA,] in consultation with . . . [the] Director and Deputy to the High Representative, acting in the capacity as Officer-in-Charge of ODA at the time.
>
> Neither . . . [the Executive Officer] nor . . . [the Director and Deputy to the High Representative] had delegated authority to make the Decision. Pursuant to paragraphs 4 and 7 of Administrative Instruction ST/AI/234/Rev.1, Annexes I and IV, the authority to terminate appointments in ODA pursuant to Staff Regulation 9.3 is vested in the Secretary-General and has not been delegated to officials in ODA.

25. On the same date, the Administration informed the applicant of the withdrawal of the notice of termination. A letter to the applicant, dated 29 December 2009, stated:

> Reference is made to proceeding UNDT/NY/2009/143 before the United Nations Dispute Tribunal and to Order No. 187 of the Tribunal and the Respondent's response thereto dated 29 December 2009.
>
> Please be advised that following a further review of the relevant regulations and rules prompted by the Tribunal's order, we understand that officials of the Office for Disarmament Affairs are not vested with the authority to terminate appointments under Regulation 9.3, regardless of the reasons for doing so, and such a decision must be taken by the Secretary-General.
>
> Accordingly, we have decided to withdraw the decision to terminate your appointment and your appointment will now continue until 10 January 2010, whereupon it will expire in accordance with your terms of appointment.

26. Following its response to the Tribunal's order, the respondent requested the Tribunal to consider whether it was necessary to proceed with the scheduled hearing. The Registry informed the parties of my view that this case involved two decisions—to terminate the applicant's contract and not to renew her a

28. The respondent made an oral submission at the hearing that the application was not receivable because the applicant was on a fixed-term contract that required no notice of expiration; therefore, if she wanted to contest the decision, she should have filed her request for management evaluation at the earliest possible moment when she became aware she was on such a contract contingent upon availability of further funding. Essentially, this would have been within sixty days of the signing of her contract. I cannot subscribe to this argument. If the respondent were correct, it would render most if not all applications against decisions not to renew fixed-term contracts irreceivable. It is neither fair nor reasonable to expect staff members on fixed-term contracts—many of which are for a duration of some months—to file their requests for management evaluation within sixty days after the contract is signed. In my view, in the applicant's case, the triggering point should have been the moment when the staff member was made aware by the Administration that there was no reasonable chance or possibility of renewal. In this case, it was 5 November 2009—the date when the applicant was notified of the termination of her contract, prior to which date the applicant was not aware that further funding was not forthcoming. Therefore, I deem this application receivable.

Respondent's request for confidentiality

29. The third preliminary matter relates to the issue of confidentiality of some of the records submitted by the respondent. Attached to the respondent's reply of 28 December 2009 were four annexes, including three annexes identified as "confidential" by the respondent. Additional annexes marked "confidential" were provided to the Registry on 29 and 30 December 2009. All documents marked "confidential" were provided to the applicant. The Registry requested the respondent to clarify the meaning of the term "confidential" as applied to several annexes submitted by him and to provide the reasons for his request to consider those submissions confidential. The respondent explained that the identified annexes were "confidential internal working documents . . . not intended for distribution to a wider audience" and that "the public interest mediates in favour of confidentiality" of the

documents since they relate to the sensitive issue of the use of funds provided to ODA.

30. The Tribunal addressed the respondent's request at the hearing. As noted above, these documents were filed and served on the applicant, who thus had the opportunity to examine them. The applicant did not raise any objections to the respondent's request that the annexes identified by the respondent be subject to a confidentiality undertaking by the applicant, and, being satisfied with the explanations given by the respondent, I so ordered.

Articles 13 and 14 of the Rules of Procedure

31. The fourth preliminary issue in this case was that of the applicable procedure. The Tribunal has authority to order interim measures under two articles of its Rules of Procedure. Article 13 covers applications requesting the 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. Article 14 is not linked to the management evaluation stage and may be used by the Tribunal "[a]t any time during the proceedings". As the Tribunal stated in *Corcoran* (UNDT/2009/071, para. 34), "these twd to th

Decision not to renew the applicant's contract

Urgency

35. Under article 13 of the Rules of Procedure, one of the criteria that must be satisfied for the Tribunal to order a suspension of action on a decision is that the case must be of a "particular urgency". The Tribunal has rendered several judgments elaborating on this requirement.

36. In *Tadonki* (UNDT/2009/016, para. 12.1), the Tribunal found the requirement of urgency to be satisfied based on a determination that "if the decision contested [i.e., the non-renewal of the applicant's appointment] is implemented before the consideration of the substantive appeal on the merits, the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful on the substantive case especially if the position were to be filled". In *Calvani* (UNDT/2009/092, para. 34), the Tribunal concluded that the decision to place the applicant on administrative leave without pay would deprive the applicant "of his salaries in

Prima facie unlawfulness

39. As the Tribunal held in *Buckley* (UNDT/2009/064, para. 7) and *Miyazaki* (UNDT/2009/076, para. 11), in order to show that the decision appears prima facie unlawful, the applicant must demonstrate an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt.

40. Pursuant to staff rule 104.12(b)(i), in effect at the time the applicant received her last appointment, fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment. Provisional staff rule 4.13(c), currently in force, also provides that fixed-term appointments generally do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. Under provisional staff rule 9.4, "A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment" (former staff rule 109.7 contained a similar provision).

41. The Administration has an obligation to make decisions that are proper and in good faith (see *Sefraoui* (UNDT/2009/095) and *James* (UNDT/2009/025)). The Tribunal therefore examined whether the applicant was given any express or implied promises that her contract would not expire on 10 January 2010 and whether the decision not to renew her appointment was motivated by any improper considerations or was made in bad faith.

42. Other than bare allegations that funding was available, the applicant did not establish in this case that she was given any express or implied promises that her employment would continue after 10 January 2009. There are also no records before the Tribunal to suggest that any such promise was made, and I need not discuss this issue further.

43. The Tribunal considered whether the decision was motivated by any improper motives. In *Bernard* (UNDT/2009/094, para. 19), the Tribunal held that the decision not to extend the applicant's appointment beyond its date of expiry did not appear

prima facie unlawful, in part because the applicant failed to show that "the non-extension of her appointment results solely from the desire of her supervisor to remove her from the service". I find that in order to show that the contested decision appears prima facie to be unlawful, it is not necessary to demonstrate that it was motivated solely by improper motives. As long as the applicant can demonstrate that the decision was influenced by some improper considerations and was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith, the test for prima facie unlawfulness will be satisfied. I will now examine whether the applicant has demonstrated in this case that the decision was tainted by improper considerations.

44. The applicant has made extensive submissions attempting to demonstrate that she was singled out and discriminated against by the management of ODA. The applicant's submissions are at odds with the records furnished by the parties.

45. The applicant's e-PAS report for 2008–2009 reflects that both the first and the second supervisors spoke highly of her performance. The applicant also appears to have sought support from her second reporting officer with respect to her employment options. Further, the evidence in this case—including the applicant's e-PAS report, signed by her—demonstrates that the applicant's assignments were not limited to administrative support functions and she was in charge of substantive projects.

46. The respondent explained in his written pleadings and at the hearing that the extra-budgetary funds obtained to finance the work of the applicant and several other ODA staff members would end in January 2010, and the posts occupied by these staff member would no longer be available. This was supported by the records provided by the respondent and was not disputed by the applicant. Thus, the applicant is not the only former UNMOVIC staff member presently with ODA whose contract is due to expire in January 2010. It appears that the other staff members whose contracts expire in January 2010 applied and were able to secure further appointments on posts other than those currently occupied by them. The Tribunal is not convinced by the

applicant that she was unfairly singled out by the Administration. Indeed, the very documents furnished by the applicant, consisting mainly of emails between herself and her second reporting officer, belie her submission that she was discriminated against, unfairly selected for non-renewal and not assisted in her job search. The records provided by the parties suggest that the applicant's second reporting officer encouraged the applicant to apply for various posts and provided some assistance to her. Regrettably, the applicant was not successful in her efforts to secure further employment. Furthermore, she did not formally appeal, challenge or contest the results of the selection exercises she took part in, thus her contentions with regard to those exercises may be irreceivable.

47. I find, on a balance of probabilities, that there is no evidence that the decision not to renew the applicant's contract was influenced by any reasons other than the financial and budgetary constraints. Accordingly, I do not find that there is an arguable case that the decision was unlawful.

48. Although this finding necessarily means that the applicant's request for a suspension of action on the contested decision fails, I will nevertheless discuss whether the implementation of the contested decision would cause irreparable harm as this issue was extensively addressed in the parties' pleadings.

Irreparable damage

49. The requirement of irreparable damage has been addressed in several judgments of the Tribunal. In *Fradin de Bellabre* (UNDT/2009/004), the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the applicant's rights are observed. In *Tadonki* (UNDT/2009/016, para. 13.1), the Tribunal further elaborated on the general rule expressed in *Fradin de Bellabre*. In *Corcoran* (UNDT/2009/071, para. 44), the Tribunal held that irreparable damage "may already be at hand where serious harm to professional reputation and career prospects or on health or unemployment after a very long time of service would result from the implementation of the contested decision". In *Calvani*

(UNDT/2009/092, para. 28), the Tribunal considered the impact of the implementation of the contested decision on the applicant's reputation, taking into account that the applicant "has been in the employ of the United Nations for more than 20 years and that . . . he holds a highly responsible and visible position".

50. In his reply, the respondent refers to *Fradin de Bellabre* (UNDT/2009/004), in which the Tribunal held that harm is irreparable if it can be shown that suspension of action is the only way to ensure that the applicant's rights are observed. Relying on *Fradin de Bellabre*, the respondent argues that if the applicant can be fully compensated by a monetary award, no suspension of action order should be granted. Indeed, this is an accurate restatement of the general rule for temporary relief measures (also expressed and discussed in *Tadonki*).

51. In each case, the Tribunal has to look at the particular factual circumstances. In my view, there are many instances wh

education grants provided through the Organization, which would have immediate detrimental impact on them. The respondent submitted at the hearing that any reimbursement of education grants by the applicant that she would be required to make, should the suspension not be granted, could be recompensed by the Organization at a later stage, if the applicant proceeded with the application and was successful on the merits. I find this argument convincing.

53. The applicant submitted to the Tribunal—and this was not contested by the respondent—that, because the applicant's contract expires on 10 January 2010, she will be able to secure medical insurance until the end of January 2010. If I were to grant the suspension of action request until the end of the management evaluation process, my order would be in force only until 23 January 2010 at the latest, as the Administration is required to complete its management evaluation within thirty days of the staff member's request. Therefore, the suspension order would not provide the staff member with any additional benefit with respect to medical insurance. Further, even if the applicant would have no access to medical insurance in January 2010, I am not at all convinced on the basis of evidence currently before me that the irreparable harm requirement would be satisfied; however, I need not discuss this issue further in light of my findings above.

54. Other issues were advanced orally by the applicant at the hearing on the issue of apprehension of irreparable harm that may arise from the applicant no longer working in a secure environment due the nature of her qualifications and work. As these issues were not canvassed in her written application and as they will, no doubt, be fully canvassed at the hearing on the main application in due course (should the applicant decide to proceed with it), they may prove relevant to the final outcome. For this reason, and in light of my findings in regard to other requirements to be established by the applicant for the interim relief she now seeks, I am of the opinion that it is neither necessary nor prudent for the Tribunal to express any views or make any finding on the question whether a finding of irreparable harm arising from any apprehended security threats has been made out.

55. Therefore, although I am satisfied that the applicant has demonstrated that this case is urgent, she has failed to show that the decision appears prima facie unlawful and that it would cause irreparable damage if implemented.

56. The applicant, therefore, failed to satisfy two of the requirements for a suspension of action. A suspension of action is, it must be remembered, a discretionary remedy; the Tribunal will exercise its discretion on a consideration of all the circumstances in the case. In the present case, there is, in my opinion, no absence of a satisfactory remedy available to the applicant, and, furthermore, the applicant did not show that she would suffer irreparable harm if a suspension of