
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/049

Order No.: 221 (NY/2018)

Date: 2 November 2018

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

SEXTON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Background

5. The Applicant joined the United Nations 14 years ago and the DGACM publishing team in January 2014 as a Publishing Assistant when the 1st phase of “Project for digitalization with DGACM” was launched with the funding mainly provided by the State of Qatar. According to the Respondent, the project team consisted of 11 staff members, seven of them on permanent appointment and four on fixed-term appointment.

6. According to the Respondent, in view of the temporary nature of the project and the anticipated exhaustion of funding at the end of October 2018, DGACM held meetings with the affected staff members from 11 to 14 December 20

10. On 23 October 2018, the Under-Secretary-General for General Assembly and Conference Management (“USG/DGACM”) held a meeting with the affected staff members and staff representatives. The Respondent and the Applicant provide different versions of what transpired at this meeting. The Respondent submits that at

contract was not based on a genuine reason, but it was a strategy to remove her from post, which is prohibited by ST/AI/2013/4.

Applicant's Submissions

14. The Applicant's principal contentions may be summarized as follows:

Prima facie *unlawfulness*

a. **Wife** (fc6(f90.2pted2 Tfthae)4(12 h12 TfTr.22 bunalo nwill Tm0 nn)JTJEint 1 1901 rf) 0

e. Alternatively, if the Applicant's post was lawfully being abolished, pursuant to staff rules 9.6(e) and 9.6(f), staff members holding fixed-term appointments shall be retained by preference to staff members with a lower level of protection. The Applicant applied to a number of vacancies within the United Nations Secretariat, 12 of which are pending, and 11 of pending applications are with DGACM. It cannot be said that there are no suitable alternative positions onto which she could be placed pursuant to staff rule 9.6;

Urgency

f. On 26 September 2018, the Applicant received a notification that her contract was not to be extended beyond 31 October 2018. On 5 October 2018, the Applicant filed a management evaluation request. However, on 23 October 2018, she learned that the reasons provided in the notification were not accurate;

g. In light of new information, on 26 October 2018, the Applicant amended her management evaluation request specifying that the non-renewal decision was not based on a genuine reason but was rather a strategy designed to remove her from post;

h. The matter is urgent as the non-renewal decision could be implemented by the time the management evaluation is due (4 November 2018);

i. It is not a case of self-created urgency since she only learned about the strategy and underlying facts on 23 October 2018;

Irreparable damage

j. It is trite law that loss which can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action. Nonetheless, this Tribunal has found that harm to career prospects

or sudden loss of employment may constitute irreparable damage (*Corcoran* UNDT/2009/071; *Calvani* UNDT/2009/092);

k. In the present case, if the impugned decision is implemented, the Applicant will suffer harm due to the loss of employment with the Organization and particularly her best chance to continue to be employed by DGACM and advance her career within the Organization. Such harm cannot be compensated for by a monetary award.

Respondent's submissions

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

Prima facie unlawfulness

a. The Dispute Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness requires that an applicant establish that there are serious and reasonable doubts about the lawfulness of the contested decision. An applicant needs to present a "fairly arguable case" that the contested decision is unlawful (*Jaen* Order No. 29 (NY/2011), para. 24; *Villamorán* UNDT/2011/126, para. 28). The Dispute Tribunal need not find that the decision is incontrovertibly unlawful (*Mills-Aryee* UNDT/2011/051, para. 4);

b. A fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice (staff regulation 4.5(c) and staff rules 4.13(c) and 9.4). The Secretary-General has the discretion whether to renew a fixed-term appointment. The reasons given for a non-renewal of

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appointment expires (that is, non-

the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the Applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions” (*Jitsamruay* UNDT/2011/206);

j. The Applicant admits that she became aware of the non-renewal decision on 26 September 2018 and thus was in a position to request suspension of action on 5 October 2018, the date by which she had prepared and submitted her request for management evaluation. The Applicant has not explained her three-week delay in filing the application;

k. That the Applicant discovered supplemental material on 26 October 2018 is irrelevant. The draft working documents relating to a new proposed project corroborate the reason given for the contested decision, that is, that funding for the existing project was exhausted. The Applicant ought to have filed her application for suspension of action with the Tribunal immediately upon submitting her request for management evaluation;

l. Had the Applicant acted with the appropriate urgency and exercised her right to seek management evaluation and suspension of action promptly, the management evaluation processes may well have been completed before the expiry of her appointment. The Applicant’s failure to act with the appropriate urgency has

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20. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, and be succinctly and precisely pleaded. Parties should bear in mind that the matter is not at the merits stage at this point of the proceedings, and that the luxury of time is unavailable. Urgent applications disrupt the normal day-to-day business of the Tribunal, thus delaying the disposal of other older outstanding cases.

21. As the Respondent has not contested the irreparable harm aspect of the application, the Tribunal will now turn to the matter in hand and deal with this aspect first.

Irreparable damage

22. 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

25.

preservation project and that there is still a second phase of the project to be completed. The detailed project initiation document, which one would presume is only prepared once funding has been received or secured, or at least an undertaking made, specifies that “DGACM would utilize five general service staff members for the second phase of the project”. Furthermore, it provides that “the remaining staff will be provided with a contract for one year from July 2018 which would mark the beginning of the second phase of the project”.

also raise serious and reasonable doubts about the lawfulness of the contested decision.

31. In the circumstances and on the papers before it, the Tribunal finds that the

Conclusion

36. 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 2nd day of November 2018