

Introduction

1. The Applicant joined the United Nations Office at Nairobi's (UNON) Joint Medical Services (JMS) on 8 June 2010 pursuant to an Agreement between UNON and the members of the United Nations Country Team Somalia (UNCT) dated 5 March 2010. Her fixed-term appointment was subsequently renewed up to 6 June 2012.

2. The Applicant prays for a suspension of action of a decision not to renew her appointment beyond 6 June 2012. The decision was conveyed to her in a memorandum dated 6 June 2012.

Facts

3. On 5 March 2010, UNON and UNCT entered into an Agreement whose stated objective was to establish the terms and conditions of medical services to be provided by UNON as site manager in coordination with the JMS to UNCT.

4. The Applicant's appointment was made pursuant to and in furtherance of the Agreement and she joined UNON/JMS on 8 June 2010. Her appointment was subsequently extended up to 6 June 2012. The Applicant's First Reporting Officer (FRO) was the Chief of UNON/JMS.

5. On 16 March 2012, the Applicant wrote to her FRO requesting for annual leave from 6 to 20 June 2012 in order to attend the International Conference on Infectious Diseases in Bangkok, Thailand. Her FRO responded on the same date advising her, inter alia, as follows:

[Applicant] pls put in the eleave system also so I can approve. I hope you enjoy the conference. It look [sic] interesting. As I explained to you earleir [sic] sb international conferences are beyond the budget of what the UN can support financially from the JMS budget. However even profession [sic]development activites [sic]that we do on our own and at our own time and expense are to be recorded in the section of your epas that is about professional development. As it is for the next cycle 2012-2013 which [sic]we will start in april I remind you to eneter [sic] it then.

6. On 24 March 2012, the Applicant wrote an email entitled "Report on my misconduct" to her FRO. In the email, she raised various concerns about her work environment including the difficulties that she was experiencing working with the nurses in JMS. The FRO responded on 26 March 2012 advising her, inter alia, as follows:

Given that it appears that reasons of mental health have caused you to be unable to return from leave on the appointed date, please indicate as soon as possible (within 14 days) the number of days you anticipate you will need to be on sick leave....Please note in this connection, you will be required to provide medical reports from a psychiatrist of at least ten years standing in the profession, consistent with the requirements of ST/AI/2005/3, Sick leave, to enable certification of your sick leave and certification of your medical clearance for fitness to return to work. In order to safeguard your right to confidentiality I request that you send the full medical reports to the chair of the Medical directors working group...

7. In another email dated 26 March 2012, the Applicant informed her FRO that she may have misunderstood her 24 March 2012 email and that she was ready to work but that she was not yet ready to attend to patients. Her FRO responded to the email on 26 March 2012 informing her that it was not for the Applicant to determine whether she was fit to return to work and that she was not cleared to return to work until she was officially cleared by the Chair of the Medical Directors as advised in the FRO's email of 26 March 2012.

8. On the morning of 27 March 2012, the Applicant's FRO called her on her mobile phone and warned her of possible arrest by the UNON gate security if she was spotted anywhere near the UNON compound. Further, she would only be allowed into the UNON compound if she was escorted by her colleagues from JMS.

9. On 28 March 2012, UNON's Chief of Human Resources Management Service wrote a memorandum to the Applicant reiterating that the Applicant must submit, by 11 April 2012, a medical note or certificate indicating the number of days necessary for her to remain on sick leave and, by 17 April 2012, a detailed medical report by a qualified psychiatrist indicating whether the Applicant was fit to return to full duty or indicating what aspects of her duty must be modified in

parte Application for suspension of action at approximately 6.00 p.m. on the same day.

14. On the same date, the Tribunal issued Order No. 077 (NBI/2012) suspending the contested decision pending review of the Respondent's submissions and a full determination of the Application. The case was set down for hearing on 11 June 2012.

15. The Respondent filed a Reply on 8 June 2012. The matter was heard in closed sessions on 11 and 12 June 2012 during which the Tribunal received testimony from the Applicant. At the end of the first day of the hearing, the Tribunal posed several questions to both counsel and requested their responses on the second day of the hearing. The questions were:

- a. What the definition of "Notice" is by law especially where the Respondent purports to give notice.
- b. What the expression "close of business" means vis-à-vis the expiry date of the Applicant's appointment on 6 June 2012.
- c. What the term "implementation" means and when a personnel action becomes effective. In this case, whether the personnel action in relation to the non-renewal of the Applicant's appointment became effective on 6 June 2012.

Tribunal's order to disclose the reasons for administrative decision as such it is entitled to draw an adverse inference from the refusal.

23. The Applicant was never notified that her contract was not to be renewed. She had approached a Human Resources Officer who informed her that if her contract was not to be renewed, she would have been given notice. In addition, she had been assigned duties that would require action beyond 6 June 2012 which led her to believe that her appointment would be renewed. She had patients booked to see her beyond 6 June 2012 and additionally, she was to take up medical evacuation duties assigned to her by her FRO which would ordinarily take two weeks. As recently as 30 May 2012, she received an email that related to ongoing arrangements that would lead to believe that she would be working in JMS after 6 June 2012.

24. The decision not to renew her contract and to immediately separate her from service was *prima facie* unlawful as it was served at approximately 4.00 p.m. The Applicant submits that the only rationale for this was to prevent her from seeking timely redress against the decision and that this is fundamentally incompatible with the obligation to act "fairly, transparently and justly".

25. The reasons proffered by the Respondent in the 6 June 2012 notice was that her appointment was not renewed as a result of the termination of the Agreement dated 5 March 2010 between UNON and UNCT. The Applicant submits that the said Agreement was subject to review by UNON and UNCT annually. According to the terms of the Agreement, termination required six months' written notice.

26. The Applicant had never seen the 31 May 2012 letter terminating the Agreement between UNON and UNCT until it was tendered towards the end of the first day of the hearing. The letter raised more questions than it answered. In particular, the letter purports to give one month's notice of termination whereas the Agreement stipulated six months' written notice. In addition, the Applicant submits that the termination letter originated from UNON within a short period following the filing of the Applicant's harassment complaint against her FRO. The Applicant further submits that the only inference to be drawn from this is that

the 31 May 2012 termination notice was sent to UNCT on the instructions of her FRO.

27. The issued guidelines on separation from service provide that it is best practice in the case of fixed-term appointments that staff members are provided 30 days' notice. In this case, this best practice was not followed. She was informed 30 minutes before the close of business in UNON about the intended non-renewal

60. Counsel argued that an entitlement to one month's notice did not exist in respect to the Applicant's fixed term contract. She pointed out that the Applicant's letter of appointment was clear on this. With regards to the UN Guidelines on Separation from Service on Expiration of Service, Counsel submitted that the prescription of one month's notice was merely aspirational, that giving the Applicant only one month's notice was not unlawful or illegal and that the Applicant had no right to a renewal of her contract. The requirement to make a showing as to unlawfulness, she submitted, was not met.

61. Concerning the element of urgency, learned Counsel for the Respondent submitted that no showing had been made.

62. As to the element of irreparable damage it was Counsel's argument that most of the Applicant's testimony on this requirement only went to show tangible financial loss which could be compensated in damages. She submitted that irreparable damage was not established.

Urgency

63. In considering the pleadings, evidence tendered and submissions made before the Tribunal and the three requirements that must be satisfied for this Application to succeed, it is unnecessary to belabour the element of urgency. For

65. In her sworn testimony, the Applicant told the Tribunal that she had been undergoing harassment at the hands of her supervisor in the workplace who on one occasion had threatened to have her removed by security officers if she came

69.

74. The Respondent's Counsel while addressing the Tribunal on the meaning

being urged in this case, is unfortunate, amounts to a petty and disgraceful game and portrays irresponsible managerial practice.

Implementation of expiry of contract and non-renewal

80. The Respondent's Counsel had sought to impress upon the Tribunal on 11 June 2012 when hearing commenced in this case, that suspension of the contested administrative decision could not be granted because the non-renewal decision had already been implemented by the Administration. According to Counsel, the interim order of the Tribunal of 6 June 2012 suspending the impugned decision had been issued after its implementation and could not be given effect.

81. The Tribunal asked for addresses of Counsel for both parties on the issue of the implementation of the impugned administrative decision. The Applicant's Counsel submitted that if it is accepted as submitted by the Respondent that UNON close of business is indeed 4.30 p.m. Nairobi time and that the Applicant's contract expired at that time on 6 June, it would be impossible for the Respondent to implement the impugned administrative decision on the same day. This is because implementation would necessarily follow after the decision had been made.

82. Counsel also pointed out that the Tribunal's interim order having been made at about 6.00 p.m. on 6 June 2012 and properly served on the Respondent, the said order had been made before any implementation of the impugned decision could be started on the next day which was 7 June 2012. The learned Counsel for the Applicant referred the Tribunal to the suspension of action Judgment *Wang* UNDT/2012/080 where Laker J held that the implementation of a promotion which would take effect on a future date had not taken place at the time the successful candidates were informed and that a suspension of action application was receivable and an order suspending the promotion could be validly made in the circumstances.

83. The Respondent's Counsel at that stage informed the Tribunal that she would not argue the issue of implementation of the impugned decision and submitted that implementation was unnecessary and that what mattered was that

the fixed term appointment expired automatically at close of business on 6 June 2012.

84. The Tribunal is in agreement that any implementation of the impugned decision not to renew the Applicant's contract had not begun since it could not be embarked upon before the expiry of the said contract. The Tribunal takes judicial notice of the fact that the Organization takes certain properly set-out steps to separate a staff member upon expiry of an employment contract. The tendering of a Personnel Action Form dated 6 June 2012 before the Tribunal to show that the impugned decision was implemented on the date that the Applicant's contract expired betrays indecent haste and dishonesty on the part of those agents of the Secretary-General who appear anxious to deny the Applicant any opportunity to challenge their decision not to renew her contract.

Bad Faith

85. The Tribunal had asked Counsel on both sides to address it on the issue of bad faith in this case. Specifically, is it right in law and in particular in the UN internal justice system that a manager or managers would in order to ensure that his or her decision to separate a particular staff member cannot be challenged before the Tribunal resort to methods aimed at ousting the Tribunal's jurisdiction?

86. The Applicant's Counsel submitted that in this case, it was obvious that UNON's Administration had unfortunately taken steps to ensure that the Applicant would not have any recourse to the available legal process. With regard to the Respondent's annex R/2 which was filed after his submissions, Counsel noted that it was dated 31 May 2012, less than one week to the decision not to renew the Applicant's contract but did not satisfy paragraph 13(i) of the UNON/UNCT Somalia agreement that six months notice be given by either party in the event of a termination of the agreement.

87. The Respondent's Counsel for her part submitted that there was no bad faith on the part of UNON administration and that it did not find it necessary to give a long notice and had acted within UN rules and the Applicant's letter of appointment.

88. Workplace harassment is viewed with great seriousness within the

in the relevant sections of her E-PAS for the next reporting cycle of 1 April 2012 to 31 March 2013.

92. On another occasion, the Applicant had before the expiry of her

not to renew the Applicant's appointment is accordingly granted pending management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 15th day of June 2012

Entered in the Register on this 15th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi