



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BALFE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Jérôme Blanchard, LPAS, UNOG

## **Introduction**

1. By application filed on 3 March 2023, the Applicant, a staff member of the International Trade Centre (“ITC”), requests suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment after its expiration date on 31 March 2023.
2. The application for suspension of action was served on the Respondent, who filed his reply on 8 March 2023.

## **Facts**

3. In October 2018, the Applicant joined ITC as a P-3 temporary appointee. On 1 July 2020, he was granted a P-3 fixed-term appointment. On 1 November 2021, the Applicant was promoted to P-4 as a Senior Program Officer (Empowering Women to Trade – EWT). His fixed-term appointment was initially due to expire on 31 October 2022.
4. The Applicant’s post was funded by project funds throughout his appointment, with the sources of these funds changing over time. In 2022, the Applicant’s post was funded from a mix of sources, including the Growth for Rural Advancement and Sustainable Progress (“GRASP”) programme (B466), Textile and Apparel Network for Africa (C027), Green Trade (C135), SheTrades West Africa (B610), SheTrades project (C131), and SheTrades Commonwealth (C185).
5. In May 2022, following a realignment exercise, the Division of Enterprises and Institutions (“DEI”) was divided into two divisions, one of them being the Division of Sustainable and Inclusive Trade (“DSIT”).
6. Having received negative feedback from the Applicant’s supervisees, on 26 September 2022, the Applicant’s supervisor, the then Director, DEI, discussed with him a number of specific performance shortcomings.

7. As per the application and not disputed by the Respondent, on 27 September 2022, the Applicant's supervisor informed him that "all four of his direct reports would be removed along with most of his project portfolio", and that "he would work on a single project which the Applicant had already been working on (GRASP) and another future project in South Sudan for which his component was yet to start".

8. By email of 6 October 2022, the Applicant's supervisor informed him of the reasons for the alteration in his functions, stating, *inter alia*, that:

During our meeting, I shared that your performance during the months preceding this discussion, including the first half of 2022, only partly meets my performance expectations. There have been issues relating to staff and engagement with stakeholders.

9. On 10 October 2022, during the Applicant's midterm review for the performance cycle 2022-2023, the Applicant acknowledged that he "agreed [to] some changes to [his] role and portfolio which will enable [him] to focus on key project delivery and business development."

10. In October 2022, the Applicant's fixed-term appointment was renewed for five months until 31 March 2023.

11. The former Director, DEI, retired on 31 October 2022, and a Director, DSIT, was appointed on 5 December 2022.

12. By email of 27 January 2023, the Director, DSIT, informed the Chief, Human Resources ("HR"), ITC, that upon review of the Division's funding structure, she was not in a position to renew the Applicant's fixed-term appointment for budgetary reasons and explained in detail that "[the Applicant's] post was funded from a mix of funding facing a set of constraints" and that the "funding structure that [had] supported the [Applicant's] post [could not continue] beyond March 2023".

13. On the same day, the Chief, HR, ITC, notified the Applicant of the decision not to extend his fixed-term appointment beyond 31 March 2023.

14. On 3 March 2023, the Applicant filed his request for management evaluation and the present application for suspension of action.

### **Consideration**

15. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative. In other words, they must all be met for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

16. The Tribunal will now assess whether the cumulative requirements to grant a suspension of action were duly met in the case at hand, and whether the Applicant has satisfied his burden of proof.

#### *Prima facie unlawfulness*

17. The Tribunal recalls that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (see *Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

18. The present case concerns non-renewal of the Applicant's fixed-term appointment. The Applicant submits that the non-renewal decision is a veiled separation for performance issues, and that it plainly falls below the standards required for a lawful decision.

19. In response, the Respondent contends that the non-renewal decision was based on valid and objective reasons, namely, budgetary restrictions, and that the Applicant has not presented a fairly arguable case that the non-renewal decision was influenced by improper considerations.

20. In this respect, the Tribunal recalls that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal under staff regulation 4.5(c) and staff rule 4.13(c), and expires automatically, without prior notice, on the expiration date specified in the letter of appointment pursuant to staff rule 9.4. There is, thus, no legitimate expectation of renewal unless the Administration has made an express promise in writing that gives the staff member an expectancy that the appointment will be extended (see, e.g., *He* 2018-UNAT-825, para. 41; *Igbinedion* 2014-UNAT-411, para. 26).

21. Nevertheless, the Administration is required to state the reasons for a non-renewal to ensure that the Tribunals can judicially review the validity of the decision, and this reason must be lawful and supported by the facts (see, e.g., *Nouinou* 2019-UNAT-902, para. 50; *He* 2018-UNAT-825, para. 46; *Obdeijn* 2012-UNAT-201, paras. 33-39; *Islam* 2011-UNAT-115, paras. 29-32).

22. Moreover, a non-renewal decision can be challenged on the grounds that the Administration has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive. It is incumbent on the staff member to prove that such factors played a role in the non-renewal decision (see, e.g., *Porrás* 2020-UNAT-1068, para. 24; *Nouinou* 2019-UNAT-902, para. 47; *He*, para. 43; *Said* 2015-UNAT-500, para. 34).

23. In view of the above, in determining the lawfulness of the non-renewal decision, the Tribunal will examine the following issues:

- a. Whether the reason provided for the non-renewal decision was lawful and supported by the facts; and
- b. Whether the non-renewal decision was tainted by improper motives.

Whether the reason provided for the non-renewal decision was lawful and supported by the facts

24. In the present case, the reason provided for the Applicant's non-renewal is lack of funding. Specifically, by email dated 27 January 2023, the Chief, HR, ITC, informed the Applicant of the decision not to extend his fixed-term appointment

beyond 31 March 2023 due to budgetary reasons. She further explained in detail that:

2. [...] There will be a lack of Window 1 funding over the next 12 months, and there is a lack of Window 2 project detailing options that unfortunately, will not allow the Organization to continue funding [the Applicant's] post. This year, funding for [his] post from 1 January to 31 March will be covered exceptionally from the Growth for Rural Advancement and Sustainable Progress (GRASP) programme (B466) to support finalisation of a grant agreement with key implementing partners in the Sindh Province and preparation of the yearly work plan and follow up, evaluation and closure of 2022 outputs.

3. [The Applicant was] originally recruited with a portfolio management role on the SheTrades Commonwealth Project (B578, C185) on 1 July 2020. In subsequent phases of the project, the level of funding was significantly decreased, and the skill set required by the project has changed. In 2023, the project requires experts on SheTrades Hubs and policy, which are two areas requiring management by technical experts, with no in-country staff, and no requirement for a dedicated oversight role.

25. Having reviewed the parties' submissions and the evidence on record, the Tribunal is satisfied that the reasons proffered by the Administration for not renewing the Applicant's fixed-term appointment beyond 31 March 2023, namely the lack of funding, are valid and objective for the following reasons.

26. First, the Tribunal notes that the Applicant does not dispute that the lack of funding is supported by facts. Instead, he submits that his role was changed to one without funding. The Tribunal finds no merit in this contention.

27. In this respect, the Tribunal wishes to point out that the change of functions is a unilateral act imposed on the staff member by the Administration, thereby constituting an administrative decision. If the Applicant did not accept it, he should have challenged it by a request for management evaluation and, later, by an application to the Tribunal.

28. Instead, the evidence on record shows that Applicant agreed to the changes to his role and portfolio. In any event, considering that the Applicant did not contest the decision to change his role, it is legally irrelevant for the present case whether this change might have been unlawful because he might have been transferred to a role with a less secure funding (see, e.g., *El-Awar* 2022- UNAT-1265, para. 62).

29. The Tribunal also notes that the Applicant was not encumbering an established regular-budget post, but an extra-budgetarily funded position.

30. Moreover, the Tribunal considers that there is a genuine reduction of funding. Indeed, the documentary evidence provided by the Respondent supports the funding situation detailed in the non-renewal decision.

31. Finally, the Tribunal is of the view that the lack of funds would have led any reasonable decision-maker to the non-renewal decision. In this respect, the Appeals Tribunal has consistently held that lack of funding is a legitimate and valid reason for not extending a fixed-term, or a similarly time limited, appointment (see, e.g., *Nouinou* 2019-UNAT-902, para. 15; *Abu Ouda et al.* 2020-UNAT-1018, para. 29).

32. Accordingly, the Tribunal finds that the reason provided for the non-renewal decision in the present case was lawful and supported by the facts.

Whether the non-renewal decision was tainted by improper motives

33. The Applicant submits that the non-renewal decision is a veiled separation for performance issues.

34. In this respect, the Tribunal recalls that it is for a party who alleges that improper motives tainted a decision to substantiate this claim by way of evidence (see, e.g., *Ross* 2019-UNAT-944, para. 25; *Morsy* 2013-UNAT-298, para. 23). When doing so, “[t]he mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence” (see *He* 2016-UNAT-686, para. 39).

35. The Tribunal finds no evidence on the record showing a causal link between the Applicant's performance shortcomings and the non-renewal decision. Indeed, it was the former Director, DEI, who discussed with the Applicant about his performance shortcomings in September and October 2022. The email of 6 October 2022 from the former Director, DEI, to the Applicant shows that he noted a "re-found motivation in the late summer of 2022" on the Applicant's part, stating that "things are now fortunately on a better track". However, the non-renewal decision was made by the newly appointed Director, DSIT, on 27 January 2023.

36. Moreover, the Applicant presented no evidence showing that any identified performance shortcomings played a role in the non-renewal decision. The assertion that the non-renewal decision is a veiled performance related separation circumventing the performance rules is based solely on speculation.

37. Accordingly, the Applicant failed to establish that the decision not to renew his fixed-term appointment was tainted by improper motives, and the Tribunal does not find any indication to this effect either.

38. In light of the foregoing, the Tribunal finds that the non-renewal decision is not *prima facie* unlawful.

39. Consequently, the Applicant's case does not meet the requirement of *prima facie* unlawfulness. Given the cumulative nature of the requirements to grant an application for suspension of action, the Tribunal does not consider it necessary to examine the remaining two conditions, namely urgency and irreparable damage.

### **Conclusion**

40. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Teresa Bravo

Dated this 10<sup>th</sup> day of March 2023



Case No. UNDT/GVA/2023/011

Order No. 22 (GVA/2023)

Entered in the Register on this 10<sup>th</sup> day of March 2023

*(Signed)*

René M. Vargas M., Registrar, Geneva