



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/044

Judgment No.: UNDT/2011/149

Date: 25 August 2011

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MAGNANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Esther Shamash, OSLA

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant is a Public Information Officer at the P-3/A level at the United Nations Mission for the Referendum in Western Sahara (“MINURSO”).

2. On 30 September 2010, the Applicant was in a meeting with Hany Abdel-Aziz, Special Representative of the Secretary-General (SRSG). According to its minutes, the meeting was held to discuss information released in the MINURSO press review and exchanges of correspondence between the Applicant and a member of the UN High Commission for Human Rights. The SRSG expressed his disappointment about the Applicant’s professional behaviour during the last period, in particular a disrespectful story about the King of Morocco contained in a recent MINURSO press review. The SRSG then instructed that any information provided by the Applicant to any human rights group or organization must follow the appropriate channel for authorization.

3. The SRSG continued that the Applicant must adhere to the principles of the Organization, the MINURSO mandate and the terms of reference/job description for his post. The Applicant was informed that it was not his prerogative to decide which information should or should not be provided to any group/organization regarding MINURSO’s mandate or activities.

4. The SRSG noted that such failure to adhere to mission policy raised serious concerns about the level of the Applicant’s professionalism, sense of responsibility and his commitment. In this regard, the SRSG stated that the Applicant was not an independent journalist and has no right to free speech which exceeds the prerogative of his function and might put the mission at risk. It was stressed that the SRSG viewed this matter with the utmost seriousness, he would not tolerate such behavior in the future and that his remarks constituted an official verbal warning to the Applicant.

5. On 4 November 2010, the SRSG placed a note-to-file in the Applicant’s Personnel File in which he made the following observations:

- a. He had met the Applicant in the presence of the Chief Mission Support and the Chief of Staff/Senior Political Adviser.
 - b. The day before, the Applicant had received an offer for a lateral transfer to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) which he declined requesting for a position at the United Nations Office at Geneva or the United Nations Office at Vienna instead.
 - c. The Applicant has spent more than 11 years in MINURSO during which time he applied for at least 10 posts in different peacekeeping missions and the UN Headquarters without success in tests and/or interviews, his command of written and spoken French and English being very much questionable.
 - d. He was under the impression that the purpose of the meeting, which was held at the Applicant's request, would be to raise the question of his transfer. Instead, the Applicant raised a security issue involving his mother in Italy. The Applicant had previously, on several occasions, verbally raised concerns regarding his personal safety in Laayoune.
 - e. The Prime Minister of Morocco had recently requested, from the Department of Peacekeeping Operations, the transfer of the Applicant to another Mission due to his impartial (sic) attitude in reporting on the situation of Western Sahara and exceeding the Mission Mandate.
 - f. The Applicant had circulated offensive, unreliable information and an offending caricature of a high level personality.
 - g. The Applicant should be transferred from MINURSO on the shortest notice or put on Administrative leave for his safety and that of his mother.
6. On 15 May 2011, the Applicant received his form for the extension of his contract. On the form, the SRSG had noted that the renewal of the Applicant's next contract would depend on him undergoing language proficiency testing. On 16 June 2011, the Applicant requested Management Evaluation of the decision requiring him to undergo language proficiency tests as condition for extending his contract.

7. The Applicant argued that: the decision requiring him to undergo language proficiency tests in order to have his contract extended is an unlawful abuse of authority and is part and parcel of a wider pattern of harassment; the circumstances surrounding the events leading up to the decision that the Applicant undergo language proficiency tests as a condition for the extension of his contract demonstrate that this decision had been taken in bad faith; it amounted to an abuse of authority on the part of the SRSG; and is in breach of ST/AI/2010/5 (Performance Management and Development System).

Facts

8. On 28 July 2011, the Applicant requested leave for the period 15 August to 9 September 2011 in order to visit his family. According to his leave approval form (annexed to the present Application), his leave request was approved by Alexander Ivanko, his supervisor, on 9 August 2011. The Applicant consequently bought flight tickets to Italy at a cost of Euros 9,950 plus Moroccan Dirhams 1,494.

9. On 11 August 2011, a Note Verbale addressed to the SRSG was received from the Moroccan authorities inviting him to meet the Force Commander to the POLISARIO Front military leaders.

10. On 12 August 2011, at around 12:00, the Applicant was informed by his supervisor, that the SRSG had designated him to be part of a delegation led by the SRSG and the Force Commander and that his leave had been cancelled. The Applicant spoke to the SRSG who confirmed this instruction.

11. The Applicant submitted a request for Management Evaluation of the decision to cancel his leave on Friday, 12 August 2011. On the same date, he filed the present Application for suspension of the said decision (after official work hours in Nairobi). The Application was received by the Registry on Monday, 15 August 2011. A hearing was held on the same day. During the hearing, the Tribunal received testimony from the Applicant and Alexander Ivanko.

The Applicant's Case

12. The Applicant's case is summarized below:

13. The circumstances leading up to the decision to cancel his leave at short notice demonstrate the SRSG's bad faith. The SRSG is engaged in a campaign of harassment against him. In light of the SRSG's earlier unlawful instruction that the Applicant undergo language proficiency tests in order to secure the extension of his contract when no other staff members were required to do so, this cancellation of his leave was malicious and meant as retaliation to punish him for officially challenging the earlier decision.

14. There are two other Political Affairs Officers who are equally capable of accompanying the SRSG on the proposed trip. This decision was motivated by bad faith and an unlawful desire to retaliate rendering it *prima facie* unlawful.

15. This matter is urgent because he was supposed to go on leave as of Monday, 15 August 2011. He was now forced to cancel his flights and his leave. He was notified of this decision only on Friday, 12 August 2011, at midday. His wife had also taken her leave to coincide with his.

16. With respect to irreparable harm, the cancellation of his flights rendered him out of pocket to the tune of Euros 9,950 plus Moroccan Dirhams 1,494. Further, having promised his family that he would be visiting them, he was forced to disappoint them. In view of the obvious malice that informed this decision, the moral damage caused to him was irreparable.

Respondent's Case

17. The Respondent's case is summarized below:

18. The Note Verbale from the Moroccan Embassy was received on 11 August 2011, after the Applicant's leave had already been approved. The Note Verbale invited the SRSG to meet the Force Commander to the POLISARIO, a post that had

been vacant for the last four years. It was therefore crucial for the Applicant, being the only Public Information Officer at the Mission to attend the meeting to give it the media coverage that it warranted.

19. It was not uncommon for staff members on Mission Assignment to be asked to cancel their leave plans and therefore the element of unlawfulness is not met in the present case.

20. The urgency requirement was not met because the Applicant's leave was to start on 15 August 2011 and the date had already reached by the time of the hearing.

21. The element of irreparable harm was not met since the costs of changing flight reservations could be compensated monetarily.

Consideration

Is the contested decision unlawful?

22. The Applicant's case is that the decision to cancel his leave was made in bad faith, an unlawful desire to retaliate and is therefore *prima facie* unlawful. The Respondent contends that the Note Verbale from the Moroccan Embassy was received on 11 August 2011, after the Applicant's leave had already been approved and that it was crucial for the Applicant, being the only Public Information Officer at the Mission, to attend the meeting to give it the media coverage that it warranted.

23. Was the decision to cancel the Applicant's leave at short notice made in bad faith? The Tribunal has carefully considered the Parties' oral and written submissions and finds that the Respondent appeared to have a good reason for cancelling the Applicant's leave. That having been said, however, the manner in which the Applicant was informed of that decision could have been done in a much better way. In an email dated 12 August 2011, the Applicant's supervisor, Alexander Ivanko, informed the Applicant as follows:

Enrico,

You are requested to accompany the SRSB and the FC on their trip to Agadir on 17-19 August.

Alex

24. In *Bekele*¹, the Tribunal observed that,

the United Nations Organization is one like no other. It is the foremost international Organization commanding the membership of one hundred and ninety-two countries out of a total of one hundred and ninety-four in the world. It is an Organization that sets standards for member countries and regional and sub-regional bodies. The Organization's Secretariat also sets standards for itself involving high performance of its staff and managerial excellence.

Considering the fact that the Applicant's supervisor had only three days earlier, on 9 August 2011, approved his leave, this one-line directive was not only callous and dismissive but most insensitive. The Tribunal is not at all surprised that the Applicant would perceive bad faith and malice in the decision.

25. As a staff member of the UN, the core competency of communication is sadly not reflected in the email highlighted above. Managers in the Organization are expected to exhibit leadership, build trust and exercise good judgment. None of these competencies can be gleaned from the email above. This managerial shortcoming does not, by itself, render the decision *prima facie* unlawful.

The element of urgency

26. The second condition precedent for the grant of a suspension of action is urgency. The Applicant submitted that the matter is of an urgent nature because he was supposed to go on leave as of Monday, 15 August 2011. He was now forced to cancel his flights and his leave even though his wife had also taken her leave to coincide with his. The Respondent's counter-argument is that the urgency requirement is not met because the Applicant's leave was to start on 15 August 2011

¹ UNDT/2010/175.

and the date was already here at the time of the hearing. The Tribunal need not belabor itself on this point as the element of urgency had been overtaken by events. The Tribunal finds that the urgency element is not met.

Irreparable damage

27. Having considered the Parties' submissions on this point, the Tribunal finds that although some harm is caused to the Applicant in dashing his and his family's expectations of a reunion during his leave, the said harm suffered by the Applicant must be examined in the light of the Applicant's duties to the Mission and the wider public interest of the Organization. The Applicant can be adequately compensated by monetary damages.

28. It is to be expected that compensation for the financial losses incurred by the Applicant will be settled swiftly and will not be allowed to become the basis for another cause of action.

Conclusion

29. The Applicant's request for suspension of action of the decision to cancel his leave is rejected.

(Signed)

Judge Nkemdilim Izuako
Dated this 25th day of August 2011

Entered in the Register on this 25th day of August 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi