



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pele Fomété

ASHRAF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGEMENT
ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for Applicant:

Bart Willemsen, OSLA

Seth Levine, OSLA

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. On 10 August 2011, the Applicant, a staff member of the United Nations Missions in Sudan (“UNMIS”), requested management evaluation and suspension of the decision not to renew his appointment beyond 31 August 2011.

2. On 22 August 2011, the Applicant filed an application for suspension of action with the United Nations Dispute Tribunal (“the Tribunal”). On 24 August 2011, the application was served on the Respondent. Their reply was received on the following day.

Relevant Facts

3. The Applicant joined UNMIS on 11 May 2009 as Mission Spokesperson/Deputy Chief Public Information Officer on a fixed-term appointment of one year, which was renewed upon expiration.

4. On 1 June 2011, the Applicant received notification by email of his reassignment to Juba effective 1st July 2011. This relocation was in line with the expiry of the UNMIS mandate and the movement of all International Staff of the Public Information Office (PIO) from the North to South Sudan.

5. On 20 July 2011, the Applicant signed an offer of a fixed-term appointment for the period 1 July 2011 to 30 June 2012 for the position of Spokesperson with UNMIS. The offer was issued by the Chief Civilian Personnel Officer (“CCPO”), UNMIS on 13 July 2011.

6. On 27 July 2011, the Applicant received a Letter of Separation, signed by the Chief Civilian Personnel Officer, UNMIS. The Applicant requested clarification in an email to the Chief Civilian Personnel Officer dated 28 July 2011 which remains unanswered.
7. On 3 August 2011, the Applicant sent an email to the SRSG of UNMIS, requesting clarification on the Letter of Separation. The email remained unanswered.
8. On 5 August 2011, the Applicant sent an email to the Under-Secretary-General for Management, who referred his email to the Management Evaluation Unit. On 10 August 2011, the Applicant filed a request for management evaluation of the decision to separate him effective 31 August 2011.

Applicant's Submissions

9. The Applicant frames his case as follows:
 - a. The Applicant claims that his application meets the three criteria required by the Statute and Rules of Procedure for the granting of a suspension of action.
 - b. First, the Applicant submits that the decision to separate him effective 31 August 2011 is *prima facie* unlawful being an *ultra vires* act. In support of this contention, he argues that neither staff rule 9.6 nor ST/AI/234, which is concerned with the delegation of authority, delegates authority to terminate appointments to the Chief Civilian Personnel Officer of UNMIS.
 - c. Secondly, he argues that the professed basis for the impugned decision finds no support in the evidence. In the Letter of Separation signed by the UNMIS Chief Civilian Personnel Officer the Applicant was advised that the Organization was “unable to transition him to [the United Nations Mission to the Republic of South Sudan] to the United Nations Interim Security Force for Abyei (“UNISFA”)”

- d. Finally, the Applicant submits that this is a matter of urgency and that if implemented the decision would cause him loss of his personal integrity and a break-in-service that would prevent him from getting a permanent appointment. He further argues that he would lose the prospects of applying for positions within the UN as an internal candidate.

Respondent's Submissions

10. It is the Respondent's submission that the Applicant has failed to meet his burden of demonstrating that the impugned decision is *prima facie* unlawful. The Respondent further argues that the Applicant has not established that the implementation of the decision to terminate his appointment would cause him irreparable damage.

11. Referring to staff regulation 9.3 and staff rules 9.6 to 9.8 (ST/SGB/2011/11) which govern the termination of appointment of a staff member, the Respondent submits that, first, the decision is not *ultra vires*. The Applicant was terminated in accordance with staff regulation 9.3 (a) (i) as the liquidation of UNMIS requires the abolition of posts. Secondly, the Respondent argues that the Assistant Secretary-General of the Office of Human Resources Management ("ASG/OHRM") has delegated authority to terminate an appointment.

12. Furthermore, the Applicant is not entitled to be reassigned from UNMIS to UNMISS. First, the Applicant has failed to adduce sufficient evidence that a post under the same occupational group and level exists in UNMISS. Moreover, the Applicant held a fixed-term appointment limited to service with UNMIS and therefore the Organization is not obliged to reassign the Applicant following the termination of the mandate of UNMIS.

13. Finally, the Respondent asserts that the Applicant has failed to prove the decision would cause him irreparable damage if implemented. The Respondent submits that, under the new staff selection system (ST/AI/2010/3), internal candidates

are no longer considered first for any vacancy or given any preference. Secondly, there is no evidence that a termination of appointment as a result of an abolition of post would call into question his integrity, affect his reputation or career prospects with future employers. In fact, efforts have been made and are sustained to reassign the Applicant to another mission, as supported by the CCPO, UNMIS' letter dated 27 July 2011.

14. For the above reasons, the Respondent moves the Tribunal to dismiss this application in its entirety.

Consideration

15. After careful consideration of the submissions of the parties, the Tribunal did not find it necessary to hold an oral hearing in this matter in accordance with article 16.1 of its Rules of Procedure.

16. When dealing with applications for suspension of action, the Tribunal is guided by the provisions of article 2 of the Tribunal's Statute and article 13 of the Tribunal's Rules of Procedure. Article 13.1 provides as follows:

“The Dispute Tribunal shall make an order on an application filed by an individual requesting the Dispute 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, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage”.

17. The current application must be therefore reviewed against the three essential prerequisites to a suspension of action application as outlined in articles 2.2 of the Tribunal's Statute and 13.1 of its Rules of Procedure.

Prima facie unlawfulness

In *Abosedra* Order No. 10 (NBI/2011), the Tribunal held that the first requirement is that the administrative decision must be unlawful and “what is unlawful depends obviously on the specific circumstances of each case”. It further stated that “such decision would also be unlawful if it was motivated by countervailing circumstances.”

18. In the present case, based on the evidence adduced by the parties, the Tribunal considers that the Applicant has not satisfied the burden of proving that the decision was *prima facie* unlawful. The Tribunal finds that there is not sufficient evidence to say that the decision is *ultra vires*. The facts and evidence adduced by the parties show that the Applicant’s termination is the result of the end of the UNMIS mandate and that 61 other staff members have been separated from service.

19. Furthermore, in case of abolition of post, the Tribunal recalls the long-standing jurisprudence that the Organization is obliged to act in good faith and try to find an alternative suitable position (see *Jocondo* UNDT/2011/147) for staff members affected by an abolition of post. In this respect, the Tribunal finds that the Organization has acted in good faith.

20. In the light of the above, the Tribunal finds that the decision does not appear *prima facie* unlawful. Having reached this conclusion, there is no need to address the other issues.

FOR THE FOREGOING REASONS

21. The application is dismissed.

(Signed)

Judge Vinod Boolell

Dated this 26th day of August 2011

Entered in the Register on this 26th day of August 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi