



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BALI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Seth Levine, OSLA

Bart Willemsen, OSLA

Counsel for Respondent:

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant served in the United Nations Mission in Sudan (UNMIS) as Radio Producer under a fixed-term appointment expiring on 11 February 2012. On 24 August 2011, the Applicant filed the present Application for a suspension of the implementation of the administrative decision to separate him from service effective 31 August 2011 on the basis that it was not possible to transition him from UNMIS to either United Nations Mission in South Sudan (UNMISS) or to the United Nations Interim Security Force for Abyei (UNISFA) (“the impugned decision”).

Facts

2. By resolution S/RES/1978 (2011) adopted on 27 April 2011, the Security Council extended the mandate of UNMIS until 9 July 2011. By resolution SC/10317 1997 (2011) authorizing closure of UNMIS adopted on 11 July 2011, the Security Council, *inter alia*, decided to withdraw UNMIS effective 11 July 2011 and called upon the Secretary-General to complete withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission’s liquidation, by 31 August 2011.

3. On 1 June 2011, Nicholas Von Ruben, Director of Mission Support, UNMIS, issued Information Circular No. 218/2011 (Movement of International Staff to South Sudan). The purpose of the Information Circular was to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan.

4. Also on 1 June 2011, Mr Bali received an email with attached a ‘Reassignment Form’ stating that,

Radio Editor, Mr Neeraj Bali, sitting against Post # 59392, is reassigned to Juba effective 1st July 2011. This relocation is in line with the expiry of the UNMIS mandate and the movement of all Public Information Office (PIO) international staff from the North to South Sudan.

This 'Reassignment Form' was signed by Mr Martin Ojjerro as Officer-in-Charge of the Human Resources Services Section and Mr Nicholas Von Ruben, Director of Mission Support, UNMIS.

5. On 27 July 2011, the Applicant received a Letter of Separation, signed by Mr. Ojjerro, Chief Civilian Personnel Officer ("CCPO"), UNMIS, which letter stated that

"[f]ollowing the completion of the UNMIS mandate, the human resources post-matching and comparative review exercises regarding the transition of international staff from UNMIS [...] we were unable to transition you to UNMISS or UNISFA."

6. On 28 July 2011, the CCPO and UNMIS Visa Office advised the Applicant to check out of the Mission and leave Sudan as soon as possible as Sudanese visas would only be effective and recognized as valid by the Sudanese Government until 7 August 2011. The Applicant subsequently initiated his check-out and on 7 August 2011 he left Sudan.

7. On 5 August, the Applicant sent an email to, the Under-Secretary-General for Management, who referred the Applicant to the Management Evaluation Unit. The Applicant filed his request for management evaluation on 12 August 2011 and on 24 August 2011 she filed the present Application seeking suspension of the impugned decision. The Respondent's Reply was filed on 26 August 2011.

8. The case was heard by the Tribunal on 29 August 2011 during which the Tribunal received testimony from the Applicant via teleconference from Egypt. The Respondent filed additional submissions on 29 August 2011 to which the Applicant filed their reply on 30 August 2011. On 31 August 2011, the Respondent filed further additional submissions.

The Applicant's case

9. The Applicant's case may be summarized as follows:

10. The decision to terminate his fixed-term appointment, which expires on 11 February 2012, is reserved to the Secretary-General, who has not delegated his

authority to the author of the decision, Mr Martin Ojjerro, the Chief Civilian Personnel Officer (CCPO) of UNMIS. ST/AI/234 (Administration of the Staff Regulations and Staff Rules) contains no provision on the delegation of the Secretary-General's authority to terminate the appointments of staff members to the Chief Civilian Personnel Officer of Peacekeeping Missions.

11. Whereas the terms of paragraph 2(A) of UNMIS Information Circular No. 218/2011 mandate that “[i]n cases where the number of posts in the new mission is equal [...] staff members [...] will be reassigned [...] provided other conditions such as satisfactory performance are met. Whereas the Applicant is aware that the staffing table of UNMISS confirms a similar position she held in UNMIS and at the same level, he was entitled to be reassigned, which vitiates his impending separation.

12. Staff rule 9.6 (c) states that “[t]he Secretary-General may, giving the reasons therefore, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds [...].”

13. The Letter of Separation was received on 27 July 2011. The evidence demonstrates that the Applicant contacted Ms Angela Kane on 5 August 2011 and that upon receiving the required form he filed his request for management evaluation on 12 August 2011. Whereas his separation from service will take effect on 31 August 2011, the Applicant respectfully submits that the matter is urgent.

14. Harm to professional reputation and career prospects, or harm, or sudden loss of employment constitutes irreparable damage. Separation from service will occasion irreparable harm in that he will lose the prospect of applying for positions within the UN as an internal candidate. The sudden termination will result in damage to career prospects, loss of his personal integrity and his reputation, which are not matters that can be compensated for by a monetary reward. In addition, implementation of the impugned decision will result in a break-in service, which will disrupt his continuous service for the purposes of his eligibility for a permanent/continuing appointment and

entitlements such as home leave, which also cannot be compensated for by a monetary award.

15. The fact that she has completed her check-out does not mean that the impugned decision has been implemented and therefore is no longer open to suspension. The termination of his appointment takes effect on 31 August 2011 and he will be remunerated until such date. However, on instruction and as a result of purported communications with the Sudanese Government, the Applicant completed her check-out and left Sudan prior to 31 August 2011.

16. A separation from service must follow from either of the causes of separation in staff rule 9.1 (i), (iv), (v) or (vi). However, it is evident that from the Letter of Separation, the termination of the Applicant's contract was a unilateral act purportedly initiated on behalf of the Secretary-General, i.e. termination under staff rule 9.6 (a) although there is no unequivocal statement that the appointment has been terminated.

17. Administrative Instruction ST/AI/234 is concerned with the delegation of authority within the United Nations and a careful review of this issuance demonstrates that the authority to terminate an appointment has not been delegated other than to (i) the Heads of UNOG, UNOV, UNEP and UN-HABITAT (see p. 20 of ST/AI/234) and (ii) the ASG/ORHM (see p. 12 of ST/AI/234).

18. Whereas neither staff rule 9.6 nor ST/AI/234 delegates the authority to terminate appointments to the CCPO of UNMIS, the impugned decision must be considered *ultra vires*.

19. The Letter of Separation stands in marked contrast with the 'Reassignment Form' signed by, *inter alia*, Mr Ojjerro, dated 25 May 2011, which states that

"Radio Editor, Mr Neeraj Bali, sitting against Post # 59392, is reassigned to Juba effective 1st July 2011. This relocation is in line with the expiry of the UNMIS mandate and the movement of all Public Information Office (PIO) international staff from the North to South Sudan."

20. Moreover, insofar as the Applicant understands, UNMISS has catered for one position of Radio Producer at the P4 level. In UNMIS, the Applicant was one of two Radio Producers at the P-4 level with more substantial and UN experience. In fact, for a protracted period of time in the course of 2010, the Applicant acted as the functional line manager of the other P-4 Radio Producer when both were stationed in Juba and was the designated Officer-in-Charge when their joint supervisor was not in function. It follows that the comparative review process should have resulted in his reassignment to UNMISS rather than his colleague's reassignment.

21. Accordingly, whereas the professed basis for the impugned decision cannot be substantiated on the available evidence it must be considered as unlawful.

22. Based on the foregoing, the Applicant respectfully requests the Tribunal to suspend the implementation of the impugned decision until the outcome of management evaluation.

The Respondent's case

23. The Respondent's case may be summarized as follows:

24. The Applicant has failed to discharge his burden of establishing that the decision is *prima facie* unlawful.

25. Following the end of the mandate of UNMIS, the appointment of the Applicant, together with other UNMIS staff members, was extended for a one-year period, until 30 June 2012, in order for the staff members to receive payment of a termination indemnity in accordance with Annex III of the Staff Regulations and Rules.

26. The liquidation of UNMIS is to be completed by 31 August 2011. As a consequence, more than 1,600 posts within UNMIS will have been abolished by this date. In view of the time constraints, and the decision of the Government of Sudan not to extend most staff members' visas beyond 31 July 2011, the Field Personnel Division (FPD), Department of Field Support (DFS), sought and received prior verbal approval

of OHRM for the termination of the appointment of 62 staff members, including the Applicant. On the basis of OHRM's verbal approval, FPD, DFS, advised UNMIS to proceed with the issuance of termination notices.

27. On 29 July 2011, the Director, FPD/DFS, wrote to the ASG/OHRM seeking approval to terminate the appointments of 62 staff members, including the Applicant. On 1 August 2011, the ASG/OHRM approved the request to terminate the appointment of the 62 staff members. In view of the foregoing, the Applicant's appointment was duly terminated.

28. In June 2011, a Comparative Review Panel was established to review the international posts in UNMIS where the number of current staff in UNMIS was in excess of the number of the proposed posts in UNMISS for particular job categories and post levels. The comparative review process of over 700 staff members took place from 25 June to 5 July 2011.

29. On 31 August 2011, the Respondent's Counsel informed the Tribunal by email that they had received additional documentation on the case which they included. The said documents sought to establish that a comparative review was actually carried out.

30. The criteria applied by the Comparative Review Panel were not limited to a length of service and seniority. The Applicant's assessment of his length of service and seniority, compared to that of his colleague, does not establish that the comparative review undertaken by the Panel was flawed. The Applicant has failed to meet his burden of proof, and therefore there is no basis for concluding that the impugned decision is *prima facie* unlawful.

31. Furthermore, 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. Accordingly, the Applicant has failed to establish *prima facie* illegality as he has no right to reassignment or appointment to a post outside UNMIS.

32. Under the new staff selection system, internal candidates are no longer considered first for any vacancy or given any preference. The Applicant would not suffer any irreparable harm if he is no longer an internal candidate. Moreover, as explained in the letter from the CCPO, UNMIS, to the Applicant, dated 27 July 2011, the Applicant's details would be forwarded to FPD to continue the efforts to reassign him to another mission.

33. There is no evidence that a termination of appointment as a result of the liquidation of UNMIS would call into question his integrity, affect his reputation or affect his career prospects with future employers. The Respondent notes that it is no longer possible for a staff member to receive a permanent appointment under the Staff Regulations and Rules. Further, the Applicant has not accrued any entitlement to a continuous appointment. Conversion to a continuous appointment can only take place against an identified post. The conversion of appointments is within the discretion of the Secretary-General, and any decision would be taken following a competitive process.

34. Any damage that might ultimately be suffered by the Applicant can be remedied through an award of damages. Accordingly, the Applicant has failed to meet his burden establishing that he would be irreparably harmed in the event his application for suspension of action is not granted.

35. The Respondent concedes that the Application is urgent.

36. In view of the foregoing, the Respondent requests that the Tribunal should reject the Application in its entirety.

Consideration

Is the Impugned Decision unlawful?

37. Having considered the Parties' submissions on the element of unlawfulness, the Tribunal finds:

a. The decision to terminate the Applicant's contract was taken at the Mission level, without the delegated authority required by ST/AI/234 and was therefore unlawful. The *post facto* approval of the decision by the ASG/OHRM does not cure the unlawfulness.

b. The Secretary-General's ability to carry on the employment relationship with the Applicant was frustrated by the coming into effect of resolution S/RES/1978 (2011). The legal effect of the frustration of the contract is that it came to an end at the time of the frustrating event, that is, the Security Council Resolution requiring the Secretary-General to complete the withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011.

c. The Secretary-General's action of entering into a contract of employment with the Applicant for the reason only of securing termination indemnities for the Applicant does not appear to be supported by any Staff Regulation, Staff Rules or any known principles of an employment contract.

d. At the hearing, the Tribunal received evidence that showed that there is a position of Broadcast Technology Officer in UNMISS. There was also unchallenged evidence that para. 2(B) of the Information Circular 219/2011, of 1 June 2011, was not complied with as no comparative review panel had considered the Applicant's possible reassignment.

38. The Tribunal finds that the Applicant has satisfied the first condition precedent for the grant of a suspension of action, that is, he has established a case of *prima facie* unlawfulness.

The element of urgency

39. The second condition precedent for the grant of a suspension of action is urgency. In the present case, the Respondent has conceded that the Application is urgent and there is no need to belabour the point.

Irreparable damage

40. Having considered the Parties' submissions on the element of irreparable damage, the Tribunal finds that the Applicant has failed to satisfy this requirement for the following reasons:

- a. The termination of the Applicant's appointment as a result of the liquidation of UNMIS does not call into question her integrity, affect her reputation or affect her career prospects with future employers.
- b. Any damage that might ultimately be suffered by the Applicant as a result of the Tribunal's findings in relation to the lawfulness of the impugned decision can be remedied through an award of damages.

Conclusion

41. The Tribunal has taken into account all arguments and submissions made in this case. In particular, the Tribunal has identified a number of shortcomings in the way that the Applicant's contract was terminated thereby making the impugned decision unlawful.

42. A suspension of action application requires the cumulative presence of *prima facie* unlawfulness, urgency and irreparable harm in order to be successful. The absence of one of these conditions, while not allowing the grant of this Application, does not extinguish an applicant's cause of action where an unlawful decision has been taken to his or her detriment.

43. This is even more evident in this case where the check-out or separation of the Applicant, perhaps owing to a combination of factors, has been somehow carried out by UNMIS, a mission which is currently defunct.

44. Granted that the conditions were met for a suspension of action application, it must be borne in mind that the Tribunal will not make an order in vain. Were the defunct UNMIS still to be in existence, an order for the suspension of the impugned

decision can be situated within that mission, which had reassigned her to Juba and then almost immediately turned around to terminate her employment.

45. It is the finding of this Tribunal that the subject matter of this suit cannot properly be addressed and determined in a suspension of action application. The Application for suspension of action is hereby refused for not having satisfied one of the three conditions required under the Statute and Article 13 of the Tribunal's Rules of Procedure for its grant.

46. In view of its finding above, the Tribunal, in the interests of justice and in exercise of its inherent powers and the provisions of Articles 19 and 36 of its Rules of Procedure, hereby transfers the instant Application to the general cause list to be heard on the merits.

47. The Applicant shall, within 28 days from the date of this Judgment, file additional documentation, if necessary, in order to provide an exhaustive application on the merits. Thereafter, the Respondent shall have 14 days to file a comprehensive case and Reply.

(Signed)

Judge Nkemdilim Izuako
Dated this 31st day of August 2011

Entered in the Register on this 31st day of August 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi