UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/027
Judgment No.: UNDT/2012/058
Date: 26 April 2012
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

KHAMBATTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Planning Officer in the Office of the Special Representative of the Secretary-General, United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed an application for suspension of action, pending the outcome of management evaluation, of the implementation of the decision not to extend her temporary appointment beyond 1 May 2012 and to require her to take a break in service starting 2 May 2012.

2. The Applicant states that she was informed of the contested decision on 10 April 2012 and that she requested management evaluation on 20 April 2012. On 24 April 2012, she filed the present application for suspension of action.

Background

3. Between January 2010 and May 2011, the Applicant served with the Department of Peacekeeping Operations ("DPKO") on a temporary appointment which was due to end on 2 June 2011, but the Applicant resigned with effect from 31 May 2011, as explained below.

4. In or around March 2011, the Applicant received an offer of a new temporary appointment with MINUSTAH.

5. At the time, the Administration required staff members who have reached 364 days of service (or, in exceptional cases, 729 days of service) on one or several successive temporary appointments to take a break in service prior to becoming eligible for a new temporary appointment. The break in service was to be of a minimum of 31 days or three months, depending on whether the new appointment would be in the same duty station. This requirement was introduced by administrative instruction ST/AI/2010/4 (Administration of temporary appointments), dated

27 April 2010. (A revised version of this administrative instruction (ST/AI/2010/4/Rev.1) was issued in October 2011.)

6. On 2 March 2011, prior to taking up a new temporary appointment with MINUSTAH, the Applicant sent an email to MINUSTAH Recruitment Unit, enquiring whether she would have to take a break in service. She stated:

> As I know you're well aware, [the Office of the Special Representative of the Secretary-General] is anxious to have me come onboard as soon as possible, and I know there is an issue of my having to take a 31-day contract break before taking up the job with MINUSTAH. Do you know of any measures that can be taken to avoid my having to do this?

7. By email dated 5 March 2011, sent by the MINUSTAH Recruitment Unit, the Applicant was informed that, if she were to resign prior to the expiration of her temporary appointment with DPKO and prior to her new appointment with MINUSTAH, she would not have to take any break in service. The email stated:

> In regards to your query regarding break of service for a month regarding your temporary appointment with MINUSTAH, we wish to inform you that 30 days break of service is not applicable to your case as resignation is filed prior to your contract expiration of temporary appointment with DPKO[,] due to expire sometime June 2011.
>
> …
>
> We would also appreciate [being provided] by email a copy of your resignation letter reflecting effective date.

8. Relying on this advice, the Applicant resigned with effect from 31 May 2011, several days prior to the expiration of her temporary appointment with DPKO. She took up her new temporary appointment with MINUSTAH on 2 June 2011. She believed, on the information given to her, that she would be able to serve on a temporary appointment starting 2 June 2011 for a period of 364 days, with the possibility of exceptional extension to 729 days.

9. The Applicant states that, in August 2011, with no background information or explanation, MINUSTAH emailed her asking to sign a new letter of appointment, shortening her initial offer of temporary appointment from 11 months (ending in May 2012) to approximately seven months (ending in January 2012). According to the Applicant, the personnel officials realized that a mistake had been made and that the Applicant had been misinformed about not having to separate from the Organization for 31 days prior to her arrival in MINUSTAH.

10. The Applicant refused to sign the new letter of appointment. The Administration thereafter decided that she would not be required to separate in January 2012.

11. On 6 January 2012, the Applicant signed a new letter of appointment with MINUSTAH for a temporary appointment expiring on 1 May 2012.

12. On 10 April 2012, the Applicant received a memorandum dated 4 April 2012 and signed by the Director Mission Support, MINUSTAH, stating that her temporary appointment would not be extended beyond 1 May 2012. The memorandum referred the Applicant to ST/AI/2010/4/Rev.1 and the "maximum period of temporary appointment". The Applicant was also separately informed that she must separate for at least three months, pursuant to ST/AI/2010/4/Rev.1.

13. The Applicant submits that, based on the information provided to her by the Administration on 5 March 2011, she has been operating on the assumption that she can serve with MINUSTAH for a period of 364 days, starting 2 June 2011 with the possibility of exceptional extension of up to 729 days without separating from the Organization.

14. There is a need for the Applicant's services and the management of MINUSTAH would like to retain her beyond 1 May 2012. The Applicant provided documents showing that her services as a Planning Officer are essential.

Consideration

15. In accordance with art. 2.2 of its Statute, the Tribunal has to consider whether the impugned decision appears to be *prima facie* unlawful, whether the matter is of particular urgency, and whether its implementation will cause the Applicant irreparable harm. The Tribunal must find that all three of these requirements have been met in order to suspend the action (implementation of the decision) in question.

16. Applications for suspension of action are necessarily urgent requests for interim relief pending management evaluation. Under art. 13 of its Rules of Procedure, the Tribunal is required to consider such an application within five days. Although art. 13 of the Rules of Procedure requires that such an application be transmitted to the Respondent, there is no obligation to require a response from the Respondent before deciding the application (*Kananura* UNDT/2011/176).

17. Speed is of the essence in considering an application for a suspension of action. The decision should, in most cases, be in summary form. The Tribunal is not required to provide, and the parties should not expect to be provided with, an elaborately reasoned judgment either on the facts or the law. To do so would defeat the underlying purpose of a speedy and cost-effective mechanism. Moreover, the time, effort and costs thereby saved by all those involved with the formal system of internal justice could be utilised to enhance the disposal of other cases.

Prima facie *unlawfulness*

18. It is important for all concerned, including the Management Evaluation Unit of the Department of Management, to understand that, in essence, the Tribunal is expressing an opinion as to whether on the facts presented by the Applicant it appears that the decision is *prima facie* unlawful.

19. The Tribunal is not required to make a finding that the impugned decision is, in fact, unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that is decisions are proper and made in good faith (*Villamoran* UNDT/2011/126).

20. It is clear from the documents submitted in support of the application that the Applicant requested advice in order to assist her in making a decision in relation to the offer of appointment from MINUSTAH. She was aware of the requirements of a 31-day break in service between contracts and wanted to know if there were any measures that she could take to avoid taking that break.

21. The Administration now takes the view that this advice given by MINUSTAH to the Applicant on 5 March 2011 was incorrect. However, it appears that the Applicant was misled by the advice given to her into making a decision which has turned out to be to her detriment. It is not suggested that the information given to the Applicant was deliberately incorrect. Whether the Administration is correct in stating that the earlier advice was wrong may yet fall to be determined at a hearing on the merits, in the event an application on the merits is filed in due course.

22. However, it cannot reasonably be disputed, based on the documents accompanying the present application, that the Applicant was induced into resigning from her previous position under the impression that it would re-set the clock for the purposes of counting the 364-day or the 729-day periods under ST/AI/2010/4/Rev.1.

23. As a result of the Applicant not taking a 31-day break in service in June 2011, in reliance on the Administration's advice given to her, the Administration now expects the Applicant to separate and take a three-month break in service.

24. The Applicant submits that had she not been given the advice of 5 March 2011, she would have taken a 31-day break in service in June 2011 and would subsequently have been able to serve, without any restrictions, for 364 days with MINUSTAH starting 2 June 2011, with the possibility of exceptional extension up to a period of 729 days.

25. The Applicant was entitled to believe that the advice given by MINUSTAH was correct. She was misled and now faces imminent separation from service on 1 May 2012 due to the break-in-service requirement. The only reason for the non-extension of the Applicant's contract is that she has now approached the limit requiring her break in service.

26. It must be noted that the memorandum of 4 April 2012, when stating that the Applicant "will reach the maximum period of temporary appointment on 1 May 2012", appears to mistakenly refer to sec. 11 of ST/AI/2010/4/Rev.1, which concerns travel-related entitlements. It is unclear on which provision of ST/AI/2010/4/Rev.1 the Administration actually sought to rely, and it is also unclear from the memorandum whether the Administration is now treating the Applicant as approaching the 364-day or the 729-day mark.

27. It appears that the Applicant's services are needed by MINUSTAH and, based on the documents submitted, it appears that a further extension beyond the 364-day period up to 729 days is a possibility, though not a certainty.

28. The Tribunal finds on the facts presented, accompanied by the relevant documents, that the Applicant has satisfied the test that the impugned decision appears *prima facie* to be unlawful. Whether this will be the final decision after a full exploration of the evidence and consideration of full submissions, if an application on the merits is filed, does not affect the Tribunal's decision at this stage. It must be emphasized that the suspension of action procedure is for interim relief based solely

on the material put forward by the Applicant in accordance with art. 2.2. of the Tribunal's Statute. Should the matter go to trial, the Respondent will have a full opportunity to challenge any application on the merits.

Urgency

29. The Applicant was informed of the contested decision on 10 April 2012. The present application was filed on 24 April 2012 and she will be unemployed as of 2 May 2012, unless the implementation of the decision is suspended. This is not a case of self-created urgency. The Tribunal finds that the requirement of particular urgency is satisfied.

Irreparable damage

30. Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.

Conclusion

31. The present application has met the conditions for a suspension of action.

Order

32. The Tribunal orders suspension, during the pendency of the management evaluation, of the implementation of the decision not to extend the Applicant's contract beyond 1 May 2012 and to require her to take a break in service starting 2 May 2012.

(*Signed*)

Judge Goolam Meeran

Dated this 26th day of April 2012

Entered in the Register on this 26th day of April 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York