



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MALOKA MPACKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 29 May 2012, the Applicant, a staff member in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), submitted an application for suspension of action, pending management evaluation, of the decision to reassign her from the Procurement Section to the Civil Affairs Section, MINUSTAH. The contested decision goes into effect on 1 June 2012.

2. The Applicant initially filed her papers by way of an interoffice memorandum on Monday, 28 May 2012. The interoffice memorandum was submitted to the Dispute Tribunal by email and the Applicant did not use the forms prescribed by the Tribunal. As a result, the papers filed by her did not contain averments as to the particular urgency, irreparable harm, and *prima facie* unlawfulness. As 28 May 2012 was a holiday, the papers submitted by the Applicant were received by the Registry the following working day, Tuesday, 29 May 2012. Having reviewed the papers filed by her, the New York Registry directed the Applicant to submit an application for suspension of action through the eFiling portal, the Tribunal’s web-based electronic filing portal in use since July 2011. The Applicant submitted the present application on Tuesday, 30 May 2012, using the form prescribed by the Tribunal, which allowed the Respondent less than one day to reply to the application and giving the Tribunal three hours thereafter to consider and render a decision.

3. At approximately 6 p.m. on 30 May 2012, following receipt of the present application through the eFiling portal, the New York Registry transmitted it to the Respondent. The Respondent filed his reply, as directed, by 2 p.m. on Thursday, 31 May 2012. The short period of time provided to the Respondent for submitting his reply was due to the fact that the contested decision goes into effect on 1 June 2012.

Background

4. The following background information is based on the parties' written submissions and the record.

5. The Applicant is an Associate Civil Affairs Officer on a P-2 post originally assigned to the Civil Affairs Section, MINUSTAH. It appears that approximately two years ago there was some friction between the Applicant and her supervisor, the Chief of the Civil Affairs Section, which resulted in the Applicant filing a complaint against him. Following the intervention of the Chief of Mission Support, the Applicant withdrew her complaint against her supervisor and was reassigned in September 2010 to the Contracts Management Unit, MINUSTAH, where she stayed for eight months before moving, in May 2011, to the Procurement Section, MINUSTAH. The Applicant alleges her reassignment was brokered on the understanding that she withdrew her complaint against her supervisor.

6. The Applicant is an active member of the Field Staff Union, although it is not known to the Tribunal when she joined it. She submits that, on 9 December 2011, she represented the Field Staff Union during a meeting with the Field Personnel Division ("FPD") on the issue of MINUSTAH retrenchment exercise. The Applicant submits that it was "discovered that some staff members assigned to MINUSTAH on regular posts in 2004 found themselves on [general temporary assistance] posts while others on loan to other sections were moved to sections different from the ones they have been recruited". The Applicant questioned the propriety of these movements during the meeting and all parties present agreed to revisit the method of the retrenchment exercise.

7. Also on 9 December 2011, the Applicant received an email from the Chief Procurement Officer, her supervisor in the Procurement Section. The email concerned the ongoing downsizing exercise in MINUSTAH and the return of the Applicant's post to the Civil Affairs Section. The email stated:

You may recall that further to the ongoing MINUSTAH downsizing exercise that will be effective during the 2012/13 budget, I informed you that upon instructions from the hierarchy, your current post has been requested to be returned to Civil affairs effective from 01 January 2012. Consequently, I have advised that you are tentatively placed on a Procurement Officer post to 30 June 2012. However, as Chief Procurement Officer, I can only technically clear Procurement staff members up to Procurement Assistant FS-5 level. FS-6 and Professional Procurement posts have to be initially cleared by FPD, and technically cleared by UN Procurement Division. In all cases, staff members have to be [Field Central Review Board] cleared.

In view of the above, your continued occupation of the Procurement Officer post beyond 30 June 2012 will be dependent upon your [Field Central Review Board] clearance as Procurement Officer or upon receipt of further favorable administrative and professional instructions in this regard.

Let me assure you that this email correspondence is purely to communicate the required due process associated with the occupation of a procurement position, and to motivate you in accomplishing the required conditions in good lead time on or before 30 June 2012. It is my fervent hope that you can and wish you all the best.

8. It is unclear whether the email above was sent before or after the meeting of the same day regarding the retrenchment exercise. It is notable, however, that the Applicant does not allege that the email from the Chief Procurement Officer had any relation to her participation in the meeting of 9 December 2011 as a Field Staff Union representative.

9. The Applicant submits that, on 10 December 2011, the Field Staff Union was asked by the Director of Mission Support to withdraw her name as its nominee for the Comparative Review Panel in MINUSTAH. On 13 December 2011, the Field Staff Union declined and the Applicant's name was not withdrawn.

10. The Applicant submits that, on 23 March 2012, she approached the Chief Civilian Personnel Officer ("CCPO"), in the presence of the Chairperson of the Field Staff Union, and discussed the issue of her proposed return to the Civil Affairs Section. The Applicant allegedly reminded the CCPO that she had been removed

from the Civil Affairs Section because of problems with the current Chief of the Civil Affairs Section. The Applicant submits that the CCPO informed her that if she did not feel comfortable going back to Civil Affairs Section, she should inform the Administration and it will review the decision.

11. On 26 March 2012, the Applicant had a meeting with the Deputy CCPO who, according to the Applicant, “officially informed [the Applicant] that she [the Deputy] was requested to coordinate [the Applicant’s] redeployment to [the] Civil Affairs Section as the Chief[,] Civil Affairs Section[,] want[ed] [the Applicant] back”. The Applicant raised objections to the proposed move and, according to her, the Deputy CCPO promised to “review and revert”.

12. On the same day, 26 March 2012, the Applicant sent an email to the Deputy CCPO, with a summary of the discussion earlier that day. In this email the Applicant described, *inter alia*, the circumstances of her reassignment from the Civil Affairs Section in September 2010.

13. On 13 April 2012, while the Applicant was on leave, she received an email informing her of her reassignment back to the Civil Affairs Section. Attached to the email was a memorandum to the Applicant from the Director of Mission Support, dated 9 April 2012, which stated (emphasis in original):

Subject: Re-assignment within mission

Within the authority delegated to me by the [Special Representative of the Secretary-General], I would like to inform you that you are hereby being re-deployed from Procurement Section, Santo Domingo to Civil Affairs Section, Port-au-Prince (Post no. 51888) effective 1 June 2012.

The relevant personnel actions will be processed accordingly.

14. On 17 April 2012, the Applicant replied to the Director of Mission Support requesting him to revisit the decision.

15. On 30 April 2012, the Applicant received a reply dated 27 April 2012 from the Officer-in-Charge, Mission Support, informing her that, after a careful review of

her case, it was determined that when she was reassigned from the Civil Affairs Section to the Contracts Management Unit and later to the Procurement Section, she continued to encumber the P-2 post that belonged to the Civil Affairs Section. In effect, her post was loaned within the Mission. Following the decision to downsize the Mission, the Civil Affairs Section requested that the P-2 post encumbered by the Applicant be returned to them. The Officer-in-Charge, Mission Support, further stated:

2. ... I wish to clarify that the Chief of Civil Affairs did not request for you specifically. Rather, his request was for the return of their post.

3. The decision for you not to stay in Procurement is not a reflection of your performance. It is regrettable that you cannot stay in Procurement as you have not been cleared for any procurement position. The only position matching your qualifications at this point in time is in Civil Affairs where you have been initially recruited.

16. The Applicant requested management evaluation of the contested decision on 7 May 2012.

Applicant's submissions

17. The Applicant's principal contentions may be summarised as follows:

Prima facie unlawfulness

a. Returning the Applicant to the Civil Affairs Section without resolving the issues with her supervisor will create an intimidating and stressful work environment for the Applicant;

b. The stressful situation created by the Administration is not only a retaliation for her duties as a Staff Union member, but also constitutes an abuse of power and authority;

Particular urgency

c. The return to the Civil Affairs Section under the supervision of the same Chief responsible for her removal will create a hostile environment;

Irreparable damage

d. Implementation of the contested administrative decision will result in the “loss of [the Applicant’s] job” and create “obstacle[s] to [her] career development”.

Respondent’s submissions

18. The Respondent’s principal contentions may be summarised as follows:

Prima facie unlawfulness

a. The Respondent has authority to reassign the Applicant pursuant to staff regulation 1.2(c) and staff rule 1.2(a). The allegations made by the Applicant do not establish that the contested decision is *prima facie* unlawful;

Particular urgency

b. The Applicant filed the present application immediately prior to the implementation of the contested decision, although she was aware of it at least since 13 April 2012. The self-created urgency in this case deprived the Respondent of a real opportunity to exercise his due process right to make meaningful submissions in response to the Applicant’s case. As a result, the Respondent was unable to seek and receive instruction from the relevant parties on the Applicant’s detailed factual allegations within the set deadline for reply;

Irreparable damage

c. The Applicant has not been irreparably harmed by the contested decision. The application fails to plead a cause of action relating to the matter of irreparable harm. It only states: “1 – Obstacle to my career development” and “2 – Loss of my job”;

d. The Applicant has not explained how the contested decision could obstruct her career development. Neither has she identified how the contested decision would result in her losing her job. On the contrary, the information contained in the application suggests that the Applicant’s continued employment would be more secure following the reassignment, in face of MINUSTAH’s downsizing. It follows that the Applicant cannot remain on the post of Procurement Officer where she has been tentatively placed, as she has not participated in a competitive selection exercise for such post;

e. Any claim for moral injury, such as the Applicant’s allegations related to the future probability of experiencing the same alleged problems she faced when she was previously assigned to the Civil Affairs Section, is hypothetical. If, in the future, the Applicant considers that she has a claim for moral injury, such a claim may be compensated in money.

Consideration

19. This is an application for a suspension of action pending management evaluation. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five working days of the service of the application on the Respondent (art. 13.3 of the Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal and the parties’ schedules. They also divert the Tribunal’s attention from considering other cases filed under standard application procedures, some of which are long outstanding. Therefore, parties approaching the Tribunal must do so on genuine

urgency basis which is not self-created, and with sufficient information for the Tribunal to, preferably, decide the matter on the papers before it. An application may well stand or fall on its founding papers.

20. Due to the nature of urgent applications, the parties and the Tribunal are under pressure of time in such situations. The Tribunal has to deal with these matters as best as it can, depending on the particular circumstances and facts of each case. The New York Registry has had three urgent applications filed this week with only one Judge at the New York duty station. The present application in particular, having been filed at the eleventh hour, placed the Tribunal under considerable pressure as it had under three hours after receipt of the Respondent's reply to consider and render its ruling before the contested decision goes into effect.

21. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Particular urgency

22. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206).

23. The Applicant was informed of the reassignment on several occasions. It is evident from the papers that she was apprised of and discussed the issue with her supervisors in December 2011, and again in March 2012. On 13 April 2012, she received the memorandum of 9 April 2012 informing her of the final decision taken to reassign her effective 1 June 2012. In view of the factual history of this case, the decision expressed in the memorandum of 9 April 2012 was not a sudden decision that could have caught the Applicant by surprise.

24. The application received on 30 May 2012 was submitted more than six weeks after 13 April 2012, when the Applicant received the final decision expressed in the memorandum of 9 April 2012, and three weeks after the request for management evaluation. Furthermore, the application was submitted only two working days prior to the decision going into effect.

25. The Applicant did not provide any explanation for not filing the present application with the Tribunal earlier. In the circumstances of this case, the Tribunal finds that the Applicant cannot seek its assistance as a matter of urgency in this case when she has had knowledge of the decision for more than six weeks. Any urgency in this case is of the Applicant's own making. Accordingly, the Tribunal finds that, the Applicant having failed to satisfy the requirement of particular urgency, the present application stands to be dismissed.

26. As one of the three conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal need not determine whether the remaining two conditions—*prima facie* unlawfulness and irreparable damage—have been satisfied.

Conclusion

27. The present application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of May 2012

Entered in the Register on this 31st day of May 2012

(Signed)

Hafida Lahiouel, Registrar, New York