



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AL-ALAMY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR SUSPENSION
OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 4 June 2012, the Applicant, a staff member with the United Nations Stabilization Mission in Haiti (“MINUSTAH”), submitted an application for suspension of action, pending management evaluation, of the decision not to renew her fixed-term appointment beyond its expiration date of 30 June 2012.

2. The Applicant initially filed her papers by email on 4 June 2012. The submission filed by the Applicant did not comply with the requirements for submissions filed before the Tribunal as the Applicant failed to attach relevant documents and failed to follow standard filing procedures, such as filing her application through the Tribunal’s web-based electronic filing system, eFiling portal, which has been in use since July 2011.

3. Having reviewed the papers filed by the Applicant, the New York Registry directed her to re-submit her application through the eFiling portal, attaching all relevant documents. Following several further communications with the Registry between 5 and 7 June 2012, the Applicant completed the filing of her application on 7 June 2012. On the same day, the New York Registry transmitted it to the Respondent. The Respondent’s reply to the present application was duly filed on 12 June 2012.

Background

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

5. The Applicant is a Human Resources Assistant in the Field Service (“FS”) category of staff, at the FS-5 level. She is assigned to MINUSTAH’s Personnel Section. She joined MINUSTAH on 1 July 2011 on a one-year fixed-term appointment, expiring on 30 June 2012. She has been with the Organization for over 20 years, working at various duty stations.

6. By Information Circular No. DMS/028/2011, dated 5 December 2011 and addressed to all MINUSTAH civilian staff, the Director of Mission Support informed staff members that the majority of MINUSTAH's operations in response to the earthquake that hit Haiti in January 2010 were expected to be phased out by mid-2012. The structure of the Mission would change and most of the temporary positions established as part of the surge effort would be abolished by the end of the following budget year. The Information Circular stated that the proposed new structure reflecting the remaining functions and staffing requirements was submitted for review and approval by the General Assembly. The Mission would carry out a retrenchment process, which would include a comparative review exercise. This exercise would be undertaken by a Comparative Review Panel ("CRP" or "Panel"), consisting of representatives nominated by management and Staff Representatives. The Information Circular stated that the comparative review process would be conducted "on the basis of the staff members' professional competence and their ability to do the job in accordance with evaluation criteria pre-approved by the CRP and a documented record of satisfactory performance and conduct". All MINUSTAH staff members were "urged to update their Personal History Profile (PHP) and to ensure that their [electronic performance appraisal system ("ePAS")] reports] for the 2009–2010 and 2010–2011 performance cycles have been completed and submitted to MINUSTAH's Personnel Section as soon as possible".

7. By Information Circular No. DMS/029/2011, dated 8 December 2011 and addressed to all MINUSTAH civilian personnel, the Director of Mission Support announced the creation of the CRP, comprised of international and national staff members nominated by the Field Staff Union, National Staff Union, and the Administration. The Information Circular outlined the evaluation criteria that would be used by the Panel, namely:

4. The criteria to be considered, and subject for review by the Panel, are broadly as follows:
 - (a) Core Values (integrity, respect for diversity and professionalism) as provided in the last 2 ePAS reports;

- (b) Performance (ePAS) as recorded in the last 2 reports;
- (c) Length of Service in the UN System;
- (d) Seniority/Experience in a given field;
- (e) Gender;
- (f) Geographical Representation (applies to International Staff only);

8. On 12 December 2011, the CRP was briefed by a team from the Field Personnel Division of the Department of Field Support on the methodology to be used during the review process. The Panel also agreed on the way it would operate and on its review and grading method and conducted a sample review of cases for training purposes.

9. With regard to the grading method, the Panel agreed that the maximum number of points to be awarded to any staff member during the review process would be 100, with points distributed among different categories as follows:

- a. Length of service—maximum of 20 points;
- b. Relevant experience as compared to the generic job description and specific requirements of the post—maximum of 20 points;
- c. Performance assessment for 2009–2010—maximum of 25 points, with the rating of “consistently exceeds performance expectations” given 20 points, “frequently exceeds performance expectations”—15 points, “fully successful performance”—10 points, and “partially meets performance expectations”—five points. Additionally, five points would be added for positive comments in the ePAS report;
- d. Performance assessment for 2010–2011—maximum of 25 points, with similar distribution of points as for the 2009–2010 assessment;
- e. Combined assessment with respect to core values as reflected in the performance evaluation reports for 2009–2010 and 2010–2011—10 points.

10. The Respondent submits that the CRP agreed that, in cases where staff members received equal points, gender and geographical representation would be considered.

11. By Information Circular No. DMS/030/2011, dated 21 December 2011 and addressed to all MINUSTAH personnel, the Officer-in-Charge, Mission Support Division, issued an update on the review process and clarified a number of issues with respect to the methodology to be used during the retrenchment exercise. The Information Circular stated that, following the completion of the review process, MINUSTAH would inform the affected staff members of the outcome of the review process. It explained that internationally-recruited staff members with a record of satisfactory performance who were not recommended for retention would be recommended to Headquarters for reassignment to other missions, subject to the availability of vacant positions. The Information Circular concluded by stating that “a dedicated email address to which staff members affected by the retrenchment should send their ePAS [reports] has been created as follows: minustah-retrenchment@un.org”.

12. During the period of January to March 2012, senior officials of MINUSTAH held several meetings with MINUSTAH staff members regarding the retrenchment exercise. The documents submitted by the Applicant indicate that she attended at least some of those meetings.

13. The Respondent submits that the General Assembly’s approved staffing levels for the Personnel Section, which the Applicant is assigned to, resulted in the reduction of the number of FS-5 level Human Resources Assistants from nine to six for the next budget year. All nine FS-5 level Human Resources Assistants were subjected to a review by the CRP.

14. The Panel conducted its review of the Human Resources Assistants on 14 February 2012. The Panel’s signed Comparative Evaluation Sheet shows that the Applicant was awarded a total of 71 points, with their distribution as follows:

- a. Length of service: The Applicant was awarded 20 points, the maximum number of points under this category;
- b. Relevant experience: The Applicant was awarded 20 points, also the maximum number of points under this category.
- c. Performance assessment for 2009–2010: The Applicant was awarded 10 out of the maximum of 25 points. This was due to the Applicant not having provided the CRP with her ePAS report for 2009–2010. Pursuant to the methodology adopted by the Panel, in the absence of the ePAS report, the Applicant was assumed to have the rating of “fully successful performance”, which corresponded to 10 points.
- d. Performance assessment for 2010–2011: The Applicant was awarded 15 out of the maximum of 25 points. This score included 10 points received by the Applicant based on her overall rating of “successfully meets performance expectations”. As a result of the positive comments in the ePAS, the Applicant received five additional points.
- e. Core values: The Applicant was awarded 5.83 out of 10 points. As the Applicant had not provided the CRP with her ePAS report for the period of 2009–2010, she was graded for that period as having received the rating of “fully competent” with respect to the core values.

15. Of the nine Human Resources Assistants, only one received less points than the Applicant. One staff member received the same number of points. The points of the six remaining Human Resources Assistants ranged from 73 to 83. The Applicant’s name was thus placed on the list of staff members who would not be retained.

16. The Respondent submits that, on 8 March 2012, the Director of Mission Support issued an update on the work of the CRP in which he explained that the CRP had completed its review of the international posts. He also allegedly explained that

the affected staff members would be notified individually by their program managers, and that efforts would be made to find other assignments for those staff members.

17. On or around 14 March 2012, the Applicant was verbally notified that, on the basis of the comparative review, she was being placed on the list of staff that would be affected by the retrenchment. She filed a request for management evaluation of that decision on 16 March 2012.

18. On 15 May 2012, the Management Evaluation Unit replied to the Applicant's request for management evaluation, informing her that her request was "not receivable, as [her] inclusion on the retrenchment list does not constitute an administrative decision within the meaning of [s]taff [r]ule 11.2, as it does not affect [her] legal rights as a staff member".

19. By memorandum dated 29 May 2012 and received by the Applicant on 31 May 2012, the Applicant was notified that her appointment would not be extended beyond its date of expiration of 30 June 2012. By letter dated 1 June 2012, the Applicant requested management evaluation of this decision and, subsequently, commenced the present proceedings.

Applicant's submissions

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

Prima facie unlawfulness

a. The absence of the ePAS report for the period of 2009–2010 had a significant negative impact on the results of the evaluation of the Applicant. The Applicant provided the ePAS report for the period of 2009–2010 to the Officer-in-Charge of the Personnel Section on 29 March 2012;

b. The Applicant was recruited against a post that was subsequently abolished, as a result of which she was placed against a different post, which continues to be budgeted for 2012–2013;

c. The Applicant’s length of service, seniority, and relevant experience in the United Nations were not taken into consideration contrary to the announced evaluation mechanism and criteria. Further, gender and geographical representation were not taken into account. The Applicant also “feel[s] that [her] age was a factor and played a role” in the contested decision;

Urgency

d. The case is particularly urgent as the Applicant’s appointment expires on 30 June 2012;

Irreparable damage

e. The Applicant has no alternative employment at the present time and is her family’s only bread-winner. Her separation at this stage of her career would negatively affect her pension entitlements.

Respondent’s submissions

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

Prima facie unlawfulness

a. The decision not to extend the Applicant was lawful and procedurally correct. The procedures and criteria used in the review process were fair, transparent, and consistent;

b. All staff members holding fixed-term appointments in affected occupational groups were subjected to evaluation by the CRP regardless of the type of post or post number they were encumbering.

c. The CRP correctly applied the evaluation criteria. The Applicant received the maximum number of points for length of service and relevant experience. Her age was not considered by the Panel. Further, the evaluation criteria provided that gender and geographical representation were to be considered by the Panel as tie-breakers. The comparative evaluation of the FS-5 Human Resources Assistants did not result in a tie. The Applicant's comparative score was among the three lowest scores;

Irreparable damage

d. The Applicant will not suffer irreparable harm simply as a result of the non-renewal of her contract. The Applicant has failed to demonstrate how the implementation of the decision will cause her harm that the Tribunal would not be able to repair with an award of damages should the Applicant decide to file an application under art. 2.1 of the Tribunal's Statute and succeed in her case on the merits.

Consideration

22. 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. 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.

23. 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.

Urgency

24. With the Applicant's contract expiring on 30 June 2012, this case is clearly urgent. The Applicant filed her request for management evaluation and the present application shortly after receiving the decision of 29 May 2012. Further, no objections as to the particular urgency of this case have been raised by the Respondent. The Tribunal finds that the Applicant has satisfied the requirement of particular urgency.

Prima facie unlawfulness

25. Given the interim nature of the relief the Tribunal may grant under art. 2.2 of the Statute, an applicant must demonstrate only that the decision appears *prima facie* to be 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 is unlawful (*Villamorán* UNDT/2011/126).

26. The Applicant does not contest that MINUSTAH's retrenchment exercise is genuine. She also does not contest the method by which the CRP was established, its composition, or the methodology used by it. Rather, she questions whether the evaluation criteria were applied to her fairly and whether any improper factors were taken into consideration.

27. It appears from the limited information on the record before the Tribunal that MINUSTAH's retrenchment exercise was a mission-wide process affecting all posts and staff members. In the particular circumstances of this case and on the limited information before the Tribunal, it is not clear whether the Applicant should have been excluded from the retrenchment process. It appears that she served in an occupational group and against a functional title impacted by the downsizing of MINUSTAH.

28. There is no evidence before the Tribunal to indicate that the CRP erred in applying the agreed evaluation criteria when assessing the Applicant and other staff members in the related category. Based on the documents provided to the Tribunal, the CRP had agreed that gender and geographical representation would be considered in the event two or more staff members receive identical overall scores. As the Applicant's overall score was lower than the overall scores of six other Human Resources Assistants, as indicated in the Comparative Evaluation Sheet, those factors did not come into consideration. Further, there is no evidence that the Applicant's age or any other factors that were not part of the agreed methodology were taken into account by the Panel.

29. It appears that the Applicant's score may have been affected by the CRP not having access to the Applicant's ePAS report for 2009–2010. The Applicant submits that, on 29 March 2012, she provided a copy of her ePAS report for 2009–2010 to the Officer-in-Charge, Personnel Section. However, the Tribunal notes that the review of the Applicant and other staff members in the related category was undertaken on 14 February 2012. The Applicant does not claim that she was unaware of the ongoing retrenchment exercise or that she was not informed that she needed to provide her ePAS reports for 2009–2010 and 2010–2011, as was indicated in the Information Circulars. In her application the Applicant gives no explanation for not providing her ePAS report for 2009–2010 at the time of the comparative review exercise. Although she now submits that she gave it to the Officer-in-Charge, Personnel Section, in late March 2012, this was after the completion of the CRP's work and after the Applicant

was verbally informed of its outcome. Moreover, the Applicant did not provide a copy of her ePAS report for 2009–2010 to the Tribunal, and therefore the Tribunal cannot assess what impact it would have had on her overall score had it been made available to the CRP. The Tribunal notes, however, that in the absence of that ePAS report, the Applicant was awarded points commensurate with the overall rating of “fully successful performance” and the rating of “fully competent” for the three core values. In doing so, the Panel appears to have acted reasonably and fairly.

30. Although the Applicant attached several documents to her application relating to her proposed placement in April 2012 on a temporary duty assignment to Syria for one month, she does not explain the relevance of that issue to the present case. It appears from her application that these documents were offered in support of her argument that she does not have alternative employment options. It is not argued by the Applicant, however, that the consideration of her temporary duty assignment was impacted by the retrenchment process.

31. Accordingly, the Tribunal finds that the Applicant has failed to demonstrate, based on the arguments in her application, that the contested decision is *prima facie* unlawful, and the present application stands to be dismissed.

32. As one of the three conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal does not need to determine whether the condition of irreparable damage has been satisfied.

33. This Judgment does not preclude the Applicant from filing an application under art. 2.1 of the Tribunal’s Statute in due course.

Observation

34. The Tribunal takes note of Information Circular No. DMS/030/2011, which states that internationally-recruited staff members with a record of satisfactory performance who were not recommended for retention would be recommended to the

United Nations Headquarters for reassignment to other missions, subject to the availability of vacant positions. The Tribunal finds it appropriate to observe that the Administration should comply with this undertaking with respect to the Applicant, particularly in view of her long service with the Organization.

Conclusion

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

(Signed)

Judge Ebrahim-Carstens

Dated this 14th day of June 2012

Entered in the Register on this 14th day of June 2012

(Signed)

Hafida Lahiouel, Registrar, New York