



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MCDONALD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Bart Willemsen, OSLA

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has been serving as an Administrative Assistant with the Humanitarian and Development Coordination Unit (“HDCU”) in the United Nations Stabilization Mission in Haiti (“MINUSTAH”) since October 2010. On 11 May 2012, she was informed that she was being placed on the list of staff members subject to a retrenchment exercise and, on 31 May 2012, that her fixed-term contract would not be renewed beyond 30 June 2012 due to unavailability of post. She contests the decision not to renew her contract.

2. The Registry received her application for suspension of action of the impugned decision at 9:40 a.m on 26 June 2012, through its eFiling portal. It was served on the Respondent at 11:38 a.m. the same day, with a request for the filing and service of a written reply by 4:00 p.m., 27 June 2012. This is one of three applications for suspension of action received on the same day arising from the same retrenchment exercise in MINUSTAH.

Relevant background

3. The following factual chronology is based on the information contained in the Applicant’s application and the Respondent’s reply and the annexes appended to these submissions.

4. On 31 May 2011, the Deputy Special Representative of the Secretary-General (“DSRSG”) filed a request for extension of the Applicant’s appointment against post no. 75211 in the Integrated Management Information System.

5. On 11 July 2011, the Applicant signed her new letter of appointment following which she was provided with a new personnel action notification which reflected that she was being offered a fixed-term appointment, effective 1 July 2011, until 30 June 2012 in the Field Service (“FS”) category at the FS-4 level, step VII, against post no. 75211.

6. In December 2011, following the completion of Presidential elections in Haiti in 2011, MINUSTAH commenced a drawdown of its post-earthquake surge capabilities. According to the Respondent, a nationwide review was conducted in order to identify within each occupational group which positions would be retained and which abolished.

7. On 5 December 2011, the Director of Mission Support announced that a Comparative Review Panel (“CRP”) would be put in place in order to evaluate the staffing structure in MINUSTAH after 30 June 2012. The CRP included members from the Field Staff Union, the National Staff Union and MINUSTAH management.

8. On 11 May 2012, the DSRSG informed the Applicant that, as result of the upcoming retrenchment exercise, her post was being abolished and that he was going to be “creating a new post for a staff member from New York” who had been serving him in the function of Personal Assistant since October 2010. This new post incidentally bears post no. 75211, mentioned below.

9. On 16 May 2012, the DSRSG informed the DMS by a memorandum that he had reviewed the profiles of the six staff members that were on the retrenchment list and found that none of them were suitable to encumber the post of his personal assistant (post no. 75211) and he was therefore requesting that the contract of his current Assistant be extended until he could find a fully-qualified successor.

10. By letter dated 31 May 2012, the DMS informed the Applicant as follows: “Due to non-availability of post, I regret to inform that your fixed-term appointment with MINUSTAH which expires on 30 June 2012 will not be further extended”.

11. On 7 June 2012, the Applicant filed a request for management evaluation of the decision not to renew her fixed-term appointment.

12. On 19 June 2012, the Applicant submitted to the Secretary-General a request for suspension of action pursuant to staff rule 11.3(b)(ii) with the Management Evaluation Unit (“MEU”).

13. On 25 June 2012, the Applicant was informed that the Secretary-General had rejected her request for suspension of action.

Applicant's submissions

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

Prima facie unlawfulness

a. A review of the memorandum dated 16 May 2012 from the DSRSG to the Director of Mission Support indicates that following the expiry of the Applicant's contract on 30 June 2012 her post is still going to be part of the budget. Furthermore, it appears that in the aforementioned memorandum, the Personal Assistant to the DSRSG was asked to continue in this function against the Applicant's post even though six staff members subject to retrenchment were deemed ineligible;

b. The selection criteria for who should be included in the retrenchment exercise were not established according to accepted procedures. It also appears from the staffing table received by the Applicant on 25 June 2012 as part of the Secretary-General's response to her request for suspension of action that there is an FS level position in the 2012–2013 budget that appears to correspond to her post;

c. The comparative evaluation of the retrenched staff members for the post of Personal Assistant to the DSRSG appended to the memorandum of 16 May 2012 stated that the Applicant "experience[d] difficulties in working without closer supervision". This unsubstantiated negative statement regarding her performance is related to two short-term projects and is contradicted by the positive reviews made by the DSRSG's predecessor, as part of the Applicant's 2008–2009 and 2009–2010 performance evaluations, that she performed well with minimum supervision;

d. Should the retrenchment exercise be lawful, the procedure followed to evaluate staff members subject to the retrenchment exercise is nonetheless flawed as it awarded extra points to staff members who received “good comments” in their evaluation even though there is no actual obligation for the reporting officer to include any type of comments;

Urgency

e. The implementation of the decision on 30 June 2012 renders this application for suspension of action urgent;

Irreparable damage

f. The implementation of the decision will cause harm such as “loss of self-esteem and career prospects, in particular after more almost [sic] twelve years of continuous service” that cannot be compensated by a financial remedy.

Respondent’s submissions

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

Prima facie unlawfulness

a. The CRP criteria do not apply to the Applicant’s unit as it was abolished in its entirety and is not included in the 2012–2013 budget. As a result of the abolishment of the HDCS the Applicant was put on the list of staff members that would not be retained;

b. The General Assembly did approve one new FS level Administrative Assistant post for the office of the DSRSG to perform the tasks of a personal assistant and it is solely pending the initiation of a formal recruitment process that MINUSTAH sought to temporarily fill the vacancy with a staff member who was already *in situ*. The Applicant, along with the other five

Administrative Assistants at the FS-4 level, was considered for the post but it was determined that she did not meet the required qualifications. The review and selection process was conducted fairly and all of the staff members at the FS-4 level were treated equally. The selection of the DSRSG's personal assistant bears no relation with the non-renewal of the Applicant's post. Furthermore, this is a new post at the FS-5 level whereas the Applicant is at the FS-4 level;

c. The Applicant was not recruited against Post No. 75211 but rather against Post No. 51940 in the Civil Affairs Section. However, like other Administrative Assistants, her position is not associated with any individualized post number and the assignment to a specific post number in itself does not provide her with a right to continue on the assigned post or have her contract renewed. Consequently, the non-renewal of the Applicant's contract is solely the result of the abolishment of the occupational group HDCS which resulted in the Applicant's post no longer existing;

Urgency

d. The current circumstances are solely the result of the Applicant's self-created urgency. Even though the Applicant had been informed of the decision not to renew her contract on 31 May 2012, she waited until four days before the expiration of her contract to request a suspension of action;

Irreparable damage

e. The Applicant has not demonstrated why any personal or professional harm she may suffer cannot be repaired through the award of damages following a successful appeal under art. 2.1 of the Tribunal's Statute.

Consideration

The nature of an application for suspension of action and its conditions

16. This is an application for suspension of action pending management evaluation. An application filed under art. 2.2 of the Tribunal's Statute (and art. 13 of the Rules of Procedure) is, by its nature, a request for urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not subject to appeal, and which requires consideration by the Judge within five days of the service of the motion on the Respondent (see art. 13.3 of the Tribunal's Rules of Procedure). Therefore, both parties must do their best to provide sufficient information for the Tribunal to decide the matter preferably on the papers before it within the time limit. Such motions disrupt the normal day-to-day business of the Tribunal, and indeed on this occasion, as the sole presiding judge in New York, I received three such applications on Tuesday, 26 June 2012, which all had to be decided by Friday, 29 June 2012.

17. Article 2.2 of the Statute of the Dispute Tribunal provides that the Tribunal 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 decision only if all three requirements of art. 2.2 of its Statute have been met.

Prima facie unlawfulness

18. The Applicant's principal case is that the reason that she was provided for the non-renewal of her contract, namely that it was "[d]ue to non-availability of post", was false as such a post actually still existed and was available in MINUSTAH's 2012–2013 budget.

19. In a case concerning the non-renewal of a fixed-term contract, as in the present case, the United Nations Appeals Tribunal has determined that, "when a

justification is given by the Administration for the exercise of its discretion it must be supported by the facts” (*Islam* 2011-UNAT-115, para. 29).

20. In support of the contention that a post was available, the Applicant adduced the personnel action form that was created following her latest letter of appointment in which it was stated that she was hired against post no. 75211. The Respondent denies that the Applicant encumbered post no. 75211, and states that she was actually employed against post no. 51940 in the Civil Affairs Section. However, the Respondent provides no evidence for this submission.

21. Accordingly, the Tribunal finds that the only reasonable inference that can be made is that the post which the Applicant is, as a matter of fact, encumbering post no. 75211.

22. The Tribunal observes that the Respondent submits in evidence a memorandum dated 25 June 2012 from the Officer-in-Charge, Mission Support, MINUSTAH, to the Chief of MEU in which he states as follows concerning the Applicant’s post:

However, [the Applicant’s] position as an Administrative Assistant is to be abolished effective 30 June 2012 as part of the abolishment of the Humanitarian and Development Coordination Unit and therefore [her] position will no longer exist after 30 June 2012. It is also necessary to clarify that [the Applicant] was recruited against an FS-4 Administrative Assistant position in the Mission, and that the position is not necessarily associated with any specific post number.

23. In light of the information contained in her personnel action form and the Respondent’s submission in his reply, it is clear that the statement of the Officer-in-Charge of Mission Support that the Applicant’s position was “not necessarily associated with a specific post number” is incorrect.

24. The next question then is whether post no. 75211 is part of the retrenchment exercise and is being abolished, or if it is going to remain in existence in MINUSTAH.

25. The Applicant adduces the memorandum dated 16 May 2012 from the DSRSG in which the subject line is “Review and Selection of MINUSTAH Retrenched Staff Members for Post # 75211, Personal Assistant to the DSRSG/RC/HC”. She further submits an organization chart for MINUSTAH for 2012–2013 (which was also adduced by the Respondent), including a staffing table indicating that one FS post is to be linked to the Office of the DSRSG.

26. The Officer-in-Charge of Mission Support, in his memorandum of 25 June 2012, as set out above, stated that the Applicant’s position as an Administrative Assistant is to be abolished as part of the abolishment of HDCU. However, from the DSRSG’s memorandum of 16 May 2012 and the 2012–2013 organizational chart, it follows that her position, namely post no. 75211, is not associated with the Humanitarian and Development Coordination Unit but with the Office of the DSRSG.

27. As the Respondent has failed to provide any submission or evidence that post no. 75211 in the Office of the DSRSG is otherwise to be abolished, the Tribunal is left with no other choice but to conclude that the Applicant’s post is not envisioned to be part of the downsizing of MINUSTAH, particularly as this is the very post number against which the DSRSG requested the extension of the contract of his current assistant by memorandum dated 16 May 2012.

28. Consequently, as a *prima facie* case, the Tribunal finds that the Applicant has established that her post is not to be affected by the retrenchment exercise of MINUSTAH and that the reason given by the Administration for the non-renewal of her contract, namely that there was no post available for her, was incorrect and therefore unlawful.

29. As a result, it is not necessary for the Tribunal to examine the Applicant’s other contentions regarding unlawfulness, for example in respect of the criteria regarding “good comments” which appears to have no basis in law. The Tribunal observes that the financial implications of extending the Applicant’s contract until the

completion of management evaluation are very limited as the time limit for MEU to reply to the Applicant's request for management evaluation would appear to be 23 July 2012. Thus, the balance of convenience supports the granting of a suspension.

Urgency

30. It is undisputed that the Applicant's contract expires on 30 June 2012, i.e., one day from the date of the present Judgment, and that she was informed about the non-renewal on 31 May 2012.

31. Considering the imminent risk of the Applicant being separated from MINUSTAH, the Tribunal finds that her case is one of particular urgency and that it is not the result of the Applicant's own actions.

32. The Tribunal notes that the Applicant only received the reply from the Secretary-General that her request for suspension of action filed with the MEU was rejected on 25 June 2012, i.e., the same day she filed her application with the Dispute Tribunal. Accordingly, the Tribunal finds that the urgency is not self-created.

Irreparable damage

33. The Applicant has 14 years of continuous service with the Respondent but now faces the possibility of unemployment. The harm that the Applicant contends that she will suffer from the non-renewal of her contract, and thereby also her separation from the Organization, is of a nature that will cause her harm that financial recompense alone cannot repair.

34. In *Khambatta* UNDT/2012/058, the Tribunal stated that:

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.

35. The Tribunal finds the reasoning in *Khambatta* persuasive and applicable to this case. Thus, the Tribunal finds that the implementation of the decision not to renew the Applicant's fixed-term contract would cause her irreparable harm.

Conclusion

36. The Tribunal finds that the three elements required for the granting of a suspension of action pending management evaluation have been established.

Order

37. The Tribunal orders that the decision not to renew the Applicant's current fixed-term contract be suspended during the pendency of management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of June 2012

Entered in the Register on this 29th day of June 2012

(Signed)

Hafida Lahiouel, Registrar, New York