



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

OKONGO

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 an Administrative Assistant (although the Respondent refers to her as a Finance Assistant) in the Finance Section 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 the application for suspension of the impugned decision at 11:43 a.m on 26 June 2012, through its eFiling portal. It was served on the Respondent at 12:26 p.m. the same day, with a request for the filing and service of a written reply by 4:00 p.m., 27 June 2012.

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. 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.

5. On 5 December 2011, the Director of Mission Support (“DMS”) 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.

6. On 21 December 2011, the DMS issued an update on the review process, confirming that internationally recruited staff members with a record of satisfactory performance whose contracts would not be recommended for renewal would be recommended to Headquarters for reassignment to other missions should they have available positions.

7. In January and February 2012, the Chief Civilian Personnel Officer held meetings during which staff members were informed of the details of the selection and evaluation methodology.

8. On 31 May 2012, the Applicant was informed 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”.

9. On 4 June 2012, the Applicant filed a request for management evaluation of the decision not to renew her fixed-term appointment.

10. On 18 June 2012, the Applicant filed a request for suspension of action pursuant to staff rule 11.3(b)(ii) with the Management Evaluation Unit (“MEU”).

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

Applicant’s submissions

12. The Applicant’s principal contentions may be summarised as follows:

Prima facie unlawfulness

a. The selection criteria for which staff members should be included in the retrenchment exercise were not established according to established procedures;

b. It also appears from the staffing table for the proposed 2012–2013 budget attached to the memorandum from the Special Representative of the Secretary-General to the Chairperson, Field Staff Union Committee, that there is an increase in the number of posts in the Finance Section at the Field Service level (“FS”), including posts under the regular budget “which is of significant relevance as [the Applicant] was appointed against a post in the regular budget”;

c. In a different staffing table provided by MEU, it appears that the number of FS level posts in the Finance Section is reduced only from 12 posts to 11. Consequently, taking into account the problems in the criteria for the retrenchment procedure and the rating the Applicant received over her last two performance evaluations, she questions her ranking as the last ranked staff member, and therefore as the only staff member in that section affected by the retrenchment;

d. Should the retrenchment exercise be deemed 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. Furthermore, “there is evidence of irregularities in the retrenchment exercise in the Finance Section in that the DMS interfered in the process without an appropriate clarification”.

Urgency

e. The imminent implementation of the decision on 30 June 2012 renders this application for a 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

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

Prima facie unlawfulness

a. The number of FS-4 level posts did not increase but rather was decreased by three, resulting in the mission having six available positions for nine FS-4 Finance Assistants. Upon completing the review process, the Applicant was ranked at the bottom of the list of nine FS-4 Finance Assistants;

b. As a result of the decision of the General Assembly to reduce the number of Finance Assistant positions at the FS-4 level, all the Finance Assistants were subjected to comparative review to determine which eight would be retained. Furthermore, all of the staff members who were on fixed-term contracts were subject to the review, regardless of the type of post or the post number they were encumbering and regardless of whether the post had been approved before or after the surge in MINUSTAH’s capacity following the 2010 earthquake. The procedures and criteria established to determine who would and who would not be renewed provided fairness, transparency, and consistency; and the comparative review process was guided by art. 101, paragraph 3, of the Charter of the United Nations, based on the staff member’s professional competence and ability in accordance with the CRP’s pre-approved evaluation criteria and a documented record of satisfactory performance;

c. The retrenchment exercise was not flawed as all of the selection criteria were agreed upon by the CRP. Furthermore, the Applicant received the maximum number of points for the comments in her electronic performance appraisal report and was therefore not negatively impacted by that criterion. The CRP's assessment of staff members was conducted independently without interference from the Administration;

d. The Director of Mission Support did not interfere with the review process. Rather, when part of the comparative review process was identified as not being in accordance with one of the internal information circulars at MINUSTAH, the CRP met independently and agreed to re-assess the process by which they would review staff members;

Urgency

e. 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

f. 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 in front of the Tribunal.

Consideration

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

14. 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.

15. 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

16. 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 existed and was available in MINUSTAH's 2012–2013 budget.

17. 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).

18. In support of the contention that a post is available for her, the Applicant adduced two organizational tables for MINUSTAH: a staffing table for 2011–2012 and another for 2012–2013 (both these tables were also submitted in evidence by the Respondent). The table for 2011–2012 indicates that in the Finance Section where

19. While the Applicant in her application states that the staffing tables indicate a *de facto* increase of FS posts in the Finance Section, the Respondent in his reply submits that these actually represent a downsizing. The Respondent further submits that for the budget year 2012–2013 the General Assembly reduced the number of Finance Assistant posts from seven to six, yet fails to provide any documentation in support of this submission which differs from the information reflected in the organizational tables.

20. The Respondent further contends that the General Assembly had decided that the number of Finance Assistants in MINUSTAH should be downsized. In support of this, he adduces in evidence a draft resolution submitted by the Chair of the Fifth Committee of the General Assembly, “Financing of the United Nations Stabilization Mission in Haiti” dated 12 June 2012 (A/C.5/66/L.57) and a report of the Fifth Committee of the General Assembly with the same title dated 14 June 2012 (A/66/846). However, not only do these documents post-date the decision not to renew the Applicant’s contracts, but the Respondent fails to make any specific reference to where, in any of these documents, it follows that no post would be available for the Applicant. After closely reviewing the documents, the Tribunal cannot discern any such mention as the document sets out the general budget for MINUSTAH but makes no reference to the post of the Applicant.

21. Based on the information before it, the Tribunal finds that the only reasonable inference to be drawn from the information before it, particularly the organizational tables, is that the number of the FS posts budgeted in the Finance Section actually increases from eleven to twelve, of which two posts in the latest table are labeled as “Redeployed – 465”. For the preparation of the Applicant’s case before MEU, in a memorandum dated 25 June 2012, the Officer-in-Charge, Mission Support, MINUSTAH, observed that the “Finance Section indeed received two FS posts under

redeployment from the Regional Coordination Unit however those posts are not vacant. They were transferred with their incumbents”. However, the Officer-in-Charge’s assertion is not corroborated by any further documentation or explanation, including why posts for redeployment are actually already encumbered when the general tenor in this retrenchment exercise is that posts do not attach to any staff members in specific. As the Officer-in-Charge’s statement was given in the context of a pending case before MEU and appears self-serving, the Tribunal finds that its evidentiary value is limited. It also observes that the Respondent does not rely on the statement and makes no reference to it in his reply. Nor does the Respondent provide any further explanation as to why the Applicant’s post could not be associated with any of these two new posts to be included in the Finance Section, or why they are included on the 2012–2013 staffing table.

22. Consequently, the Tribunal finds that, based on the evidence presently before it, it appears that there is a post available for the Applicant after the retrenchment exercise in the Finance Section, MINUSTAH, and that the reason given by the Administration for the non-renewal of her contract, namely that there was no such post, was incorrect and therefore *prima facie* unlawful.

23. In 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 notes that the financial implication of extending the Applicant’s contract until the completion of management evaluation is 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

24. 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.

25. Considering the imminent risk of the Applicant being separated from MINUSTAH, the Tribunal finds that her case is one of particular urgency. The Respondent does not deny this, but contends that the urgency is self-inflicted in that the application for suspension of action was only filed four days before the expiration of her contract.

26. 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

27. From the papers it appears the Applicant has been subjected to evaluation by the CRP regardless of the post type or post number she was encumbering, regardless of her length of service as compared to others, and also it is not clearly ascertainable whether the functions she was performing are no longer available, or indeed were core functions. Furthermore, the Applicant has 12 years of continuous service with the United Nations but now faces the possibility of unemployment.

28. 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.

29. The Tribunal finds the reasoning in *Khambatta* persuasive and applicable to this case (see also *Tibouti* UNDT/2012/093). 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

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

Order

31. The Tribunal orders that the decision not to renew the Applicant's current fixed-term contract be suspended during 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