



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

HASSOUNA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for Applicant:

Edwin Nhliziyo

Counsel for Respondent:

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant seeks suspension of the implementation, pending management evaluation, of his separation from service upon expiration, on 31 December 2016, of his fixed-term appointment with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”).

Facts

2. The Applicant joined the Organization in 2003, as a Protocol and External Relations Officer at the International Criminal Tribunal for Rwanda. He was subsequently appointed as a Political Affairs Officer (P-4) with the African Union/United Nations Hybrid Operation in Darfur (“UNAMID”), where he served until he was declared *persona non grata* by the Sudanese government in 2011. He then served for one-year periods on different positions in Entebbe, Syria, Addis Ababa. In mid-2015, he joined MINUSCA as Chief, Board of Inquiry (“BOI”), on a borrowed post, at the P-4 level. His fixed-term appointment with MINUSCA is due to expire on 31 December 2016.

3. The regular budget for 2016/2017 approved for MINUSCA provided for a post of BOI Officer (P-4). Management made the decision to advertise it through a Recruit from Roster (“RFR”) exercise. The Applicant is not on the relevant roster, hence not eligible in a RFR exercise.

4. By the Applicant’s admission, he was informed of his upcoming separation on 2 November 2016. By email of 28 November 2016, he was asked to sign the memorandum of recommendation of the non-extension of his appointment. He received a formal memorandum, dated 30 November 2016, on his “Separation from MINUSCA upon completion of Fixed Term Appointment on 31 December 2016”, which specified the administrative formalities that he was expected to fulfil. As the Applicant states, on 13 December 2016, he was asked to complete the administrative formalities linked to his separation.

5. The Applicant requested management evaluation of the decision at issue on 22 December 2016.

6. This application was initially filed with the Nairobi Registry of the Tribunal on 23 December 2016. It was transferred to its Geneva Registry on 27 December 2016 and served on the Respondent for reply on the same day.

7. The Respondent filed his reply to the application on 28 December 2016.

Parties' contentions

8. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. When it was decided to fill the regular budget post of BOI Officer through an RFR exercise, the previous Chief of Staff, MINUSCA, promised the Applicant that he would be reassigned to another post within the Mission. As the Mission's Chief of Staff and the Applicant's supervisor, he had the authority to proffer such commitment. The contested decision amounts to dishonouring this promise, although there are available P-4 posts to which the Applicant could be reassigned;

b. The very fact that it was decided to fill the post in question from the roster, instead of issuing a Vacancy Announcement allowing the Applicant to compete for the functions he is encumbering, suggests a mindset to exclude him from consideration, all the more since the Applicant's performance was satisfactory and there was thus no urgency to fill the post. In this light, the possibility that the contested decision was tainted with discrimination and extraneous factors cannot be excluded;

c. The wanton use of the roster tool as it has developed within the Organization violates the staff members' right to receive full and fair consideration for recruitment and promotion. Rosters should be used in situations where speed is of the essence, not to create a "caste" system where being rostered automatically guarantees priority in recruitment and promotion;

Urgency

d. The Applicant's appointment will expire on 31 December 2016. This will mark the end of the Applicant's 14-year career with the Organization, and from this date he will have no other source of income. Every effort to persuade management to reconsider the decision has been unsuccessful;

Irreparable damage

e. The Applicant is losing his job and his livelihood. Moreover, once separated from the Organization, his chances of being reabsorbed are close to zero.

9. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The contested decision is not prima facie unlawful. The Applicant's appointment did not carry any expectancy of renewal. The Applicant joined MINUSCA after he had to leave UNAMID, and in the meantime could apply for other positions and be selected or rostered. His appointment was not renewed because there is no longer a post available to finance it, given that the post currently used to finance the Applicant's appointment will be repurposed to other functions, and the functions he currently performs are covered by a regular post that has been the subject of a selection exercise;

b. The Applicant has not provided any evidence of a written promise or firm commitment to renew his appointment beyond 31 December 2016. Although he requested management to consider reassigning him to a Political Affairs Officer position, he received no such commitment;

Urgency

a. Urgency was self-inflicted by the Applicant. The Chief of Staff, MINUSCA, notified the Applicant of the non-renewal of his contract on 2 November 2016. Subsequently, the Administration sent him a number of clear communications on his separation. He could have initiated management evaluation well in advance, but chose to wait until a few days before the expiry of his appointment.

Consideration

10. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. These are cumulative conditions. Therefore, the impugned decision can be suspended only if all three requirements are met (e.g., *Hepworth* UNDT/2009/003).

Scope of application for suspension of action

11. The administrative decision that this application seeks to stay is the Applicant's separation on the expiry date of his current fixed-term appointment. In his submission, his separation ultimately results from an implicit disregard of a promise to reassign him, which is the main ground for illegality he relies upon. For clarity, while the Applicant also takes issue with the choice of resorting to an RFR to fill the BOI Officer post, this is not a contested decision in these proceedings. It is clear enough that he raises this matter solely in arguing that there was an intent to leave him out of consideration for this position. In any

event, the Applicant would be time-barred to contest said decision, since it transpires from his correspondence with the Administration that he was aware of it at least by the end June 2016.

12. The Tribunal must now consider if the decision identified above meets the three statutory conditions for its suspension.

Prima facie unlawfulness

13. As noted, the Applicant submits that a competent officer of the Administration, the Chief of Staff, MINUSCA, promised to have him reassigned to a different P-4 position within the same Mission, but the staff member who later took over as Chief of Staff effectively dishonoured this commitment.

14. The relevant case law has held that a promise can only be said to bind the Organization and create a legitimate expectation for a staff member if it is express and not based on mere verbal assertions, but on a firm commitment (*Ahmed* 2011-UNAT-153, *Abdalla* 2011-UNAT-138, *Igbinedion* 2014-UNAT-411, *Zuñiga-Rojas* UNDT/2010/218, *Bowen* UNDT/2010/197, *Masykanova* UNDT/2014/137).

15. The Applicant submits two email communications to substantiate his allegation. However, these emails do not contain or recognise any promise. The Applicant is the only one who alludes to a promise in the course of such exchanges, as he thanks the recipient for his “commitment and promise to make this reassignment materialize”. Nonetheless, the existence of such commitment or promise was not acknowledged, even implicitly, by the recipient of the email. Moreover, while the possibility of reassigning the Applicant was indeed mentioned, there is no evidence that assurances or promises were given in this respect.

16. The tenor of the email discussion does not support the contention that there was a promise to reassign the Applicant. On the contrary, the Chief Human Resources Officer, in his email of 30 June 2016, made it clear that a reassignment

could be “requested”, stressing however that such reassignment needed to be approved by the Field Personnel Division at Headquarters.

17. In the absence of more compelling evidence, the Tribunal is unable to find that the Administration was bound by a promise to reassign the Applicant.

18. As to the contentions suggesting extraneous factors or discrimination, suffice it to say that the burden of proving improper motivation rests with the Applicant (*Frechon* 2011-UNAT-132, *Ahmed* 2011-UNAT-153). The Applicant adduces no tangible evidence thereof, and the mere claim that the choice of an RFR to fill the BOI Officer post indicates a certain mindset falls short to meeting this burden.

19. Based on the evidence before it, the Tribunal cannot but to find that it is not established that the Applicant’s separation would be *prima facie* unlawful.

Urgency

20. This Tribunal has ruled in several instances that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), *Lorand* Order No. 93 (GVA/2010), *Woinowsky-Krieger* No. 59 (GVA/2010), *Yisma* Order No. 64 (NY/2011), *A-Ali et al.* Order No. 220 (NY/2011), *Suliqi* UNDT/2011/120, *Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206, *Maloka Mpacko* UNDT/2012/081, *Majoul-Hunter* UNDT/2012/117, *Longone* No. 27 (GVA/2013), *Terragnolo* Order No. 96 (GVA/2013)).

21. The Tribunal has repeatedly held (*Maloka Mpacko* UNDT/2012/081, *Majoul-Hunter* UNDT/2012/117, *Longone* Order No. 27 (GVA/2013)) that:

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).

22. The Applicant manifests in his application that he was informed of his upcoming separation on 2 November 2016. He was later invited, by email of 28 November 2016, to sign the memorandum relating to the non-extension of his contract. He was sent a formal memorandum, dated 30 November 2016, detailing the administrative arrangements related to his “Separation from MINUSCA upon completion of Fixed Term Appointment on 31 December 2016”. He further concedes that on 13 December 2016, he was urged to complete the administrative formalities linked to his separation.

23. Yet, although he was aware of his separation almost two months in advance of his contract’s expiry date, and despite several reminders, he did not make his request for management evaluation until 22 December 2016, and did not file his application before the Tribunal until the next day, that is, over seven weeks after he was first informed of the decision, and merely five working days before its implementation date. Had he requested management evaluation shortly after he came to know about the intended separation, that is, on 2 November 2016, the Management Evaluation Unit, which must reply within 45 days of the submission of any such request, could have rendered its evaluation while the Applicant’s contract was still in effect.

24. The Applicant provides no explanation for not taking action earlier. He barely mentions that he made “effort[s] to persuade the management to reconsider their decision”, with no particulars whatsoever. Even if this were to be interpreted as the Applicant having seriously tried to reach an amicable settlement, the Tribunal recalls that informal attempts at settlement and mediation, if any, do not exonerate an applicant from acting in a timely manner (*Dougherty* UNDT/2011/133, *Woinowsky-Krieger* No. 59 (GVA/2010). See also *Sahel* UNDT/2011/023, *Patterson* UNDT/2011/091).

25. In assessing the particular circumstances of the case, it should also be stressed that the Applicant is a highly qualified staff member, who has served at the United Nations for more than 13 years, in several duty stations and most of the time at the P-4 level. He is familiar with the Organization's procedures in general, and with those pertaining to the internal justice system in particular, as he has to date lodged various cases, including suspensions of action (*Hassouna* Order No. 105 (NBI/2015), *Hassouna* UNDT-2014-094). Furthermore, he was assisted by counsel, which, as a matter of fact, was the same lawyer who represented him in other matters before the Tribunal; thus he did not have to start looking for professional support from scratch. The Applicant could not ignore the importance of bringing his application as soon as possible, and he had the means, experience and knowledge to do it promptly.

26. In view of all of the above, the Tribunal considers that the urgency in this case was self-created, hence, the particular urgency requirement is not fulfilled.

27. Having found that two of the statutory requirements for a suspension of action are not met, it is unnecessary to examine the third one. This application cannot be granted.

Conclusion

28. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 30th day of December 2016

Entered in the Register on this 30th day of December 2016

(Signed)

René M. Vargas M., Registrar, Geneva