



Before: Judge Nkemdilim Izuako
Registry: Nairobi
Registrar: Eric Muli, Officer-in-Charge

GUZMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is the Chief, Conduct and Discipline Unit at the P-4 level in the United Nations Assistance Mission for Afghanistan (UNAMA). On 15 December 2013, she filed two Applications:

a. An Application on the merits contesting a decision taken by the UNAMI Chief Civilian Personnel Officer (CCPO), Jeanie Fraser, to separate her from service effective 31 December 2013 (“the contested decision”) and sought rescission of the contested decision.

b. An Application for Interim Measures Pending Proceedings (Suspension of Action) under art. 10.2 of the Statute of the Dispute Tribunal seeking an order for the suspension of the contested decision.

2. On 17 December 2013, the Applicant filed an addendum to the Application for interim relief seeking a suspension of the decision to separate her from service pending a determination of the case on the merits. She contested that the contested decision was taken illegally and was based on untrue reasons.

3. The Respondent filed a Reply on 18 December 2013 arguing that the Application was not receivable and should be dismissed and that even if it were receivable, the Tribunal has no power to grant an interim relief in this case.

Facts

4. On 21 July 2013, the Applicant was issued with a fixed-term appointment effective 1 September 2013. The appointment was for 10 months from the effective date of appointment and was to expire on 30 June 2014.

5. On 23 July 2013, the Applicant addressed a letter to Mr. Paul Johnson, Acting Director, Field Personnel Division in the Department of Field Support requesting the initiation of a rebuttal of her performance appraisal for the period 1 April 2012 to 31 March 2013. This letter was also copied to the Chief of Mission Support for UNAMA, Ms. Stephani Scheer.

6. The Applicant contended that the then membership of the UNAMA rebuttal panel did not meet the requirement that the membership of the panel should be equal in grade or higher than that of the reporting officer whose performance evaluation or comments were being rebutted. She therefore sought to have a rebuttal panel instituted at the Headquarters level in New York.

7. The Applicant was served with a notice of separation from service on 22 September 2013. The notice dated 15 September 2013 was titled "Separation notification due to downsizing of budgeted post eff. COB 31 December 2013." It was signed by the CCPO, UNAMA, Ms. Jeanie Fraser and stated in part that

The change in circumstances relating to UNAMA's operations for 2014 has made it necessary to evaluate closely the current and future needs of the Mission and our operational effectiveness. At the conclusion of this exercise, the mission has identified a number of changes to be made in the staffing requirements which has resulted in various posts being abolished and/or nationalized. These changes are due to restructuring of sections and offices and absorption of functions by other staff.

I regret to inform you that your post is one of those identified for downsizing in 2014. This decision is effective 31 December 2013

8. On 22 October 2013, the Applicant sought the intervention of the Management Evaluation Unit (MEU) to suspend the decision to separate her from service pending the completion of a performance evaluation rebuttal process. She also made a request for management evaluation of the abolition of her post and impending separation that was to take effect on 31 December 2013.

9. The MEU responded on 30 October 2013 and upheld the contested decision for which management evaluation had been sought.

10. The Applicant again wrote to the MEU on 4 December 2013 requesting a suspension of the decision to separate her from service. The MEU responded to this on 10 December 2013 and upheld its decision taken on 30 October 2013.

Applicant's case

11. The Applicant's case may be summarized as follows:

Prima facie unlawfulness

- a. The contested decision is a breach of her due process rights.
- b. The reason given for her separation from service, namely that her post has been abolished is false. The Applicant contends that her post has not been abolished but has only been proposed for reclassification.
- c. The proposed downsizing of posts in UNAMA and the proposed reclassification of her own post had not been presented to the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and had not been approved by the General Assembly at the time she was issued with the notice of separation.
- d. Later on when the ACABQ report was issued, the Applicant contends that it did not propose to abolish her post, thereby rendering the reasons given by the UNAMA Administration as false.

Urgency

- e. The impending separation from service takes effect on 31 December 2013 which is barely two weeks away from the date of the filing of this Application making it urgent.

Irreparable damage

- f. Should the Applicant be separated from service prior to the completion of her Performance Evaluation (“ePAS”) rebuttal, she will be unable to effectively and judiciously defend her case.
- g. Denial of an opportunity to defend her “ePAS” through a rebuttal will jeopardize her chances for further employment with the United Nations, and given her advanced age, it will be difficult for her to find a new job and to start a new career.
- h. The contested decision is damaging to her professional reputation and career.

i. The decision will cause her financial loss and economic damage due to loss of employment, moral and emotional injuries, physical stress and a negative impact to her social status.

12. The Applicant's seeks the suspension of the decision to separate her from service effective 31 December 2013 pending the substantive hearing of her Application on the merits.

Respondent's case

13. The Respondent's case may be summarized as follows:

14. The two Applications are not receivable and even if the Tribunal deems them to be receivable, it does not have the power to grant an interim relief in this case under art. 14 of the Rules of Procedure as read together with art. 10 of the Statute of the Dispute Tribunal.

15. To the extent that the administrative decision challenged is the Secretary-General's proposal to the General Assembly that the Applicant's post be abolished or reclassified, it is not receivable as it does not constitute a final administrative decision as defined under the Statute of the Dispute Tribunal.

16. The memorandum sent to the Applicant by the UNAMA CCPO simply identifies that the post she encumbers has been identified for downsizing, subject to the General Assembly's decision. Without a General Assembly decision to this effect, the Applicant continues to serve on a fixed-term appointment until 30 June 2014.

17. The memorandum from the CCPO was only a preparatory step in the budget process and such a preparatory step can only be disputed in light of a final decision. This preparatory step does not affect the Applicant's situation and therefore there is no final administrative decision justiciable before the Dispute Tribunal.

18. The Applicant's request for rescission of the MEU decision to deny suspension of the separation pending completion of the rebuttal process is not an

“administrative decision” within the meaning of the Statute of the Dispute Tribunal further implying that the Tribunal has no power to make an order for interim measures.

19. Even if the Tribunal was to understand the request for rescission of the MEU decision as a request to rescind the purported decision by UNAMA, then art. 10.2 of the Statute of the Dispute Tribunal precludes the Tribunal from granting orders of temporary relief in cases of appointment, promotion or termination.

20. In view of the foregoing, the Respondent prays that the Motion be dismissed as not being receivable. In the event that the Tribunal finds it receivable, the Respondent avers that the said Tribunal has no power to make an interim measure in this case.

Considerations

Receivability

21. The Respondent has submitted that the Dispute Tribunal is excluded from ordering temporary relief in cases of appointment, termination and promotion.

22. The Respondent submitted further that

If the Dispute Tribunal finds that a decision has been made in this case, a decision to separate the Applicant from service in these circumstances would relate to her appointment. Accordingly, the Dispute Tribunal has no power to make an order for interim measures.

23. In considering the Application for interim relief, the Tribunal is mindful that both art. 10.2 of the Statute of the Dispute Tribunal and art. 14 of the Rules of Procedure provide that a temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

24. Each and every application that a staff member brings before the Dispute Tribunal must necessarily be based on their capacity as a staff member under an employment contract or appointment.

25. The Respondent's submission is that the Tribunal may not grant the order because it would be related to the Applicant's appointment. This interpretation is totally misleading. The effect of the words "appointment", "promotion" and "termination" as used in art. 10 of the Statute and art. 14 of the Rules of Procedure simply mean that where a suspension of action application challenges an appointment, termination or promotion, the Tribunal cannot grant an interim relief. In other words, it is only in cases where the subject-matter of an application seeks to impugn an appointment, termination or promotion that the interim relief cannot be ordered.

26. The Tribunal thus finds that the Application under art. 14 of the Tribunal's Rules of Procedure is receivable and proceeds to determine whether the case meets the three requirements for the grant of a suspension of action as stipulated in the said art. 14.

Prima facie unlawfulness

27. The Applicant submitted that the decision to separate her was *prima facie* unlawful because the reason given for her separation from service, namely that her post has been abolished is false. The Applicant contends that her post has not been abolished but has only been proposed for reclassification. The Respondent did not address the Tribunal on the issue of *prima facie* unlawfulness in the Reply.

28. The CCPO UNAMA, on 15 September 2013, sent a memorandum to the Applicant titled "separation notification due to downsizing of budgeted posts eff. C.O.B 31 December 2013." The Applicant was informed therein that her post was to be downsized and that the decision was to take effect on 31 December 2013 on which date she would be separated.

29. The Respondent blows hot and cold claiming somewhat that this separation notice is a preparatory and hypothetical decision. A decision taken by a

manager with regard to a staff member conveying a date for separation of the said staff member is neither a preparation nor a hypothesis; it is an administrative decision. It beats the imagination that these lame and meaningless phrases are manufactured to respond to this Application.

30. The words “appointment”, “promotion” and “termination” used in art. 10 of the Statute and art. 14 of the Rules of Procedure are not an “open sesame” or magic words. In dispensing justice, the Tribunal has a clear duty to examine the circumstances in order to be satisfied and to determine whether the words employed by a party to an application are genuine and honest or whether they are merely used to manipulate the system of justice.

31. The Respondent seeks to interpret the word “appointment” in the context of this case to mean that no application under art. 14 of the Rules of Procedure can be successful when brought by a staff member. Since non- staff members cannot come before the Tribunal, it is a condition precedent that all who come before the dispute Tribunal must be serving or retired staff members or others acting on their behalf.

32. Curiously, the Respondent strives to explain that only the General Assembly can abolish posts and that as at the date of this Application, the General Assembly had not taken such a decision.

33. It is also claimed by the Respondent that the CCPO’s memo of 15 September 2013 to the Applicant “simply identifies that the post she encumbers has been identified for downsizing subject to the General Assembly’s decision.” The Reply also states that the Applicant will continue to serve on a fixed-term appointment until 30 June 2014 and that there is no final administrative decision that is justiciable before the Dispute Tribunal.

34. Clearly, none of this is true since the notice of separation memorandum was unequivocal in informing the Applicant that she would be separated from service effective 31 December 2013.

35. The Administration’s agents must be genuine in their dealings with staff members. The claim that the Application challenges the Secretary-General’s

proposal to the General Assembly that the Applicant's post be abolished or reclassified is preposterous and clearly untrue. The Applicant is challenging her separation notice by the CCPO UNAMA.

36. Given that there has been no decision by the General Assembly to downsize the mission or to abolish the Applicant's post, the CCPO acted without authority. In fact at the time of writing to the Applicant to convey a decision to terminate her services on grounds of abolition of post effective 31 December 2013, there had been no report by the ACABQ on downsizing in UNAMA.

37. Even as at this moment, an anticipated proposal by the Secretary-General to the General Assembly with regards to a possible abolition of the Applicant's post has not been made. No such decision has been taken by the General Assembly and the CCPO cannot by herself abolish any posts in the mission.

38. It is evident that the separation decision conveyed to the Applicant on 15 September 2013 was made without any basis or authority on the part of the CCPO and the Tribunal finds that the requirement of *prima facie* unlawfulness has been satisfied.

Urgency

39. The illegal decision seeks to separate the Applicant on 31 December 2013 which is barely two weeks after the date of filing the Application and is therefore evidently urgent.

Irreparable damage

40. The Applicant submitted and the Tribunal accepts her argument that her separation from service while an ePAS rebuttal is still pending would make it difficult for her to make out her case and would damage her professional reputation and career.

Conclusion

41. In view of the foregoing, the Application for suspension of action is granted, and it is ordered that the implementation of the decision to separate the Applicant from service on 31 December 2013 be suspended pending the substantive hearing and determination of her Application on the Merits.

(Signed)

Judge Nkemdilim Izuako

Dated this 20th day of December 2013

Entered in the Register on this 20th day of December 2013

(Signed)

Eric Muli, Officer-in-Charge, UNDT Nairobi