



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/086
Order No.: 224 (NBI/2014)
Date: 10 October 2014
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

DALGAMOUNI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**REASONED DECISION ON THE
APPLICANT'S SECOND APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for the Applicant:
Alexandre Tavadian, OSLA

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

The Application

1. The Applicant is a Budget Officer at the Regional Service Centre in Entebbe, Uganda (RSCE). She serves at the P4 level on a fixed term appointment.
2. On 23 September 2014, the Applicant filed her second Application for Suspension of Action. The Applicant contends that she has been subjected to “a series of actions which cumulatively amount to a decision to constructively dismiss her by depriving her of her functions”. The “most recent decision” was made on 19 September 2014.
3. The Applicant sought management evaluation of the impugned decision on 23 September 2014.
4. The Respondent filed his Reply to the Application on 24 September 2014.
5. On the same day, the Tribunal issued Order No. 214 (NBI/2014) setting this matter down for hearing.
6. The Tribunal heard the matter on 25 September 2014. The Applicant and one other witness testified. The Tribunal admitted the written statement of one further witness for the Applicant, without objection from the Respondent. For his part, the Respondent called one witness.
7. Closing submissions were filed by both Parties on 26 September 2014.

Facts

8. The Applicant entered into the service of the United Nation as a United Nations Volunteer (UNV) with the (then) United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) in August 2002.

9. She was appointed as a Supply Officer at the P3 level at the same Mission in October 2004.

10. The Applicant has since served in various capacities within the United Nations, and has throughout this time been appraised as either “exceeding performance expectations” or as “fully satisfactory.”

11. On 1 June 2013, the Applicant was appointed to her fifth duty station as Budget Officer at the RSCE at the P-4 level.

12. The interpersonal difficulties between the Applicant and her First Reporting Officer, Ms Safia Boly, Chief RSCE, began in September 2013.

13. On 2 September 2013, the then Operations Manager (now Chief RSCE/CRSCE) asked the Applicant to sign a document confirming that a specific post against which the Administration intended to appoint a new candidate was vacant. The Applicant declined to sign the document explaining that she had no authority to carry out functions that fall within the exclusive purview of a Human Resources Officer.

14. On 6 September 2013, the Applicant was served with a Performance Improvement Plan (PIP) by the CRSCE.

15. On 27 November 2013, the CRSCE informed her that there was no progress in her performance.

16. On 5 May 2014, the CRSCE told the Applicant that her appointment would not be renewed on grounds of unsatisfactory performance. The Applicant was also directed not to act on behalf of the RSCE and not to respond to any official communication.

17. On 16 May 2014, the Applicant sought management evaluation of the decision not to extend her fixed-term appointment and filed an application for suspension of action.

18. On 23 May 2014, the Tribunal issued Order No. 137 (NBI/2014) granting the injunction that was sought.

19. Following the issuance of Order No. 137 (NBI/2014), the Applicant's performance "appraisal was considered completed, even though it was never completed in Inspira".

20. The Applicant then requested a rebuttal of the performance rating. The Administration is still in the process of constituting a rebuttal panel. The rebuttal process has not yet begun and it is unclear when it will end. Pending the outcome of the rebuttal process, the Applicant's appointment is extended on a month-by-month basis.

21. On 19 June 2014, the Management Evaluation Unit informed the Applicant that her request before them is "moot" given that she has challenged her performance appraisal before a rebuttal panel.

22. In August 2014, the Chief RSCE requested that the Applicant's access to the financial system UMOJA be discontinued. A form requiring the signature of the Applicant was submitted in support of this request with someone else's signature. The form was signed by another staff member on the instructions of the CRSCE.

23. The Applicant was not informed that a request was sent to discontinue her access to UMOJA.

24. When the UMOJA support team and the Supervisor of Information and Communications Technology Operations of MONUSCO (United Nations

Stabilisation Mission in the Democratic Republic of Congo), Mr. Brian Cable, informed the CRSCE that the Applicant's signature was required, Ms. Boly replied as follows:

Dear Brian,

Thank you for your support. The User is not part of the RSCE anymore and was notified of the same in May 2014. Furthermore, the Controller removed the delegation of authority which is the basis for the UMOJA access.

Regards,

Safia

Submissions

Receivability

Respondent

25. The Application is not receivable.

26. The Applicant has no right under her terms of appointment to determine the scope of duties assigned to her. Staff Rule 1.2(a) provides for a hierarchy within which staff members are required to follow directions and instructions within the scope of their terms of appointment.

27. As the Applicant continues to serve as a Budget Officer, no administrative decision carrying a direct impact on her terms of appointment has been made to allow for a challenge before the Tribunal.

28. In any case, notice of the impugned decision being complained of was given in May 2014 and has been implemented. Management evaluation should have been requested by 4 July 2014. As the Tribunal does not have the power to extend the

time-limit for requesting management evaluation, it has no jurisdiction to hear the Application.

Applicant

29. The Application is receivable.

30. The impugned decision forms part of a “continuum” of decisions that have been made against the Applicant.

31. On 19 September 2014, the Administration was still in the process of revoking the Applicant’s access to UMOJA; thus demonstrating that the impugned decision forms part of a series of decisions made over a period of almost five months aimed at rendering the Applicant redundant. Indeed the Tribunal heard testimony from both the Applicant and Ms. Boly that the request to revoke the Applicant’s access to UMOJA has not yet been implemented.

32. The Application is also receivable *ratione temporis* because the decision to deprive the Applicant of her functions was suspended by Order No. 137 (NBI/2014).

33. The Administration advised the Applicant not to perform any official functions in the context of separation from service. It was not a stand-alone decision and cannot be separated from the decision not to extend the Applicant’s appointment. The two decisions are intimately related and were part of the same letter.

34. If the Respondent’s position is determined to be correct, the Administration would acquire the right to constructively dismiss staff members even when there is an Order from this Tribunal suspending the decision to separate a staff member. This would be a clear denial of justice. The Administration cannot be allowed to circumvent Orders of this Tribunal.

Merits

Applicant

35. The impugned decision is *prima facie* unlawful.

36. The decision to strip the Applicant off her functions and to marginalise her was based on extraneous factors.

37. The Applicant has never been accused of misconduct or of misusing the UMOJA system, and cannot be said to present a danger to the United Nations budgetary and financial operations.

38. The fact that the Applicant and the CRSCE have an interpersonal dispute, which unfortunately resulted in a negative appraisal of the Applicant's performance, does not justify the impugned decision.

39. An extension of the appointment necessarily implies that the staff member would be allowed to perform her functions. By stripping the Applicant of her core functions, the Administration is effectively circumventing and violating Order No. 137 (NBI/2014).

40. The Respondent's actions "amount to either a constructive dismissal or administrative leave with full pay. In either case, the decision is unlawful".

41. In the present case, in a letter dated 24 April 2014 the Respondent directed the Applicant to refrain from the following actions: (a) take any official action on behalf of RSCE; (b) respond to any RSCE communication; (c) represent the RSCE in any official meeting.

42. Although the Applicant secured an injunction challenging that decision, the Respondent has continued to implement its plan to "march the Applicant to the door".

43. In addition to depriving the Applicant off her core functions, the Applicant was not formally notified that she was no longer allowed to certify funds. This could have led to serious financial implications for her.

44. In addition to not being allowed to perform the functions of a budget officer for RSCE, the Applicant was also physically isolated by being left in an office which is approximately half a kilometre away from the remaining RSCE staff members. RSCE staff moved into new offices, but the Applicant alone was not assigned any office in the new facilities.

45. The Applicant's mid-point review for the current performance cycle is due at the end of September 2014.

46. If the suspension of action is not granted, the Applicant will have performed no functions between 1 June and 30 November 2014. The more this situation is allowed to continue, the more the Applicant will be adversely affected. This makes the need for an injunction urgent.

47. No amount of monetary compensation can repair the reputational damage and emotional distress experienced by the Applicant.

Respondent

48. The Applicant has not shown that the impugned decision is *prima facie* unlawful. The Secretary-General enjoys broad discretion in the organisation of work and the assignment of tasks to staff members.

49. On 5 May 2014, the Respondent informed the Applicant that her appointment will not be renewed on grounds of poor performance. The Applicant was also advised to refrain from acting or responding on behalf of the RSCE or representing it at meetings.

50. As the Respondent remains of the view that the Applicant is a poor performer, he is obliged to take this information into account in managing the Organisation. This is within the discretion of the Secretary-General and is not unlawful.

51. The Applicant has also not satisfied the test of urgency. The Dispute Tribunal has consistently held that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant.

52. The Applicant was requested to refrain from performing certain functions on 5 May 2014 and has provided no explanation for filing this Application so long after she was notified. Any urgency in this case is of the Applicant's own making.

53. As for the impending mid-term review and ongoing humiliation, the Applicant will have the opportunity to address her limited functions during the review process. Any continuing humiliation cannot give rise to a situation of urgency. In addition to not being urgent, humiliation is a question of harm that can be compensated by moral damages.

54. The Applicant has failed to adduce evidence of irreparable harm resulting from the alleged decision. Any harm caused to the Applicant can be adequately compensated by financial compensation. The Applicant's terms and conditions of appointment have not been affected – she remains in her post.

DELIBERATIONS

55. Applications for suspension of action are governed by article 2.2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and article 13 of the Tribunal's Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

56. This Tribunal has previously held that¹

A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

57. Both Parties have made submissions as to the receivability of the Applicant's motion for suspension of action.

58. Before entering into a discussion on whether the Applicant has met the requirements for the test of suspension of action, the Tribunal must first determine whether or not the impugned decision can properly be stayed.

Receivability

59. A large part of the Respondent's submissions in this matter has to do with whether this Application is receivable as a matter of substance and timeliness. The Respondent also submits that the impugned decision cannot be stayed because it has been implemented.

Ratione Materiae

60. The Tribunal will therefore first deliberate on the question of whether the impugned decision is properly reviewable by it. The Respondent's and Applicant's detailed submissions on this point have been set out earlier in this Decision and therefore need not be rehashed here.

61. The Applicant is challenging the Respondent's decision to strip her of her functions as a Budget Officer. The Respondent submits that the Secretary-General's

¹ See *inter alia* Applicant Order No. 087 (NBI/2014).

decision on the assignment and scope of a staff member's tasks cannot be reviewed by the Tribunal unless it directly impacts upon the staff member's terms of appointment.

62. The Applicant's position is that the Respondent has continued to strip her of her functions as a Budget Officer, culminating in the attempt to withdraw her access to the UMOJA system.

63. What is reviewable by the Tribunal has been established and serially confirmed in *Andronov*²

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions

64. The decision to deprive the Applicant of her duties and to remove her from UMOJA cannot be severed from her contract as duties cannot exist in a vacuum but are associated to a contract.

65. It is this progressive continuum of events stemming from her bad appraisal and the decision not to renew her appointment that the Tribunal finds the Applicant to be

² Judgment No. 1157 (2003).

challenging. As a decision of “individual application” with “direct legal consequences” to the Applicant, the Tribunal finds this decision to be materially receivable.³

66. The Tribunal is therefore not persuaded by the Respondent’s arguments as to the receivability of this Application *ratione materiae* and finds the matter to be properly before this Court.

Implementation and Ratione Temporis

67. The Tribunal will consider the issues of timeliness of the Application and the arguments pertaining to the implementation of the impugned decision together.

68. The Tribunal rejects the argument of the Respondent that the decision not to renew the Applicant is separate from the decision to deprive her of all the duties.

69. It is disingenuous for the Respondent to suggest and argue that the Applicant needed to have distinctly challenged every aspect of the letter informing her of the decision not to renew her appointment, and that the injunction she won prohibits him only from not renewing her appointment but has no effect on the actions and decisions ancillary to that non-renewal.

70. The Tribunal reiterates the position it took in Order No. 218 (NBI/2014):

The Respondent’s position that this Application is time barred because the Applicant did not challenge her “constructive dismissal” in her initial application (UNDT/NBI/2014/40) to the Tribunal is incorrect. Both the Management Evaluation request and the initial application for suspension of action make mention of her constructive dismissal.

It is entirely reasonable and proper for a staff member who is challenging her performance appraisal, and who has won an

³ UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003)..

injunction against the decision to terminate her employment⁴, to expect that the *status quo* is preserved so that she is able to continue performing the functions for which she was recruited.

The impugned decision of stripping the Applicant off her functions cannot be seen to have been fully or properly implemented so as to make it inadmissible before this court.

71. The Tribunal find this Application to be receivable.

Merits

72. The Tribunal now turns to consider whether the Application meets the statutory test for suspension of action.

Prima Facie Unlawfulness

73. In May 2014, the Applicant successfully challenged the Respondent's decision not to renew her contract with the RSCE, which decision was suspended pending management evaluation and the evaluation of her bad appraisal by a rebuttal panel.⁵

74. She now submits that notwithstanding the injunction, her responsibilities have been gradually whittled away such that she feels "constructively dismissed" and humiliated.

75. Is the Respondent correct in removing substantive functions away from the docket of a staff member he claims is not performing? In other words, was the removal of those functions done in a manner that suggests that discretion was properly exercised?

76. It has been variously held that the Respondent's exercise of its broad discretionary authority must not be "tainted by forms of abuse of power such as

⁴ Order No. 137 (NBI/2014).

⁵ *Ibid.*

violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision”.⁶

77. The Applicant bears the burden of showing that the Respondent did not properly exercise his discretion. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue here.⁷

78. After encumbering the post of budget officer for three months in Entebbe, the Applicant was found to be underperforming. She is the same individual who served as budget officer in two previous missions and was rated as “exceeding expectation” or “fully meets expectation”.

79. In regard to her duties as a budget officer the only complaint levelled against her was delay on her part to submit the budgetary requirements to be forwarded to the Controller. To her credit the Applicant did not deny that there had been delays. She explained however that since she had been excluded from all weekly and other meetings with responsible heads of departments she could not get all the input on budgetary matters timely. She also added that Ms. Boly never responded to her emails about budget input. To this Ms. Boly replied that since the Applicant was a P4 staff member there was no need to feed her with information on a constant basis. The Tribunal considers that response as a sheer example of bad faith from Ms. Boly considering the fact that as a senior officer she had to give the clearance for budgetary matters.

80. The Respondent avers that the Applicant was deprived of her duties because of her non-performance. The Tribunal does not agree. When a staff member is considered to be not performing she is placed on a PIP and the ePAS procedures

⁶ UN Administrative Tribunal Judgment No. 885, *Handelsman* (1998).

⁷ See also: *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

come into play. How can a staff member be expected to comply with the PIP if he/she is not allowed to perform the duties of the post he/she occupies? The removal of all the duties from the Applicant was a colourable device used by the Respondent through Ms. Boly to circumvent the suspension of action issued against the decision not to renew the contract of the Applicant.

81. During the course of her testimony, Ms. Boly attempted to persuade the Tribunal that the situation presenting was not the result of interpersonal difficulties between her and the Applicant. The Tribunal however notes that she could say little more than that the Applicant was a “great mother and great wife;” neither of those qualities has anything to do with the quality of their own professional relationship in the workplace.

82. When it dawned on Ms. Boly that the Applicant could still certify budgetary matters through UMOJA she had her removed from UMOJA. Yet in the same breath she reproached the Applicant for not acting on the requests sent to her by other staff members who were not informed that the Applicant had been deprived of her normal duties. To remove the Applicant as an end user from UMOJA without informing her and having somebody else sign the relevant document on behalf of the Applicant is another example of the abuse of power and bad faith coming from Ms. Boly.

83. The Tribunal will not enter into a discussion on the meanderings of UMOJA and the procedures that need to be followed for provisioning or deleting a staff member as an end user. Suffice it to say that the guide on the use of UMOJA is quite explicit on the procedure a staff member has to follow to be registered as an end user but is not very clear how a staff member should be deleted as an end user. According to Ms. Boly she had the right to ask for the deletion of the Applicant without her concurrence or informing her. When asked why she asked another staff member to sign the UMOJA User Registration Form “for” the Applicant without first asking the Applicant to sign it herself, she told the court that the Applicant was a staff member

who has repeatedly refused tasks and has on several occasions administratively/formally challenged the Organisation's decisions.

84. The Tribunal is more than a little disturbed at the clarity and vehemence with which Ms Boly has boxed-in the Applicant as being difficult. The witness was in essence telling the court that she saw no reason to approach a staff member who has challenged her decisions before the Tribunal for her signature!

85. The Tribunal is also astonished at the audacity of Ms. Boly in telling Brian Cable of MONUSCO that the Applicant "is not part of the RSCE anymore and was informed of the same in May 2014". The witness wrote that email to Mr. Cable in *September 2014* - months after the issuance of Order No. 137 (NBI/2014) and while a rebuttal panel was still being constituted.

86. Ms. Boly's bad faith and blatant disregard for the rules of the Organisation could not be clearer.

87. The Tribunal finds that the Applicant has made out more than a *prima facie* case of unlawfulness.

Urgency

88. If the Respondent is allowed to continue stripping the Applicant of her functions, the mid-term review will serve as a self-defeating and perpetuating exercise. The Applicant will continue to receive poor performance reviews on grounds that she has not been doing anything when all her functions have been withdrawn from her.

89. The urgency in such a situation given the imminence of the review is obvious.

Irreparable Damage

90. The Tribunal rejects the Respondent's argument that the only detriment likely to befall the Applicant in this case, should the impugned decision be found to be properly unlawful, is financial and can therefore be compensated against.

91. This Tribunal recalls the position it espoused in previous cases that where *prima facie* unlawfulness was established⁸:

[I]t should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.

Observations

92. In Order No. 137 (NBI/2014), the Tribunal advised the Parties in the following terms:

Given the facts of this case, the Tribunal strongly believes that while the Management Evaluation Unit (MEU) carries out its review of the Applicant's request, the Parties should engage in meaningful consultations towards having this matter resolved. In the interest of efficient use of the Tribunal's resources and the expeditious conduct of these (and potentially future) proceedings, the Tribunal pursuant to articles 10.3 of the Statute and 15.1 of the Rules of Procedure, strongly urges the Parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

A conducive and productive working relationship between the employer and an employee demands nothing less.

⁸ *Tadonki* UNDT-2009-016. See also *Corna* Order No. 80(GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096.

It, of course, remains open to the Applicant to have this matter litigated on the merits should the informal efforts to resolve the dispute be unsuccessful.

93. The Tribunal believes this advice to be that much more relevant now given the deterioration of the situation facing the Applicant.

94. The circumstances described to the Tribunal by both the Applicant and the witness who testified on her behalf paints the picture of a bad working environment. Staff members cannot be expected to work effectively and productively while being marginalised and humiliated. It makes for poor morale. From the Organisation's perspective, it is equally poor form to have a staff member on payroll with no functions to perform. It is a waste of the Organisation's resources, which cannot be condoned.

Conclusion

95. The Application for Suspension of Action is **GRANTED** pending management evaluation.

(signed)

Judge Vinod Boolell

Dated this 10th day of October 2014

Entered in the Register on this 10th day of October 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi