UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/102
Order No.: 255 (NBI/2014)
Date: 19 November 2014
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DALGAMOUNI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON THE APPLICANT'S APPLICATION FOR SUSPENSION OF ACTION PURSUANT TO ART. 14 OF THE UNDT RULES OF PROCEDURE

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. This Application for *interim* relief pursuant to art. 14 of the UNDT Rules of Procedure, was filed annexed to the Applicant's substantive application before the Tribunal.

3. The Applicant's substantive application challenges "a series of actions" by the Respondent "which cumulatively amount to a decision to constructively dismiss her by depriving her of her functions".

4. By way of the present Application, the Applicant seeks a stay of the 'decision to deprive her of her functions and responsibilities."

5. Taking into account the substantive application before the Tribunal, this is the Applicant's fifth challenge at the UNDT.

6. On 16 May 2014, the Applicant filed an application for suspension of action challenging the decision not to extend her fixed-term appointment. The Tribunal issued Order No. 137 (NBI/2014) on 23 May 2014, granting the application. As part of Order No. 137, the Tribunal recognised the hostile work environment in which the Parties found themselves and urged them to "engage in meaningful consultations towards having this matter resolved".

7. On 23 September 2014, the Applicant filed her second Application for Suspension of Action. The Applicant complained that she had 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.

8. The Respondent argued that the Applicant's second application for suspension of action was not receivable as a matter of substance; that it did not meet the statutory timelines; and that it had, in any event, been implemented.

9. On 24 September 2014, the Tribunal issued Order No. 214 (NBI/2014) setting the matter down for hearing.

10. The Tribunal heard the Parties 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. Closing submissions were filed by both Parties on 26 September 2014.

11. On 30 September 2014, the Tribunal issued Order No. 218 (NBI/2014) in which it found the second application receivable and granted the stay that the Applicant sought, pending management evaluation.

12. On 10 October 2014, the Tribunal issued Order No. 224 (NBI/2014) in which it fully set out its position in respect of the receivability and merits of the second application.

13. Recalling its observations in Order No. 137 (NBI/2014), the Tribunal held (in Order No. 224) as follows:

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

14. On 7 November 2014, the Applicant moved for execution of Order No.224 (NBI/2014) pursuant to arts. 32.2 and 36 of the Rules of Procedure.

15. Also, on 7 November 2014, the Applicant received the outcome of her second request for management evaluation.

16. In response to the motion for execution, the Respondent took the position that the Tribunal does not have the jurisdiction to decide on the motion for execution as Order No. 224 (NBI/2014), which was issued pending management evaluation, was no longer in force.

17. On 12 November 2014, the Applicant filed an application on the merits and with it the present Application for *interim* relief pursuant to art. 14 of the Rules of Procedure.

18. The Respondent replied to the Application on 13 November 2014, and the Applicant filed her Rejoinder to the Respondent's Reply on 16 November 2014.

Submissions

Receivability

Respondent

19. The Applicant presents two arguments that this Application is receivable *ratione temporis*. First, the Applicant argues that the contested decision only crystallized in September 2014, when the Respondent sought to remove her UMOJA access. Secondly, she argues that the contested decision was the 5 May 2014 decision, which formed part of Order No. 137 (NBI/2014) and therefore was part of the management evaluation request made on 16 May 2014.

20. The Applicant's arguments are contradictory. The Applicant cannot argue that "the decision had not crystallised" until September 2014 *and* maintain that the decision had in fact been dealt with in Order No. 137 (NBI/2014).

21. It is wrong for the Applicant to characterise the attempted removal of the Applicant's UMOJA access on 19 September 2014 as the crystallization of the decision. This was simply the natural consequence of the 5 May 2014 decision. It was not a separate administrative decision with direct legal consequences to the terms and conditions of the Applicant's appointment. Each consequence which arises in furtherance of the implementation of this decision is not a separate administrative decision, nor does the decision only crystallize on the implementation of the final step.

22. The Dispute Tribunal has jurisdiction to hear appeals against decisions, not the individual actions taken in furtherance of those decisions.

23. The instruction contained in the 5 May 2014 decision to refrain from carrying out certain actions is the only action that may be identified as a decision; everything else that flows from it is merely implementation.

24. The Applicant ought to have explicitly challenged the 5 May 2014 decision in her request for management evaluation letter of 16 May 2014 and subsequently filed an application with the Dispute Tribunal following receipt of the response to her request on 16 June 2014. She did not and the Application is therefore not receivable.

25. The Dispute Tribunal held in Order No. 224 (NBI/2014) that the decision to remove the Applicant's functions was linked to the decision not to renew her appointment. Order No. 218 (NBI/2014) stated that the Applicant challenged the removal of her functions in her request for management evaluation dated 16 May 2014, and in her application for suspension of action filed on the same day. The

Dispute Tribunal further held that Order No. 137 (NBI/2014) implicitly included a prohibition on the Respondent removing the Applicant from her functions.

26. The Applicant accepts that the decision to remove her from her functions is linked to the non-renewal decision and therefore asserts that Order No. 137 (NBI/2014) suspended both decisions.

27. Article 8(1)(d)(i)(a) of the Statute of the Dispute Tribunal provides that an Application is only receivable if it is filed within 90 days of the Applicant's receipt of the response to the request for management evaluation. Having received the response on 16 June 2014, the Applicant had until 14 September 2014 to file an application on the merits before the Dispute Tribunal challenging the decisions that had been the subject of a request for management evaluation. As this Application was not filed until 12 November 2014, it is not receivable *ratione temporis* and should be dismissed.

28. If the Dispute Tribunal holds that the response to the request for management evaluation did not address the issue of the removal of the Applicant's functions and therefore the timeline in Article 8(1)(d)(i)(b) of the Statute applies, then the Applicant had until 29 October 2014 to file an application on the merits and this Application remains not receivable.

29. Furthermore, the Application is not receivable *ratione materiae*. Article 10.2 of the UNDT Statute precludes the Dispute Tribunal from making an order for interim measures in an appointment related case. The Applicant asserts that this contested decision is linked to the non-renewal decision that was the subject matter of Order No. 137 (NBI/2014). The Dispute Tribunal held in Order No. 218 (NBI/2014) that the issue of whether the Applicant could continue to perform her functions was an intrinsic part of Order No. 137 (NBI/2014). This makes the present matter an appointment related case, in which the Dispute Tribunal has no jurisdiction to make an order for interim measures.

Applicant

30. In its Order Nos. 218 and 224 (NBI/2014), the Tribunal has already ruled that the Applicant's claim is receivable *ratione temporis*. The doctrine of issue *estoppel* (a branch of the *res judicata* doctrine) precludes the Respondent from re-litigating the same matter. Where one or more technical requirements of the *res judicata* doctrine does not apply, the Tribunal may nevertheless refuse to entertain questions that have already been adjudicated in the same case by invoking the doctrine of abuse of process.

31. The doctrine of *res judicata* may not be applicable if Order Nos. 218 and 224 (NBI/2014) are considered interlocutory rather than final decisions. However, the doctrine of abuse of process exists to address situations where a party is attempting to re-litigate a matter that has already been disposed of but where the doctrine of *res judicata* doctrine is inapplicable.

32. The Respondent failed to address the contents of Exhibit P filed by the Applicant. This documentary evidence confirms that on 11 November 2014, the Respondent has once again requested that the Applicant's access to UMOJA be revoked. It is absurd to argue that the administrative decision challenged by the Applicant was taken in May 2014, whereas the Respondent is still in the process of revoking the very last of the Applicant's functions and responsibilities. The Respondent cannot credibly argue that the Applicant has no right to seek an order suspending the decision to revoke her access to UMOJA.

33. The Respondent also argues that under art.14 of the UNDT Rules of Procedure, the Tribunal has no authority to suspend administrative decisions related to appointments. The Respondent suggests that if stripping the Applicant of her functions was part of the decision to separate her, then art.14 cannot be invoked to suspend the impugned decision.

34. The Respondent has essentially admitted that he has not complied with Order No. 137 (NBI/2014) which according to the Respondent himself also suspended the decision to strip the Applicant of her functions.

35. This argument is an unequivocal admission that the Respondent is in contempt of court. This argument alone is sufficient to conclude that officials responsible to ensure that Order No. 137 (NBI/2014) is implemented are in contempt and must be referred to the Secretary-General for accountability.

36. The Respondent also contends that the Applicant's arguments on receivability are contradictory; that the Applicant cannot simultaneously argue that the decision to deprive her of her functions was suspended in Order 137 (NBI/2014) and that the decision she is challenging crystalized in September 2014 when the Respondent attempted to revoke the Applicant's access to UMOJA.

37. The Respondent fails to acknowledge the impossible situation he has placed the Applicant in. Order No. 137 (NBI/2014) suspended the Applicant's separation from service pending management evaluation.

38. MEU has determined that the Applicant's request to them was moot because her appointment has been extended pending the outcome of the rebuttal process. At that time, the Applicant still had some functions to perform. These functions were sufficient for a short period within which the rebuttal process should have been completed.

39. The Applicant would not have complained if the rebuttal process was completed. But six months on, the rebuttal process remains on-going. The delay in completing the rebuttal process in a timely manner is attributable to the Respondent. When it became clear that the rebuttal process would take longer than anticipated, the Respondent should have reinstated all of the Applicant's functions, instead of continuing to strip her of her responsibilities.

40. There is nothing contradictory in the Applicant's arguments with regard to receivability. Instead of complying with Order No. 137 (NBI/2014), the Respondent acted in a manner which exacerbated the Applicant's situation. This gave rise to a new administrative decision which the Applicant duly challenged.

Merits

Applicant

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

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

43. The Performance Improvement Plan (PIP) was imposed only three months after the Applicant was appointed as a Budget Officer. During the first three months of the Applicant's appointment, the Applicant was getting acquainted with the specificities of RSCE and was not performing "post management" functions (except during the absence of her first reporting officer). The PIP was imposed on the Applicant only 4 days after she was instructed, but declined, to perform a "post management" function.

44. The testimony of the former Chief Human Resources Officer (CHRO) of RSCE established that a PIP was a disproportionate and premature measure. She told the court that no genuine attempts to resolve this minor professional disagreement had been made by the Chief RSCE, Ms. Safia Boly, prior to preparing the PIP.

45. The Applicant testified that her Second Reporting Officer was not even aware that a PIP had been prepared and imposed on her by Ms. Boly.

46. The CHRO also testified that she was under the impression that a disagreement on a purely professional matter was transformed into a personal conflict.

47. Stripping the Applicant of her functions is not a remedial measure provided for in any statutory provision. It is disguised administrative leave with full pay.

48. The impugned decision puts the Applicant in an impossible situation. She was supposed to have her midpoint performance review in November 2014 but has nothing to show for her review period.

49. Ms. Boly communicated a draft workplan for 2014/15 on 17 October 2014 that drastically reduced the role of the Applicant and contains no more than 20% of the functions of a Budget Officer.

50. The circumstances have not changed since the Tribunal issued Order Nos. 218 and 224 (NBI/2014). If anything, it has deteriorated since the MEU decision on 7 November 2014.

51. MEU told the Applicant that:

> your physical location away from other RSCE staff members was done out of courtesy to you, given that you were asked not to take any official action on behalf of the RSCE.

52. This reasoning is outrageous. There is no presumption that staff members are incapacitated and cannot make decisions on their own. If the Applicant wanted to be isolated, she would have said as much. The Organization cannot take adverse and unlawful decisions against staff members without consulting them and contend that it is doing so in their interest.

53. If the rebuttal panel concludes that the Applicant's performance was appraised unfairly, her final rating will be upgraded. Her performance during the current appraisal cycle will become a decisive factor when determining whether her fixed-term appointment should be extended. If the current situation is allowed to persist, the Applicant will have nothing to show for the period 2014-2015.

54. The more this situation is allowed to continue, the more the Applicant will be adversely and irremediably affected.

55. The Applicant has also suffered significant reputational damage. The Applicant has been a victim of public humiliation. Her fellow colleagues witness the abuse she has been subjected to. Hence, unless the suspension of action is granted, this public humiliation will continue for a prolonged period.

56. The act of revoking the Applicant's access to UMOJA is the very last assault against the Applicant that the Respondent could deliver. For these reasons, the Applicant respectfully submits that the criterion of urgency has been met.

57. Monetary compensation will not repair the reputational damage and emotional distress experienced by the Applicant.

Respondent

58. 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.

59. 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.

60. 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 Organization. This is within the discretion of the Secretary-General and is not unlawful. Given that the Applicant's performance evaluation is under review by a rebuttal panel, the Respondent is obliged to take this information into account in managing the

Organization. It is not obliged to wait until the outcome of performance assessment procedures or, before it considers the information known to it.

61. In this case, the Chief, RSCE has a duty of care to the Organization to minimize potential financial risk. Allowing the Applicant to continue functioning as a budget officer, poses direct financial risk to the Organization which outweighs the Applicant's right to perform specific functions. The Applicant's reliance on Section 10.1 of ST/AI/2010/5 (Performance Management and Development System) is misguided. The remedial measures listed in that section are not exhaustive.

62. If the Application is granted, there is a risk of actual harm to the Organization. During the pendency of Order No. 218 (NBI2/2014), the Applicant's former functions were restored to her. In spite of this, the Applicant refused to perform them until certain conditions unilaterally imposed by her were complied with. As a result of this, the RSCE will not receive the funding required to support the growth in personnel in one of its client missions. This shows that Applicant cannot be relied upon to properly perform her functions in financial matters.

63. 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.

64. 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.

65. As for the impending mid-term review and on-going 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.

66. 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.

Applicant's Rejoinder

67. The Respondent continues to exhibit wilful blindness towards a clear case of personal animosity. The Respondent's submissions, arguments and overall behaviour are inconsistent with his duty and commitment to hold officials of the Secretariat accountable for reprehensible conduct.

68. A manager has neither a duty of care nor a fiduciary duty towards the Organization. A manager is just another staff member who has an obligation to perform his functions in accordance with the Charter, Staff Rules and Regulations, and applicable administrative issuances.

69. The Respondent is alleging that the Applicant was stripped of her functions in order to minimize potential risk of actual financial harm to the Organization. The Respondent is trying to impress the Tribunal with ambiguous and vague notions. If the Respondent had concerns about financial risks, he would not have waited until September 2014 to revoke the Applicant's access to UMOJA.

70. Also, most functions the Applicant is entitled to perform cannot possibly pose any financial risk to the Organization. The responsibilities of a Budget Officer at the P4 level are set out in the generic vacancy announcement against which the Applicant was recruited. They include the following functions:[1]

a) Budget Proposals: Collate and analyse budget proposals as submitted by the head of the mission/office and his/her direct rapports; ensure that cost

[1] Applicant's Exhibit L.

estimates and staffing requirements are accurately stated and are well justified to withstand the review of several departments and legislative bodies in UNHQ;

b) Monitoring Budget Execution: Monitor and report to leadership on the execution of the budget throughout the financial year and ensure that adequate records are kept for any deviation from approved budget for audit and reporting purposes; prepare requests for redeployment of resources as deemed necessary by the leadership;

c) Performance Reporting: Prepare performance report at the end of the financial year based on actual expenditure and delivered output as reported by leadership and responsible units;

d) Provide guidance to the Mission personnel to ensure compliance with UN Financial Regulations and Rules.

71. None of the above responsibilities pose any financial risk to the Organization. On the contrary, the advisory role of providing guidance with regard to compliance with Financial Regulations and Rules reduces the financial risk to the Organization.

72. Furthermore, the Applicant cannot certify funds without the CRSCE's pre-approval. There are safety mechanisms in place to ensure that no individual staff member has the ability to make detrimental decisions resulting in financial losses.

73. In any event, the Respondent seems to suggest that as soon as an FRO identifies shortcomings in a staff member's performance, he can deprive the Applicant of all of her functions. ST/AI/2010/5 does not provide for such a remedial measure in addressing performance shortcomings.

74. The Applicant is not accused of misconduct or gross negligence resulting in a financial loss. Before placing that staff members accused of misconduct on administrative leave with full pay, the Respondent has a duty to ensure that alternative arrangements such as redeployment were not feasible. The Respondent could have reasonably eliminated any risk of financial loss without depriving the Applicant of her functions. However, the Respondent chose the most drastic measure without exploring any alternatives. This is a textbook example of bad faith.

75. At paragraph 5 of his Reply, the Respondent contends that "the Applicant was aware that her responsibilities included post management since at least June 2013. The Applicant had personally sought access to the necessary IT systems to be able to carry out the post management functions".

76. The Respondent filed as his Annex R-2, an email where the Applicant requests access to a system which would allow her to perform post management functions. It is interesting to note that the date mentioned on that email is 13 August 2013. In other words, the Respondent's Annex R-2 establishes that as of 13 August 2013, the Applicant was still not performing post management functions. Yet, on 6 September 2013, she was already placed on a PIP with regard to post management functions. The Respondent does not explain how a manager can determine within a few days that a staff member is a poor performer. Annex R-2 is detrimental to his own position.

77. At paragraph 7 of his submissions, the Respondent alleges that "there were genuine attempts made to resolve the disagreement between the Applicant and her FRO". This assertion is inconsistent with paragraph 18 of the Applicant's Statement where she clearly states that the Chief RSCE refused on three occasions to participate in any sort of informal dispute resolution through the Ombudsman's Office.[2] She also refused the involvement of several senior officials who offered to mediate the

[2] Applicant's Exhibit F.

dispute. The CRSCE did not deny this allegation during her testimony in Case No. UNDT/NBI/2014/086. The Respondent's allegation at paragraph 7 is not credible.

78. The assertion that two Human Resources Officers took "part in counselling of the Applicant" is also misleading. The Applicant was ambushed in the Office of the Chief RSCE and humiliated in front of the Human Resources Officers. This was not a counselling session; it was bullying. That is why the CRSCE chose not to invite or even inform the CHRO of the meeting.

79. The Respondent's allegation that the Applicant refused to perform some of the functions that were temporarily reinstated is a lie. Although some functions had been reinstated, the vast majority of functions were still being performed by other staff members. The Applicant was unable to perform only one part of the functions without having a full picture of the whole entity. The Chief RSCE refused to allow the Applicant to attend meetings that were essential for the purposes of gathering information and performing her functions.

80. At paragraph 21 of the Reply, the Respondent states that the Applicant failed to establish that there is urgency. Contrary to the Respondent's contention, the urgency stems not only from the fact that the Applicant has no achievements to show at her mid-point review but also from the continuous humiliation and marginalization of the Applicant. If the decision is not suspended, the Applicant will have to work in these conditions for several more months.

DELIBERATIONS

81. The present case exhibits certain peculiarities in that each application the Applicant files before the Tribunal reveals the on-going tug of war between her and the CRSCE, Ms. Boly.

82. Some of the facts in this case are reiterated for purposes of clarity.

83. The Applicant started her duties with the RSCE as a Budget Officer at the P4 grade on 1 June 2013. She had previously worked as a United Nations Volunteer (UNV) with the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in August 2002. She was subsequently appointed a Supply Officer at the P3 level in the same Mission in October 2004.

84. The Applicant has served in various capacities within the Organization and has, throughout her career, been appraised as either "exceeding performance expectations" or as "fully satisfactory". Her appointment as a Budget Officer in RSCE was her fifth posting.

85. The Applicant's first reporting officer is Ms. Boly, who at the time of the posting of the Applicant, was Operations Manager and now is the CRSCE.

86. On 2 September 2013, Ms. Boly asked the Applicant to sign a document confirming that a specific post against which the Respondent 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.

87. Four days later, on 6 September 2013, the Applicant was served with a PIP by Ms. Boly on the ground that the Applicant was not performing.

88. On 27 November 2013, Ms. Boly informed the Applicant that there had been no progress in her performance.

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

90. The Applicant requested a rebuttal of her performance and the process is still pending as no rebuttal panel has been established.

91. 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.

92. On 19 June 2014, MEU informed the Applicant that it considered the Application to be moot as the Applicant was being renewed on a monthly basis pending the completion of the e-PAS rebuttal procedure.

93. On 23 May 2014, the Tribunal granted the Application for suspension of action.

94. On 23 September 2014, the Applicant filed a second application for suspension of action challenging "a series of actions which cumulatively amount to a decision to constructively dismiss her by depriving her of her functions".

95. The Applicant also sought management evaluation of the impugned decision on 23 September 2014. In response to that second Application for suspension of action the Respondent submitted: (i) the Applicant has no right under the terms of her appointment to determine the scope of duties assigned to her; (ii) 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; and (iii) as notice of the impugned decision being challenged was given to the Applicant on 5 May 2014, and the decision has been implemented, management evaluation should have been requested by 4 July 2014 and therefore the Application for suspension of action was not receivable.

96. On 10 October 2014, the Tribunal granted the suspension of action by Order No. 214 (NBI/2014). The Tribunal rejected the submission of the Respondent that the

decision not to renew the Applicant is separate from the decision to deprive her of her duties.

97. As a suspension of action was in force pending the management evaluation of the impugned decision, Order No. 224 (NBI/2014) lapsed on 7 November 2014.

98. MEU overruled the findings of the Tribunal that the second application for suspension of action in September 2014 was receivable and found it time-barred. MEU took the view that that the Applicant had on 24 April 2014 been "requested not to act on behalf of RSC-Entebbe and not to respond to any official communication". MEU also referred to the argument of the Applicant that she had therefore been constructively dismissed. As the Applicant had not challenged these facts in her request of 16 May 2014 but only requested an evaluation of the non-renewal decision, the matter was not receivable *ratione temporis*.

99. The Tribunal opined on the issue of receivability in Order No. 224 (NBI/2014) as follows:

> 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.
>
> 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.
>
> 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 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".

100. Two observations are called for in the light of the MEU decision.

101. It is striking that the finding of the MEU on the stripping of the Applicant's duties is an endorsement of the testimony of CRSCE. There does not seem to have been any independent inquiry into the events leading to the performance appraisal, the decision not to renew the Applicant or the motivation behind the removal of her duties from her.

102. On the removal of the Applicant from UMOJA, all that the MEU found is that the decision was taken "to implement the removal of the delegation of authority approved by the Controller…". Nothing is mentioned on the manner in which this was done and whether there were extraneous factors behind that decision.

103. It should recalled that when Ms. Boly testified before the court in September 2014, and was asked why she had 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 Tribunal that the Applicant was a staff member who has repeatedly refused tasks and has on several occasions administratively/formally challenged the Organization's decisions. Ms. Boly also told Brian Cable of MONUSCO in an email that the Applicant "is not part of RSCE anymore and was

informed of the same in May 2014". Ms. Boly 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 considered.

104. None of these issues were addressed by the MEU.

105. The mandate is prescribed in ST/SGB/2010/9 (Organization of the Department of Management). One of the core functions of the MEU is to conduct:

> an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations. The MEU is also mandated to propose means of informally resolving disputes between staff members and the Respondent.

106. The functions of the MEU should not only be impartial but be seen to be so. The process of management evaluation is designed to give the Secretary-General the opportunity to objectively and impartially assess the merits of a claim made against his decision-making agent. It necessarily calls for a measure of independence, the exercise of which is critical to the efficient and effective functioning of the system. In the circumstances of the present case, the Tribunal will resist the conclusion that the required levels of impartiality was tampered with.

107. In *Omondi* Order No. 017 (NBI/2010) Judge Izuako observed:

> The management evaluation system is designed to give management a chance to correct an improper decision, or provide acceptable remedies in cases where the decision has been flawed, thereby reducing the number of cases that proceed to formal litigation. It affords the staff member an opportunity to have their grievance addressed internally and objectively.
>
> The processes at the UNDT and the Management Evaluation Unit are distinct processes, independent of each other, and it is imperative that they be seen as such.

108. This case has once again brought into sharp focus a rather peculiar feature of the injunctive relief provided for in art. 13 of the Rules of Procedure and art. 2 of the Statute of the Tribunal.

109. The Tribunal has made observations on that rather peculiar aspect of the rules governing injunctive relief. In the case of *Kasmani* Order No.75 (NBI/2010) the Tribunal stated:

> The Appeals Tribunal's reading of the Rules in effect means that a judicial finding of prima facie unlawfulness may be reversed, or in any case come to nought, by a decision of the Management Evaluation Unit of the Department of Management of the Secretariat. It is difficult to see why a court must be seised of an application to suspend when its decision can, in anything from 30 to 45 days, be reversed by a decision of the Respondent endorsing its own impugned decision. The framers of the new system and drafters of the Statute could not have intended for the new system to be one in which the Secretary-General's review of his own decision would result in a preceding judicial order, on the same set of facts, being rendered empty and therefore useless. If the sanctity of the judicial process and all that it entails is to mean anything at all, such a reading of the Statute and Rules must not be correct.

110. In *Abosedra* Order No. 010 (NBI/2011) the Tribunal observed:

> Article 2.2 as it stands would be against the general principle of law relating to the independence of the judiciary. By making the Respondent the judge of the duration of the management evaluation, the Article is thereby curtailing the power conferred on the Tribunal to decide in its wisdom the duration of the suspension. General principles of law have been applied in a number of cases in spite of the existence of rules when it was considered that these rules were not in conformity with basic fundamental principles of the rule of law.

111. Be that as it may the Tribunal's hands are tied. Litigants may question whether art.13 of the Rules and art. 2 of the Statute still have their *raison d'être*.

Is the Applicant entitled to the *interim* measures?

112. The Tribunal held in Order No. 137 (NBI/2014) that the Applicant's contract should not be terminated pending management evaluation. The Tribunal also held in the second order for suspension of action that the "removal of the duties from the Applicant was a colourable device used by the Respondent through Ms. Safia Boly to circumvent the suspension of action not to renew the contract of the Applicant".

113. Both the above orders have now lapsed following the MEU decisions. Under art.14, the Tribunal is empowered to grant *interim* relief when a case is filed on the merits. Article 14 should obey the same principles of injunctive relief that are applicable to art.13. The Tribunal is not bound by the administrative decisions that have overruled its two orders.

Is the decision *prima facie* unlawful?

114. 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. This is a roundabout way of terminating her employment and amounts to constructive dismissal. The Tribunal has also considered the fact that the Applicant was found to be underperforming and that she has engaged in a rebuttal process in that respect. The Respondent argues that by the very fact that the Applicant was not performing, the Respondent has the right to remove all responsibilities from her or to assign such duties as he would deem appropriate.

115. When a staff member is not performing there are measures that need to be followed as provided for by section 10.1 of ST/AI/2010/5:

> When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first

> reporting officer in conjunction with performance discussions, which should be held on a regular basis.

116. Under section 10.2:

> If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as "partially meets performance expectations", a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.

117. The Respondent is silent on whether these procedures were followed. The PIP was served on the Applicant four days after she refused to sign a document at the request of Ms. Boly, a fact not denied by the Respondent. Where the appropriate procedures for appraising performance are not followed, the Respondent cannot claim that the very fact of underperformance entitles him to strip a staff member of his/her duties pending a rebuttal process. It has been held that the appraisal system must be transparent:[3]

> There is another reason why prescribed procedures for performance appraisal should be observed. As was pointed out in Judgment 2836, performance appraisal procedures must be "both transparent and adversarial". That is unlikely to be the case where the prescribed procedures are not observed. In the present case, the failure to set performance objectives before informing the complainant that her appointment was not to be extended has the consequence that the steps taken by the Respondent with respect to her performance lack transparency.

118. In ILOAT Judgment No. 2414 (2005), the court held:

> The fundamental considerations which lead to the conclusion that an organisation must comply with the rules which it has established

[3] Administrative Tribunal of the International Labour Organization (ILOAT) Judgment No. 2916 (2010).

> also dictate the conclusion that it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance.

119. The Tribunal adopts the position taken by the court in *Safir*[4]:

> The Tribunal is not required to make a finding that the impugned decision is, in fact, unlawful. For the prima facie unlawfulness test to be satisfied, it is enough for an Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively effective, or was contrary to the Respondent's obligation to ensure that its decisions are proper and made in good faith.

120. The Tribunal therefore finds that the continuous deprivation of the Applicant of her duties, in view of the flaws in the appraisal performance process, cannot be allowed to stand. Further by not following the procedures and jumping to a PIP four days after the refusal of the Applicant to sign a document smacks of bad faith and abuse of authority. Depriving the Applicant of her duties was a means of not allowing her to improve if improvement was an issue.

Is the matter urgent?

121. The Applicant has been facing the possibility of non-renewal of her contract since 5 May 2014. On 23 May 2014, she was granted an injunction against that decision.

122. On 10 October 2014, she applied for and obtained a second suspension of action as the Respondent, through Ms. Boly, was depriving her of her core duties as a Budget Officer. The Tribunal held that this was a colourable device to circumvent the first suspension of action order.

123. Now the Applicant has filed a substantive case and has applied for a further interim measure under art.14.

[4] *Safir* Order No. 49 (NY/2013).

124. The facts of this case reveal that the interpersonal difficulties between the Applicant and Ms. Boly will continue to plague the Applicant's career and the working environment at the RSCE. It is urgent in these circumstances to grant the order prayed for to prevent further adverse decisions in regard to the contract of the Applicant.

Irreparable harm

125. The classic argument against the granting of an injunctive relief in matters of non-renewal of employment is that such a loss can be compensated by damages. The argument may be used to get rid of staff members and leave it to the Organization to pay monetary compensation. The Tribunal cannot subscribe to such an approach. There are a number of matters that need to be considered when balancing the granting of injunctive relief and monetary compensation.

126. The Tribunal has to look at the career prospects of the staff member; his/her reputation; the length of service and his/her performance; and the motives of management behind the termination or non-renewal of the employment.

127. In *Khambatta* UNDT/2012/058, Meeran J. took the following approach in the balancing exercise:

> 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.

128. In *Tadonki* UNDT/2009/016, the Tribunal held that where an act is found to be *prima facie* unlawful:

> [I]t should not be allowed to continue simply because the wrong doer 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.

129. The Tribunal finds that the Applicant has been subjected to an unfair procedure right from May 2014 that has necessitated a number of applications to be filed before this court. It would too easy and a denial of justice to allow this to continue and leave the Applicant with monetary compensation only.

130. The Tribunal finds irreparable harm proved.

Conclusion

131. The Application for Suspension of Action is **GRANTED** pending the determination of this case on the merits.

132. A case management order will shortly issue in respect of the Applicant's substantive application.

(signed)
Judge Vinod Boolell
Dated this 19th day of November 2014

Entered in the Register on this 19th day of November 2014

(signed)
Abena Kwakye-Berko, Registrar, Nairobi