



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

YASIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for applicant:

Self-Represented

Counsel for respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant holds a permanent appointment with the United Nations. She is currently the Chief of Mission Support at the United Nations Assistance Mission in Iraq (UNAMI). She serves at the D1 level and is based in Baghdad.

2. On 19 January 2015, the Applicant filed the subject Application of this Order seeking an injunction against the decision of the Under-Secretary-General of the United Nations Department of Field Support (USG/DFS), Ms Ammerah Haq, to terminate her mission assignment with UNAMI as of 20 January 2015.

3. The Applicant submits that her appointment with UNAMI was up for renewal on 9 February 2015, and that the decision to terminate her appointment with the Mission was not communicated to her. She came to know of the impugned decision from the Administrative Assistant assigned to check her out of the Mission.

4. Given the urgency of the matter, the Tribunal issued Order No. 003 (NBI/2015) suspending the impugned decision up to Friday, 23 January 2015. The Tribunal also set the matter down for hearing on 21 January 2015 and advised the Applicant to seek the assistance of counsel for the conduct of her case.

5. The Respondent filed his Reply on 20 January 2015.

6. The matter was heard on 21 January 2015. The Applicant represented herself, and the Respondent called the Mr Rudy Sanchez, Assistant Secretary-General for DFS as a witness.

7. At the conclusion of the hearing, the Tribunal directed a number of questions to the Respondent and directed that a response to those be filed by the morning of 22 January 2015.

8. On 22 January 2015, the Applicant filed a Motion for Leave to Respond to the Respondent's Arguments and Reply. The Respondent also filed his response to the Tribunal's questions.

Submissions

Applicant

9. The impugned decision is tainted. The USG/DFS told the Applicant that she needed to place Mr Maqbool before she retired at the end of January 2015. The Applicant had made clear that if a D1 position was not available for her to return to in Headquarters, she would be seeking to have her assignment with UNAMI extended.

10. There is no good faith basis for not renewing her assignment with UNAMI – the post continues to exist and has been budgeted for, and she has “effectively and efficiently” performed the functions of Chief of Mission Support for the last two years.

11. Returning to New York at the P5 level and in the manner currently being orchestrated would irreparably harm her professional reputation and career progression.

Respondent

12. The Application is without merit and should be dismissed because the Applicant has failed to demonstrate that the decision not to renew her appointment is *prima facie* unlawful or that it may cause her irreparable damage.

13. Contrary to the Applicant's assertion, her appointment has not been terminated. The Applicant is currently serving on mission assignment to UNAMI. This assignment was due to end on 9 February 2015. The Applicant retains a lien on a post at Headquarters.

14. The USG/DFS exercised her authority to reassign the Applicant to her original post on which she holds a *lien*, approximately three weeks early, for operational reasons. The Applicant has not shown any evidence that this decision was not properly motivated, that it was tainted by an improper motive or taken in violation of mandatory procedures.

15. Secondly, the Applicant will not suffer any irreparable harm caused by the USG's decision to reassign her to New York. The Applicant's mission assignment has been concluded three weeks early. She will continue to receive her salary at the D-1 level until 9 February 2015.

16. Both senior management of DFS and the SRSG/UNAMI consulted the Applicant about this decision in advance. She was given a number of opportunities to state if she wished to remain with UNAMI beyond 9 February 2015. She did not give any indication that she wished to do so. Accordingly, the Applicant was well aware that she would be reassigned to New York at the beginning of 2015.

17. The Applicant has failed to show evidence of any harm caused to her by this decision. The Applicant's mission assignment to UNAMI was temporary in nature. The Applicant has no right to continue her mission assignment beyond 9 February 2015. Accordingly, any harm to the Applicant would be limited to ending her assignment three weeks early. In any event, the Applicant will continue to be paid at the D1 level until 9 February, and will therefore suffer no loss. Further, the decision to return her to her parent office will not alter her conditions of service.

Deliberations and Directions

18. 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.

19. 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.

20. 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.

21. This remedy is not available in situations where the impugned decision has been implemented. It is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.²

22. The Tribunal must therefore consider the Parties' submissions against the test stipulated in art. 2.2 of the Statute and art. 13 of the Rules of Procedure.

23. 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 violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision".³

24. 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*

¹ See *inter alia* Applicant Order No. 087 (NBI/2014); Dalgamouni Order Nos. 137 and 224 (NBI/2014).

² See for example, Taddonki UNDT/2009/016; Applicant UNDT/2011/158; Kweka UNDT/2011/122; Tiwathia UNDT/2012/109; Laurenti Order No. 243 (NBI/2013).

³ UN Administrative Tribunal Judgment No. 885, *Handelsman* (1998).

case to be made out by the Applicant to show that there is a triable issue before the court.⁴

25. The Tribunal is concerned at the manner in which the Respondent has conducted itself in respect of this Applicant.

26. The Respondent has not rebutted the Applicant's submission that she is being returned to her parent office at Headquarters to make way for the appointment of another staff member whom the USG/DFS needed to place before she retired at the end of January.

27. The Tribunal is not persuaded by the Respondent's submission that this is being done to "ensure continuity" and because the "customary period for a staff member to keep a lien against a HQ post is 2 years."

28. Given the imminent appointment of a new Special Representative for the Secretary-General (SRSG) for UNAMI, would continuity not be better achieved by keeping on a Chief of Mission Support who knows the Mission and has performed the function satisfactorily?

29. As for the customary period for a *lien* against a post, the record shows that the proposed new CMS would have held his current *lien* for two years come 8 June 2015. The Respondent may, of course, chose to argue that the renewal of Mr Maqbool's *lien* is, in fact, not a given and that the staff member will have to choose between giving up his hold on the post in Headquarters and continuing in Baghdad.

30. For two reasons, this too would be implausible. Firstly, the Applicant does not appear to have been given the option of renewing or relinquishing the *lien* she holds on her post in Headquarters. The Respondent, while submitting that the Applicant

⁴ 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.

“was repeatedly asked” if she would like to carry on as CMS has not provided as evidence to that effect. Likewise, Mr Sanchez testified that the Applicant was happy to return to Headquarters but only if there was a position at the D1 level available for her, and that this was not possible. Most importantly, the Respondent did not dispute or challenge the Applicant’s submission that she made it clear that she would like to carry on as CMS/UNAMI if a position at the D1 level is not available for her at Headquarters.

31. Secondly, the Tribunal would be surprised if Mr Maqbool’s assignment to UNAMI is planned to only cover the period between 20 January and 8 June 2015.

32. The Tribunal is unable to accept the picture that the Respondent paints of the impugned decision being based on the exigencies of work and the lawful exercise of discretion by the USG/DFS.

33. The Tribunal finds the decision not to extend the Applicant’s assignment with UNAMI to have been made in bad faith and tainted by extraneous factors, thus making it *prima facie* unlawful.

34. The urgency of this Application is obvious, and is conceded by the Respondent.

35. The Tribunal cannot accept the Respondent’s argument that the Applicant will suffer no loss or harm because she will continue to be paid at the D1 level until 9 February 2015 and that returning to Headquarters will not “affect her conditions of service.”

36. This Tribunal recalls the position it espoused in previous cases that where *prima facie* unlawfulness was established⁵:

⁵ *Tadonki* UNDT-2009-016. *See also Corna* Order No. 80(GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096.

[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.

37. The fact of holding a permanent appointment does not inure the Applicant from the loss of the invaluable experience of continuing as the Chief of Mission Support with UNAMI.

38. The Applicant would still have had the opportunity, an option that she alone could have exercised, to opt for a surrender of her *lien* and use all the options open to her under section 6.5 of ST/AI/2010/3 (Staff Selection System) and section 7 of ST/AI/404 (Assignment to and return from mission detail). Removing her from the assignment prematurely to place someone else denies the Applicant the choice of exercising any of the options embodied in section 6.5, referenced above. To that extent the Tribunal finds that irreparable harm is present. To simply give the Applicant monetary relief until 9 February 2015 does not lessen or remove that irreparable harm.

Observations

39. 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. The effects of this case will concern more than just the Secretary-General and the Applicant. An amicable resolution will avert potentially adverse consequences for both the Mission and the staff member proposed to take over from the Applicant.

40. 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.

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

Conclusion

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

(Signed)

Judge Vinod Boolell

Dated this 23rd day of January 2015

Entered in the Register on this 23rd day of January 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi