



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/028

Order No.: 051 (NBI/2015)

Date: 10 February 2015

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BERNATEAU

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:

Nicole Wynn, ALS/OHRM

Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant is a Transport Assistant at the United Nations Disengagement Observer Force (UNDOF) based at Camp Ziouani, Amret Al-Faouar, Syrian Arab Republic. He serves at the FS-5 level on a fixed-term appointment. The Applicant is also the Chairman of the UNDOF Field Staff Union.

2. On 3 February 2015, he filed an Application for Suspension of Action, pending management evaluation, seeking the suspension of the decision of the International Civil Service Commission (ICSC) not to approve a four-week rest and recuperation (R&R) cycle for staff members serving west of the “Alpha Line” in the “Area of Limitation” of UNDOF.

3. The Respondent filed a Reply to the Application on 6 February 2015 in which it was asserted that the Application was not receivable.

Facts

4. Duty stations where danger pay is authorized by the Chairman of the ICSC are granted a six-week R&R cycle, unless the Chairman of the ICSC exceptionally approves a four-week R&R cycle.

5. By memorandum dated 19 December 2014, the ICSC exceptionally approved a four-week R&R cycle, effective 1 January 2015 for the following locations in Syria: Al Nabek, Aleppo, Ar Raqqa, Damascus (Camp Faouar), Daraa, Deir Ezzour, Hamma, Hassake (Al-Hasakah), Horns, Idlib, Latakia, Qamishli and Tartous.

6. No approval for a four-week R&R cycle was authorized for Camp Ziouani in UNDOF or locations west of the so-called Alpha Line in Syria.

7. On 9 January 2015, the Chief, Policy and Conditions of Service section of the Office of Human Resources Management (OHRM) disseminated to headquarters offices and Chiefs of Administration in the field, the list of duty stations which the ICSC had approved for an R&R entitlement effective 1 January

2015. An updated list was issued on 14 January 2015. By facsimile dated 16 January 2015, the Director, Field Personnel Division of the Department of Field Services (FPD/DFS) further disseminated the list to all field missions.

8. The Applicant received notification of the R&R designation on 21 January 2015.

9. On 29 January 2015, he requested for a management evaluation of the decisions abolishing R&R entitlements and the “refusal of Danger Pay on A-side”.

10. The Tribunal held a hearing on 9 February 2014. During the hearing, the Applicant was asked to respond to the Respondent’s objection to his Application on the grounds of receivability but did not make any submissions on the same.

Respondent’s submissions

11. The Respondent submits that the Application is not receivable for the following reasons:

a. The Applicant does not challenge an administrative decision within the meaning of art. 2.1(a) of the Dispute Tribunal’s Statute.

b. The Dispute Tribunal lacks jurisdiction to review decisions taken by the ICSC regarding hardship entitlements.

c. The ICSC is a subsidiary body of the General Assembly charged with determining the conditions of service, including which duty stations are approved for the entitlement to a four-week R&R cycle. General Assembly resolution 65/248 expressly grants the ICSC the authority “to regulate the rest and recuperation framework”. The ICSC is independent of the United Nations Secretariat and is prohibited from taking instructions from any entity in the UN common system. Its decisions promulgated under signature of the Chairman “shall be applied by each organization with effect from a date to be determined by the Commission”.

d. Contrary to the Applicant's contention, OHRM did not take the contested decision. The decision whether to approve a duty station for a four-week R&R cycle is solely within the purview of the ICSC. The Administration is obliged to implement that decision without the exercise of any discretion.

e. The Dispute Tribunal in the case of *Obino* UNDT-2013-008 found that decisions of the ICSC are not to be imputed to the Secretary-General and, therefore, the Tribunal lacks jurisdiction to review such decisions. Upholding the Dispute Tribunal judgment, the United Nations Appeals Tribunal (the Appeals Tribunal), in *Obino* 2014-UNAT-405, also recognized that the ICSC takes decisions with respect to hardship entitlements such as a four-week R&R cycle and that the Dispute Tribunal is not competent to review such decisions.

f. The Applicant may not contest the decision in his representational capacity as an officer of the staff association. Representational rights are limited under the Dispute Tribunal's Statute to those making claims in the name of an incapacitated or deceased staff member. The Dispute Tribunal is not competent to hear claims brought by staff representatives on behalf of other staff members.

g. The Applicant's own submissions demonstrate that he has filed this appeal on behalf of other staff members.

h. The Applicant may not bring an application on behalf of other staff members who have their own individual right to access the internal justice system if they choose to do so. The Applicant, therefore, lacks standing and the Application should be rejected.

Considerations

12. The Respondent submits that the Applicant is not challenging an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute and as such, the Application is not receivable.

13. The Respondent further submits that the Dispute Tribunal lacks jurisdiction to review decisions taken by the ICSC regarding hardship entitlements and that the Applicant may not contest the decision in his representational capacity as an officer of the staff association.

14. Article 2.1(a) of the Statute of the Tribunal (UNDT Statute) provides that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General of the United Nations:

To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance [...].

15. The current Application purports to challenge the decision of the ICSC not to approve a four-week R&R cycle for staff members such as himself serving at Camp Ziouani Amret Al-Faouar, Syrian Arab Republic. The issue for determination in this case is whether the ICSC’s actions or omissions can be deemed to be that of the Secretary-General and therefore of the Administration. This issue was considered by Boolell J in *Obino* where the Learned Judge concluded:

In view of the fact that art. 2.1(a) of the UNDT Statute expressly states that the Tribunal is competent to hear and pass judgment on an application filed by an individual “against the Secretary-General of the United Nations”; the Tribunal cannot extend its jurisdiction to include decisions made by the ICSC, regardless of how those decisions are couched to appear like decisions of the Secretary-General¹.

16. The Appeals Tribunal in *Obino* also held that the ICSC takes binding decisions in some matters such as hardship elements like R&R².

17. The Tribunal concludes that the Applicant is not challenging an administrative decision within the meaning of art. 2.1(a) of the Tribunal’s Statute.

¹ At para. 48.

² At paras. 20 and 21.

18. The Respondent submitted that the Applicant may not contest the decision in his representational capacity as an officer of the staff association. On this issue, the Tribunal finds that the Applicant has filed this Application in his individual capacity. The relevant sections of the Application form reveal this even though this might appear somewhat ambiguous. For example, in the section headed “Applicant’s general information”, the Applicant indicates his name and functional title. The Applicant, however, annexed a petition signed by other affected UNDOF international staff members supporting his cause. The Applicant’s confusion may be explained by the fact that he is an unrepresented litigant.

Conclusion

19. In view of the foregoing, the Tribunal concludes that the current Application is not receivable and is therefore rejected.

(Signed)

Judge Nkemdilim Izuako

Dated this 10th day of February 2015

Entered in the Register on this 10th day of February 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi