



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/067

Order No.: 223 (NBI/2015)

Date: 25 June 2015

Original: English

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

MCNEILL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:

Jiries Saadeh, OSLA
Alexandre Tavadian, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

The Application and Procedural History

1. The Applicant is the Chief of the Staff Counselling and Welfare Section at the African Union-United Nations Mission in Darfur (UNAMID). She serves on a fixed-term appointment at the P-5 level in El Fasher.
2. On 23 June 2015, the Applicant filed an Application for Suspension of Action seeking an injunction against the decision not to renew her appointment beyond 30 June 2015.
3. The Respondent filed his Reply to the Application on 25 June 2015.
4. The Applicant responded to the Respondent's Reply on the same day.

Facts and Submissions

Applicant

5. On 22 January 2015, the Applicant received an unofficial and draft Staffing Table for UNAMID for financial year 1 July 2015 to 30 June 2016.¹ That Staffing Table showed that the Applicant's P-5 post (post number 68169) was to be "redeployed" as the Head of Office in Zalingei, Darfur, and a vacant P-4 post would be "reassigned" to serve as the Chief of the Staff Counselling and Welfare Section – which Section would be moved under the Human Resources Section.
6. At no point prior to receiving the draft Staffing Table had anyone discussed the restructure or reclassification with the Applicant, which had by the time the Applicant became aware of it been submitted for consideration to the Advisory Committee on Administrative and Budgetary Questions (ACABQ). In her previous

¹ Applicant's Annex A.

decade of experience as a Section Chief, the Applicant had always been consulted on proposed Staffing Tables before their submission to the ACABQ.

7. No one had discussed the “redeployment” of her specific post, which is nothing more than a disguised and illegitimate reclassification exercise. Nor, to the Applicant’s knowledge, did the Organization conduct a reclassification exercise or classification review as required by ST/AI/1998/9 (System for the Classification of Posts).

8. Since January 2015, the Applicant has engaged in prolonged discussions and negotiations with relevant parties concerning this proposed reclassification of her post. For example, on 28 January 2015, the Applicant wrote to Ms. Vevine Stamp, Chief of Operations and Services and her First Reporting Officer, requesting that Senior Management review the decisions to: (1) move the Staff Counselling and Welfare Section from the Service of Operation and Services to the Human Resources Section; and (2) “redeploy” her P-5 position to the office of the Head of Office in Zalingei.²

9. The Applicant stated she understood that the restructuring and reclassification exercise was “based on a facsimile from Ms. Ameerah Haq dated 9 December 2014 with the subject: Guidance on Mission Support Structures”³ and noted that “[t]here appears to be confusion as to who made [the decision in question] and whether it was based on a strict interpretation of the organizational chart included in the Guidance facsimile”.

10. The Applicant made similar points in an email to Mr. Anthony Nweke (Officer-in-Charge, Division of Mission Support), Mr. Aggrey Kedogo (Chief, Human Resources), Mr. Sajjad Malik (Officer-in-Charge, Budget) and Ms. Vevine

² Applicant’s Annex C.

³ Applicant’s Annex D.

Stamp on 22 March 2015⁴, to which she received a reply from Mr. Kedogo that same day. Mr. Kedogo stated that “UNAMID decided to move towards the proposed structural changes in full, and there is nothing wrong with taking that decision” and that she was not informed “of the potential downgrading of the P-5 because a decision had not been made by the time you were selected for the position”.⁵

11. Shortly thereafter, the Applicant was offered only a very short term extension to her fixed-term appointment, starting on 9 April 2015 and due to expire on 30 June 2015.⁶ Notably, this is precisely the date upon which the Applicant’s post is proposed to be reclassified and moved to the Human Resources Section. The Applicant accepted the new fixed-term contract under protest, attaching her signed acceptance to an extensive email to numerous recipients reiterating her concerns with the entire structural and reclassification process.⁷

12. The Applicant has also sought to have the present dispute resolved through the engagement of the Office of the Ombudsman. That process remains ongoing.

13. The Applicant believes that the proposed reclassified P-4 post has not yet been advertised, on either a temporary or fixed-term basis. It is also believed that the proposed UNAMID budget for 1 July 2015 to 30 June 2016, A/69/839/Add.6, has not yet been approved by the General Assembly.

14. The Applicant fell and suffered a serious concussion in the mission area on 19 February 2015. Although she initially tried to continue with her duties, she has been on certified sick leave in the United States since 1 April 2015. That sick leave is currently certified to continue until 30 June 2015.⁸

⁴ Applicant’s Annex E.

⁵ Applicant’s Annex F

⁶ Applicant’s Annex G.

⁷ Applicant’s Annex H.

⁸ Applicant’s Annex I.

15. The impugned decision is at least *prima facie* unlawful for failing to adhere to staff rule 2.1 and the provisions of ST/AI/1998/9.

16. The unlawfulness of the Respondent's actions in the present case is compounded by the fact that UNAMID has attempted to circumvent the clear process for reclassification outlined in ST/AI/1998/9. Instead of directly reclassifying the Applicant's post, UNAMID is "redeploying" that P-5 post to another section and changed its functions, then "reassigned" a P-4 post from another section (see A/69/839/Add6 – the proposed UNAMID budget and ACABQ consideration). This is a transparent and flawed attempt not to apply ST/AI/1998/9 and it must be rejected.

17. Indeed, such illegitimate "re-profiling" exercises were explicitly warned against only last year, when Mr Chhaya Kapilashrami (Director, Field Personnel Division, Department of Field Support (DFS)) wrote to all missions reminding them of their obligations under ST/AI/1998/9. Mr Kapilashrami observed, *inter alia*, that "the UNDT emphasized the need for missions to follow the procedure for classification of posts established under ST/AI/1998/9 ... and held that the alternative approaches such as the "re-profiling" of posts have no basis in law".⁹

18. Should the Administration take the position that reclassification or a reclassification challenge is premature until budget approval, the Applicant notes that, on that view, there can be no current basis to give the Applicant implied notice of her non-renewal.

19. Should a classification review process be proposed in the future, classification will not become effective until after the Applicant's proposed separation, and thus, there can again be no current basis for her separation. Should the Administration argue that it has sought classification advice, the classification remains ineffective until after budget approval, which has not yet occurred. The Applicant should in

⁹ Applicant's Annex J.

those circumstances be entitled to exercise her procedural rights to appeal the classification decision at that point.

20. The Applicant is scheduled to be separated on 30 June 2015, well within the period for management evaluation. She is making this application now based on the apparent failure of informal resolution and the imminent date of her separation.

21. If this honourable Tribunal does not suspend the decision to separate the Applicant from service, the only remedy subsequently available to her will be monetary compensation.

22. 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 for even a short period of time, 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.

Respondent

23. The Respondent submits that contrary to the Applicant's submissions, her appointment is being renewed, at her current level, for one month beyond 30 June 2015 "pending GA approval of the budget and classification" of her post. That being the case, there is "no contestable administrative decision as stipulated by art. 2.1(a) of the UNDT Statute." The Application should therefore be dismissed.

Applicant

24. The Respondent's *interim* renewal of the Applicant's appointment is insufficient, and does not cure the procedural flaws and unlawfulness of the impugned decision.

25. The one month renewal also does not make the impugned decision any less urgent or irreparably harmful to the Applicant.

26. It is entirely likely that the General Assembly might approve the unlawful proposal of the Secretary-General within the one month for which the Applicant is being renewed. Likewise, the Management Evaluation Unit is not likely to render its decision before the expiration of its 45-day time limit. Should the General Assembly approve the proposal during the course of that month and before the Management Evaluation decision is issued, the likelihood is that the Applicant will be immediately separated; thus leaving her with no recourse other than the filing of a substantive application and seeking monetary compensation.

Deliberations

27. 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.

28. 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.

29. This Tribunal has previously held that¹⁰:

¹⁰ See *inter alia Applicant* Order No. 087 (NBI/2014); *Dalgamouni* Order Nos. 137 and 224 (NBI/2014).

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.

30. This remedy is not available in situations where the impugned decision has been implemented.

31. 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.

32. The Tribunal is satisfied on the submissions before it that the procedural requirements of ST/AI/1998/9 have not been complied with and have been circumvented. The Secretary-General has wide discretion in the reclassification of posts. But like any discretion, it may not be exercised in an arbitrary, capricious or illegal manner.

33. The Tribunal considers that by using the subterfuge of reclassification the Respondent is in fact re-profiling the post encumbered by the Applicant. This procedure was held to be unlawful in *Eissa* UNDT/2013/112. In *Hersch* 2014-UNAT-433, the United Nations Appeals Tribunal found that the Respondent manipulated the job description and posting, and failed to apply the relevant Rules, Regulations and guidelines in a fair and transparent manner, thereby preventing a staff member from automatically rolling-over into a post in a new mission.

34. The Tribunal is also satisfied that allowing the decision to stand will cause the Applicant irreparable harm. That irreparable harm consists in the high likelihood of the Applicant being out of a job through an unlawful procedure or being downgraded. The risk becomes higher as it cannot be speculated what the decision of the General Assembly would be in regard to her position.

35. This Tribunal recalls the position it espoused in previous cases, in that a *prima facie* unlawful decision¹¹:

[S]hould 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.

36. The remaining limb to be satisfied is that of urgency of the application, which is tied to the question of whether the Application can succeed in the face of the renewal of the Applicant's appointment. It is not lost on the Tribunal that the decision to renew her appointment was made *after* she filed the application to challenge her imminent separation.

37. The Applicant is correct in her assertion that the one month renewal does not cure the defects in the impugned decision. It continues to be the case that the conditions precedent to a reclassification exercise have not been met in respect of the Applicant.

38. The fact that an imminent decision of the General Assembly can radically alter the Applicant's circumstances at any time, and notwithstanding the one month renewal that she has been given, makes this matter urgent.

39. As it is the role of the Management Evaluation Unit, as prescribed in ST/SGB/2010/9 (Organization of the Department of Management), 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 Tribunal finds it appropriate under the circumstances of the present case that the Unit be afforded the opportunity carry out that evaluation

¹¹ *Tadonki* UNDT-2009-016. *See also Corna* Order No. 80(GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096.

and, if necessary, “propose means of informally resolving disputes” between the Applicant and the Respondent.

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

(Signed)

Judge Vinod Boolell

Dated this 25th day of June 2015

Entered in the Register on this 25th day of June 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi