UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2015/079
Order No.:	245 (NBI/2015)
Date:	28 July 2015
Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHEMINGUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON THE APPLICATION FOR SUSPENSION OF ACTION PURSUANT TO ARTICLE 14 OF THE RULES OF PROCEDURE

Counsel for the Applicant:
Marisa Macleenan, OSLA

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

The Application and Procedural History

1. The Applicant is a Senior Economist at the Economic and Social Commission for Western Asia (ESCWA). He serves on a fixed term appointment, at the P5 level, on an "established" post.

2. On 21 July 2015, the Applicant filed an Application for Suspension of Action seeking an injunction, pending a determination on the merits, against the decision to laterally reassign him as the Regional Adviser on Trade.

3. The Tribunal is informed that, as far as the Applicant is aware, ESCWA intends "to issue a memo today, 21 July, to reassign him effective immediately."

4. The Application was filed along with a substantive merits application, which has been served on the Respondent.

5. On 21 July 2015, the Tribunal issued, in the interim, Order No. 240 (NBI/2015) suspending the impugned decision until 28 July 2015.

6. On 22 July 2015, the Respondent filed his Reply to the Application for Suspension of Action. The Respondent argues *inter alia* that Order No. 240 (NBI/2015) should be vacated on the ground that the Applicant has not satisfied the tripartite test required for the issuance of an injunction.

7. On the same day, the Tribunal issued Order No. 242 (NBI/2015) directing the Respondent to file documentary evidence in support of the assertions in his Reply, particularly those in paragraphs 13, 14 and 22. The same Order afforded the Applicant the opportunity to respond to the Respondent's submissions.

8. Both Parties filed their respective submissions on 23 July 2015.

Deliberations

9. Applications for suspension of action are governed by art. 2 of the Statute and arts. 13 and 14 of the Rules of Procedure of the Tribunal. Art. 13 provides as follows:

> 1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.**
>
> 2. […]
>
> 3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.
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> 4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

10. Art.14, in relevant part, provides

> 1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be **unlawful, in cases of particular urgency and where its implementation would cause irreparable damage**. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.
>
> 2. […]
>
> 3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.
>
> 4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

11. Both provisions require the Applicant to seek a review of the impugned decision by the Management Evaluation Unit (MEU), before resorting to litigation. The identical wording of Articles 13 and 14 contain one critical difference, and that is the stage at which the application for suspension of action is filed.

12. In the present case, the court is seized with an application in which MEU has concluded its review and upheld the impugned decision which the Applicant is seeking to challenge. The test for an application under both articles is identical.

13. The current application must therefore be adjudicated against the stipulated cumulative test.

14. 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 the applicant/plaintiff temporary relief by maintaining the status quo and thereby regulating the position between the parties to an application pending adjudication. An order for suspension of action cannot therefore be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

15. To grant an application for suspension of action, the Tribunal must be satisfied that there is a serious question to be tried on the merits and that damages would not adequately compensate the Applicant in the event that his or her application succeeds at trial. The application would therefore normally fail where a court finds that the payment of damages would be an adequate remedy for the harm suffered.

16. Additionally, a suspension of action application will only succeed where the Applicant is able to establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the

Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

17. The Tribunal will now turn to consider the Application before it based on the Parties' submissions.

Prima Facie Unlawfulness

18. The Respondent's contention is that the decision to reassign the Applicant was made for "operational reasons" and that the post he is being reassigned to is at the Applicant's current grade and carries responsibilities that correspond to his level, skills and competencies. Specifically, the Respondent submits:

> Contrary to the averment by the Applicant, the Job Opening to which the Applicant is to be reassigned does have a post number. The post in question was established on 16 July 2015 and has the post number 402034. This post is funded by the regular budget, not extra-budgetary funding. This funding is provided by the General Assembly to carry out technical co-operation activities.
>
> There is no merit in the Applicant's assertion that his contractual position would be less secure following his reassignment. The Applicant's appointment is not affected in any way. He will continue to hold a fixed term appointment at the P5 level and his right to be considered for a continuing appointment remains unchanged.

19. Is this Tribunal persuaded by the Respondent's submissions that the Applicant is being reassigned to a regular budget post?

20. In *Kamunyi*[1] the Appeals Tribunal held that it is within the Administration's discretion to reassign a staff member to a different post at the same level and such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member.

[1] 2012-UNAT-194, at para. 3. See also *Lauritzen* 2013-UNAT-282

21. However, this discretion is not unfettered as the Appeals Tribunal held in *Abdulla*[2].

> [M]anagerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

22. It is clear from the Respondent's own submissions that the decision to reassign the Applicant was made before the post was even created. It is also clear from the Respondent's annexes that the post is of limited duration and is funded by general temporary assistance (GTA) funds, so that it does not have the security of the post currently encumbered by the Applicant.

23. The potential "economic prejudice" to the Applicant that would occasion from being reassigned to a less secure position requires little explanation.

24. The Respondent has the option of giving the Applicant a *lien* on his current established post, which would address the job security concerns expressed by him. But he has chosen not to afford the Applicant this option.

25. For present purposes, therefore, the Tribunal is satisfied that the decision to reassign the Applicant to a GTA funded post was irregular, so that it is at the very least *prima facie* unlawful.

Urgency

26. The Respondent's Annex 1 states that the position is to become effective on 1 August 2015, which satisfies the Tribunal on this element of the test.

[2] 2014-UNAT-482 at para. 60.

Irreparable Harm

27. The Respondent is seeking to reassign the Applicant to a position at the P5 level which, the Applicant contends, has "historically little to no leadership and managerial responsibilities due to their temporary nature" and therefore represents a marked difference from the "managerial and leadership tasks" currently carried by the him.[3]

28. In *Tadonki*[4] the Tribunal held:

> The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it 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. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

29. On the facts of the present case, the reassignment of the Applicant to a post which is not as secure as the one he currently encumbers could easily result in far reaching consequences for his career within the United Nations system. The resulting harm to the Applicant should those consequences come to pass would, the Tribunal finds, be irreparable so as to satisfy this limb of the test.

[3] Applicant's Annex H. *See Calvani* UNDT/2009/092.
[4] UNDT/2009/016.

Observations

30. In *Cranfield,*[5] the Court held that,

> In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility thereof and act with due expedition once alerted to the unlawful act.

31. The Tribunal has carefully reviewed both Parties' submissions on this matter, and strongly believes that 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 proceedings, the Tribunal pursuant to articles 10.3 of the UNDT Statute and 15.1 of the Rules of Procedure, firmly urges the Parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

32. It, of course, remains open to the Applicant to have this matter litigated on the merits should mediation be unsuccessful.

Order

33. The Application for Suspension of Action is **GRANTED** pending informal consultation and resolution between the Parties or the determination of the substantive application in the event that mediation fails**.**

[5] 2013-UNAT-367, at para. 36. See also *Das* 2014-UNAT-421.

34. **NOTICE** is hereby issued that the matter of *Chemingui v Secretary-General of the United Nations* (UNDT/NBI/2015/079) is set down for a case management hearing at **1030hrs** on **Tuesday, 15 September 2015** in the **UNDT Boardroom.**

35. The Parties are directed to advise the Tribunal on the status of their consultations and the likelihood of this matter being settled by **Tuesday, 15 September 2015.**

(Signed)
Judge Nkemdilim Izuako
Dated this 28th day of July 2015

Entered in the Register on this 28th day of July 2015

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi