



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KELAPILE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICATION FOR
INTERIM RELIEF PURSUANT TO
ART. 14 OF THE RULES OF
PROCEDURE**

Counsel for the Applicant:

Daniel Trup, OSLA

Counsel for the Respondent:

Sandra Baffoe-Bonnie, OES/ECA

Introduction

1. The Applicant was appointed Chief of Staff in the Office of the Executive Secretary (ES) in the United Nations Economic Commission for Africa (UNECA) on 1 August 2014. He serves at the D1 level on a fixed term appointment.

2. On 24 September 2015, the Registry of the United Nations Dispute Tribunal (UNDT) in Nairobi received the Applicant's application for suspension of action, challenging the Respondent's decision to "strip him of his core functions as Chief of Staff". The Applicant contends that the impugned decision is inconsistent with the United Nations Staff Regulations and Rules as well as with the jurisprudence of the UNDT.

3. On 1 October 2015, the Applicant filed a motion to withdraw his request for interim measures "pursuant to the terms and conditions of a recently concluded interim settlement between the Parties".

4. The Tribunal issued Order No. 310 (NBI/2015) on the same day, granting the Applicant's motion and striking the matter off the court's docket.

5. On 3 November 2015, the Applicant filed a substantive Application pursuant to art. 2.1(c) of the UNDT Statute and an Application for Suspension of Action pursuant to art. 14 of the Rules of Procedure. The Applicant is challenging the Respondent's decision to "not comply with the intent, letter and spirit of the Settlement Agreement reached on 1 October 2015 through mediation".

6. Both Applications were served on the Respondent on the same day. The Respondent was directed to file his Reply to the motion for interim relief by 4 November 2015.

7. On 4 November 2015, the Tribunal received the Respondent's Motion for Extension of Time.

8. On 4 November 2015, the Tribunal issued Order No. 358 (NBI/2015) partially granting the Respondent's Motion.

9. The Respondent filed his Reply to the Application for interim relief on 5 November 2015.

10. The Tribunal sought the Applicant's response to the Respondent's Reply, particularly on the issue of receivability. The Applicant filed his response on 6 November 2015.

Deliberations

11. 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.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal (emphasis added).

12. 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 (emphasis added).

13. The identical wording of arts. 13 and 14 contain one critical difference, and that is the stage at which the application for suspension of action is filed. The test for an application under both articles is identical.

14. The current Application must therefore be adjudicated against the stipulated cumulative test.

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. In the present case, the court is seized with an Application, pursuant to art. 2.1 (c) of the Statute, for which the Applicant has not filed a request for management evaluation.

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

Receivability

19. The Respondent challenges the receivability of the Application on the ground that the Court has no jurisdiction to adjudicate this matter as the Applicant has not sought management evaluation.

20. The Applicant submits that applications filed to enforce a settlement agreement pursuant to art. 2.1 (c) and art. 8. 2 of the Statute, read together with

art. 7.4 of the UNDT Rules of Procedure, permit applicants to complain about the Respondent's refusal to comply with the terms of a mediated agreement without first seeking review of that refusal by the Management Evaluation Unit.

21. Article 2 of the UNDT Statute provides as follows:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance 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;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

22. Article 8.2 of the UNDT Statute stipulates:

an application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. An Applicant may file an application to enforce the implementation of an agreement reached through mediation which **shall** be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation agreement, or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement (emphasis added).

23. The issue here is not whether the substantive application is filed pursuant to art. 13 or 14 of the Rules of Procedure. Where a challenge under *either* article is filed against an "administrative decision" within the terms of art. 2.1 (a) of the Statute, the filing of a request for management evaluation is a mandatory condition precedent.

24. The drafters of the Statute, however, clearly drew a distinction between "administrative decisions" and a decision or decisions by the Respondent which result in the terms of a settlement agreement not being adhered to. The Statute

also makes it mandatory for the court to receive an application to “enforce the implementation of an agreement reached through mediation”.

25. The present Application, filed pursuant to art. 2.1 (c), is therefore receivable.

Suspension of Action

26. 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.

27. In this case, the Applicant finds himself in a situation in which he is being deprived of the core functions of the position to which he was recruited, and which position he resumed following the settlement agreement.

28. It is difficult for the court to provide effective and meaningful injunctive relief in this case. Preserving the *status quo* by suspending the “non-implementation of the settlement agreement” will not provide the Applicant with the *interim* relief he seeks.

29. The refusal of the Respondent to enforce a settlement agreement, as described in the facts of this case, is not a decision that the Tribunal finds it can properly suspend within the terms of art.14 of the Rules of Procedure.

Observations

30. In *Cranfield*,¹ 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-

¹ 2013-UNAT-367, at para. 36. See also *Das* 2014-UNAT-421.

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 arts. 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, with the assistance of the Ombudsman, towards having this matter informally resolved.

32. There Tribunal therefore makes the following **ORDERS**:

- a) The Application for Suspension of Action is **DISMISSED**;
- b) The Registry is **DIRECTED** to serve a copy of this Order on the Office of the Ombudsman and Mediation Services (OMS).

33. A Notice of Hearing will issue shortly after the filing of the Respondent's Reply, for an expedited hearing on the merits.

(Signed)

Judge Vinod Boolell

Dated this 9th day of November 2015

(Signed)

Entered in the Register on this 9th day of November 2015

Abena Kwakye-Berko, Registrar, Nairobi