



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/039

Order No.: 268 (NBI/2016)

Date: 3 June 2016

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

EDWARDS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
INTERIM MEASURES PURSUANT TO  
ARTICLE 10.2 OF THE UNDT  
STATUTE**

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**Counsel for the Applicant:**  
George Irving

**Counsel for the Respondent:**  
Kong Leong Toh, UNOPS

## **Introduction**

1. The Applicant is currently serving as a Security Specialist with the United Nations Mine Action Service (UNMAS) in Baidoa, Somalia.

2. He filed an Application on the merits with the United Nations Dispute Tribunal (UNDT) on 25 May 2016 to contest the decision to separate him from service on 31 May 2016 while he is on certified sick leave (the Contested Decision). This Application was served on the Respondent on 26 May 2016 with a deadline of 27 June 2016 to file his Reply.

3. On 26 May 2016, the Applicant filed a Motion for Interim Measures Pending Proceedings pursuant to art. 10.2 of the Statute of the UNDT and art. 14 of its Rules of Procedure.

4. In this Motion for interim measures, the Applicant prays the Tribunal to grant a suspension of the implementation of the Contested Decision for the duration of his certified sick leave.

5. By Order No. 265 (NBI/2016) dated 27 May 2016, the Tribunal suspended implementation of the Contested Decision on an interim basis until 3 June 2016 and directed the Respondent to file a Reply to the Applicant's Motion by 31 May 2016.

6. The Respondent filed his Reply on 31 May 2016.

## **Facts**

7. The Applicant is a Security Specialist at the P-3/12 level. He is serving with the United Nations Mine Action Service (UNMAS) in Baidoa, Somalia on a United Nations Office for Project Services (UNPOS) contract.

8. He commenced certified sick leave (CSL) on 30 November 2015 and has remained on CSL which is presently approved through 23 July 2016.
9. In December 2015, pursuant to an internal restructuring the Applicant's post was earmarked for abolishment. Consequently, he received an initial Separation Notice form UNOPS in January 2016, with his separation from service being effective as of 31 March 2016.
10. He was notified on 17 March 2016 that his contract would be extended until 31 May 2016. On 7 April 2016, his Portfolio Manager advised him that notwithstanding his approved CSL, he would be separated since UNOPS did not have the funding.
11. He was notified by UNOPS on 21 April 2016 that he would shortly receive a separation notice.
12. The Applicant received the Separation Notice from UNOPS on 29 April with an effective date of 31 May 2016. This Separation Notice also stated:

Given your current medical condition, we would like to offer you the option of being on Special Leave Without Pay (SLWOP) from 01 June 2016 until your medical condition improves or 30 November 2017 (whichever is the earlier). Your medical condition will need to be certified by the UN Medical Services Division. For the duration of this SLWOP (i) UNOPS will exceptionally pay the portion of the medical insurance premium ordinarily paid by you, as well as the Organization's portion of the premium, (ii) your appointment will be extended month-to-month; and (iii) you will not be entitled to any other benefits and entitlements. At the end of your SLWOP, you will be separated from service. If you would like to avail of this option, please sign in the space provided below and return the signed document to me by 15<sup>th</sup> of May 2016.

13. The Applicant did not respond to the offer contained in this second Separation Notice.

14. On 29 April 2016, the Applicant requested management evaluation of the Contested Decision. He received a response to his request for management evaluation on 23 May 2016, which upheld the Contested Decision.

### **Summary of Applicant's submissions**

15. The Applicant submits that his Motion for interim measures is receivable because he is not contesting the non-renewal of his fixed-term appointment due to lack of project funding per se but rather is contesting the refusal of UNOPS to allow him to avail himself of certified sick leave prior to being separated from service. It is thus the effective date of his separation which is at issue. As such, this case is not a matter of appointment and may be subject to interim measures to suspend his separation from service for the duration of his certified sick leave.

16. The Applicant submits that the Contested Decision is unlawful for the following reasons:

a. Sick leave is a social benefit that is earned through service. It is therefore a contractual right which may not be terminated unilaterally.

b. In ST/AI/2005/3 (Sick leave), the Secretary-General has recognized the need to extend staff on fixed-term appointments in order to allow them to avail themselves of this right.

c. UNOPS has erroneously taken the position that they are not bound by ST/AI/2005/3. UNOPS is part of the United Nations System and should not derogate from the Organization's Staff Rules. In the absence of any contrary policy duly promulgated and forming part of the Applicant's terms of employment, the Respondent may not simply pick and choose which staff rights he chooses to recognize. Decisions on medical issues have not been

delegated to UNOPS. They remain under the jurisdiction of the United Nations Medical Director and the United Nations Joint Staff Pension Fund and may not be abridged by any practices of agencies that contravene the entitlements regulated under their jurisdiction.

d. According to the United Nations Staff Rules and ST/AI/2013/1 (Administration of fixed-term appointments), the Applicant is incapacitated for service by reason of an illness that continues beyond the date of expiration of his appointment. Thus, he should be granted an extension of his appointment, after consultation with the Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay and half pay under staff rule 6.2.

17. The Applicant submits that the matter is urgent because:

a. His contract is not being extended beyond 31 May although he has certified sick leave until 23 July 2016.

b. By separating him from service on 31 May 2016, UNOPS will be denying him of the right to use his full sick leave entitlement, including any related social benefits provided under his contract and to apply for disability upon the exhaustion of that entitlement.

18. The Applicant submits that he will suffer the following irreparable harm if the Contested Decision is implemented:

a. He will be excluded from any future claim for disability.

b. Once he is separated, all entitlements would cease and will not be recouped. He will be left incapacitated with no income, medical coverage or pension. Non-renewal would exclude him from applying for a disability pension or coverage under Appendix D of the Staff Rules.

- c. This time sensitive matter may not be capable of appropriate remedy by the Tribunal should the Applicant prevail.

### **Summary of Respondent's submissions**

19. The Respondent submits that the Applicant's Motion for interim measures is not receivable because art. 10.2 of the UNDT statute prohibits the Dispute Tribunal from suspending the implementation of a contested decision in cases of appointment, promotion and termination. Relying on *Siri* 2016-UNAT-609, the Respondent contends that the exclusionary clause in art. 10.2 applies in the present matter because reversal of the underlying contested decision would result in the issuance of a new appointment.

20. The Respondent submits that the Contested Decision is lawful for the following reasons:

- a. The Applicant's post of Security Specialist was abolished together with other Security Specialist posts. It is not disputed that the abolition of these posts was lawful.

- b. The United Nations Appeals Tribunal (the Appeals Tribunal) confirmed in *Weerasooriya* 2015-UNAT-517 that administrative issuances of the United Nations Secretariat, such as ST/AI/2005/3, do not apply to the separately administered funds and programmes of the United Nations, including UNOPS, unless otherwise expressly provided for therein. ST/AI/2005/3 does not include any such provision.

- c. Neither the United Nations Staff Rules nor Regulations contain a provision to the same effect as section 3.9 of ST/AI/2005/3. On the contrary, staff rule 6.2(a) is consistent with a decision not to renew the appointment of a staff member whose post has been abolished.

21. The Respondent concedes that the matter is urgent in light of the fact that the Applicant's appointment is expiring shortly.

22. The Respondent submits that there is no irreparable harm because:

a. The Applicant has not highlighted any regulation, rule or policy that supports his argument that non-renewal of his appointment would exclude him from applying for a disability pension. On the contrary, art. 33 of the United Nations Joint Staff Pension Fund Regulations and Rules shows that the Applicant would receive the same disability benefits regardless of the date of his separation from service.

b. The Applicant's claim that non-renewal would exclude him from applying for coverage under Appendix D of the Staff Rules is erroneous. Article 11 of Appendix D specifically state that its provisions apply to "a former staff member".

c. The Applicant claims that if he is separated from service, he will no longer have medical coverage. However, the Applicant is a national of a country that has a publicly funded health system. Thus he will have the same access to health coverage as other nationals of his country.

d. The Applicant refers to loss of income but since loss of income can be compensated by an award of damages, it is not irreparable harm.

### **Considerations**

23. Under article 10.2 of the UNDT Statute and article 14.1 of the UNDT Rules of Procedure, the Dispute Tribunal may order an interim measure at any time during the proceedings, to provide temporary relief to either party, where the contested administrative decision appears to be 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.

24. The issue for determination now is whether the Contested Decision is receivable. Is this a “case of appointment” that would fall under the exclusionary rule in art. 10.2 of the UNDT Statute?

25. In reliance on *Siri*, the Respondent is urging the Tribunal to dismiss the Applicant’s motion for interim measures on the basis that a reversal of the underlying contested decision would result in the issuance of a new appointment. Thus, the exclusionary rule in art. 10.2 of the UNDT Statute would become applicable.

26. In *Siri* Order No. 306 (NBI/2015) Corr. 1 dated 30 September 2015, the Applicant filed a motion for interim measures before UNDT pursuant to art. 10.2 of the UNDT Statute and art. 14 of the UNDT Rules of procedure to suspend the decisions to separate him from service on the basis of mandatory retirement and to conduct a recruitment process in relation to his post. The Respondent argued that the matter fell under the exclusionary rule in art. 10.2 because the contested decision concerned a case of appointment. The Dispute Tribunal held that the prohibition in art. 10.2 of the UNDT Statute was not applicable because the case was not one of appointment.

27. On appeal, the Appeals Tribunal noted in *Siri* 2016-UNAT-609 that:

The Appeals Tribunal has previously found that cases of separation following non-renewal constitute a case of appointment and fall under the exclusionary clause of Article 10(2) of the UNDT Statute. In these cases, the reversal of the underlying contested decision results in the issuance of a new appointment reflecting “expressly or by reference all the terms and conditions of employment” as provided for in Staff Rule 4.1. Conversely, the rescission of a transfer<sup>4</sup> or appointment<sup>5</sup> does not constitute an “appointment” under Article 10(2) of the UNDT Statute and its reversal does not result in a new appointment.

28. The Appeals Tribunal noted that a matter “related” to an appointment is not the same as a “case of appointment” under art. 10.2 of the UNDT Statute and that Mr.



Siri was not asking for a renewal of his appointment. Rather, he was contesting the decision to separate him from service based on what he considered to be an erroneous calculation of his retirement age. The Appeals Tribunal concluded that “while necessarily linked to his appointment, his retirement age is a term of his current appointment and, as such, does not constitute “a case of appointment” under art. 10.2 of the UNDT Statute. Additionally, the Appeals Tribunal held that the decision to conduct a recruitment exercise for Mr. Siri’s position was a direct consequence of the decision to separate him from service and as such did not fall under the narrow definition of “appointment” under art. 10.2 of the UNDT Statute.

29. In the present case, the Applicant is seeking suspension of the decision to separate him from service while he is on sick leave. The Applicant does not dispute the underlying reason for his separation from service – the non-renewal of his post due to abolishment and the lack of funding. Although the Applicant’s post was abolished at the end of March 2016 his contract was exceptionally extended by UNOPS until 31 May 2016 because additional funding was identified in the programme budget.

30. Simply put, although the Applicant’s post has been abolished, he is seeking an extension/renewal of his contract until 23 July 2016 so that he can utilize his certified sick leave entitlement.

31. Unlike Mr. Siri, the Applicant in the current case is clearly asking for a renewal of his appointment, which in turn means that the reversal of the underlying contested decision would result in the issuance of a new appointment reflecting “expressly or by reference all the terms and conditions of employment” as provided for in Staff Rule 4.1<sup>1</sup>. Under the circumstances of this particular case where the Applicant is not even contesting the non-renewal or abolishment of post decisions, should the Tribunal grant his motion for interim measures, it would be going against the jurisprudence of the Appeals Tribunal that “cases of separation following non-

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<sup>1</sup> Siri 2016-UNAT-609.

renewal constitute a case of appointment and fall under the exclusionary clause of Article 10(2) of the UNDT Statute”<sup>2</sup>.

32. Being mindful of the Appeals Tribunal’s reminder in *Igbinedion* 2014-UNAT-410 that “the Dispute Tribunal should recognize, respect and abide by the Appeals Tribunal’s jurisprudence”, this Tribunal sees no reason to depart from the precedent that has been set in *Siri* 2016-UNAT-609.

### **Decision**

33. In light of the foregoing, the Tribunal holds that due to the unique circumstances of this matter the Applicant’s Motion for interim measures is not receivable. Since the Motion is not receivable, the Tribunal does not have the jurisdiction to review the elements of *prima facie* unlawfulness, urgency and irreparable harm.

### **Order**

34. The Applicant’s motion for suspension of action during the proceedings is rejected.

(Signed)

Judge Vinod Boolell

Dated this 3<sup>rd</sup> day of June 2016

Entered in the Register on this 3<sup>rd</sup> day of June 2016

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<sup>2</sup> See also *El Komy* 2013-UNAT-324; *Benchebbak* 2012-UNAT-256.

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi