



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEWLAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**DECISION ON THE APPLICANT'S
APPLICATION FOR SUSPENSION OF
ACTION**

Counsel for the Applicant:

Katya Melliush, OSLA

Counsel for the Respondent:

ALS/OHRM

Introduction

1. The Applicant holds a permanent appointment with the United Nations, and is currently deployed in Mogadishu, Somalia, as Chief, Vehicles Plant and Equipment Services for the United Nations Support Office in Somalia (UNSOS) at the P5 level.

Procedural History

2. On 30 November 2016, the Applicant filed a substantive application challenging the Respondent's decision to retire him at the age of 60 instead of 62.

3. He also filed this present Application for a stay against the impugned decision which, if implemented, will see the Applicant separated from service today.

4. The Management Evaluation Unit (MEU) had issued its decision upholding the impugned decision of the Respondent on 15 November 2016.

Submissions

5. It is the Applicant's case that the impugned decision was taken in violation of staff rules 4.1, 9.1 and 9.2 which stipulate to the effect of a letter of appointment and the actions and conditions of separation from service.

Deliberations

6. The present Application has been filed pursuant to art. 10.2 of the UNDT Statute and art.14 of the Rules of Procedure. Art.14, in relevant part, provides:

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.

7. Given the urgency of this Application, the Tribunal here makes its decision *ex parte*.

8. In making his submissions to the Tribunal, the Applicant is required to satisfy the Court that the impugned decision is *prima facie* unlawful, is urgent and will cause him/her irreparable harm if implemented. *All* three elements of the test must be satisfied before the impugned decision can be stayed.

9. A suspension of action order may appear in substance and effect to be similar to an interim order of injunction in national jurisdictions. An injunction in national jurisdictions is ordinarily a temporary order made with the purpose of providing the applicant/plaintiff some temporary relief by maintaining the status quo and thereby regulating the position between the parties to an application pending adjudication.

10. 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.¹

11. 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*.

¹ See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanide Co v Ethicon Ltd* (1975) AC396.

12. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue before the court.²

13. In this case, the Applicant has already sought a review of the impugned decision by management evaluation. This process resulted in the Respondent's decision being upheld.

14. What is before the Court is a substantive application and with it an application for *interim* relief for the Applicant. A stay, in situations such as these, where MEU has pronounced on a matter, is normally valid until the application is heard and determined on its merits.

15. Based on the Applicant's submissions, the Tribunal is satisfied that there is a *prima facie* claim of right which the Respondent must be called upon to respond.

16. The matter is clearly urgent, given that the Applicant will be separated from service of the United Nations today but for an injunction against that decision by this Tribunal.

17. The Tribunal is also persuaded by the Applicant's arguments on the irreparable harm that will be caused if the impugned decision is not stayed.

Observations

18. The Tribunal has carefully examined the Applicant's case and 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

² See also: *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

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.

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

Order

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

21. There will be accelerated hearing of the substantive application which hearing is set down for 17 January 2017 at 11am Nairobi time.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of November 2016

Entered in the Register on this 30th day of November 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi