



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ALMOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant holds a fixed-term appointment at the P-3 level. He serves at the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) as a Political Affairs Officer and is based in Bangui.
2. On 22 May 2017, the Applicant filed an application for suspension of action against the Respondent's decision to separate from service as of 31 May 2017.
3. The Respondent filed his reply to the application on 23 May 2017.
4. Subsequent to the filing of the Respondent's reply, the Applicant (who is self-represented) wrote two emails to the Registry with additional information that he wanted the Tribunal to be cognisant of.

Facts

5. The Applicant started work at MINUSCA on 26 August 2015, as an Electoral Officer.
6. On 30 June 2016, the P-3 post that the Applicant encumbered was abolished. His appointment was however extended through 31 July 2016 for administrative purposes.
7. On 26 July 2016, the Mission temporarily assigned the Applicant to a Political Affairs position. This position was for three months effective 1 August 2016.
8. The Applicant was subsequently renewed on the Political Affairs post for a further three months taking him through to 31 January 2017. This was followed by another three month extension of appointment, which went up to 30 April 2017.

9. On 2 April 2017, the Applicant was given a further one month extension through 31 May 2017.

10. On 13 May 2017, a Personnel Action notification was raised extending the Applicant's appointment to 31 May 2018.

11. On 17 May 2017, the Applicant was informed that that Personnel Action was raised in error and that the correct date for the expiry of his contract was 31 May 2017. A corrected Personnel Action was raised and the Applicant was informed as much.

12. On 18 May 2017, the Applicant received a memorandum pertaining to his separation from service on 31 May 2017.

Submissions

Applicant

13. The Applicant case is that the decision not to renew his appointment with the Mission was "discriminatory and arbitrary." The Applicant also argues that a mistaken Personnel Action does not absolve the Respondent from the contractual obligations he has undertaken.

Respondent

14. The Respondent contends that the Applicant has not met his burden of proving the elements of the tripartite test for an application for suspension of action.

Deliberations

15. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 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.

16. All three elements of the test must be satisfied before the impugned decision can be stayed.

17. The Applicant in this case seeks a temporary order to maintain the *status quo* between the parties while the impugned decision is reviewed by the Management Evaluation Unit (MEU).

18. Within the United Nations internal justice system, a suspension of action order under article 2 of the UNDT Statute and article 13 of its Rules of Procedure, can only be obtained to maintain the *status quo* until the MEU concludes its review.

19. A Tribunal's order granting suspension of action of an administrative decision cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

20. 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

21. 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*.

22. This Application must be adjudicated against the stipulated cumulative test, in that the Applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

23. 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

24. On the facts of the case before it, the Applicant has made allegations of arbitrariness and discrimination on the part of the Respondent but has provided nothing by way of evidence to substantiate those allegations.

25. The Respondent has clearly argued that following the abolition of the post which the Applicant encumbered, the Mission temporarily extended his appointment on a Political Affairs post and that the Applicant was well aware of the temporary nature of his contract as a Political Affairs Officer. The post that the Applicant has

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

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.

temporarily encumbered is currently subject to a recruitment process, and the Applicant is not a candidate in the selection exercise for the post.

26. The Applicant cannot properly rely on a mistakenly raised Personnel Action as a basis for his claim that the Respondent has contractual obligations beyond what he knew was intended for him. While it behoves the Respondent to be more careful in raising such important documents, the mistake in this case was quickly corrected.

27. Given what is available on the record, the Tribunal is not persuaded that the decision to separate the Applicant is tainted by the extraneous factors alleged.

28. Having found that the impugned decision has not been shown to be *prima facie* unlawful, and given that the test for suspension of action applications is a cumulative one, it is unnecessary for the Tribunal to proceed to assess this Application on the ground of urgency and irreparable harm.

29. The Application for Suspension of Action is **accordingly REFUSED.**

(Signed)

Judge Nkemdilim Izuako

Dated this 29th day of May 2017

Entered in the Register on this 29th day of May 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi