



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NSENGIYUMVA

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:

Adrien Meubus, ALS/OHRM

Susan Maddox, ALS/OHRM

Introduction

1. The Applicant serves as a Security Officer at the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic. He is based in Bangui.

2. On 14 June 2017, the Applicant filed the subject application of the present decision for an injunction against the Respondent's decision to separate him from service for misconduct. The Secretary-General decided that the Applicant's conduct warranted separation from service with compensation *in lieu* of notice, but without the payment of termination indemnity.

3. The Respondent filed his Reply to the application for suspension of action on 15 June 2017.

4. The Applicant was found to have misconducted himself when he engaged in disorderly conduct at the Nouvel Hotel in Bangui, Central African Republic on 16 July 2016; and, the next day, when he drove a United Nations vehicle while intoxicated, operated the vehicle in a manner that was dangerous to the public and failed to stop the vehicle when instructed by MINUSCA Security personnel.

Submissions

Applicant

5. The Applicant's case is that the decision to separate him from service was taken without a review of all the circumstances surrounding the assaults on 16 and 17 July 2016, and that past incidences formed part of the decision making process.

Respondent

6. The Respondent submits that the Application is not receivable because the decision to separate the Applicant from service was implemented on 8 June 2017. The Tribunal cannot suspend a decision which has already been implemented.

7. The Respondent also submits that in the event the Tribunal finds this application receivable, the Applicant has not met his burden in proving the three elements of the test for suspension of action.

Deliberations

8. 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.

9. 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

10. 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.

11. The Tribunal is required to adjudicate on the facts presented by the applicant 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.

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

14. The Applicant was placed on administrative leave with pay on 20 July 2016, for having assaulted a local resident, and operating a United Nations vehicle while intoxicated, disobeying the lawful command of a security officer and violating the stipulated curfew. The Applicant was asked to remain in his place of home leave for the duration of the administrative leave.

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.

15. The Applicant was subsequently presented with a charge letter on 13 February 2017. He responded to the allegation in the charge letter on four occasions between 14 and 23 February 2017. He did not provide the Tribunal with a copy of his responses to the Respondent's allegations.

16. The Tribunal surmises from the letter containing the disciplinary sanction, dated 31 May 2017, that the Applicant conceded to having engaged in the alleged conduct.

17. While the 31 May 2017 letter also makes mention of the Applicant's allegations that he was mistreated by the Chief Security Advisor, and the Cameroonian Formed Police Unit, the Applicant has not provided the Tribunal with any evidence in support of his allegations.

18. Given what is available on the record, the Tribunal is not persuaded that the decision to separate the Applicant was improperly made or tainted by the extraneous factors alleged.

19. 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.

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

(Signed)

Judge Nkemdilim Izuako

Dated this 19th day of June 2017

Entered in the Register on this 19th day of June 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi