



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/088

Order No.: 167 (NBI/2017)

Date: 4 October 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HOUENON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is a staff member at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). He was hired on a temporary appointment, at the P-4 level, to serve as a Sites Engineer/Architect in Bouar.

The Application and Procedural History

2. On 27 September 2017, the Applicant filed for a stay of the Respondent's decision to "curtail [his] appointment and separate by non-renewal."

3. The Respondent filed his reply to the application on 28 September 2017.

4. On 29 September 2017, the Tribunal issued Order No. 166 (NBI/2017) setting this matter down for an oral hearing.

5. The matter was heard on 2 October 2017. The Applicant testified, as did the Chief Human Resources Officer of MINUSCA who was called by the Respondent.

Submissions

6. It is the Applicant's case that there are serious and reasonable doubts as to the lawfulness and propriety of the impugned decision; that a stay should be granted as a matter of urgency and that the Applicant will suffer irreparable harm if the Respondent is not estopped from implementing the impugned decision.

7. The Respondent on his part contends that the impugned decision is lawful, that "any alleged urgency [was] created by the Applicant" and that implementation of the decision to separate the Applicant will not cause him irreparable harm.

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. In making his case, 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.

10. 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.¹

11. Having reviewed the parties' submissions and annexes to their respective filings, the Tribunal was not persuaded by the Respondent's submissions as to the propriety and lawfulness of the impugned decision. The Tribunal indicated in Order No. 166 (NBI/2017) that it was "particularly concerned about the way the Applicant's appointment was "renewed" and subsequently "curtailed," and that there were "questions of legality which the Respondent" must answer to.

12. The facts of the case are simple. The Applicant was given to understand – both from discussions and two documents – that his temporary appointment was extended by one year through to 30 June 2018. He continued working. His United Nations Identification (UN ID) was renewed, and reflected the date he signed up to in the Recommendation for Extension document. He asked for documentation in support of his extension, but never received anything. He received a salary at the

¹ 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.

end of July, as one normally would when a contract is extended; went on leave towards the end of August and received a salary at the end of that month too. He returned from leave in September, and shortly thereafter received a check-out notice indicating that his appointment with MINUSCA was to expire on 30 September 2017!

13. The Applicant then began inquiring into what might have happened to so drastically change the terms of the appointment he thought he had. He found that an official document on which the request for the extension of his temporary appointment was made, which he signed on 30 June 2017², and which was also signed by a Human Resources Officer, the Applicant's direct supervisor and approved by the Officer-in-Charge/Director of Mission Support on 12 July 2017, was tampered with.

14. The date for the expiry of the extended contract which was 30 June 2018 was crossed out and replaced with 30 September 2017, thus reflecting a new recommended extension period of three months rather than one year. The changes and cancellations on the document were not countersigned or initialed. In the altered document, the approval column which had been signed by the Officer-in-Charge/Director of Mission Support on 12 July 2017 was now signed by the Director of Mission Support, Mr. Milan Trojanovic³, and dated 17 July 2017.

15. The record before the Court also contains a document titled 'Loaning of Position within Mission' which indicates that the Service Delivery Unit of MINUSCA loaned a Project Management Officer's position to the Engineering Section of the Mission to cover the post and functions of a Civil Engineer for the period 1 July 2017-30 June 2018. The purpose of the loan was to "extend the appointment of the Construction Civil Engineer for the Hardwall Project currently underway."⁴ This document was signed by both the Lending Programme Manager and the borrowing Programme Manager on 9 June 2017 and also by the Chief

² Annex 3.

³ Annex 2.

⁴ Annex iv

Human Resources Officer and the Chief of Finance and Budget on 20 June 2017, and finally by the Director of Mission Support on 22 June 2017.

16. The Respondent argues that the Applicant's appointment cannot be renewed for the one year he was made to believe it was renewed for because: (a) there is no budgetary approval for the position; (b) approval of the recommendation to renew him for one year was given before the budget for 2017/2018 was received; (c) the OIC/DMS did not have the authority to approve contract renewals and extensions; and (d) there was no contract between the Applicant and the Organization because he was neither given a letter of appointment nor a Personnel Action form which expressly extended his appointment through to 30 June 2018. The Respondent also argues that any recommendation and/or approval to renew the Applicant's appointment for one year contravenes the rules governing temporary appointments and cannot therefore be valid.

17. On the issue of the Mission's budget for the 2017/2018 cycle, the CHRO who testified for the Respondent could not tell the Tribunal when the Mission received the budget which became effective on 1 July 2017. In fact, all she could say was that she had not received the budget document for 2017/2018 as of 1 July 2017. To make the Respondent's budgetary argument plausible, the Tribunal must assume that everyone who signed the Loan document committed the Organization's funds for one year, with absolutely no knowledge as to whether the funds in fact existed. These would include the witness CHRO herself, the Chief of Finance and the Director of Mission Support.

18. The budgetary argument, and the error surrounding the initial recommendation for renewal of the Applicant's appointment, could have been substantiated had the Respondent shown the Tribunal that the Mission received the Budget document for 2017/2018 at some point between 12 and 17 July 2017 when the approval already given in response to the request for the extension of the Applicant's temporary contract was altered. In other words, the Respondent needs to have shown the Tribunal that the Mission received the budget document at some point between the initial approval by the OIC/DMS and the alteration and unilateral amendment of the relevant official document by the DMS.

19. As to the Respondent's argument that the OIC/DMS has no authority to approve extensions of temporary appointments, the Tribunal notes that the document provided by the Respondent in support of this argument is one in which the current DMS accepted delegated responsibility for the "processing of transactional human resources management authorities and responsibilities" in his capacity as *Acting Chief of Mission Support* in April 2015.

20. There is nothing in that document to suggest that the authority delegated to him in 2015 in an acting capacity mirrors the authority he continues to exercise in his capacity as *Director of Mission Support*. Indeed, the Respondent's submissions on this score leaves the Tribunal wondering how effectively the Mission functions if all extensions of contracts must be signed by the DMS himself. Are all contract extensions held in abeyance every time the DMS is away from the Mission area?

21. Regarding the Respondent's argument that the "mere recommendation for an extension of the Applicant's appointment" could not extend the appointment, the Tribunal finds that on the facts of this case there existed an offer, acceptance and consideration to form a binding contract between the Organization and the Applicant. The CHRO testified that UN IDs are renewed based on a contractual term but added that the Applicant did not have a contract up till June 2018 because no Personnel Action Form was raised in that respect. This testimony was placed before the Tribunal irrespective of the fact that the Respondent's Counsel had earlier informed the Tribunal from the Bar that a Personnel Action earlier raised in that regard could not be located by the Mission.

22. The Mission had so cavalierly treated the matter of the work and livelihood of a staff member that the Applicant only came to know that he was about to be out of work two weeks before his unilaterally altered term was up! The Respondent's lone witness told the Tribunal that the Applicant being a staff member with only a temporary appointment, there was no obligation to inform him of his impending separation until two weeks to the time. The fact that the Respondent chose to vary the terms of an offer he made to the Applicant without so much as informing him is irregular, improper and at the very least *prima facie* unlawful.

23. The urgency of this matter is obvious. The Respondent's suggestion that the putative urgency of this matter is of the Applicant's own doing is both hollow and disingenuous. Whatever the Respondent's submissions on when the Personnel Action was raised, he does not dispute that the Applicant was only made aware of his "curtailed" appointment when he was served with a notice of separation on 13 September 2017.

24. Irreparable harm is generally defined as harm that is incapable of being compensated for. As there is little that cannot be monetarily compensated for, the Tribunal has previously held that the concept of irreparable harm is a little more nuanced than the question of money alone. In *Tadonki*, the court opined as follows:

a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.⁵

25. The Tribunal is satisfied that the Mission's actions will cause the Applicant harm that cannot simply be monetarily compensated for in a later, substantive application. The timelines at play on the facts of this case would place any staff member in significant harm's way personally, professionally and financially.

Observations

26. It is a matter for the Applicant and his counsel to further consider the appropriateness of approaching the Tribunal with an application on the merits and to seek a suspension of action pending its determination.

27. The system of administration of justice in this Organization is predicated upon the expectation that all parties to a dispute work with the Tribunal towards achieving the true ends of justice in which identified wrongs are righted. Parties and their counsel bear the burden therefore of placing all relevant facts, face-up, on the table and to concede on issues where appropriate.

⁵ UNDT-2009-016.

28. This burden rests more on counsel who are officers of the Tribunal and must exhibit professionalism by not deliberately misleading it. In this regard, this Tribunal appreciates the candour and professionalism of the Respondent's counsel, Ms. Chagtai, who acknowledged from the Bar of the existence of a Personnel Action Form in respect of the Applicant's extension of appointment to June 2018 which has not been traced.

Order

29. This Application for Suspension of Action is **GRANTED** pending management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 4th day of October 2017

Entered in the Register on this 4th day of October 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi