



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/104

Order No.: 197 (NBI/2017)

Date: 16 November 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HOUENON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
INTERIM MEASURES**

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.

6. On 4 October 2017, the Tribunal issued Order No. 167 (NBI/2017) granting the motion for suspension of action pending management evaluation.

7. On 10 October 2017, the Management Evaluation Unit (MEU) upheld the impugned decision. The Applicant received MEU's decision on 13 October 2017.

8. On 14 October 2017, the Applicant filed a substantive application challenging the impugned administrative decision, and, with it, a motion for interim measures.

9. For its part, the Mission had, on 13 November 2017, extended the Applicant's appointment to 30 November 2017; but went on to reverse that extension upon receipt of MEU's decision.

10. The Applicant was separated from service on 14 November 2017.

Submissions

11. 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 he will suffer irreparable harm if the Respondent is not estopped from implementing the impugned decision.

12. The Respondent on his part contends that the Tribunal has no jurisdiction to grant interim measures against a decision which has already been implemented.

Deliberations

13. This motion for interim measures is governed by art. 10.2 of the Statute and art. 14 of the Rules of Procedure of the Tribunal. Art. 14 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 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.

14. 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.

15. 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 is for him to show that there is a triable issue before the court.¹

16. 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.

17. 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, would ordinarily be valid until the application is heard and determined on its merits.

18. An order for interim measures cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

19. Therefore, before entering into a discussion on whether the Applicant has met the test for the injunctive relief that is sought, the Tribunal must determine whether or not the impugned decision has been implemented.

20. In the circumstances of the present case, the Tribunal made extensive findings in Order No. 167 (NBI/2017) on the putative unlawfulness of the Respondent's decision to separate the applicant from service. Specifically, the Tribunal found

17. 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, did so 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. [...]

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.

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. [...]

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.

21. The Tribunal therefore finds itself in the uncomfortable situation of having to allow a *prima facie* unlawful act to stand simply because the Respondent has proceeded to implement the decision; in other words, because the Applicant has already been separated.

22. On the face of it, the Respondent appears to have acted unlawfully. There is nothing on the record to cause the Tribunal to revisit the *prima facie* findings it made in Order No. 167 (NBI/2017). However, since the decision has been implemented, the Tribunal's hands are effectively tied.

23. The Tribunal has previously, and gravely, observed, an unlawful act will subsist because of the limitations on the court's powers for a grant of injunction. The difficulties arising from this limitation is obvious and needs little explanation.

24. In view of the above observations this Tribunal strongly 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 Statute and 15.1 of the Rules of Procedure, strongly urges the parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

25. The Tribunal holds as follows:

- a) The Parties are **DIRECTED** to jointly advise the Registry by **15 December 2017** on the progress of their joint consultations **OR** if a formal order for referral to mediation is required.

- b) The motion for interim measures is **DISMISSED**.

(Signed)

Judge Nkemdilim Izuako

Dated this 16th day of November 2017

Entered in the Register on this 16th day of November 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi