



**Before:** Judge Agnieszka Klonowiecka-Milart  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

OLUGBEMI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PURSUANT  
TO ARTICLE 2.2 OF THE UNDT  
STATUTE**

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**Counsel for the Applicant:**  
Robbie Leighton, OSLA

**Counsel for the Respondent:**  
Nicole Wynn, ALS/OHRM  
Nusrat Chagtai, ALS/OHRM

## **Introduction**

1. The Applicant is an Administrative Officer in the Public Information Section (PIS) at the United Nations Mission in Liberia (UNMIL).
2. On 27 November 2017, he requested management evaluation and filed an application for suspension of action (SOA), pending management evaluation, of the Respondent's decision not to renew his appointment beyond 30 October 2017 (the contested decision).<sup>1</sup>
3. The Respondent filed a reply on 29 November 2017.

## **Facts**

4. The Applicant joined the United Nations in 2009 and currently works as a P-3 Administrative Officer in UNMIL/PIS. He is a staff representative and head of the United Nations Field Service Union (UNFSU) at his duty station.
5. On 23 December 2016, the Security Council adopted Resolution S/RES/2333 (2016) extending UNMIL's mandate for a final period until 30 March 2018 and requesting the Secretary-General to complete the withdrawal of all uniformed and civilian components by 30 April 2018.<sup>2</sup>
6. On 21 March 2017, the Secretary-General submitted to the General Assembly his report on the budget for UNMIL for the period 1 July 2017 to 30 June 2018 proposing a budget in the sum of USD 122,111,200.<sup>3</sup> With respect to the Communication/PIS, where the Applicant worked, it proposed:

56. In accordance with Security Council resolution 2333 (2016), the current staffing establishment of 30 posts and positions is proposed to be decreased by one P-5 post as at 1 July 2017. By the end of March

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<sup>1</sup> This is a typographical error at para. V(6) of the application as the Notice of non-extension of fixed term appointment dated 20 October 2017 (annex 9 to the application) and the Applicant's submissions indicate that the non-renewal is to be effective 30 November 2017.

<sup>2</sup> At para. 10.

<sup>3</sup> A/71/847.

2018, 26 posts and positions of the remaining 29 will be abolished. One National Professional Officer post will be abolished by the end of April 2018, and one P-4 post and one national General Service post will remain in the Mission until 30 June 2018.

7. On 28 April 2017, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) issued its report on the budget proposed in the Secretary-General's Report and reduced it to USD 114,347,900.<sup>4</sup> The Fifth Committee made further reductions on 29 June 2017.<sup>5</sup>

8. In the early part of 2017, as the Mission prepared for draw down, the Applicant identified a number of recruitment practices being adopted by senior management that he considered were unlawful. He shared his concerns with the President/UNFSU and, on 10 April 2017, the President/UNFSU sent a letter to the Director of the Field Personnel Division (FPD) detailing concerns regarding irregular recruiting practices.<sup>6</sup>

9. The letter drew attention to specific posts against which the Applicant understood irregular recruitment processes had taken place. The Applicant referenced Post No. 50170 a P-4 Spokesperson post which became vacant in November 2016. Recruitment against this post was initiated and finalized but the post offer was withdrawn. Post No. 50232 was referenced, this was a P-3 Administrative Officer post in the office of the Director of Mission Support (DMS). It was provided to PIS and a recruitment process initiated and finalized which would have seen the recruitment of a member of the DMS's family. This individual declined the offered P-3 post but in January 2017 was recruited to the P-4 Spokesperson post No, 50170 which had previously been offered to another staff member only for that offer to be withdrawn.

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<sup>4</sup> A/71/836/Add. 16.

<sup>5</sup> A/71/951.

<sup>6</sup> Application – annex 2.

10. The issue was taken up again during an UNFSU Executive Mission to UNMIL from 28 May - 3 June 2017.<sup>7</sup>

11. On 17 August 2017, the Director/FPD responded to the letter from the President/UNFSU indicating the intention to review the recruitments referred to in the latter's letter to ensure that procedures were followed. He also explained the reductions in UNMIL's budget and the need for a drawdown in accordance with Resolution 2333 (2016).<sup>8</sup>

12. The Applicant raised a number of concerns with mission management on 23 August 2017<sup>9</sup> which were responded to on 9 September 2017<sup>10</sup>.

13. On 5 September 2017, UNMIL/DMS wrote to all UNMIL personnel explaining the reductions in UNMIL's budget and the need to immediately implement a drawdown of personnel.<sup>11</sup> The DMS further informed UNMIL personnel that all expiring contracts for international and national staff would be extended only until 31 October 2017 and that managers were completing a workforce post plan.

14. On 18 September 2017, the Applicant, in his capacity as Chairperson of FSU, wrote to the Senior Administrative Officer indicating that the Union would withdraw from the comparative review process (CRP)<sup>12</sup>, this email was responded to on 21 September 2017.<sup>13</sup>

15. On 20 October 2017, the Applicant was informed that his appointment would not be extended beyond 30 November 2017.<sup>14</sup>

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<sup>7</sup> Application – annex 3.

<sup>8</sup> Application – annex 4.

<sup>9</sup> Application – annex 5.

<sup>10</sup> Application – annex 6.

<sup>11</sup> Reply – annex 1.

<sup>12</sup> Application – annex 7.

<sup>13</sup> Application – annex 8.

<sup>14</sup> Application – annex 9.

## **Applicant's case**

### ***Prima facie unlawfulness***

16. The Applicant acknowledges that the Administration has discretion to manage its resources and the Mission was required to cut posts over and above what had been envisaged in their original budget document. Still, such decisions regarding restructuring must be taken for legitimate reasons based on operational requirements.

17. Unlawful motivation for an administrative decision may be gleaned through inference from the primary facts. The specific decision to bring forward the end date for his post from end of March 2018 to end of November 2017 was not taken for operational reasons. Instead, it was a decision motivated by malice on the part of UNMIL's senior management as a result of the Applicant having reported, via the President/UNFSU, potential misconduct in the form of recruitment irregularities and having been part of the FSU's decision to withdraw from the CRP process.

18. The Applicant would have been easily identifiable as the source of the information provided to the President/UNFSU and reported to the Director/FPD. The recruitment irregularities that relate to the specific posts identified in the letter to the Director/FPD represent potential misconduct. Thus, the potential consequences of the Applicant's actions for UNMIL senior management are profound. Added to this, FSU's withdrawal from the CRB process created a further obstacle for the mission management in conducting the current liquidation. The evidence, therefore, clearly demonstrates a potential unlawful motive for the decision to bring forward the Applicant's non-renewal.

19. The head of the Applicant's section, who might have been expected to provide input to inform the decision regarding the Applicant's separation, is the P-4 spokesperson occupying post #50170. The individual is a member of the DMS's family. Thus, at least two of the decision makers regarding bringing forward the Applicant's separation were implicated in the allegations forwarded to the

Director/FPD. This demonstrates an overlap between the unlawful motive and the action taken.

20. The Mission's primary position was that the Applicant's post would be required until the end of March 2018. The Budgetary Assumptions document confirms that UNMIL's radio capabilities, the main source of work for the Applicant's section, would be transferred to an independent entity as of 28 February 2018. Thus, nothing in the Budgetary Assumptions suggests a change in the needs of PIS as of the end of November 2017. The work of the section will continue relatively unchanged until that date. The assumptions remain consistent with his appointment continuing until the end of March 2018.

21. The Applicant is the only staff member in PIS whose contract finishes at the end of November 2017. This confirms that the Budgetary Assumptions do not suggest a change in the work of the section as of the end of November 2017 consistent with bringing forward his date of departure. No operational reason exists to treat the Applicant differently from other PIS staff.

22. The Applicant is an Administrative Officer. Any suggestion that administrative tasks were significantly reduced as of the end of November 2017 is contradicted by the decision to extend an Administrative Assistant beyond what had been planned in the original budget document. Annex 12, line 65 refers to an FS-5 administrative assistant post scheduled in the budget to be cut by January 2017 but now extended until the end of March 2018.

23. In general terms, the Budget Assumptions indicate the need for support staff to remain at the Mission longer than substantive staff. For instance, it indicates that all substantive staff will depart by 31 March 2018 while Management Support Division staff remain after the close of substantive activities.

24. The Applicant contends that his functions relate to support rather than substantive staff. The Applicant does not seek to suggest that this means that his appointment should be extended beyond the end of 31 March 2018. However,

accepting that the Budget Assumptions broadly indicate support staff are required longer than substantive staff, the decision to separate the only support staff member in PIS prior to either separation of substantive staff or cessation of substantive tasks, cannot be in the operational interests.

25. It is the Applicant's submission that the run up to liquidation of PIS will increase the requirement for the functions of his Administrative Officer role.

26. The Applicant does not consider that the discrepancy between operational requirements and staffing decisions is limited to the decision regarding his post. In this regard he notes that while the staffing table indicates that the SRSG will depart as of 31 March 2018, the close protection officer assigned to protect him is unaccountably to remain in contract until 30 June 2018, long after the Mission closes. The decision to maintain this staff member does not impact directly on the Applicant's contractual situation. It, however, can demonstrate that decisions regarding extension of appointment were often taken not in conformity with operational requirements and makes it more likely that the decision to bring forward the Applicant's non-renewal was not taken for operational reasons.

***Urgency***

27. Without the intervention of the Tribunal, the Applicant will be separated from service on Thursday, 30 November 2017. The notice provided to the Applicant on 20 October 2017 meant that even if he had sought management evaluation immediately upon receipt, a suspension would, nonetheless, have been required given the 45-day deadline for management evaluation.

28. Since receiving notice, the Applicant has made serious attempts to resolve the matter informally with the assistance of the Office of the Ombudsman. When these were not successful he took prompt action to protect his rights through the formal system. These efforts were slightly delayed as the Applicant was unwell last week.

29. In the circumstances, the Applicant requests that an interim suspension be ordered to ensure that he is not separated prior to the Tribunal ruling on this SOA application and that the urgency in this case cannot be described as self-created.

***Irreparable harm***

30. It is settled law that monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career development associated with the non-renewal of a fixed-term contract.

31. Loss of United Nations employment is not merely viewed in terms of financial loss but also in terms of the loss of career opportunities.

**Respondent's case**

***Receivability***

32. The Applicant served as a member of the CRP who reviewed every decision regarding the abolition of posts as part of the mission downsizing. In that capacity, on 16 September 2017, he reviewed and approved by his signature, the non-renewal of his appointment as of 30 November 2017.

33. As such, contrary to the application, the Applicant became aware of the decision not to renew his appointment on 16 September 2017, but did not seek management evaluation until 27 November 2017, more than sixty days later. The Dispute Tribunal lacks jurisdiction to hear an appeal where the applicant has not timely sought management evaluation and may not waive the timelines for management evaluation. The application should be dismissed.

***Prima facie unlawfulness***

34. The decision not to renew the Applicant's appointment was due to the mandated closure of UNMIL to be effected no later than 30 March 2018.



35. Contrary to the Applicant's contention, the Mission was not required to retain him through 30 March 2018 and the Secretary-General's report does not state such an intent. The Secretary-General's report proposed that all but one P-5 and two locally recruited posts were to be abolished by 30 March 2018, not on 30 March 2018. The report does not state that the posts were to be retained up until 30 March 2018.

36. Even if the report had expressed a desire or request to retain staff until 30 March 2018, the proposed budget report to the General Assembly could not be construed as an express promise to the Applicant.

37. Notwithstanding the Secretary-General's proposal, the General Assembly significantly cut the Secretary-General's proposed budget. The 5 September 2017 memorandum from the DMS explained that in order to achieve the necessary drawdown in personnel to close the mission, expiring contracts for international and national staff would be extended only until 31 October 2017. The Applicant's appointment was extended one month longer until 30 November 2017 to meet operational needs. There was no express or other promise to the Applicant to extend the Applicant's appointment until 30 March 2018.

38. The Applicant has not adduced any evidence that the contested decision was due to any other reason than the mandated closure of the Mission. He has not met his burden of proving that the contested decision was based on improper motives. The Applicant's claims are purely speculative. To the contrary, the evidence shows that UNMIL treated the Applicant in a fair and transparent manner. His appointment was extended until 30 November 2017 notwithstanding UNMIL's decision to not extend any contracts beyond 31 October 2017.

39. The decision to retain the other P-3 international staff member beyond 30 November 2017 also does not show improper motives. As the Applicant acknowledged in his CRP evaluation, the functions of the post he encumbered were unique and not comparable to the other P-3 position.

40. As of 8 September 2017, the UNMIL Chief, Communication/PIS determined to extend the P-3 Radio Producer for a longer period given the General Assembly's instruction to continue communication through UNMIL Radio until the end of the Mission's mandate.

41. Furthermore, UNMIL has made good faith efforts to reassign the Applicant. As a result of these efforts, the United Nations Support Office in Somalia (UNSOS) has expressed interest in recruiting the Applicant. These good faith efforts to assist the Applicant to continue his employment with the Organization belie his allegations of improper motive. The contested decision was lawful.

***Urgency***

42. The Applicant has known since 16 September 2017 that his fixed-term appointment would not be extended beyond 30 November 2017. The Applicant has also been represented by Counsel at least since 7 November 2017. Nevertheless, he waited until three days before the expiration of his appointment to seek management evaluation and suspension of the implementation of the contested decision. Any alleged urgency has been created by the Applicant. Self-created urgency does not satisfy the requirements for suspension of an administrative decision.

***Irreparable harm***

43. The Applicant has not established irreparable harm.

44. The gravamen of the Applicant's complaint is that he should be retained until 30 March 2018. Even so, any harm the Applicant may suffer from the contested decision could be addressed with a monetary award. In this case, there is not an issue of loss of career opportunities as the Applicant concedes that due to the closure of the Mission, his appointment would have ended on 30 March 201[8].

45. He also has not identified any opportunities he would lose if the contested decision is not suspended. Any harm the Applicant might suffer can be adequately compensated through a monetary award.

## **Considerations**

### ***Receivability***

46. It is the Respondent's contention that the Applicant became aware of the decision not to renew his appointment on 16 September 2017, but did not seek management evaluation until 27 November 2017, more than 60 days later. On the basis of the documents attached to the reply, the Tribunal is not able to evaluate whether the table with the Applicant's signature affixed in one of the cells represents his acknowledgment of the non-extension of his appointment. On the face of it, the CRP's role is to make recommendations and not to take decisions. Without prejudice to a possibility of entering a different finding in relation to any future action before this Tribunal supported with better particulars, this Tribunal is not persuaded that the non-renewal decision was notified to the Applicant on 16 September 2017 as opposed to the 20 October 2017 communication.

### ***Applicant's request for an interim order***

47. In *Villamorán* 2011-UNAT-160, UNAT held,

43. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

48. According to *Villamoran*, thus an application for an interim SOA order requires the state of increased urgency which has not been created by the applicant. In determining whether to grant an interim SOA for five days in that case, UNAT held that the UNDT should explicitly address the issue of whether the Applicant acted diligently:

The Secretary-General contends that “[t]he last minute submission of an application for a suspension of action does not provide a legally sustainable basis to grant such a suspension, as was the approach of the Dispute Tribunal in the present case”. While we agree that the UNDT should have explicitly addressed this matter, a review of the record reveals that the decision to impose a break in service following the expiration of Villamoran’s fixed-term appointment was notified to her only on 23 June 2011. She made her request for management evaluation the same day and filed her request for suspension one week later, on 1 July 2011. The UNDT Registry informed her that she had used the wrong form and Villamoran refiled her submission, using the correct form, on 5 July 2011, two days prior to the date the decision would be implemented. In light of the foregoing, we do not find that the urgency was self-created.<sup>15</sup>

49. In the present case, the Applicant argues that that the urgency in his case is not self-created because, since receiving the notice of non-renewal on 20 October 2017, he “has made serious attempts to resolve the matter informally with the assistance of the office of the Ombudsman. When these were not successful he took prompt action to protect his rights through the formal system. These efforts were slightly delayed as the Applicant was unwell last week.”

50. The Tribunal considers that efforts to resolve the dispute informally through the Ombudsman’s office do not bar an action before the UNDT, in particular where the issue concerns an SOA. In *Jitsamruay* UNDT/2011/206, it was held at para. 25 that,

[t]he Dispute Tribunal has held in several instances that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), *Lorand* Order No. 93

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<sup>15</sup>*Ibid.*, at para. 44.

(GVA/2010), *Yisma* Order No. 64 (NY/2011), *A-Ali et al.* Order No. 220 (NY/2011), as well as *Dougherty* UNDT/2011/133). The Tribunal has also held in *Sahel* UNDT/2011/023 and *Patterson* UNDT/2011/091 that informal attempts at settlement and mediation, if any, do not absolve an applicant from acting timeously.

51. In light of the foregoing jurisprudence, the Applicant's arguments that urgency in this case is not self-created because he was engaged at informal attempts at mediation is not sustainable. His case is distinguishable from that of the applicant in *Villamorán* who, faced with a 14-day notice, acted diligently and timeously in pursuing her rights. In the present case, the Applicant had over 40 days to undertake legal actions as required, including contingency for an eventuality that he may become "unwell". The Tribunal finds and holds that the facts of the present case do not justify an interim SOA order as pleaded by the Applicant.

52. Such order could be issued at the request of the Respondent, should he wish to have more time to articulate his position. No such request has been made.

53. The Tribunal will therefore consider the case based on the material available to it.

### ***The SOA application***

54. Applications for suspension of action are governed by art. 2.2 of the Statute and art. 13 of the Dispute Tribunal's Rules of Procedure. In accordance with art. 2.2, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

55. 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 an applicant to show that there is a judiciable issue before the court.<sup>16</sup>

### ***Prima facie unlawfulness***

56. The Tribunal appreciates that downsizing of a mission is obviously a difficult exercise where unpopular decisions must be made under time pressure and using prognosis and estimates for determining priorities in staffing needs, which, no matter what efforts are made to devise objective criteria, is not an exact science. It is also an extremely difficult and stressful period for the affected staff. It is not unusual that this climate breeds controversy, suspicions and allegations of breaching the rules, unfairness and cronyism from disgruntled downsized employees. It also holds true, however, that the context of downsizing creates both motives and *de facto* opportunity for favoritism, which may be hidden under the guise of legitimate staff reduction.<sup>17</sup> The Tribunal, therefore, has to determine what constitutes a *prima facie* substantiation of unlawfulness of a separation decision, taking into account that demonstrating unlawful motive is always a challenge, even more so in the turbulent context of downsizing. The Tribunal considers that, the relevant showing for the purpose of the SOA must be at minimum on a “reasons to believe” level.

57. The Applicant is making serious allegations that the setting of his separation date was motivated by retaliation for his whistle-blowing activity and disagreements with the Mission Administration. In this regard, it is the Tribunal’s opinion that disagreements in the workplace are common and do not *per se* prove unlawful motive and that existence of a “potential unlawful motive” as the Applicant alleges, on the part of the Administration does not suffice to establish *prima facie* unlawfulness. Rather, what is necessary to be shown, in order to overcome the presumption of

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<sup>16</sup> See *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 and *Wang* UNDT/2012/080 at para. 18.

<sup>17</sup> See for example in *Chama* Order Nos. 347 (NBI/2015) and 348 (NBI/2015).

regularity of the impugned decision, is a probability that the impugned decision was taken because of an unlawful motive as opposed to lawful ones.

58. With this in view, the Tribunal observes that, while the Respondent claims that the Applicant did not discharge the burden of proving the unlawful motive, he did not rebut the following assertions by the Applicant:

a. The Applicant had reported, via the President/UNFSU, recruitment irregularities forming potential misconduct. In this connection, the Applicant would have been easily identifiable as the source of the information provided to the President/UNFSU and reported to the Director/FPD.

b. The Applicant as Chairperson of FSU criticized the comparative review process in the period August-September 2017.

c. The Applicant's animated FSU withdrawal from the CRB process created a further obstacle for the Mission management in conducting the current liquidation.

d. The head of the Applicant's section, who might have been expected to provide input to inform the decision regarding the Applicant's separation, is a member of the DMS's family and that two of the decision makers regarding bringing forward the Applicant's separation were implicated in the allegations forwarded to the Director/FPD.

e. Nothing in the Budgetary Assumptions suggests a change in the needs of PIS as of the end of November 2017. The work of the section will continue relatively unchanged until that date.

f. The Applicant is the only staff member in PIS whose contract finishes at the end of November 2017.

g. The Applicant is an Administrative Officer. Any suggestion that administrative tasks were significantly reduced as of the end of November

2017 is contradicted by the decision to extend an Administrative Assistant beyond what had been planned in the original budget document. Further, the Administrative Assistant post, scheduled in the budget to be cut by January 2017, was now extended until the end of March 2018

59. Moreover, the Tribunal notes that the Respondent is not quite accurate in presenting the content of the memorandum of 5 September 2017 from the DMS. Applying the rules set out in this memorandum to the information at hand, the Applicant would have fallen in the category of “unique” staff in his Section. Refusal to approve his extension beyond 31 October 2017 would need to be justified by the redundancy of functionality of his post. The Respondent does not address the fact that the functions fulfilled by the Applicant, that is, administrative support, appear to have been removed from him and vested in an Administrative Assistant.

60. Taking the aforesaid in consideration, the Tribunal finds that there are reasons to believe that the impugned decision was motivated by improper motives, that is, to effectively silence the Applicant in his criticism of how the downsizing was being conducted. This motive would have been improper given the freedom of expression as a United Nations value, given that in expressing his criticism the Applicant does not seem to have violated procedures established by the staff rules, especially in his role as the Chairperson of the FSU, and given the protection that the Organization affords to whistle-blowers.

61. Whereas the Applicant’s assertions may not stand a deeper scrutiny as well as the Respondent may have rational explanations for separating the Applicant concretely at the date set, however, for the purpose of the present application the impugned decision is unlawful.

***Urgency***

62. Urgency objectively results from the fact that the Applicant’s appointment was set to expire by 30 November 2017, before the due date for the management evaluation.



***Irreparable harm***

63. The Tribunal agrees with the Applicant that a loss of United Nations employment is not merely viewed in terms of financial loss but also in terms of the loss of career continuity and other opportunities.

**IT IS ACCORDINGLY ORDERED**

64. The application for suspension of action is granted and the implementation of the contested decision is suspended pending management evaluation.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 30<sup>th</sup> day of November 2017

Entered in the Register on this 30<sup>th</sup> day of November 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi