



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

RUBVUTA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for the Applicant:**  
Self-represented

**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 is currently serving on a fixed-term appointment at the P-4 level as a Special Assistant, Political Affairs in Bangui.

## **Facts**

2. The Applicant joined MINUSCA in November 2015 as a Special Assistant, Political Affairs. In his first performance evaluation covering the period from 10 November 2015 to 31 March 2016, his overall performance was rated as “unsatisfactory”. In his second performance evaluation covering the period from 1 April 2016 to 31 March 2017, his overall performance was rated as “partially meets expectations”.

3. In June 2017, the Applicant submitted a formal rebuttal contesting the rating of his 2016-2017 performance evaluation. The rebuttal panel reviewed his case and concluded in its report dated 26 October 2017, that the rating of “partially meets expectations” should be maintained.

4. By memorandum dated 14 November 2017, the Applicant was informed of the decision not to renew his appointment beyond its expiry date of 31 December 2017 based on his unsatisfactory performance.

5. On 17 November 2017, the Applicant filed a request for management evaluation of the decision to separate him from service effective 31 December 2017. On 4 December 2017, he amended his initial request for management evaluation indicating, as the contested decision, the non-renewal of his appointment beyond 31 December 2017.

6. On 27 December 2017, the Applicant filed the current application seeking suspension of the decision not to renew his contract beyond 31 December 2017.

7. The Respondent filed his reply to the application on 28 December 2017.

**Parties' contentions**

8. The Applicant's primary contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The contested decision violates the Staff Rules and his conditions of employment, including the established procedure to evaluate his performance. The non-renewal of his appointment amounts to a "constructive termination", considering the way in which he was supervised and managed over the last two years.

*Urgency*

b. The Applicant's appointment will expire on 31 December 2017.

*Irreparable damage*

c. The non-renewal of his appointment would cause irreparable damage to his career. If separated, he may not be reinstated later.

**Respondent's contentions**

9. The Respondent's primary contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The Applicant has not demonstrated that the contested decision is *prima facie* unlawful. The Applicant had no right to have his appointment renewed beyond 31 December 2017. The Applicant's appointment is not being renewed due to performance shortcomings identified during the performance cycles for 2015-2016 and 2016-2017, including the findings of the rebuttal panel. Furthermore, the Applicant has adduced no evidence to prove that the non-renewal decision was arbitrary or motivated by improper purposes.

*Urgency*

b. The application is not urgent. The Applicant has known since at least 14 November 2017 that his appointment would not be extended beyond 31 December 2017. Yet, the Applicant waited until four days before the expiration of his appointment to seek suspension of the implementation of the contested decision. Any alleged urgency has been created by the Applicant.

*Irreparable damage*

c. The Applicant has not established irreparable harm. His separation presents no more harm to him than the eventual separation to any MINUSCA staff member whose contract is due to expire. Moreover, any harm the Applicant might suffer can be compensated through a monetary award.

**Considerations**

10. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Dispute Tribunal may suspend the implementation of an administrative decision during the pendency of the management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. These are cumulative conditions. Therefore, the impugned decision can be suspended only if all three requirements are met (e.g., *Hepworth* UNDT/2009/003).

*Prima facie unlawfulness*

11. The Applicant submits that the non-renewal of his appointment violates the Staff Rules and his conditions of employment, including the established procedure to evaluate his performance. However, he does not indicate which Staff Rules have been violated or how the procedure to evaluate his performance had not been followed.

12. The evidence shows that the decision not to renew the Applicant's appointment was based on his unsatisfactory performance rating for two

consecutive performance periods. The Applicant's overall performance was rated "unsatisfactory" during the 2015/2016 cycle and his overall performance was rated as "partially meets expectations" during the 2016/2017 cycle. While it seems that the Applicant did not contest his 2015/2016 performance evaluation, he filed a formal rebuttal contesting his 2016/2017 performance evaluation. The rebuttal panel reviewed his claim and concluded that his 2016/2017 rating of "partially meets expectations" should be maintained.

13. Section 10.3 of ST/AI/2010/5 provides, *inter alia*, that if the performance shortcoming was not rectified following the remedial actions indicated in section 10.1, a number of administrative actions may ensue, including the non-renewal of an appointment. In this regard, the Tribunal has taken note of the unsatisfactory ratings in the Applicant's 2015-2016 and 2016-2017 performance appraisals and of the outcome of the rebuttal process. Consequently, the Administration's decision not to renew his appointment beyond its expiry date of 31 December 2017 based on the Applicant's unsatisfactory performance is not *prima facie* unlawful.

14. As to the contentions suggesting extraneous factors, suffice it to say that the burden of proving improper motivation rests with the Applicant (*Frechon* 2011-UNAT-132, *Ahmed* 2011-UNAT-153). The Applicant adduces no tangible evidence thereof, and the mere claim that the non-renewal of his appointment amounts to a "constructive termination", considering the way in which he was supervised and managed over the last two years, falls short of meeting this burden.

15. Based on the evidence before it, the Tribunal finds that it is not established that the non-renewal of the Applicant's appointment would be *prima facie* unlawful.

#### *Urgency*

16. This Tribunal has ruled 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 (GVA/2010), *Woinowsky-Krieger* No. 59 (GVA/2010), *Yisma* Order No. 64 (NY/2011), *A-Ali et al.* Order No. 220 (NY/2011), *Suliqi* UNDT/2011/120, *Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206, *Maloka Mpacko* UNDT/2012/081, *Majoul-Hunter* UNDT/2012/117, *Longone* No. 27 (GVA/2013), *Terragnolo* Order No. 96 (GVA/2013)).

17. The Applicant indicates in his application that he was informed of the upcoming non-renewal of his appointment on 17 November 2017 when he received the memorandum dated 14 November 2017. On 17 November 2017, the Applicant filed a request for management evaluation of the decision to separate him from service effective 31 December 2017 and on 4 December 2017, he amended his initial request for management evaluation indicating, as the contested decision, the non-renewal of his appointment beyond 31 December 2017. Yet, although he was aware of the non-renewal of his appointment more than a month in advance of his contract's expiry date, he did not file his application for suspension of action before the Tribunal until 27 December 2017, that is over five weeks after he was informed of the decision, and merely two working days before its implementation date.

18. The Applicant provides no explanation for failing to take action earlier and simply indicates that his contract would be terminated in the "next few days". The Tribunal considers that the urgency in this case was self-created and, consequently, the particular urgency requirement is not fulfilled.

19. Having found that two of the statutory requirements for a suspension of action are not met, it is unnecessary to examine the third one as the application cannot be granted.

**Conclusion**

20. In view of the foregoing, the application for suspension of action is rejected.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 29<sup>th</sup> day of December 2017

Entered in the Register on this 29<sup>th</sup> day of December 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi