



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/065

Order No.: 102 (NBI/2018)

Date: 26 June 2018

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NANGWANA NDONDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION
PURSUANT TO ARTICLE 13 OF THE
UNDT RULES OF PROCEDURE**

Counsel for the Applicant:
Julia Kyung Min Lee, OSLA

Counsel for the Respondent:
ALS/OHRM

Introduction

1. The Applicant is a Disarmament, Demobilisation and Reintegration Assistant at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). He serves on a fixed-term appointment at the G5 level, and is based in Goma.

The application

2. On 22 June 2018, the Applicant filed an application to suspend the Respondent's decision to separate him from service with MONUSCO when his appointment expires on 30 June 2018.

Submissions

3. It is the Applicant's case that the decision to terminate his services with the Mission is unlawful. The Mission informed him of his imminent separation on 31 May 2018. The letter to the Applicant stated then that the decision is based on a comparative review process that has been finalised and in which he was amongst those identified for retrenchment. The Applicant sought access to the results of the comparative review exercise on 13 June and has been informed that the results of the review process were being reviewed by the Field Personnel Division and therefore not yet finalised for purposes of disclosure to concerned staff members.

Considerations

4. Applications for suspension of action are governed by art. 2 of the UNDT Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 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.
5. While the Tribunal is under a duty to transmit a copy of the suspension of action application to the Respondent, there is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to wait for the Respondent's response before the applicant's request is considered. With or without the Respondent's reply, the Tribunal must rule on an art. 13 application within five working days.
6. Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for suspending, in appropriate cases, an administrative decision, which may have been wrongly made, so as to give the Management Evaluation Unit sufficient time to consider the matter and to advise management. The process itself should not become unduly complex, time-consuming and costly for the United Nations or its staff members.
7. The Tribunal adopts the position taken in *Wilson*¹:

[A]pplications for suspension of action have to be dealt with on an urgent basis and the decision should, in most cases, be in summary form. There is no requirement to provide, and the parties should not expect to be provided with, an elaborately reasoned decision either on the facts or the law. To do so would defeat the underlying purpose of a speedy and cost-effective mechanism. Moreover, the time, effort and costs thereby saved by all those involved in the formal system of internal justice could be utilised to facilitate the disposal of other cases.
8. The impugned decision must be shown to be *prima facie* unlawful, that the matter must be particularly urgently and implementation of the decision would

¹ Order No. 327 (NY/2014).

cause the applicant irreparable harm. All three elements must be satisfied for the Court to grant the injunction being sought, as the test is a cumulative one.

9. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he/she has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.²

***Prima Facie* Unlawfulness**

10. At this stage, the Applicant need only show *prima facie* unlawfulness. The presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process, and consideration of irrelevant material or extraneous factors.³ The Applicant bears the burden of showing such irregularity in the selection exercise that creates doubt as to the lawfulness of the process.

11. Put another way, does it appear to the Tribunal that, unless it is satisfactorily rebutted by evidence, the claim of unlawfulness will succeed?⁴

12. On the facts before it, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness. The comparative review process through which the Applicant was identified for retrenchment was clearly not finalised at the time the Applicant was served with notice of his imminent retrenchment and separation from service.

Urgency

13. The urgency of this application is obvious given that the Applicant's contract of employment with the Mission ends on 30 June 2018.

² See for example Order No. UNDT/NBI/O/2010/017 *Omondi*; Order No. 494 (NBI/2016) *Newland*.

³ *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

⁴ *Wilson* Order No. 327 (NY/2014).

Irreparable Harm

14. Irreparable harm is generally defined as harm that cannot be compensated for.

15. As there is little that cannot be monetarily compensated for, the Tribunal has previously held that the concept is a little more nuanced than the question of money alone. In *Tadonki*, the court held 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

16. In the circumstances presented by the Applicant in this case, the Tribunal finds that the requirement of irreparable damage is satisfied.

ORDER

17. The application for suspension of action is **GRANTED** pending management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of June 2018

Entered in the Register on this 26th day of June 2018

(Signed)

Eric Muli, Legal Officer for
Abena Kwakye-Berko, Registrar, Nairobi

⁵ UNDT-2009-016.