



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/073

Order No.: 110 (NBI/2018)

Date: 23 July 2018

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
UN-HABITAT

The Application and Procedural History

1. The Applicant is the Director of the Management and Operations Division of UN-Habitat. He serves at the D2 level and is based in Nairobi.

2. On 20 July 2018, after hours at the United Nations Dispute Tribunal in Nairobi, the Registry received the subject application of the present Order, seeking an injunction against UN-Habitat's decision to withdraw the management and operational functions currently held by the Applicant, transfer those functions to two other staff members, and reassign the Applicant as "Advisor" on a temporary post, at his current level, for which classification is being sought but for which funding is insecure beyond January 2019.

Deliberations

3. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

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 on-going 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 Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

4. Adopting the position it took most recently in *Kalume Matala*, the Tribunal is adjudicating on this application for suspension of action without waiting for a response from the Respondent.¹

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. Even 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, 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 notes with approval the reasoning in *Wilson*² that suspension of action applications must be dealt with urgently and summarily because to embark upon a fully reasoned decision would defeat the purpose of a speedy and cost-effective mechanism.

8. What is required is that the impugned decision must be shown to be prima facie unlawful, that the matter must be particularly urgently and implementation of the decision would cause the applicant irreparable harm. All three elements must be

¹ See Order No.103 (NBI/2018).

² Order No. 327 (NY/2014).

satisfied for the Court to grant the injunction being sought, as the test is a cumulative one.

9. The application can only succeed where an Applicant can establish a *prima facie* case on a claim of right, or where he/she can show that *prima facie*, his/her case 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.³

***Prima Facie* Unlawfulness**

10. At this stage, the Applicant need only show *prima facie* unlawfulness. The legal 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.⁴ The Applicant bears the burden of showing such irregularity in the impugned decision, and/or the circumstances surrounding it, so that there is doubt as to the lawfulness of the process.

11. On the facts before it, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness. The circumstances surrounding the decisions that have been taken in respect of his functions, without any performance concerns or queries, are haphazard and opaque. The numerous changes to the assignments intended for the Applicant – from Geneva to India to the post of Advisor in Nairobi – between 29 June and 20 July 2018 betrays a lack of clarity in the processes being attempted by the Respondent. It is also curious that while the Applicant has been stripped of his

³ See for example Order No. UNDT/NBI/O/2010/017 *Omondi*; Order No. 494 (NBI/2016) *Newland*.

⁴ *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.

functions for no apparent or objective reason, the post itself continues to exist and its functions are shared between two other staff members!

Urgency

12. The Tribunal is persuaded that the matter is sufficiently urgent.

Irreparable Harm

13. Irreparable harm is generally defined as harm that cannot be compensated for. The Tribunal has previously held that the concept of irreparable harm goes beyond the question of money alone. In *Tadonki*, the Tribunal held:⁵

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.

14. The Tribunal is satisfied that allowing the impugned decision to stand will cause the Applicant irreparable harm. A tarnished professional reputation, particularly at the level the Applicant currently occupies, will inevitably and invariably follow.

Observations

15. In *Cranfield*,⁶ it was held that,

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the

⁵ *Tadonki* UNDT-2009-016. See also *Corna* Order No. 80(GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096.

⁶ 2013-UNAT-367, at para. 36. See also *Das* 2014-UNAT-421.

circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility thereof and act with due expedition once alerted to the unlawful act.

16. The Tribunal strongly believes that while the Management Evaluation Unit carries out its review of the Applicant's request, 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 these (and potentially future) proceedings, the Tribunal pursuant to articles 10.3 of the Statute and 15.1 of the Rules of Procedure of the Dispute Tribunal, strongly urges the parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

17. It remains open to the Applicant to have this matter litigated on the merits should mediation be unsuccessful.

ORDER

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

(Signed)

Judge Nkemdilim Izuako

Dated this 23rd day of July 2018

Entered in the Register on this 23rd day of July 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi