Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AMOUSSOUGA-GERO

v.

SECRETARY-GENERAL

OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION PENDING MANAGEMENT EVALUATION

Counsel for Applicant:
Brandon Gardner, OSLA

Counsel for Respondent:
ALS, OHRM

Introduction

1. By application filed on 30 July 2018, the Applicant who is currently working as Head of Integrated Office (Head of Office, Political Affairs) in the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), requests suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment beyond 31 July 2018.

2. The application was served on the Respondent on the same day for his information and he was advised that no response was required.

Facts

3. The Applicant works as D-1 Head of Office, Political Affairs in the Office of the Deputy Special Representative of the Secretary-General (D-SRSG)/Humanitarian Coordinator in Bangui, MINUSCA.

4. On 26 January 2018, the Applicant received a broadcast from MINUSCA explaining that there would be a forthcoming staffing structuring exercise with significant downsizing of staff. To that end, a comparative review process (CRP) was going to take place in March 2018.

5. On 24 February 2018, the Applicant received a letter entitled "Request for extension of appointment" which had been signed by his supervisor, the D-SRSG as well as by the Director of the Mission Support. The letter recommended the extension of the Applicant's appointment through 18 March 2019.

6. On 7 March 2018, the Secretary-General published a report on the Budget for MINUSCA for 2018-2019 (A/72/779). The report recommended the abolishment of the Applicant's post as well as three other D-1 Head of Office posts.

7. By letter dated 7 April 2018, the Applicant was informed that his post was among those proposed by the Secretary-General for abolition effective 1 July 2018. The letter further indicated that it did not constitute an official notice of the

termination of his appointment in line with Staff Rule 9.7 but an advance information in the interest of keeping him fully informed of the developments to enable him to prepare for that eventuality.

8. Meanwhile, the Applicant's appointment was extended through 31 May 2018.

9. According to the Applicant, around that time, he was informed that his D-1 post was not compared against other posts in the CRP process; instead the D-1 Head of Office post that he encumbered, and three others like it, were each proposed for abolition.

10. Upon the finalization of the Applicant's ePAS for 2016-2017 and 2017-2018 on 28 May 2018, his appointment was extended through 30 June 2018.

11. On 26 June 2018, the Applicant's appointment was extended until 31 July 2018.

12. By letter dated 18 July 2018, the Applicant was informed of the decision not to renew his fixed-term appointment beyond 31 July 2018.

13. On 24 July 2018, the Applicant filed a request for management evaluation of the contested decision.

Applicant's submissions

14. It is the Applicant's case that the decision not to renew his appointment is *prima facie* unlawful. He was not compared during the CPR against the other D-1 Head of Office posts which were in fact reclassified to the P-5 level.

15. As all four D-1 Head of Office posts had similar functions, duties and responsibilities, the Applicant claims that they should have compared against each other during the CRP. This would have allowed him to have a chance of being placed in one of the three reclassified P-5 Head of Office posts. Instead, the Administration chose to not compare these four posts, declaring each one a "dry cut" on its own, which lead to the Applicant's separation.

16. By failing to allow the Applicant to compete against other similarly situated staff members whose posts were abolished and reclassified, the Administration failed to conduct the CRP in a fair and transparent manner, which constitutes a severe procedural irregularity that vitiates the legality of the decision not to renew his appointment with MINUSCA because the non-renewal decision was based on the outcome of the CRP exercise.

17. The Applicant further asserts that the matter is urgent as his appointment will expire on 31 July 2018. He also asserts that he will suffer irreparable harm if the contested decision is implemented as he will lose his employment and no amount of monetary compensation could adequately repair the harm caused to his career.

Considerations

18. Applications for suspension of action are governed by art. 2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure. Article 13 provides as follows (emphasis added):

> 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. […]
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> 3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.
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> 4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

19. 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 application is considered. Even in the absence of

a reply by the Respondent, the Tribunal must rule on an application for suspension of action within five working days.

20. 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 Organization or its staff members.

21. The Tribunal reiterates its position in *Wilson*[1] that:

> [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.

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

23. 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 or she can show that *prima facie*, the case he or 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]

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[1] Order No. 327 (NY/2014).

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

Prima Facie Unlawfulness

24. At this stage, the Applicant needs only to show *prima facie* unlawfulness. The threshold required is that of "serious and reasonable doubts" about the lawfulness of the impugned decision.[3] Put another way, does it appear to the Tribunal that, unless it is satisfactorily rebutted by evidence, the claim of unlawfulness will succeed?[4]

25. With respect to the non-renewal of a fixed-term appointment, the Tribunal has regard to the established jurisprudence of the Appeals Tribunal according to which a fixed-term appointment does not bear any expectancy of renewal.[5] A non-renewal decision however, can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation.[6]

26. The staff member alleging that the decision was based on improper motives carries the burden of proof with respect to these allegations.[7] In *Obdeijn*[8], the Appeals Tribunal further stressed that "a decision not to renew [a fixed-term appointment] can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members".

27. On the facts before it, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness. The documentary evidence produced by the Applicant establishes on a *prima facie* basis that the Administration failed to conduct a CRP of the D-1 posts which deprived the Applicant of the chance to be

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[3] See for example *Hepworth* UNDT/2009/003, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015).

[4] *Wilson* Order No. 327 (NY/2014).

[5] See for example *Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341.

[6] See for example *Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534.

[7] See for example *Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503.

[8] 2012-UNAT-201.

properly considered for placement in one of the three reclassified P-5 Head of Office posts. Indeed, the evidence shows that unlike the other three D-1 staff members affected by the abolishment of their posts, the Applicant was not given full and fair consideration for placement on any of the reclassified P-5 posts. The failure of the Administration to conduct a proper CRP constitutes an irregularity that vitiates the legality of the decision not to renew the Applicant's appointment.

28. Therefore, the Tribunal finds that the decision not to renew the Applicant's appointment beyond 31 July 2018 is *prima facie* unlawful.

Urgency

29. The urgency of this application is obvious given that the Applicant's appointment will expire on 31 July 2018, which would result in his separation from service.

Irreparable Harm

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

31. 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.[9]

32. In the circumstances presented by the Applicant in this case where he may lose his employment with the Organization, the Tribunal finds that the requirement of irreparable damage is satisfied.

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[9] UNDT-2009-016.

ORDER

33. The decision of 18 July 2018 not to extend the Applicant's appointment beyond 31 July 2018 is suspended pending the outcome of the management evaluation.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of July 2018

Entered in the Register on this 30th day of July 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi