



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/120

Order No.: 190 (NBI/2018)

Date: 17 December 2018

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ATUYA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**  
Edwin Nhliziyo

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

### **The Application and Procedural History**

1. The Applicant is an Administrative Assistant at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). She holds a fixed term appointment at the FS5 level, and is based in Bangui.

2. On 11 December 2018, the Registry received the subject application of the present Order, seeking an injunction against the Respondent's decision to not renew her appointment beyond 31 December 2018.

3. The Registry received the Respondent's Reply to the Application on 14 December 2018.

### **Facts**

4. On 7 March 2018, the Secretary-General proposed the abolishment of 223 posts in MINUSCA for the 2018-2019 period.

5. On 27 April 2018, MINUSCA's Chief Human Resources Officer (CHRO) informed the Applicant that a Comparative Review Process (CRP) would be conducted for staff members encumbering posts affected by the proposed abolishment. This included the Applicant; as she encumbered one of two Administrative Assistant posts at the Mission Support Centre (MSC) and only one post was to be retained as of 1 July 2018.

6. In preparation for the comparative review, staff members were encouraged to update their Personal History Profiles (PHP) in *Inspira*. The Applicant did as much.

7. On 2 May 2018, MINUSCA's Director of Mission Support (DMS) informed all MINUSCA staff members that a Panel was being established for the comparative review exercise.
8. In the review of the two staff members encumbering the two Administrative Assistant posts, the Applicant scored fewer points than her colleague.
9. On 25 May 2018, the Department of Field Support (DFS) endorsed the results of the CRP.
10. On 29 May 2018, the CHRO informed the Applicant that she would be separated from service of the Organisation as of 30 June 2018.
11. On 21 June 2018, the Applicant asked the CHRO to consider extending her appointment to 31 December 2018 so that she attains the retirement age of 62, and therefore maximises her pension benefits and other entitlements as applicable.
12. On 28 June 2018, the Applicant requested management evaluation of the decision not to renew her appointment beyond 31 July 2018.
13. On 5 July 2018, the General Assembly approved the proposed budget.
14. On 18 July 2018, MINUSCA informed the Applicant that her appointment would not be renewed beyond 31 July 2018.
15. Following further discussions between the Applicant and MINUSCA, the Respondent exceptionally agreed to renew the Applicant's appointment until 31 December 2018.

16. To this end, the Applicant was temporarily placed on an FS-5 Human Resources Assistant post from 1 August 2018 until expiry of her appointment on 31 December 2018.

17. On 5 October 2018, in response to her management evaluation request of 28 June 2018, the Management Evaluation Unit (MEU) dismissed her request for review by the Unit as moot.

18. On 8 October 2018, a personnel action (PA) notification was raised extending the Applicant's appointment to 31 December 2018.

19. On 4 December 2018, MINUSCA HR sent the Applicant a letter regarding the separation procedure.

20. On the same day, the Applicant requested management evaluation of the decision to separate her on 31 December 2018.

### **Deliberations**

21. 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.

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

23. 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.<sup>1</sup>

24. 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.<sup>2</sup> 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.

25. On the facts before it, the Tribunal finds that the Applicant has not made out a case of *prima facie* unlawfulness.

26. While the Applicant alleges discrimination and bias, she has avoided the stating of relevant facts in her pleadings. She has sought to mislead the Tribunal by not putting

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<sup>1</sup> See for example Order No. UNDT/NBI/O/2010/017 *Omondi*; Order No. 494 (NBI/2016) *Newland*.

<sup>2</sup> *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.

such facts as her request to the Mission, following the abolishment of her post in July 2018, to be allowed to stay until December 2018 to retire at 62 years.

27. This Tribunal has previously warned Counsel that it is imperative for him, acting as an officer of the Court, to be clear and complete in stating the facts of his client's case. Invoking the language of the Charter while simultaneously concealing facts relevant to the dispute is disingenuous and unbecoming. The Tribunal regrets that Counsel has neither heeded nor taken its previous warning to him seriously.

28. Additionally, the Applicant has not shown that the decision to not renew her appointment beyond 31 December 2018 is tainted by improper motive or bias, or that the process leading up to the decision to abolish the post she encumbered was irregular or improper.

29. The Respondent, on the other hand, has demonstrated that the post she encumbered was in fact abolished as of 1 July 2018, and that the Mission temporarily placed the Applicant on a different post to allow her the benefits of retiring at the age of 62.

30. Having examined the material by the Parties, the decision to separate the Applicant from service does not, without more, give the appearance of an unlawful or otherwise impermissible exercise of discretion on the part of the Respondent. There is nothing in the Applicant's submissions to support a finding or inference that the decision maker was motivated by improper or impermissible motives.

31. The Applicant's contentions and submissions, therefore, do not satisfy the test

of whether the impugned decision appears *prima facie* to be unlawful.

32. Since the threefold test is cumulative, it is not necessary for the Tribunal to examine whether the other two limbs of the test for a successful application for suspension of action have been met.

### **ORDER**

33. The application for suspension of action is accordingly **REFUSED**.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 17<sup>th</sup> day of December 2018

Entered in the Register on this 17<sup>th</sup> day of December 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi