



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LOPES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR,
Nusrat Chagtai, AAS/ALD/OHR,

Introduction

1. On 23 May 2019, the Applicant, Chief of Service, Rule of Law at the D-1 level, at the United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS), filed an application for suspension of action pending management evaluation. He seeks suspension of the decision to place him on Special Leave With Full Pay (SLWFP), which he alleged had been taken out of ulterior motives taken during the absence of a Head of Mission.
2. On 24 May 2019, the Tribunal issued Order No. 059 (NBI/2019) in which the implementation of the contested decision was suspended until 31 May 2019.
3. On 28 May 2019, the Respondent filed a reply to the application.

Facts

4. The Applicant was initially appointed to the Organization on 13 February 2001. On 4 April 2014, the Applicant's fixed term appointment was converted to a continuing appointment.¹
5. On 28 December 2018, the General Assembly approved UNIOGBIS' proposed budget for 2018-2019. Paragraph 68(a)(i) and table 7 of the budget foresaw the abolition of the post of D-1 Chief of Service, Rule of law, effective 1 January 2019.²

68. For 2019, the proposed net staffing changes include:

(a) The abolishment of 21 positions (1 D-1, 2 P-5, 4 P-4, 4 P-3, 1 Field Service, 6 National Professional Officer and 3 United Nations Volunteer), including:

(i) Twenty positions from the former Rule of Law and Security Institutions Section: a Chief of Service (D-1), a Senior Police Adviser (P-5), a Senior Security Sector Reform Officer (P-5), a Rule of Law Officer (P-4), three Security Sector Reform Officers (P-4), two United Nations Police/Reform Officers (P-3), a Rule of Law Officer (P-3),

¹ Reply, annex 1.

² A/73/352/Add.3, Report of the Secretary-General, Estimates in respect of special political missions, good offices and other political initiatives authorized by the General Assembly and/or the Security Council.

an Administrative Assistant (Field Service), six National Professional Officers, a Security Sector Reform Officer-Defence Sector (United Nations Volunteer) and two Rule of Law Officers (United Nations Volunteer); [...]

6. On 28 December 2018, Ms. Patricia Fynn, UNIOGBIS, Chief Mission Support (CMS), sent a fax to Ms. Chhaya Kapilashrami, Director, Field Personnel Division (FPD) of the Department of Field Support (DFS), requesting her assistance in seeking the Under-Secretary-General for Management's approval for termination of four positions, including the Applicant's.³

7. On 4 January 2019, the Applicant received a notice of termination of his appointment with UNIOGBIS from the UNIOGBIS/CMS effective 31 December 2018.

Pursuant to the General Assembly's approval of the mission's budget for 2019, I regret to inform you that today 4 January 2019 we received an approval dated 31 December 2018 from the Under Secretary-General for Management for the termination of your continuing appointment with the United Nations on the grounds of abolition of post in accordance with Staff Regulation 9.3 (a)(i) and Staff Rule 9.6 (c)(i).

...

Your separation will be effective on 31 December 2018. This letter constitutes the formal notice of termination of your appointment in line with Staff Rule 9.7.⁴

8. On 15 January 2019, the Applicant requested management evaluation and suspension of action of the decision to terminate his appointment.⁵

9. On 15 January 2019, the Management Evaluation Unit (MEU) informed the Applicant that his request for suspension of action pending management evaluation had been granted. He was also informed that, pursuant to staff rule 11.2(d), the management evaluation in his case was to be completed by 1 March 2019.⁶

³ Application, annex 1.

⁴ Application, annex 2.

⁵ Application, annex 3.

⁶ Application, annex 6.

10. On 29 January 2019, Mr. José Viegas Filho, Special Representative of the United Nations Secretary-General in Guinea-Bissau (SRSG) and Head of UNIOGBIS, informed the Applicant following the abolition of his post with the approval of the 2019 budget by the General Assembly, his functions no longer existed but that,

[t]he mission has taken note of your management evaluation request (MER) and the suspension of the termination decision pending the outcome of the MER. The Mission will honour the suspension of action and has obtained GTA funding for purposes of ensuring you receive a salary during the suspension. The extension is not for purposes of your continuing to exercise functions of Chief of Service, which no longer exist under the 2019 budget.

As we await the outcome of the MER from 1 February 2019, you may be assigned tasks, as appropriate. You may also exercise the option of requesting for special leave with full pay pending the outcome of the management evaluation process.⁷

11. On 16 May 2019, the former SRSG departed the mission and David McLachlan, Deputy SRSG (DSRSG) assumed the functions *ad interim*.⁸

12. On 17 May 2019, David McLachlan informed the Applicant that he had been placed on SLWFP pending the outcome of his management evaluation request.⁹

13. On 23 May 2019, the Applicant requested management evaluation of the decision to place him on SLWFP and also filed the present application.

Applicant's submissions

Unlawfulness

14. The only authority for unilateral placement on any form of special leave is found in staff rule 5.3(f), which allows it in exceptional circumstances.

15. Mr. McLachlan's memo asserts that the decision is taken in the interests of the Organization and pursuant to this section. The memo, however, does not

⁷ Application, annex 7.

⁸ Reply, para. 13.

⁹ Application, annex 10.

allege that exceptional circumstances exist, let alone describe circumstances that might amount to such.

16. The placement on SLWFP means that the Applicant will continue to receive salary without contributing to the mandate of the Organization, this when his desire is to continue to contribute. The decision to unilaterally place him on SLWFP against his will is clearly contrary to the suspension in place, the role of which was to preserve the status quo. The former SRSG did not consider that the interests of the Organization would be served by the Applicant's placement on SLWFP as reflected by his suggestion that such would only be provided at the Applicant's request.

17. There was a function in the Mission that the Applicant could perform pending management evaluation of the decision on the termination of his appointment, namely the vacant Chief of Staff, at the D-1 level, a role he had carried out before. Rather than deploying the Applicant to carry out these duties, however, a P-4 was taken from his duties to carry out these on a temporary basis.

18. It is inconceivable that the interests of the Organization might have changed from one day to the next following the departure of the SRSG. The only variable that altered was the individual making the decision. This points to a motive other than the furtherance of the interests of the Organization on the part of the DSRSG.

19. The actions of the mission leadership in the period following the Applicant's filing of a management evaluation indicate a sustained course of retaliation on their part. The DSRSG characterizes the Applicant's management evaluation request as a challenge to the Mission leadership rather than a legitimate exercise of a staff member's rights. Senior staff members occupy themselves in seeking to restrict the Applicant's access to a vehicle and continue to question his exercise of entitlements to leave. The same reasoning applies to office space, mobile phone, radio, etc.

20. The DSRSG is aware that the Applicant has reported an allegation of serious misconduct against him. It might be considered that such knowledge

created a conflict of interests on the DSRSG's part when it comes to making decisions regarding the Applicant's contract of employment. However, the DSRSG has not recused himself from such decisions, on the contrary he wastes no time in acting to the Applicant's detriment the moment the SRSG departed.

Urgency

21. There is urgency because the decision was to be implemented on 24 May 2019 and was only adjourned pending the Tribunal's decision on the request for the suspension of action.

Irreparable harm

22. He has contested the termination of his appointment in part on the basis that there was no reasonable consideration of lateral transfer within the mission to a suitable available vacant post. Implementation of the decision will remove him from the mission and return him to his country of home leave. The arrival of a new SRSG is imminent. Removing him from the mission at this stage deprives him of the opportunity to have his situation considered by an alternate SRSG. It does irreparable damage to his chances of securing an effective remedy sought in his challenge to the termination decision.

23. His removal from the mission from one day to the next when he still seeks to support the Mission by performing tasks risks reputational damage particularly in light of the fact that tasks remain which he is in a position to perform. The action amounts to a stripping of functions which has been held previously by the UNDT to give rise to an irreparable harm.

Respondent's submissions

The contested decision is lawful

24. UNIOGBIS has not stripped the Applicant of his functions. The functions that the Applicant performed no longer exist because the General Assembly abolished the post. The General Assembly also approved the elimination of the entire Rule of Law and Security Institutions (ROLSI) section, equaling 20 ROLSI

positions. Since the Applicant has had no functions to perform since January 2019, the Acting SRSG determined that it was in the interests of the Organization to place the Applicant on SLWFP under staff rule 5.3(f)

25. The contested decision is not contrary to the MEU decision to suspend the implementation of the termination decision. UNIOGBIS has suspended the termination decision in accordance with the MEU decision.

26. The Applicant has adduced no evidence that the contested decision was improperly motivated or retaliatory by the Acting SRSG. Indeed, the former SRSG had discussed the option of SLWFP with the Applicant as an alternative to working from home. However, since there were no functions for the Applicant to perform, working from home was not appropriate. Nor was the mission's decision to withdraw the Applicant's access to a United Nations vehicle retaliatory. The Applicant has been present in the mission area without official functions for nearly five months and the use of a United Nations vehicle is for official use only.

27. The decision to assign a P-4 Legal Officer to perform the D-1 Chief of Staff (COS) functions does not demonstrate ill motive on the part of the Acting SRSG. That decision was made by the former SRSG before his departure, when the COS position was vacated in April 2019. The SRSG decided that the P-4 Legal Advisor was most suitable to perform the functions on an interim basis because he had served the most as OiC/COS and had delivered consistently in that capacity. This was a reasonable exercise of the SRSG's discretion in light of a 5 April 2019 Code Cable from the Under-Secretary-General Department of Political and Peacebuilding Affairs (USG/DPPA) calling for the downgrading of the COS position from the D-1 to the P-5 level. Given the imminent downward reclassification of the position, UNIOGBIS has decided to continue to have the P-4 staff member perform the functions pending the recruitment for the position at the P-5 level.

The Applicant would not suffer irreparable harm

28. The Applicant has not established irreparable harm. The continuity of his service is unaffected by the contested decision and he will continue to receive all

of his salary, benefits and service credits in accordance with staff rule 5.3(g). Moreover, there is no risk of reputational damage as the Applicant claims. The Applicant's personnel record will reflect that he was placed on SLWFP through no fault of his own, but rather due to the abolition of the post.

There is no particular urgency

29. There is no urgency. The contested decision simply formalizes the current situation where the Applicant is receiving his full pay, but is not performing functions for the Organization.

Consideration

30. This application is made under art. 2.2 of the UNDT Statute and art. 13 of the Rules of Procedure of the Tribunal.

31. The Applicant is required to satisfy the Tribunal that the impugned decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. All three elements of the test must be satisfied before the impugned decision can be stayed.

Prima facie unlawfulness

32. It is clear that the Dispute Tribunal's Statute does not require the Tribunal to make a definitive finding on the unlawfulness of the impugned decision. The *prima facie* showing test is not particularly onerous, however, the onus is on the Applicant to provide a sufficiency of material in order to satisfy the statutory test. Whether or not this initial showing is well-founded or not is a matter for determination after a full examination of the evidence in the event that a substantive claim is filed.

33. Under staff rule 5.3(f), the Secretary-General may, in exceptional cases, place a staff member on SLWFP if he considers such leave to be in the interests of the Organization. The matter thus involves exercise of discretion.

34. The Respondent relies on the standard of deference to the Secretary-

General's exercise of discretion, where the Dispute Tribunal determines if the decision is legal, rational, procedurally correct and proportionate. The Dispute Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse.¹⁰ The Dispute Tribunal cannot, however, engage in fact-finding exercise in order to substitute its own views for those of the Secretary-General.¹¹ This said, in the given instance, the Secretary-General's discretion is qualified by the requirement of exceptionality of the circumstances that amount to a prevalent interest of the Organization in applying a compulsory SLWFP as well as by his obligation of protecting the employment of staff members on continuing appointments.

35. The Tribunal observes that, in arguing the legality of the impugned decision, the Respondent rebuts the Applicant's various arguments; he, however, does not make a particular showing of the circumstances required by staff rule 5.3(f). In the context of the case, two interrelated issues merit consideration:

- a. Whether a situation where a staff member's post has been abolished, makes up an "exceptional case" *per se*; and
- b. Where the "interest of the Organization" lies.

36. Regarding the first issue, the Tribunal recalls that under staff rule 9.6(e), a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing appointment, and an obligation on the part of the Administration to undertake reasonable and good faith efforts to find an alternative suitable placement. This obligation, in the Tribunal's opinion, is not lifted in an interim situation, like pendency of management evaluation, informal resolution or court proceedings. As such, the first question is to be answered in the negative, in that a placement on SWLFP is not to be applied by way of a knee-jerk reaction but, rather, the staff member should be accommodated, albeit only on a temporary basis, at a suitable post, where such is available.

¹⁰ *Sanwidi*, 2010-UNAT-084, para. 40; see also *Toure*, 2016-UNAT-660, para. 30.

¹¹ *Ibid.*, see also *Ivanov* 2015-UNAT-519, paras. 10 and 15–19.

37. In this connection, it is, however, also recalled that staff rule 9.6 expressly states that in all cases due regard must be given to relative competence, integrity and length of service. As stated by the Appeals Tribunal, the staff member is required to be fully competent for the alternative post where he/she is to be retained and to hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions.¹² Regarding an interim situation, e.g., a temporary assignment, the requirements need not be that stringent, however, the principle applies *mutatis mutandis*. It means that a temporary assignment would need to be available, suitable and the staff member would need to have relative competence compared with other candidates. It follows that a mere availability of a temporary assignment for which the staff member affected by reduction of post could formally be qualified does not create an imperative of granting it to him or her.

38. On the facts of the case, the Administration, having suspended the decision about the termination of the Applicant's appointment, has been exploring options for a suitable placement of the Applicant, which need not necessarily be in UNIOGBIS.¹³ As such, the Tribunal is not persuaded that the decision – originally taken and explained as to its reasons by the former SRSG, against whom there is no allegations of retaliation against the Applicant - to retain another staff member in temporarily performing the duties of the vacant Chief of Staff position at UNIOGBIS violated the Applicant's rights under staff rule 9.6 (e).

39. Regarding the second issue, the Tribunal notes that under staff rule 5.3(a)(ii), special leave is normally without pay, which expresses a general interest of the Organization in not remunerating a staff member who is not rendering work. Resorting to SLWFP would thus need to be justified upon additional factors or another protected interest. Absent a specific submission from the Respondent, the Tribunal may only assume that, given the unavailability of an obviously suitable assignment in the Mission, it is more cost-effective (in terms such as hazard pay, rest and recuperation and other entitlements attaching to physical service in the Mission) to have a staff member put on SLWFP than

¹² *Timothy* 2018-UNAT-847, at para. 39.

¹³ *Ibid.*, at para. 63.

maintaining his or her artificial employment in the Mission. This is a legitimate concern. Accordingly, even if the impugned decision were improperly motivated, as alleged, in the objective sense it may still conform with the interest of the Organization.

40. In conclusion, the Tribunal is not satisfied as to the showing of *prima facie* unlawfulness.

Irreparable harm

41. For completeness of the argument, the Tribunal will briefly address the claim of irreparable harm. The Applicant maintains that removing him from the mission at this stage deprives him of the opportunity to have his situation considered by an alternate SRSG, whose arrival is imminent. The Tribunal understands that the Applicant wishes to make his case before the SRSG in person. Yet, there is no indication whatsoever that the new SRSG would be deployed during the pendency of management evaluation. Regarding the remainder of arguments on this score, the Tribunal shares the views of the Respondent.

Conclusion

42. The application for suspension of action, having failed on two prongs of the test under art 2.2 of the UNDT Statute, is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 30th day of May 2019

Entered in the Register on this 30th day of May 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi