



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2019/068  
069, 070, 071, 072,  
073, 074, 076, 077,  
079, 080, 082, 083 and  
084  
Order No.: 083 (NBI/2019)  
Date: 27 June 2019  
Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

NSEREKO ET AL.<sup>1</sup>

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Christine Graham, AAS/ALD/OHR

Nusrat Chagtai, AAS/ALD/OHR

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<sup>1</sup> The other Applicants are: Mukiibi, Nyanduru, Mayanja, Ssekamatte, Tamuzadde, Ssekabira, Kiyingi, Ssewaguma, Katongole, Abubakari, Tusingwire, Twijukye and Lodi.

## **INTRODUCTION**

1. The current Order is in relation to applications for suspension of action filed by 14 staff members of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) on 21 June 2019 to challenge the non-renewal of their fixed-term appointments (FTAs) upon expiry on 30 June 2019.
2. The Applicants are all serving on fixed-term appointments (FTAs) as Heavy Vehicle Operators at the GL-3/10 level in the Centralized Warehouse Section, Supply Chain Management, in Entebbe, Uganda,
3. The Registry served the applications in Case Nos. UNDT/NBI/2019/068 (Nsereko), UNDT/NBI/2019/069 (Mukiini), UNDT/NBI/2019/070 Nyanduru, UNDT/NBI/2019/071 (Mayanja), UNDT/NBI/2019/072 (Ssekamatte), UNDT/NBI/2019/073 (Tamuzadde) and UNDT/NBI/2019/074 (Ssekabira) on the Respondent on 21 June 2019, setting the deadline for a reply at 4.00 p.m. on Tuesday 25 June 2019. The applications in Case Nos. UNDT/NBI/2019/076 (Kiyingi), UNDT/NBI/2019/077 (Ssewaguma), UNDT/NBI/2019/079 (Katongole), UNDT/NBI/2019/080 (Abubakari), UNDT/NBI/2019/082 (Tusingwire), UNDT/NBI/2019/083 (Twijukye) and UNDT/NBI/2019/084 (Lodi), were served on the Respondent on 22 June 2019 with a deadline for a reply at noon on 26 June 2019.
4. The Respondent submitted a joint reply to the applications on 24 June 2019.

## **FACTS**

5. On 7 March 2019, the MONUSCO Special Representative of the Secretary-General (SRSG) held a town hall meeting with MONUSCO staff to discuss the implementation of the civilian staffing reduction, effective 1 July 2019, that was contained in the mission's 2019-2020 budget proposal.

6. On 29 March 2019, the Secretary-General submitted a final proposed budget for MONUSCO for 2019-2020, which included proposals to abolish 764 posts, including 15 Heavy Vehicle Operator posts in the Centralized Warehouse Section.

7. On 1 April 2019, the SRSG informed all MONUSCO staff, including the Applicants, by broadcast, *inter alia*, that the posts for affected international staff in all locations and affected national staff in locations that were not closing, would be subject to either a “dry cut” or to a comparative review process (CRP). The SRSG indicated further that staff who would be affected by the dry cut or subjected to the CRP would receive details from HRS and that staff would be notified of the outcome of the CRP by late May.

8. The purpose of the CRP was for recommendations to be made regarding the retention of international and national staff members for the reduced number of posts in the new mission structure. In accordance with the Terms of Reference (TOR) for the CRP, posts or functions that were unique and had no comparative post or function in the same organizational unit/sub-unit would be subjected to a dry cut with no comparative review.

9. On 5 April 2019, the MONUSCO Chief Human Resources Officer (CHRO) informed the 14 Applicants, by letters that were addressed to them individually, that their posts had been proposed for abolition in the 1 July 2019 to 30 June 2020 budget and that the budget was being considered by the General Assembly for implementation effective 1 July 2019. The CHRO further stated that: “In anticipation of the General Assembly’s approval of the mission’s budget, MONUSCO will not extend your fixed-term appointment beyond its expiration on 30 June 2019 in line with Staff Regulation 9.4” and that the Human Resources Section (HRS) will commence their check-out processes in line with the notices.

10. In anticipation of approval by the General Assembly, the mission commenced a CRP on 17 April 2019.

11. On 16 May 2019, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) recommended in its report that the General Assembly approve the abolition of posts as proposed by the Secretary-General in the 2019-2020 budget.

12. On 28 May 2019, the Office of the Director of Mission Support, sent a broadcast to staff advising them that: the CRP process had been completed; and from 29 May onwards, notification letters would be sent to staff members affected by the CRP or dry cuts. The broadcast further indicated that staff on continuing appointments or permanent appointments would be notified upon approval of MONUSCO's budget proposal by the General Assembly.

13. The Applicant's posts were subjected to dry cuts instead of the CRP since all the 15 Heavy Vehicle Operator posts in the Centralized Warehouse Section had been proposed for abolition.

14. On 29 May 2019, the CHRO informed the 14 Applicants once again that their posts had been proposed by the Secretary-General for abolition and thus, their FTAs would not be renewed beyond 30 June 2019. Once again, they were informed that HRS would commence their check-out processes in line with the notices.

15. The Applicants wrote to the Management Evaluation Unit (MEU) requesting suspension of action and management evaluation of the non-renewal decisions on 14 June 2019. On 19 June, MEU informed the Applicants that their request for suspension of action pending management evaluation was under consideration and that a decision would be made in "due course". MEU further informed them that the management evaluation in their case would be completed no later than 29 July 2019.

### ***RECEIVABILITY***

16. The Respondent submits that the applications are not receivable *ratione temporis* because the mission notified the Applicants of the non-renewal decision

on 5 April 2019 thus they had until 4 June 2019 to request management evaluation. Since the Applicants requested management evaluation on 14 June 2019, they are time-barred. The Respondent asserts that the CHRO's letter of 29 May was a mere reiteration of the 5 April 2019 decision.

17. In reviewing the receivability of the applications, the Tribunal finds that the 5 April 2019 notice was a prefatory act that did not rise to the level of a contestable administrative decision. It is well noted that the Secretary-General's proposed 2019-2020 budget, which included the proposal for abolition of the Applicants' posts, had been submitted to the General Assembly only six days before, on 29 March 2019, and was still pending approval.

18. At that point, the mission had no assurance whatsoever that the proposal to abolish all the 15 Heavy Vehicle Operator posts in the Centralized Warehouse Section would be accepted or rejected. In other words, the mission was assuming at this stage that the Applicants' posts would be subjected to dry cuts although the possibility of the posts having to go through the CRP was also quite high.

19. Although the 29 May 2019 notice echoes the language in the 5 April 2019 notice, the Tribunal finds that it is not a reiteration of an earlier decision or the announcement of a prefatory act. This is an administrative decision in that it was informed by the ACABQ's recommendation to the General Assembly to approve the abolition of posts as proposed by the Secretary-General in the 2019-2020 budget and the finalization of the CRP. Further, it was a decision taken in such proximity to the expiry of the Applicants' FTA, that it served as the call to action on the part of the Applicants.

20. The Tribunal notes that the Applicants requested management evaluation of the 29 May 2019 timeously on 14 June 2019.

21. Accordingly, the Tribunal finds the applications to be receivable.

## **MERITS**

22. When faced with an application for suspension of action, the Tribunal must decide whether the Applicant satisfies the three cumulative requirements in art. 2.2 of the Statute and art. 13 of the Tribunal's Rules of Procedure, namely that the decision appears to be *prima facie* unlawful, that the matter appears to be of particular urgency, and that the implementation of the decision would appear to cause irreparable damage.

23. The Tribunal is not required to make a conclusive finding when it is considering an application for suspension of action. It simply applies the statutory test by making a swift assessment based on the submissions and supporting documents. Whether this initial assessment is upheld when the substantive issues of fact and law are subsequently considered will depend on the evidence, arguments and submissions of the parties.

24. The issues that are currently before the Tribunal are: (i) whether the Respondent's decision not to renew the Applicants FTAs beyond 30 June 2019 is *prima facie* unlawful; (ii) whether the matter is urgent; and (iii) whether implementation of the separation decision will cause the Applicants irreparable damage.

### ***Prima facie unlawfulness***

#### *Submissions*

25. Each of the Applicants submits that the contested decision is *prima facie* unlawful because:

- a. In October 2018, the mission halted the operations of the Heavy Transport Unit (HTU) and started using the services of a contractor. The Applicants were thereafter left without duties to perform. The decision to outsource their duties has resulted in the termination of their FTAs. The mission is violating General Assembly resolutions 55/232 and 59/289 by

utilizing outsourcing services that neither save money nor reduce costs. It is more economical/cost effective to reinstate the Applicants.

b. The Staff Union was not involved in the decision-making process prior to the service being outsourced.

26. The Respondent submits that the contested decision is *prima facie* lawful because:

a. The Applicants have failed to present a “fairly arguable case” that the contested decision is unlawful.<sup>2</sup>

b. The Applicants’ posts are anticipated to be abolished by the General Assembly following the adoption of the budget with effect from 1 July 2019. Since all the 15 Heavy Vehicle Operator posts in the Centralized Warehouse Section were proposed for abolition, there was no need for a CRP. The posts were subject to dry cuts.

c. The mission acted transparently throughout the downsizing exercise by keeping staff members apprised of developments in the budgetary and downsizing processes. Information was communicated to staff through email broadcasts, meetings with staff association representatives, town hall meetings and posting of relevant documents on the mission’s intranet.

d. The Applicant’s views about the cost effectiveness of the mission’s decision to outsource are not relevant. It is for the Secretary-General to determine the needs of the Organization and how best to meet these needs.<sup>3</sup> The Applicants have not identified any rights under their own terms of appointment that have been impacted by the decision to outsource or procure transport services. Further, their assertions about General

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<sup>2</sup> Order No. 29 (NY/2011), para. 24; UNDT/2011/126, para. 28.

<sup>3</sup> Staff regulation 1.2(c); *Gehr* 2012-UNAT-236, para 25; *Pacheco* UNDT/2012/008, paras 39-41; *Rosenberg* UNDT/2011/045, para 14.

Assembly resolutions 55/232 and 59/289 and the mission's failure to consult with the Staff Union are baseless.

### *Considerations*

27. The Tribunal finds it surprising that MONUSCO is proceeding with its decision not to renew the Applicants FTAs although the General Assembly has not approved the Secretary-General's final budget proposal for 2019/2020. While the ACABQ has recommended that the General Assembly approve the budget, this approval is still pending.

28. In the Tribunal's considered view, unless the General Assembly's anticipated resolution on the mission's proposed budget is approved on or before 30 June 2019, the Applicant's posts cannot be deemed to be abolished. Under these circumstances, MONUSCO's decision not to renew the Applicants' FTAs due to abolition of post, which has not been approved, is *prima facie* unlawful and cannot stand.

29. The Tribunal holds that the Applicants have satisfied the prerequisite for *prima facie* unlawfulness.

### *Urgency*

#### *Submissions*

30. The Applicants submit that the matter is urgent because they will be separated on 30 June 2019.

31. The Respondent submits that the Applicants have failed to meet the requirement of urgency because they should have requested management evaluation and filed applications for suspension of action shortly after 5 April 2019. Instead they waited almost two and a half months after notification of the contested decision to file their applications for suspension of action.



32. The Respondent argues that alternatively, should the Tribunal consider 29 May 2019 as the date of notification of the contested decision, they should have filed their applications for suspension of action on 14 June 2019 when they submitted their requests for management evaluation. They did not do so but rather waited until 21 June to file the applications. They have not provided any reasonable explanation for the delay of more than three weeks (from 29 May to 21 June 2019) in filing the Applications.

33. In *Maloka Mpacko* UNDT/2012/081, the Tribunal recalled that:

If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206).

34. The Tribunal has already concluded that the Applicants were properly notified of the administrative decision on 29 May 2019 and not on 5 April 2019. They then sought suspension of action and management evaluation from MEU on 14 June 2019. It is understandable that since they had requested suspension of action from MEU, they did not come to the Tribunal immediately with an application seeking the same injunctive relief. MEU's response of 19 June 2019 that there would be a response "in due course" was an indication to the Applicants that their requests for suspension of action could be pending beyond the expiry of their FTAs and this prompted them to turn to the Tribunal as a last resort.

35. The Tribunal finds that the Applicants acted reasonably by first using the mechanism for suspension of action in cases involving separation from service, which is set out in staff rule 11.3(b)(ii), before approaching the Tribunal. The Tribunal notes that the Applicants initiated this process on 14 June, when they still had 16 days before the end of their FTAs. The Tribunal also finds that since the Applicants came to the Tribunal at the first available opportunity, i.e. two days

after MEU rejected their request for suspension of action, they were diligent in filing their applications for suspension of action with UNDT. Thus, the urgency in this case was not self-created.

36. The Tribunal holds that the Applicants have satisfied the prerequisite for urgency.

### ***Irreparable damage***

#### *Submissions*

37. The Applicants submit that implementation of the contested decision will cause irreparable damage to them because their jobs with MONUSCO are the only source of income for their families. They also submit that implementation will also cause irreparable damage to the Organization financially and reputation-wise.

38. The Respondent did not provide any submissions on irreparable damage.

#### *Considerations*

39. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual.<sup>4</sup> The Tribunal finds that implementation of the separation decision now would damage the Applicant's career prospects in a way that could not be compensated by a monetary award. The requirement of irreparable damage is satisfied.

### **Conclusion**

40. The Tribunal finds that the three statutory conditions for a suspension of action have been met by the Applicant.

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<sup>4</sup> *Saffir* Order No. 49 (NY/2013); *Farrimond* Order No. 200 (GVA/2013)

**ORDER**

41. This application for suspension of action is accordingly GRANTED pending management evaluation.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 27<sup>th</sup> day of June 2019

Entered in the Register on this 27<sup>th</sup> day of June 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi