



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2019/089

Order No.: 084 (NBI/2019)

Date: 27 June 2019

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ONIWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Mohamed Abdou, OSLA

Counsel for the Respondent:

Christine Graham, AAS/ALD/OHR

Nusrat Chagtai, AAS/ALD/OHR

INTRODUCTION

1. The Applicant is the Senior Women's Protection Adviser at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). She serves on a fixed term appointment at the P5 level and is based in Kinshasa.

2. On 26 June 2019, counsel acting on behalf of the Applicant moved, pursuant to art. 13 of the Rules of Procedure, to suspend the Respondent's decision to separate her from service upon expiry of her current contract on 30 June 2019. The Respondent's decision is based on the putative abolition, by the General Assembly, of the post encumbered by the Applicant.

3. The Application was served on the Respondent on the day it was received by the Registry, and the latter filed his Reply to it on 27 June 2019.

FACTS

4. The Applicant joined the Organization on 24 September 2011 as Senior Programme Officer at the P-5 level. Her current appointment as Senior Women's Protection Advisor is due to expire on 30 June 2019.

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. The Proposal reflects changes in the Mission's priorities and a consolidation of the Missions' footprint. It also proposes the closure of seven field offices and one site. The proposal envisages an overall reduction of 764 posts. 126 of these are international posts, including that currently encumbered by the Applicant.

7. On 3 April 2019, the MONUSCO Chief Human Resources Officer (CHRO) sent the Applicant a memorandum entitled "Advance Information"

informing her that her post “is amongst those proposed for abolition effective 1 July 2019.”

8. On 29 May 2019, the Applicant received a Notice of non-extension.

9. On 4 June 2019, the Applicant a notice of separation which included information and instruction on the check-out process.

10. The Applicant requested management evaluation of the impugned decision on 25 June 2019.

RECEIVABILITY

11. The Respondent submits that the application is not receivable *ratione temporis* because the mission notified the Applicant of the non-renewal decision on 3 April 2019; and that she therefore had until 3 June 2019 to request management evaluation. Since the Applicant requested management evaluation on 25 June 2019, she is time-barred. The Respondent asserts that the CHRO’s letter of 29 May was a mere reiteration of the 3 April 2019 decision.

12. In reviewing the receivability of the application, the Tribunal finds that the 3 April 2019 notice 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 Applicant’s post, had been submitted to the General Assembly only six days before, on 29 March 2019, and was still pending approval.

13. At that point, the mission had no assurance whatsoever that the proposal to abolish the post encumbered by the Applicant would be accepted. In other words, the mission was assuming at this stage that the post would be subjected to a dry cut although the abolition of the post had not actually been approved by the General Assembly.

14. Although the 29 May 2019 notice echoes the language in the 3 April 2019 notice, the Tribunal finds that it is not a reiteration of an earlier decision or the

announcement of a prefatory act. A notice of non-extension of contract is an administrative decision in and of itself. Additionally, the said notice 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.

15. The Tribunal finds that the notice of 29 May 2019 signaling an administrative decision to not extend the Applicant's contract, added to the fact of the notice's proximity to the expiry of her appointment, constituted an unambiguous call to action on the part of the Applicant.

16. Accordingly, the Tribunal finds the application to be receivable.

MERITS

17. 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.

18. 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.

19. The issues that are currently before the Tribunal are: (i) whether the Respondent's decision not to renew the Applicant's FTA 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 Applicant irreparable damage.

Prima facie unlawfulness

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

21. 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 post cannot be deemed to be abolished. As the Respondent correctly points out:

The General Assembly is the ultimate decision making organ in the Organization and its decisions to abolish posts are not subject to challenge.

22. There is, in effect, no *decision* by the General Assembly yet. Under these circumstances, MONUSCO's decision not to renew the Applicant's appointment *on grounds of abolition of post* is premature and therefore *prima facie* unlawful.

23. The Tribunal holds that the Applicant has satisfied the prerequisite for *prima facie* unlawfulness.

Urgency

24. The Applicant submits that the matter is urgent because she will be separated on 30 June 2019.

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

Irreparable damage

26. 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:¹

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.

27. The Tribunal is satisfied that allowing the impugned decision to stand will cause the Applicant irreparable harm.

Conclusion

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

ORDER

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

(Signed)
Judge Nkemdilim Izuako

Dated this 27th day of June 2019

Entered in the Register on this 27th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

¹ *Tadonki* UNDT-2009-016. See also *Corna* Order No. 80(GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096. See also *Saffir* Order No. 49 (NY/2013); *Farrimond* Order No. 200 (GVA/2013)