



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/085

Order No.: 086 (NBI/2019)

Date: 28 June 2019

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OPOLOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Christine Graham, AAS/ALD/OHR
Nusrat Chagtai, AAS/ALD/OHR

INTRODUCTION

1. The Applicant filed the current application on 24 June 2016 seeking suspension of the decision by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) not to extend his fixed-term appointment (FTA) beyond 30 June 2019.

2. The Respondent filed a reply on 26 June 2019.

FACTS

3. The Applicant is serving on an FTA with MONUSCO as a Telecommunications Assistant at the GL-5/7 level in the Field Technology Section in Entebbe.

4. 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.

5. On 29 March 2019, the Secretary-General submitted a final proposed budget for MONUSCO for 2019-2020, which included proposals to abolish 764 posts.

6. On 1 April 2019, the SRSG informed all MONUSCO staff, including the Applicant, 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.

7. 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.

8. On or about 4 April 2019, staff members in the Field Technology Section in Entebbe received a memorandum dated 2 April 2019, notifying them of their participation in the CRP. The Applicant did not receive this notification.

9. In anticipation of the proposed budget being approved by the General Assembly, the mission commenced a CRP on 17 April 2019.

10. 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.

11. Also on 16 May 2016, the Applicant received a memorandum dated 15 April 2019 from the MONUSCO Chief Human Resources Officer (CHRO) informing him of the proposed abolition of 764 posts and the initiating of a Comparative Review Process (CRP). He was directed to submit his latest PHP and last two e-Pases, which he did the same day.

12. On 29 May 2019, the CHRO informed the Applicant that his post had been identified for retrenchment and thus, his FTA, which was expiring on 30 June 2019, would not be renewed. He was further informed that HRS would commence his check-out process in line with the notice.

13. The Applicant wrote to the Management Evaluation Unit (MEU) on 17 June 2019 requesting suspension of action and management evaluation of the non-renewal decision. On 19 June, MEU informed the Applicant that his request for suspension of action pending management evaluation was under consideration and that a decision would be made in “due course”. MEU further informed him that the management evaluation in his case would be completed no later than 1 August 2019.

CONSIDERATIONS

14. 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.

15. 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.

16. 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

Submissions

17. The Applicant submits that the contested decision is *prima facie* unlawful because:

a. While the other staff members in his section were notified of the CRP as early as 4 April 2019, he was not notified until 16 May 2019, approximately 42 days after the CRP had begun.

b. His immediate supervisor, second supervisor and the Section heads of Regional Field Technology Service were unaware that he was being

subjected to the CRP. This shows how unfair, incompetent and non-transparent the staff involved in the CRP were.

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

a. The Applicant has failed to present a “fairly arguable case” that the contested decision is unlawful.¹

b. The Applicant’s post is one of two in the Field Technology Section in Entebbe anticipated to be abolished by the General Assembly following the adoption of the budget with effect from 1 July 2019. Since he was one of the staff members in his Section who received the lowest scores in the CRP, his post was proposed for retrenchment.

c. The post encumbered by the Applicant is anticipated to be abolished by the General Assembly following the adoption of the Budget with effect from 1 July 2019.

d. The Applicant has not provided any evidence in support of his allegation that the CRP was “unfair, incompetent, unprofessional and non-transparent.” The fact that MONUSCO omitted to send him the initial CHRO letter of 15 April 2019 is immaterial. The error was corrected in time for him to be included in the CRP, which reviewed him fairly against other staff at the same level and in the same category, section and duty station in accordance with the CRP’s terms of reference.

e. MONUSCO 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.

¹ Order No. 29 (NY/2011), para. 24; UNDT/2011/126, para. 28.

Considerations

19. The facts that have been presented by the Applicant regarding the early notification to other Telecommunication Assistants at the G-5 level in Entebbe and the very late notification sent to him, have given the Tribunal cause to doubt the reasonableness of the contested decision. The Tribunal is also concerned with the failure of Respondent's counsel to address this issue squarely and providing, instead, the following rather flippant explanation: "The fact that the Mission, in error, omitted to send the Applicant the initial CHRO letter of 15 April 2019 is immaterial." What exactly was this "error", which now calls into question the propriety of the CRP in respect of the Applicant?

20. There is evidence on the record to show that the CRP began on 17 April 2019 and ended on 28 May 2019. This, in the Tribunal's considered view, places a rather large question mark against the correctness/fairness of the process that the Applicant was subjected to when his assessment did not commence until 16 May 2019, which was two weeks after the CRP had begun, and then the process ended two weeks after the commencement of his assessment. It appears that the Respondent would have a case to answer should the Applicant decide to proceed with a substantive challenge of the administrative decision in accordance with art. 8 of the UNDT Statute.

21. Additionally, the Tribunal finds it surprising that MONUSCO is proceeding with its decision not to renew the Applicant's FTA although the General Assembly has not yet 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.

22. 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. Under these circumstances, MONUSCO's decision not to renew the Applicant's FTA due to an abolition of post, which has not been approved, is *prima facie* unlawful and cannot stand.

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

Urgency

Submissions

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

25. The Respondent submits that the urgency is self-created and thus, the Applicant has failed to meet the requirement of urgency. He was notified of the contested decision on 29 May 2019 and on 17 June 2019, he submitted a request for management evaluation, which is drafted in very similar terms to his current application for suspension of action. He has not provided any reasonable explanation for the delay of over three weeks (from 29 May to 24 June 2019) in filing his application to the Tribunal.

Considerations

26. In *Maloka Mpacko* UNDT/2012/081, the Tribunal emphasized 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).

27. The Applicant was notified of the administrative decision on 29 May 2019. He then sought suspension of action and management evaluation from MEU on 17 June 2019. It is understandable that since he had requested suspension of action from MEU, he 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 Applicant

that his request for suspension of action could be pending beyond the expiry of his FTA and this prompted him to turn to the Tribunal as a last resort.

28. The Tribunal finds that the Applicant 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 Applicant initiated this process on 17 June, when he still had 13 days before the end of his FTA. The Tribunal also finds that since the Applicant came to the Tribunal at the first available opportunity, i.e. three days after MEU rejected his request for suspension of action, he was diligent in filing his application for suspension of action with UNDT. Thus, the urgency in this case was not self-created.

29. The Tribunal holds that the Applicant has satisfied the prerequisite for urgency.

Irreparable damage

Submissions

30. The Applicant submits that implementation of the contested decision will cause irreparable damage to him because his job with MONUSCO is the only source of income for his family. He also submits that implementation will cause irreparable damage to the Organization financially and reputation-wise.

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

Considerations

32. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual.² 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.

² *Saffir* Order No. 49 (NY/2013); *Farrimond* Order No. 200 (GVA/2013)

ORDER

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

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of June 2019

Entered in the Register on this 28th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi