



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HARMON

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:
Rosangela Adamo, AAS/ALD/OHR

INTRODUCTION

1. The Applicant is a Logistics Assistant at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). He serves on a fixed term appointment at the FS4 level and is based in Kinshasa.

The Application

2. On 2 July 2019, the Applicant moved, pursuant to art. 13 of the UNDT Rules of Procedure, to suspend the Respondent's decision to separate him from service upon expiry of his 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 later that afternoon. The Respondent's case is that the Tribunal lacks jurisdiction to consider the application because the impugned decision has already been implemented. The Respondent also argues that the application should be rejected pursuant to art. 8.3 of the Rules of Procedure, as it is unsigned.

Considerations

4. 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 UNDT 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.

5. 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.

6. A Tribunal's order granting suspension of action of an administrative decision cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented. The *interim* measure of an injunction will not, and indeed cannot, provide an applicant with effective relief against a decision that has already been implemented.¹

7. Therefore, before entering a discussion on whether the Applicant has met the test for the injunctive relief that is sought, the Tribunal must determine whether the impugned decision has been implemented.

8. In this case, the Respondent blithely submits:

The Applicant's fixed term appointment expired on 30 June 2019. There is no further decision pending with regard to the renewal of the Applicant's fixed term appointment. Therefore, there is no decision to suspend. The Dispute Tribunal is not competent to reverse the decision not to renew the Applicant's fixed-term appointment.

9. The facts of this case are interesting. On 18 June 2019, a Memorandum from the Director of the Field Operations Finance Division informed the Mission that the Controller of the United Nations had approved the extension of *all posts* "including those subject to the decision of the General Assembly, for a period of one month from 1 to 31 July 2019."

10. Still later, on 27 June 2019, the Tribunal made a clear statement in Order No. 083 (NBI/2019) and Order No. 084 (NBI/2019) on the putative unlawfulness of the Respondent's decision to separate staff members from service on grounds of abolition of post before the posts have in fact been abolished. Specifically, the Tribunal stated thus:

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

¹ See *Almou* Order No. 103 (NBI/2017).

recommended that the General Assembly approve the budget, this approval is still pending.

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.

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.

11. What then would cause the Mission to separate the present Applicant in the face of the clear information contained in the 18 June 2019 memorandum from the Director of the Field Operations Finance Division to the Head of the Mission that approval had been given to extend all posts until 31 July 2019, including the posts affected by the proposed abolition?

12. The Respondent's apparent suppression of this memorandum and his efforts to mislead the Tribunal by claiming in his Reply that there is no further pending decision to extend the Applicant's fixed term appointment is both unfortunate and unprofessional.

13. The Respondent submitted that the separation of the Applicant was already implemented. He has not provided proof of such implementation except to state that the Applicant's contract has expired. The Tribunal's considered view in this regard is that the expiry of a fixed term appointment is not tantamount to the implementation of an administrative decision not to extend the affected staff member's contract.

14. There have been situations in the Organization when a staff member's contract was not extended until after its expiry. In the absence of any evidence to show that the decision taken by MONUSCO to not extend the Applicant's contract, pursuant to a yet unapproved abolition of his post, has been physically implemented, the Tribunal finds that the Applicant continues to remain in service.

15. Regarding the first test of *prima facie* unlawfulness, the Tribunal finds that that element is satisfied since the Respondent cannot, on the face of it, purport to implement the abolition of the Applicant's post without the approval of the General Assembly. Also, the Respondent has withheld and unlawfully flouted the directives in the 18 June 2018 memorandum of the Director of the Field Office Finance Division to extend the Applicant's contract up until 31 July 2019.

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

17. 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:²

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.

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

Observations

19. In the event that the Management Evaluation Unit upholds the impugned decision, and the Applicant files a substantive challenge before the Tribunal, the Applicant is advised to seek the assistance of counsel for effective representation before the Tribunal, should he wish to file a substantive application.

ORDER

20. This application for suspension of action is **GRANTED** pending Management Evaluation.

21. The Tribunal therefore **DIRECTS** service of the present Order on the Office of Staff Legal Assistance (OSLA).

² *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)

(Signed)

Judge Nkemdilim Izuako

Dated this 3rd day of July 2019

Entered in the Register on this 3rd day of July 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi