



Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ELBADAWI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICANT'S MOTION
FOR SUSPENSION OF ACTION
PENDING MANAGEMENT
EVALUATION**

Counsel for applicant:

Shuba Naik, OSLA

Counsel for respondent:

AAS/ALD/OHR

Introduction

1. The Applicant is a Public Information Officer at the United Nations Mission to Support the Hudaydah Agreement (“UNMHA”). She holds a temporary appointment at the P-3 level, and was deployed to serve in Hudaydah, Yemen. However, due to COVID-19 pandemic related difficulties she served her deployment partly stranded on a United Nations vessel *en route* from Hudaydah and thereafter by telecommuting from Addis Ababa.

Procedural History and Submissions

2. On 8 June 2020, the Applicant sought an injunction against the Respondent’s decision to not extend her contract beyond 13 June 2020 and to advertise the post she encumbers (the functions she currently performs) as a “recruit from roster” vacancy, thus excluding her from the selection process.

3. It is the Applicant’s case that the decision to terminate her employment services with the Mission is unlawful.

4. The Respondent had informed the Applicant on 3 May 2020, that she would be placed on Flexible Working Arrangements in Addis Ababa until she is “cleared to return to [...] Hudaydah.” On 15 May 2020, the Applicant was informed that her appointment would not be extended beyond 29 May 2020. When she pressed for reasons for the sudden change in the Mission’s position, the Applicant was informed that her supervisor had not recommended the extension of her appointment. The Applicant submits that her performance appraisals have shown her to have met performance expectations, and that there has been no indication of any dissatisfaction with her work from her supervisors.

5. The Applicant contends that the impugned decision was taken in bad faith; that it did not take into consideration the enormous stress that she was under despite having missed two rest and recuperation cycles because of exigencies of work and the

circumstances caused by the COVID-19 pandemic.

Considerations

6. Applications for suspension of action are governed by art. 2 of the UNDT Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage [emphasis added]**.

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

7. While the Tribunal is under a duty to transmit a copy of the suspension of action application to the Respondent, there is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to wait for the Respondent's response before the applicant's request is considered. With or without the Respondent's reply, the Tribunal must rule on an art. 13 application within five working days.

8. Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for suspending, in appropriate cases, an administrative decision, which may have been wrongly made, so as to give the Management Evaluation Unit sufficient time to consider the matter and to advise management. The process itself should not become unduly complex, time-consuming and costly for the United Nations or its staff members.

9. The Tribunal adopts the position taken in *Wilson*¹:

[A]pplications for suspension of action have to be dealt with on an urgent basis and the decision should, in most cases, be in summary form. There is no requirement to provide, and the parties should not expect to be provided with, an elaborately reasoned decision either on the facts or the law. To do so would defeat the underlying purpose of a speedy and cost-effective mechanism. Moreover, the time, effort and costs thereby saved by all those involved in the formal system of internal justice could be utilised to facilitate the disposal of other cases.

10. The impugned decision must be shown to be *prima facie* unlawful, the matter must be particularly urgently and it must be evident that implementation of the decision would cause the applicant irreparable harm. All three elements must be satisfied for the Tribunal to grant the injunction being sought, as the test is a cumulative one.

11. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he/she has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.²

***Prima Facie* Unlawfulness**

12. At this stage, the Applicant need only show *prima facie* unlawfulness. The presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process and consideration of irrelevant material or extraneous factors.³

13. Put another way, does it appear to the Tribunal that, unless it is satisfactorily

¹ Order No. 327 (NY/2014).

² See for example *Newland* Order No. 494 (NBI/2016).

³ *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

rebutted by evidence, the claim of unlawfulness will succeed?⁴

14. On the facts before it, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness. It is clear from staff rule 4.12(c) that “[a] temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment.” However, a non-renewal decision ought not to be made arbitrarily or in bad faith.

15. In this case, no specific reason for the Applicant’s non-renewal has been provided despite her requests.⁵ It is imperative that the administration provide reasons to staff members without them having to resort to MEU or the Tribunal. In light of the foregoing, the Tribunal considers that a *prima facie* case of arbitrariness has been made out. The Applicant has also established a *prima facie* case that the decision may have been based on improper motives. She contends that despite having positive appraisals, an unfair position may have been taken against her when she faced COVID-19 pandemic related difficulties based on which she preferred to be posted in one of the mission’s duty stations other than Hudaydah.

16. The Tribunal finds that based on the foregoing a *prima facie* case of unlawfulness had been established.

Urgency

17. The urgency of this application is obvious given that the Applicant’s contract of employment with the Mission ends on 13 June 2020.

Irreparable Harm

18. Irreparable harm is generally defined as harm that cannot be compensated.

19. As there is little that cannot be monetarily compensated for, the Tribunal has

⁴ *Wilson* Order No. 327 (NY/2014).

⁵ *Obdeijn* UNDT/2011/032, para. 33 (citing *Abosedra* Order No. 10 (NBI/2011), para. 23 and *Rasul* Order No. 143 (NBI/2010), para. 50).

previously held that the concept is a little more nuanced than the question of money alone. In *Tadonki*, the court held as follows:

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.⁶

20. In the circumstances presented by the Applicant in this case, the Tribunal finds that the requirement of irreparable damage is satisfied. It would also adversely affect her reputation, emotional well-being and career prospects during unsettling times of Pandemic in a manner that may not be compensated for in any practical way

ORDER

21. The application for suspension of action is **GRANTED** pending management evaluation.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 10th day of June 2020

Entered in the Register on this 10th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, UNDT, Nairobi

⁶ UNDT-2009-016.