



**Before:** Judge Francesco Buffa

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

LOTO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**ORDER ON A MOTION FOR  
EXECUTION OF ORDER NO. 119  
(NBI/2020)**

---

**Counsel for the Applicant:**

Sétondji Roland Adjovi

**Counsel for the Respondent:**

Nicola Esti Caon, AAS/ALD/OHR  
Elizabeth Gall, AAS/ALD/OHR

Notice: This Order has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. By a motion filed on 30 June 2020, the Applicant, a Mail Assistant at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Goma, requests execution of Order No. 119 (NBI/2020), of 25 June 2020, which granted his motion for interim measures and ordered that the decision to deprive him of his salaries while he was on administrative leave pursuant to staff rule 10.4 be suspended until the completion of the investigations and the disciplinary process. The Applicant specifically alleges that the Order requires him to be on administrative leave with pay (“ALWP”) since 13 January 2020.

## **Procedural background and historical facts**

2. On 10 December 2019, the Applicant received an email from the Office of Internal Oversight Services (“OIOS”) informing him that he was the subject of an investigation and that he was required to submit to an interview on 13 December 2019. On 13 January 2020, the Under-Secretary General for Management, Strategy, Policy and Compliance (“USG-MSPC”), placed the Applicant on administrative leave without pay (“ALWOP”) for a period of three months pending completion of the investigation and any disciplinary process against him. On 13 May 2020, the Applicant was notified that the USG-MSPC had decided to extend his ALWOP for an additional period of three months from 13 April 2020, or until the completion of the disciplinary process, whichever comes earlier.

3. On 14 June 2020, the Applicant filed an application on the merits challenging the decision to place him on ALWOP.

4. On 17 June 2020, the Applicant filed a motion for interim measures pending proceedings seeking: (a) change of the administrative leave from ALWOP to ALWP, effective 13 January 2020, with payment of his full pay and entitlements issued through off-cycle payroll; (b) credit of his leave entitlements and associated point

credits for home leave, rest and recuperation (“R&R”) to be awarded if they have been withheld during the period of his ALWOP.

5. In the alternative, the Applicant sought the payment of his full pay and entitlements for the period 13 April 2020 to 13 May 2020 through an off-cycle payroll disbursement while credit for his leave entitlements and associated point credits for home leave and R&R be awarded if they have been withheld during this period.

6. On 19 June 2020, the Assistant Secretary-General for Human Resources (“ASG/OHR”) rescinded the decision to place the Applicant on ALWOP on a retroactive basis, from 13 April to 12 May 2020. The ASG/OHR instructed MONUSCO to pay the Applicant his salary, including the corresponding allowances and entitlements, for this period.

7. By Order No. 119 (NBI/2020), issued on 25 June 2020 (“Order No. 119”), the Tribunal granted the Applicant’s motion for interim measures and ordered that the decision to deprive the Applicant of his salaries while he was on administrative leave pursuant to staff rule 10.4 be suspended until the completion of the investigations and the disciplinary process.

8. On 27 June 2020, the Applicant received an email from the Human Resources Officer (“HRO”), MONUSCO, informing him, among others, that the USG-MSPC’s decision of 13 May 2020 placing him on ALWOP would expire on 12 July 2020. In this regard, the Mission would advise on the Applicant’s status from 12 July 2020 onwards.

9. On 28 June 2020, the Applicant replied to the HRO and clarified that the Tribunal’s Order of 25 June 2020 requires him to be on ALWP from 13 January 2020.

10. On 29 June 2020, the Applicant received another email from the Chief Human Resources Officer (“CHRO”), MONUSCO, informing him that the Tribunal’s Order took effect from 25 June 2020, the very day it was published. The CHRO also

informed the Applicant that the Order was going to be implemented by the Mission and that he would soon receive a new Personnel Action placing him on ALWP effective 25 June 2020.

11. By the motion mentioned in para. 1, the Applicant requests execution of Order No. 119, recognizing his ALWP from 13 January 2020.

12. On 3 July 2020, the motion was served on the Respondent, who filed his reply on 6 July 2020.

13. On 7 July 2020, the Applicant filed a motion for leave to include further submissions (contained in the same motion) to respond to the Respondent's reply and reiterating his request for the Tribunal to order the Respondent to fully comply with para. 41 of the Order No. 119, without any further delay.

14. On the same day, leave was granted by the Tribunal.

### **Submissions**

#### *Applicant's submissions*

15. The Applicant submits that MONUSCO's position does not comply with para. 41 of Order No. 119; he therefore requests the Tribunal to compel the Respondent to fully comply with the Order, specifically to place him on ALWP from 13 January 2020.

#### *Respondent's submissions*

16. The Respondent contends that the motion is not receivable. The Tribunal does not have competence to enforce the execution of a suspension of action order as an interim measure under art. 12.4 of the Tribunal's Statute and art. 32.2 of the Tribunal's Rules of Procedure. In any event, the Respondent has and will continue to execute the Order until the completion of the investigation and any disciplinary proceedings.

17. The Respondent explains that, in his motion, the Applicant seeks final relief, that is, relief that may only be granted under art. 10.5 of the Tribunal's Statute, when the Tribunal ultimately finds on the merits that the contested decision was unlawful. By seeking an order that he be placed on ALWP from 13 January 2020, the Applicant requests the Tribunal to exceed its powers.

18. The Respondent maintains that interlocutory orders of the Tribunal, including orders for interim measures, do not have retroactive effect. Retroactivity of orders would violate the general principle against retroactivity recognized under international law. In accordance with paragraph 41 of Order No. 119, the Respondent is taking steps necessary to pay the Applicant his salaries while he is on administrative leave as from 25 June 2020, the date of the issuance of the Order.

19. In light of the above, the Respondent requests the Tribunal to dismiss the motion.

### **Considerations**

20. The motion is filed for the execution of the Order mentioned in para. 1, which is an order on interim measures pending proceedings.

21. The Respondent contends that the motion is not receivable, for lack of competence by the Tribunal to enforce the execution of an interim measure under art. 12.4 of the Tribunal's Statute and art. 32.2 of the Tribunal's Rules of Procedure, which limit the application for an order for execution to judgments only. The Respondent explains that the Tribunal only has competence to order execution of a judgment after it has found on the merits that a contested administrative decision is unlawful and an applicant has been awarded relief by way of a final binding judicial decision.

22. The Respondent also argues that the Dispute Tribunal does not have competence to extend its jurisdiction beyond the limits defined by the General Assembly in the UNDT Statute. In particular, the Respondent stresses that the Applicant, by seeking an order for him to be placed on ALWP from 13 January 2020,

requests the Tribunal to exceed its powers to order final relief under art. 10.5 of the Tribunal's Statute.

23. The Respondent's submissions raise important issues, concerning the general power of the Tribunal to rule on the execution of orders on interim measures.

24. The Tribunal is fully aware of the principle consistently stated by the General Assembly that International Tribunals do not have powers beyond those conferred under their respective Statutes. The Tribunal finds, however, that the objection by the Respondent is without merit because it is the UNDT Statute itself that empowers the Tribunal to take interim measures with the exclusive aim to grant adequate protection of applicants' rights pending the proceedings on the merit.

25. Indeed, art. 10.2 of the Tribunal's Statute provides that:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

26. Art. 11.3 of the Statute provides that:

The judgments and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal. Case management orders or directives shall be executable immediately.

27. Art. 12.4 of the Statute provides that:

Once a judgement is executable under article 11, paragraph 3, of the present statute, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out.

28. Art. 14 of the Tribunal's Rules of Procedure provides for suspension of action during the proceedings stating that:

1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.
2. The Registrar shall transmit the application to the respondent.
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.

29. Art. 32 of the said Rules of procedure provides that:

1. Judgments of the Dispute Tribunal shall be binding on the parties, but are subject to appeal in accordance with the statute of the Appeals Tribunal. In absence of such appeal, it shall be executable following the expiry of the time provided in the statute of the Appeals Tribunal.
2. Once a judgment is executable under article 11.3 of the statute of the Appeals Tribunal, either party may apply to the Dispute Tribunal for an order of the execution of the judgment if the judgment requires execution within a certain period of time and such execution has not been carried out.

30. Considering these rules, the Tribunal notes that the Statute empowers the Tribunal to issue executable orders with interim measures that provide applicants temporary reliefs.

31. The Respondent contends that art. 12.4 of the Statute and 32.2 of the Tribunal's Rules of Procedure limits the application for an order for execution to judgments only, being necessary that the staff member be awarded with a relief by a final binding judicial decision.

32. Considering the above cited rules, the Tribunal observes that the rules enabling the Tribunal to order interim measures would be ineffective and fictitious if that function would not be accompanied by the power to assess that the order has not been executed by the Administration; indeed, the mandate given to the Dispute Tribunal to conduct judicial review of the administrative decision would be void and ineffective if the Tribunal could not ensure the execution of orders that it has issued.

33. It follows that the rule contained in art. 10.4 of the Statute and art. 32.2 of the Rules of Procedures, although referring explicitly only to judgments, applies to any executable decision issued by the Tribunal, this interpretation being the only one in compliance with the effectiveness of justice rendered by the Tribunal and the concreteness of powers conferred by the Statute to the Tribunal.

34. In sum, the power to issue interim orders, recognized by the Statute, is intended to grant applicants measures which, although temporary (as they are destined to be substituted with the judgment on the merits), must be effective.

35. A different interpretation, like the one proposed by the Respondent, would render judicial orders totally ineffective, unable to bind the Administration and therefore not juridical and completely useless; therefore, the proposed interpretation must fail.

36. The Tribunal is aware that in its case law the issue has been examined in *El-Awar*, UNDT/2017/023, paras. 20-25, where the Tribunal, moving from the letter of arts. 12.4 of the UNDT Statute and 32.2 of the UNDT Rules of Procedure, argued that the Dispute Tribunal's powers with respect to execution are limited to its judgments. According to this judgment, the exclusion of suspension of action orders and interim measures from the rules above mentioned is not a mere *lacuna*, but is an exclusion of the power of the Tribunal to rule on the execution of suspension of action orders.

37. In *El-Awar*, where the Respondent did not challenge at all the receivability of the application and the issue was examined *motu judicis*, the Tribunal considered that



the suspension of action order has nature and scope only in maintaining the *status quo* and, thereby, in regulating the position between the parties pending final adjudication of the dispute on the merits. In that situation, given that an order for suspension of action “does not make an award that may be the subject of execution”, the Tribunal concluded that it could not order execution.

38. The *El-Awar* judgment didn’t consider, however, that interim measures can consist also of relief of an anticipatory nature, which, recalling the conditions set up in the rules about interim orders, temporarily provide an applicant with an award which is similar (or even the same) to the one the judgment on the merits will grant at the end of the proceedings. Orders providing such kind of interim measures raise, indeed, the issue of their execution.

39. Therefore, this Tribunal will not follow the conclusions of *El-Awar*, as an obstacle to the issuance of an order for the execution of an interim measure - which sometimes can come from the nature of the decision challenged and the remedy consequently ordered - is never related, instead, to the powers of the Tribunal.

40. Indeed, an issue about the execution of an interim order arises when the order refers to interim measures which are not limited to suspending an administrative decision, but to temporarily awarding a relief which consists in the payment of a sum of money, like in the case at hand. Here, the Tribunal ordered suspension of the decision not to pay the Applicant, thereby recognizing his right to receive pay pending the proceedings. Given that the order made an award that may be subject to execution, the Applicant’s right is enforceable (although the Applicant will seek execution under his responsibility, owing to the temporality of the ruling).

41. The case law regarding the inviolability of the Dispute Tribunal’s orders is well-established. In *Igunda*, 2012-UNAT-255, the Appeals Tribunal stated that:

A party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body’s jurisdiction, because it is not for a party to

decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.

42. In *Gizaw*, Order No. 44 (NY/2018) of 23 February 2018, the Tribunal stated that proper observance must be given to judicial orders. Parties must obey the Dispute Tribunal's binding decision regardless of the fact that the order is ultimately vacated by the Appeals Tribunal, and that failure to implement the Tribunal's orders may merit contempt proceedings and accountability procedures.

43. Paras. 20-21 of the previous Order *Gizaw*, No. 20 (NY/2018) dated 29 January 2018, read as follows:

The Tribunal notes that the Respondent does not address the Applicant's serious averments regarding the failure to comply in good faith with the Tribunal's interim measures order. The Tribunal notes that there is an executable interim measures order in place in this matter, together with the Respondent's motion for an expedited hearing on the merits of the matter, *simpliciter*. There is no application for stay of execution or stay of proceedings.

Furthermore, there is no application before the Tribunal under the Dispute Tribunal's Rules of Procedure for revision pursuant to art. 29, or interpretation pursuant to art. 30 on the meaning or scope of Order No. 151 (NY/2017). Nor has an appeal been filed with the Appeals Tribunal on any basis. Even if such were the case, compliance with and execution of an order issued by the Dispute Tribunal is not voluntary, even if it is pending an appeal, or considered unlawful or deemed in excess of its jurisdiction (see *Villamorán* 2011-UNAT-160 and *Igbinedion* UNDT/2013/024) because it is not for a party to decide about these issues (see *Igunda* 2012-UNAT-255). Proper observance must be given to judicial orders. Parties must obey the Dispute Tribunal's binding decision regardless of the fact that the order is ultimately vacated by the Appeals Tribunal (See *Igbenedion* 2014-UNAT-410). There is need for due diligence and circumspection by counsel in the presentation and prosecution of a case as officers of the court who have a duty to contribute to the fair administration of justice and the promotion of the rule of law (see *Dalgamouni* UNDT/2016/094 and *Dalgaard* 2015-UNAT-232). The Dispute Tribunal may also refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered UN funds and programs for possible action to enforce accountability on the part of management and staff members in decisions made and

actions taken by them (see art. 10.8 of the Dispute Tribunal's Statute and *Dalgamouni, supra*).

44. The principles above are undoubtedly applicable to the case at hand, which has many similarities with the previously mentioned.

45. With specific reference to the present case, Order No. 119 was immediately executable and, given its nature as an order for interim measure, it was without appeal.

46. Although the period within which Order No. 119 was to be executed was not specified, the urgency of its execution can be inferred from the fact that the Applicant needed his salary to meet the subsistence needs of his family. In finding that the application was urgent, the Tribunal recalled that the Applicant was "the sole provider for his wife, seven children and two elderly parents" and that "the deprivation of a family of eleven of a source of income {was} in the circumstances of this case very harsh, especially since the Applicant is in a foreign country and cannot seek alternative employment".

47. The Applicant submits that, in consideration of the content of the said Order, the Administration was bound to put him on ALWP from 13 January 2020 and, given that the Administration didn't comply with the said Order, he filed the motion for execution of the Order.

48. The Respondent objects that in any case interlocutory orders by the Tribunal, including orders for interim measures, do not have retroactive effect, as they produce effects only for the future.

49. The Tribunal finds that retroactive application of the Order is not an issue in this case given that the Applicant did not ask for a retrospective acknowledgement of his rights, but only for the full execution of the Order.

50. The Tribunal notes that in his motion of 17 June 2020, indeed, the Applicant primarily requested "interim measures pending proceedings seeking: (a) change of

the administrative leave from ALWOP to ALWP, effective 13 January 2020, with payment of his full pay and entitlements issued through off-cycle payroll ...”.

51. The Tribunal further notes that the content of Order No. 119 is, indeed, general, as it orders that “that the decision to deprive the Applicant of his salaries while he is on Administrative Leave pursuant to staff rule 10.4 be suspended until the completion of the investigations and disciplinary process”. The Tribunal found that the suspension of payment was unlawful from the beginning (as the Tribunal accepted that the decision of 13 January to place the Applicant on ALWOP was unlawful) and therefore it fully accepted the motion, so referring to the moment specifically indicated by the Applicant in his request (that is 13 January 2020).

52. The Tribunal stresses also that no specific issue about the interpretation of the content of the said Order has been raised by the Respondent.

53. On the other hand, the Respondent submits that the Applicant is requesting, in a form of interim relief, the grant of final relief (which is the rescission of the 13 January 2020 decision and the replacement of ALWOP with ALWP) and objects that interim measures could not be retroactive.

54. The Tribunal notes on this issue that it is not its task to assess whether the content of the Order (providing a relief also for past salaries, due for the period from the date of the administrative decision challenged to the date of the motion for interim measures) was, or was not, in compliance with the nature of the interim measures, and whether the specific reference to the salaries for the past period from January onwards was, or was not, justified with reference to urgency and necessity (see for a different solution *Okwakol*, Order No.127/NBI/2020 of 6 July 2020).

55. The Tribunal is, indeed, called here only to verify the full and correct execution (on inexecution) by the Administration of the Order No. 119, as issued.

56. In the case at hand, given that the Administration did not change the status of the Applicant from ALWOP to ALWP from 13 January 2020 as ordered by the Tribunal, paying the salary consequently due to him for the said period, and instead

provided payment of the salary only from 25 June 2020 (that is only the date of the Order) onwards, the execution of the Order has not been carried out properly.

57. In conclusion, Order No. 119 has not been completely executed by the Administration; it must be consequently ordered to the Administration to change the administrative leave of the Applicant from ALWOP to ALWP, effective 13 January 2020, with payment of his full pay and entitlements issued through off-cycle payroll, without further delay.

### **ORDER**

58. In light of the forgoing, the Tribunal orders the execution of the Order No. 119 (NBI/2020) of 25 June 2020 and, consequently, orders the Administration to change the Applicant's administrative leave from ALWOP to ALWP, effective 13 January 2020, and to pay the Applicant his full pay and entitlements issued through off-cycle payroll, without further delay.

*(Signed)*

Judge Francesco Buffa

Dated this 15<sup>th</sup> day of July 2020

Entered in the Register on this 15<sup>th</sup> day of July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi