



Before: Judge Agnieszka Klonowiecka-Milart
Registry: Nairobi
Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

AND

**ORDER ON MOTION FILED PURSUANT
TO ARTICLES 19 AND 36 OF THE UNDT
RULES OF PROCEDURE
(VILLAMORAN)**

Counsel for the Applicant:

Evelyn W. Kamau, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Child Protection Officer, working with United Nations Mission in South Sudan (“UNMISS”), based in Bor, South Sudan. She serves on a fixed-term appointment (“FTA”) at the P-3 level.¹

2. On 25 September 2020, the Applicant filed an application for suspension of action before the United Nations Dispute Tribunal in Nairobi. She seeks: (i) suspension of the decision denying her to telecommute and compelling her to return to the duty station by 1 October 2020 pending management evaluation; and (ii) a Villamoran suspension of the contested decision pending the art. 13 suspension of action proceedings pursuant to articles 19 and 36 of the UNDT Rules of Procedure.

3. The Respondent filed a reply on 29 September 2020.

Facts

4. The Applicant joined UNMISS on 3 October 2017 as a Child Protection Officer.²

5. In October 2019, the Applicant fell ill and she was admitted to UNMISS level 2 hospital for several days. [REDACTED]

[REDACTED] On 17 October 2019, the Applicant went to seek further treatment in the United Kingdom.⁴

6. Between 4 October 2019 and 16 April 2020, the Applicant was placed on sick leave.⁵

¹ Application, section V.

² Application, section VII, para 22.

³ Application, annex 2.

⁴ Application, section VII, para 25.

⁵ Ibid, para 26.

7. On 16 April 2020, the Applicant was cleared by her doctor to return to work. However, due to the COVID-19 pandemic, working remotely was advised.⁶ Accordingly, UNMISS allowed the Applicant to telecommute until the end of June 2020.⁷

8. On 1 July 2020, the Applicant submitted a request for the extension of her telecommuting. Her request was approved to run until 30 September 2020.⁸

9. On 24 September 2020, the Applicant submitted another request to continue working from home after 1 October 2020. She attached a letter from the medical services in the United Kingdom, which she had received in April 2020, advising her on how to keep safe during the COVID-19 period, considering that she has underlying medical conditions.⁹ On the same day, UNMISS rejected her request stating that “the position of child protection officer in the field requires the presence of the staff member on the ground and no one has any idea as to when COVID-19 will come to an end”.¹⁰ The UNMISS Human Resources Office (“UNMISS/HRO”) advised the Applicant to return to the duty station by 1 October 2020 failing which she should apply for the sick leave (“SL”) or annual leave (“AL”) or special leave without pay (“SLWOP”).¹¹ This makes the basis for this application.

10. On 25 September 2020, the Applicant requested management evaluation of the contested decision. The Management Evaluation Unit is yet to respond.¹²

Submissions

Applicant’s submissions

Unlawfulness

⁶ Ibid.

⁷ Application, annex 3.

⁸ Application, annex 3.

⁹ Application, annex 4.

¹⁰ Application, annex 0.

¹¹ Application, annex 3.

¹² Application, section VI.

11. The Applicant contends that the contested decision is unlawful.¹³ She maintains that although granting a telecommuting request is discretionary, such approval should not be withheld unreasonably. The Applicant relies on UNMISS Broadcast issued on 27 May 2020 and town hall meetings held on 18 June 2020 and 23 September 2020, where it was communicated, among others, that a return to the duty station and/or workplace in the context of COVID-19 pandemic requires reasonable accommodation of staff, including telecommuting to be provided to staff who are vulnerable due to their medical conditions.

12. [REDACTED]
[REDACTED]
[REDACTED] She clearly falls within the category identified by UNMISS Administration of staff who should be considered for telecommuting. The Applicant had [REDACTED] while she was at the duty station even prior to the COVID-19 pandemic and she has provided documentary material in support. Therefore, the decision denying her request to telecommute reflects an abuse of discretion and authority.

13. The Applicant also argues that by UNMISS/HRO advising her to seek SL or take AL or SLWOP if she cannot return to the duty station, the HRO failed to carry out its functions of properly interpreting administrative policies and advising managers and staff on the relevant responsibilities and entitlements. In doing so, the HRO is advising the Applicant to commit attendance fraud.

Urgency

14. The Applicant submits that this matter is urgent because she has been directed to report to the duty station by 1 October 2020, she will thus need to commence her travels by 29 September 2020. She explains that urgency is not self-created as she had been approved to work from home until 30 September 2020. Following

¹³ Application, section VIII.

continued treatment and reviews by her doctors, a medical report was issued on 24 September 2020 recommending that she should work from home. On the same day, the Applicant submitted the medical report to the UNMISS medical team and a request to telecommute. Her request was also declined on the same day and she filed this application on 25 September 2020.

Irreparable harm

15. If the decision is implemented and the Applicant travels back to her duty station in this COVID-19 period, she will be exposed to an unreasonable risk of infection. In addition, she will be forced to wear a mask for 18-20 hours uninterrupted, which will have a debilitating effect on her as she [REDACTED]. Further, the Applicant submits that her FTA will expire on 2 October 2020 and the Administration has not renewed it or given any indication whether they will renew it. If she does not return to the duty station on 1 October 2020, it is likely that the Administration will argue that she has abandoned her post and begin the separation process.

Motion pursuant to articles. 19 and 36 of the UNDT Rules of Procedure (Villamorán)

16. The Applicant submits that if the Administration is allowed to proceed and she is compelled to travel to her duty station on 29 September 2020, she will be placing her health at risk. She therefore, requests the Tribunal to order the suspension of the contested decision pending the art. 13 suspension of action proceedings pursuant to articles 19 and 36 of the UNDT Rules of Procedure.

The Respondent's submissions

17. The Respondent contends that the application is not receivable *ratione materiae*. The contested decision is not an administrative decision within the meaning of art. 2.1(a) of the Dispute Tribunal's Statute. It has produced no legal consequences adversely affecting the Applicant's terms of appointment or employment contract.

The Applicant's abuse of authority claim is not receivable because she did not exhaust internal remedies, as required.

18. On the merits, the Respondent submits that the Applicant has not satisfied the three prerequisites for suspension of implementation of the decision. The contested decision is lawful because the Applicant has no right to telecommute and the manager has the discretion to grant the Applicant's request for an accommodation to work remotely. The Chief, Child Protection Unit reasonably concluded that the Applicant is required to report on site because her position requires her presence on the ground. She has been absent from the mission area working remotely for more than the allowable six months. The Respondent maintains that since UNMISS Medical found the Applicant fit to work in the mission area and cleared to travel, there are no grounds to extend her telecommuting beyond 1 October 2020.

19. With regard to urgency, the Respondent submits that the Applicant has not demonstrated suspension of the contested decision is urgent. Since 11 September 2020, the Applicant was informed that effective 1 October she would have to return to her duty station. However, she waited until 25 September 2020, more than two weeks later to file the application. Any urgency is self-created.

20. For irreparable harm, the Respondent argues that if the Applicant does not work remotely, she may avail herself of leave. She has produced no evidence that her FTA will not be renewed beyond 2 October 2020 in the normal course. Accordingly, the Applicant has not demonstrated irreparable harm.

21. The Respondent therefore, requests the Tribunal to reject the application.

Considerations

22. The application is receivable. The issue is about modality of work from outside the duty station, which now, in the era of COVID-19, has been made widely available to staff members on the basis of several policy documents creating an *ad hoc* normative framework for working arrangements. A refusal to grant permission

for a staff member to avail herself/himself of this modality – which implies that incompliance will be sanctioned as abandonment of post - is clearly a decision in the matter of terms of appointment. The impugned decision is appealable before the Tribunal and thus may be the subject of a motion for suspension of action under art. 2 of the UNDT statute.

23. As concerns the Respondent's argument related to "exhausting other remedies", the Tribunal recalls that the competence of the Tribunal is determined by the UNDT Statute alone and this competence does not fall to be modified by administrative issuances; likewise, the latter must not be attributed legal effect inconsistent with the Statute. Among others, art. 2 of the UNDT Statute determines expressly and exhaustively the impact of administrative proceedings on matters falling under UNDT jurisdiction. Specifically, the impugned decision must be submitted for management evaluation, where required. Statutory deadlines for filing an application are adjusted to this requirement. The UNDT Statute does not, however, require "exhausting internal remedies of ST/SGB/2019/8".

24. In parallel, analysis of ST/SGB/2019/8 demonstrates that UNDT proceedings and administrative proceedings under ST/SGB/2019/8 have different functions and are largely independent from each other. Harassment, discrimination or abuse of authority are committed not only by discrete administrative decisions but also by other actions, often forming a pattern of behaviour giving rise to difficult and complex factual inquiries. Proceedings under ST/SGB/2019/8 serve the purpose of investigating whether there is basis for instituting corrective and preventive measures and reestablishing a healthy workplace. An aggrieved individual who is pursuing corrective measures under ST/SGB/2019/8, as well as the alleged offender, may appeal the outcome of the procedure on corrective measures to UNDT. The latter, however, is a remedy particular to the avenue of proceedings pursuant to ST/SGB/2019/8 and decisions issued thereunder.

25. Conversely, the vast majority of proceedings before UNDT concern administrative decisions issued in the regular operation of the administration and not

resulting from investigation under ST/SGB/2019/8. With respect to allegations of ulterior motive, when such are made, a different distribution of proof is adopted, in that an applicant who alleges an ulterior motive carries a burden of proving it. As such, the UNDT is indeed not equipped to conduct investigations, in the sense of ST/SGB/2019/8, into allegations of harassment, discrimination and abuse of authority, just as it has no competence to pronounce on the corrective, preventive, or monitoring measures foreseen therein. However, as confirmed by the Appeals Tribunal, “[a]s part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose” (*Toure* 2016-UNAT-660, para.30). All considered, for the purpose of assessing validity of a decision concerning the terms of appointment or the contract of employment which do not result from investigation under ST/SGB/2019/8, the Tribunal is competent to independently establish all facts relevant for the proceedings before it, without being formally limited or bound by either the pendency or the outcome of proceedings under ST/SGB/2019/8. The same is expressed by UNAT in *Messinger* 2011-UNAT-123, para 25, which states:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. *However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment* (emphasis added).

26. The holding in *Messinger* confirms that an applicant who wishes to appeal a decision concerning the terms of his/her appointment or the contract of employment, is not required to exhaust any measures under ST/SGB/2019/8. The same is confirmed by jurisprudence: *Nwuke* 2010-UNAT-099, *Argyrou*, 2019-UNAT-969 and by *Symeonides* 2019-UNAT-977. In the latter case, invoked by the Respondent, see in particular para 33: “In other words, before a staff member may *file an ST/SGB/2008/5 complaint* with the UNDT, he or she must have exhausted the internal remedies set forth in the Secretary-General’s Bulletin...(emphasis added)”. The application in this case does not concern an ST/SGB/2008/5 or ST/SGB/2019/80 complaint. Any allegations of abuse of power are contextual.

27. In summing up, the Respondent's argument is entirely misplaced.

Merits

28. Under art. 2.2 of the Dispute Tribunal's Statute, the Applicant must establish that: (i) the contested decision was *prima facie* unlawful; (ii) there is particular urgency; and (iii) implementation of the decision would cause irreparable harm. All three statutory requirements must be satisfied in order for the implementation of a contested decision to be suspended.

29. This Tribunal agrees with the Respondent that the requirement of *prima facie* unlawfulness was not made out. The Applicant has no right to telecommute; the matter belongs in the area of broad managerial discretion. Whereas individual needs of staff members, and health impediments among them, are important considerations recognized in the relevant policy documents, any decision on the claim to be accommodated for personal reasons must also take into account the necessity to maintain proper operation of the Organization. The question is thus about balancing competing needs.

30. It is undisputed – moreover quite obvious - that the position of Protection Officer at the Child Protection Unit requires a presence on the ground. The Applicant has been physically absent from the Mission for a year now, as after her sick leave she was permitted to work from home for several months. Such a long absence inevitably put a burden on the Unit. The Tribunal also endorses the argument that in so far as the claim is based on the Applicant's condition and the pandemic, there is no possibility to predict that any of these elements will be alleviated in the foreseeable future. Perpetuating the situation thus begs the question of the Applicant's fitness for work. In the latter respect, in August 2020 the Applicant's condition has been again assessed by the United Nations Medical Services, in consultation with her treating physician, and she has been cleared to travel and return to work in the Mission. The Tribunal finds no basis to question this judgment.

31. Altogether the impugned decision does not disclose unreasonableness or disproportionality, as such it is not *prima facie* unlawful. This entails refusal of the application for suspension of action. The Tribunal needs not address the remaining issues.

ORDER

32. The application is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 29th day of September 2020

Entered in the Register on this 29th day of September 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi