



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

O'BRIEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Barry Crushell, Crushell & Co.

Counsel for the Respondent:
AAS/ALD/OHR

Introduction

1. The Applicant is a military observer deployed with the United Nations Truce Supervision Organisation (“UNTSO”). He filed an application on 17 February 2021 seeking suspension of the 4 February 2021 decision by the UNTSO Head of Military to issue him a written reprimand and to remove him from the position of Chief Operations Officer for Observer Group Golan.

2. It is the Applicant’s case that: the impugned decision is *prima facie* unlawful because his due process rights have been violated; there is urgency because he has been removed from his position; and there is irreparable harm because his publicly announced removal for alleged improper conduct has tarnished his reputation. Further, his move to another outstation has resulted in lost earnings and will impact his ability to take much-needed leave.

3. The application was served on the Respondent on 19 February 2021.

Considerations

4. Article 2.2 of the Statute of the Dispute Tribunal (Statute) and art. 13 of the Rules of Procedure (Rules) empower the Tribunal to grant an interim relief by way of a suspension of action in relation to an administrative decision that impacts on the contract or terms of employment of an individual provided the criteria of *prima facie* unlawfulness, urgency and irreparable damage are satisfied. Since the test is cumulative, the three elements must be satisfied for the Tribunal to grant this relief.

5. Before applying the test for suspension of action, the Tribunal will first determine whether this application is receivable pursuant to arts. 2 and 3 of its Statute because it relates directly to its jurisdiction.

6. Article 2.1, of the Tribunal’s Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for

in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance.

7. Article 3.1 of the Statute further provides that:

An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

8. For an applicant to have standing to appear before the Tribunal, he or she must be a staff member, former staff member, or someone making claims on behalf of an incapacitated or deceased staff member. The United Nations Appeals Tribunal has previously affirmed the Dispute Tribunal’s findings that it was not competent to hear cases brought by parties who were not staff members of the Organization.¹

9. As a Military Observer, the Applicant is categorized as a United Nations Military Expert on Mission (“UNMEM”)². Paragraph 12 of the DPKO/DFS UNMEM Manual states that “Military personnel contributed by the Member States to UNPKOs remain members of their national defence forces” but that “the operational authority (including the operational control) over such forces and personnel is transferred to the

¹ See *Basenko* 2011-UNAT-139; *Di Giacomo* 2012-UNAT-249.

² See DPKO/DFS UNMEM Manual dated 23 April 2010, para. 1.

UN, and vested in the Secretary-General, under the authority of the Security Council.” Clearly, the Applicant, as a Military Observer, is not covered by art. 3 of the UNDT Statute since he is not a staff member, former staff member or a person making a claim in the name of an incapacitated or deceased staff member of the United Nations. Therefore, his request for suspension of action does not fall within the jurisdiction of the Tribunal. Accordingly, the Tribunal lacks jurisdiction to consider the contentions made by the Applicant.

Order

10. The application is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 19th day of February 2021

Entered in the Register on this 19th day of February 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi