



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/042

Order No.: 125 (NBI/2021)

Date: 22 June 2021

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

WATHANAFI

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:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a P-3 Disarmament, Demobilization and Reintegration (“DDR”) Officer with the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) in Goma.

2. On 14 June 2021, she filed an application for suspension of action (“SOA”) seeking to suspend the decision to terminate her fixed-term appointment by 30 June 2021.

3. The Respondent filed his reply on 17 June 2021 in which it was argued that the application should be denied.

Relevant facts

4. On 26 October 2020, the Secretary-General established a joint strategy on the progressive and phased drawdown of MONUSCO with the Government of the Democratic Republic of the Congo (“Joint Strategy”). According to the Joint Strategy, the Government of the Democratic Republic of the Congo resolved to pursue a new, community-based national disarmament, demobilization, and reintegration approach in preparation for the Mission drawdown.¹

5. On 19 February 2021, the Secretary-General submitted his proposed 2021-2022 MONUSCO budget (“Budget”) to the General Assembly. The Budget proposed the abolition of 113 posts (23 international staff, 67 national staff and 23 United Nations Volunteers) effective 1 July 2021. The Budget specified, *inter alia*, that four international staff posts, including three P-3 DDR positions would be nationalized and converted to DDR National Professional Officer positions in line with the Joint Strategy.²

¹ Reply, para. 4 and Annex R/2.

² Reply, para. 5 and Annex R/3.

6. On 2 April 2021, MONUSCO's Officer-in-Charge ("OIC") Human Resources Section, informed the Applicant that the anticipated approval of MONUSCO's proposed budget would result in the abolishment of the post she encumbered through a "dry cut" and the non-renewal of her fixed-term appointment, expiring on 30 June 2021.³

7. On 26 April 2021, the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") recommended the approval of some parts of the Budget.⁴

8. On 18 May 2021, MONUSCO notified the Applicant of the non-renewal of her appointment beyond its expiration on 30 June 2021.⁵

9. On 1 June 2021, the Applicant submitted a management evaluation request concerning the contested decision.⁶

Parties' submissions

The Applicant

Prima facie unlawfulness

10. The 2 April 2021 decision does not reflect the commitment of the communications made by the management before the ongoing reconfiguration of the Mission. On 4 April 2021, a message was sent to all staff informing about the organization of the Comparative Review Process ("CRP") in coming weeks. On the same day, she received a notice of non-extension of her appointment before the CRP was conducted.

11. There was no communication to her that her post was subject to a "dry cut". The transcripts of the Special Representative of the Secretary-General's ("SRSG")

³ Application, Annex 4.

⁴ Reply, para 7 and Annex R/4.

⁵ Application, Annex 7.

⁶ Application, Annex 1.

town hall meeting held on 7 May 2021 do not mention that the Goma duty station was subject to either a “dry cut” or CRP.

12. The 18 May 2021 decision is against the spirit of the General Assembly Resolutions 70/244 of 23 December 2015 and 72/254 of 24 December 2017, regarding new staff regulation 9.2 and staff rule 13.13 as reflected in ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

13. The Applicant submits that she was discriminated against based on her age.

Urgency

14. The matter is urgent because the Mission is sending her several notifications to begin the check-out process despite the communications she is addressing to the Humans Resources Section.

15. Following the current volcano situation in Goma, she was relocated to Uganda where she got sick and needs to stay in bed as per her doctor’s advice. She is out of her duty station and needs to wait for the management evaluation outcome.

Irreparable harm

16. The Applicant submits that she has a right to be treated fairly as per the Mission communication and that the contested decision is a violation of her right to a mandatory retirement period and to her dignity.

17. She has been undergoing a lot of stress and has suffered from moral damages as a result of the contested decision and requests to be compensated for this.

The Respondent

Prima facie unlawfulness

18. The contested decision is lawful. The Applicant’s appointment was not renewed because she was retrenched following a lawful downsizing exercise,

resulting in the nationalization of three P-3 DDR posts.

19. Contrary to the Applicant's claim, there was no requirement for a CRP in the DDR Section which had four P-3 DDR Officers. One of the four P-3 DDR Officers held a continuing appointment while the other three Officers held fixed-term appointments. Given that three P-3 DDR posts were being nationalized, the DDR Officer holding a continuing appointment was retained since he enjoyed a greater preference of retention in line with staff rule 9.6(e), while the three DDR Officers holding fixed-term appointments, including the Applicant, were retrenched through dry cuts.

20. The Applicant's allegation that she should not have been affected by the downsizing in the DDR Office because she is assigned to the Goma office is incorrect. Internationally recruited staff members were reviewed mission-wide, across all duty stations, but within the same section. MONUSCO was therefore required to consider all the four internationally recruited DDR Officer posts across the Mission and not by duty stations.

21. Contrary to the Applicant's claim, the contested decision had nothing to do with her retirement age. The non-renewal notice that MONUSCO sent to the Applicant on 2 April 2021 stated that the Applicant's fixed-term appointment would not be renewed beyond its expiration on 30 June 2021 in light of MONUSCO's proposed budget which would result in the abolishment of the post she encumbered through a "dry cut". MONUSCO is not required to renew the Applicant's appointment indefinitely.

Urgency

22. The Applicant has not demonstrated that suspension of the contested decision is urgent. Any alleged urgency has been created by the Applicant. The Applicant has known since 18 May 2021 that MONUSCO would not renew her appointment and that she would be separated. Yet, she waited over three weeks before seeking a suspension of action. The Applicant provides no explanation as to why she did not act

with due diligence. A delay of 10 days or more without explanation is self-created urgency.

Irreparable harm

23. The Applicant has not demonstrated irreparable harm. She has no right or expectation to serve until her retirement. No staff member has a right of permanent employment with the United Nations.

24. In any event, the Applicant has reached the normal age for retirement (62 years) since she joined the United Nations between 01 January 1990 and 31 December 2013. Given that she has five years of contributory service, the Applicant is entitled to her retirement benefits in line with art. 28 of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund.

25. The non-renewal of the Applicant's fixed-term appointment therefore presents no more harm to her than the non-renewal of the appointments of the more than 113 staff members who were affected by the downsizing in MONUSCO.

Considerations

26. The application is made under art. 10.2 of the UNDT Statute and art. 13 of the UNDT Rules of Procedure, which allow the Tribunal to suspend the implementation of the impugned decision pending management evaluation where the decision appears *prima facie* to be unlawful, where it is a case of particular urgency and where the implementation would cause irreparable damage.

27. 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.

28. The issues that are currently before the Tribunal are: (i) whether the Respondent's decision not to renew the Applicant's fixed-term appointment beyond 30 June 2019 is *prima facie* unlawful; (ii) whether the matter is urgent; and (iii) whether implementation of the separation decision will cause the Applicant irreparable damage.

Prima facie unlawfulness

29. The Applicant's assertion that her duty station (Goma) was not subject to either a "dry cut" or CRP is not supported by evidence. The Tribunal accepts the Respondent's explanation that internationally recruited staff members were reviewed mission-wide, across all duty stations, but within the same section, and that MONUSCO was therefore required to consider all the four internationally recruited DDR Officer posts across the Mission and not by duty stations.

30. The 2 April 2021 non-renewal notice that MONUSCO sent to the Applicant stated that the Secretary-General of the United Nations proposed the abolishment of 111 posts in MONUSCO's budget for 2021/22 and that the budget proposal was then being considered by legislative bodies for implementation effective 1 July 2021. She was also informed that the post which she encumbered was among those proposed for abolishment through "dry cut" and that her fixed-term appointment would not be renewed beyond its expiration on 30 June 2021.⁷ On 26 April 2021, the ACABQ recommended the approval of parts of the Budget.

31. The Tribunal has reviewed the ACABQ Report and the paragraphs in it cited by the Respondent (paragraphs 21, 23 and 29) and sees no express recommendation for the abolishment of the three P-3 DDR posts as proposed by the Secretary-General. The Tribunal considers that MONUSCO should not proceed with the decision not to renew the Applicant's fixed-term appointment given that the General Assembly has not approved the Secretary-General's final budget proposal for 2021-2022. While the ACABQ has recommended that the General Assembly approve the Budget, this

⁷ Application, Annex 4.

approval is still pending. Under these circumstances, MONUSCO's decision not to renew the Applicant's fixed-term appointment due to abolition of her post, which has not been approved, is *prima facie* unlawful.

Urgency

32. The Tribunal agrees with the Applicant that the matter is urgent because the Mission is sending her several notifications to begin the check-out process despite the communications she was addressing to the Humans Resources Section to try and resolve the issue. Further, it is understandable that since she had requested suspension of action from the Management Evaluation Unit ("MEU"), she did not come to the Tribunal immediately with an application seeking the same injunctive relief. The Applicant acted reasonably by first using the mechanism for suspension of action in cases involving separation from service, which is set out in staff rule 11.3(b)(ii), before approaching the Tribunal.⁸

Irreparable harm

33. A loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual.⁹ The Tribunal finds that implementation of the separation decision now would damage the Applicant's career prospects in a way that could not be compensated by a monetary award. The requirement of irreparable damage is satisfied.

Conclusion

34. The application for suspension of action pending management evaluation is granted.

⁸ See also *Nsereko et al.* Order No. 083 (NBI/2019), para. 35.

⁹ *Saffir* Order No. 49 (NY/2013); *Farrimond* Order No. 200 (GVA/2013).

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(Signed)

Judge Margaret Tibulya

Dated this 22nd day of June 2021

Entered in the Register on this 22nd day of June 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi