



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/011  
Order No.: 029 (NBI/2023)  
Date: 6 February 2023  
Original: English

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**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ELEAS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**  
Mario Hainboeck, OSLA

**Counsel for the Respondent:**  
Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

## **Introduction and procedural history**

1. The Applicant, an FS-5 Administrative Assistant at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo or (“MONUSCO”) based in Entebbe, Uganda, filed an application on 27 January 2023 seeking to suspend the implementation of the decision to withdraw a 7 July 2022 conditional offer of appointment to the position of FS-5 Administrative Assistant with the United Nations Truce Supervision Organization (“UNTSO”), (Job Opening 180602) pending management evaluation.

2. The application was transmitted to the Respondent on 30 January 2023.

3. The Respondent filed a reply to the application on 2 February 2023. In the reply the Respondent argued that the application is not receivable *ratione materiae* because the decision had already been implemented.

## **Background**

4. From 4-17 May 2022, UNTSO posted a Recruit from Roster Job Opening for an FS-5 Administrative Assistant position. On 13 June 2022, UNTSO interviewed the Applicant for the position.<sup>1</sup>

5. On 7 July 2022, the Applicant received a conditional offer of appointment from UNTSO Human Resources (“HR”) in Inspira.<sup>2</sup> The conditions attached to the offer of appointment were in respect of obtaining a valid visa issued by the relevant authorities prior to reporting for duty, and that no travel could commence prior to her obtaining the visa and all other security clearances.

6. On 12 July 2022, the Applicant accepted the offer of appointment<sup>3</sup>. On 19 July 2022, the Applicant submitted supporting documents to the UNTSO Protocol

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<sup>1</sup> Reply, paras. 5 and 6.

<sup>2</sup> Application, annex 2; reply, annex R/2.

<sup>3</sup> Reply, para. 9; application, para. 21 and annex 12.

Officer for her and her family members' Israeli visa applications.<sup>4</sup>

7. By letter dated 11 January 2023, the UNTSO Chief Mission Support informed the Applicant that the offer of appointment made to her on 7 July 2022 for Job Opening 180602 was withdrawn because the process for the Israeli visa had been unusually lengthy with no guarantee that the visa would be granted.<sup>5</sup>

8. On 17 January 2023, the Israeli Consular Affairs Division informed UNTSO that the Applicant's visa application had been refused.<sup>6</sup> On the same day, the UNTSO Chief Mission Support confirmed the withdrawal of the offer of appointment based on the Israeli visa denial.<sup>7</sup>

9. On 20 January 2023, UNTSO informed another candidate, who for purposes of this Order is referred to as "CB", that the Head of Department/Office/Mission had selected her for Job Opening 180602.<sup>8</sup>

10. On 24 January 2023, UNTSO acknowledged receipt of CB's continued interest in Job Opening 180602.<sup>9</sup>

11. On 27 January 2023, the Applicant requested management evaluation of the decision dated 11 January 2023 withdrawing the offer of appointment by UNTSO made on 7 July 2022.<sup>10</sup>

12. On 2 February 2023, the Tribunal directed the Respondent to file documentation as proof of CB's confirmation, availability and continued interest in Job Opening 180602. The Respondent filed the proof on 3 February 2023 stating that the candidate had confirmed her availability through the Inspira automated system.

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<sup>4</sup> *Ibid.*, at annex R/3.

<sup>5</sup> *Ibid.*, at annex R/6; application, annex 1.

<sup>6</sup> *Ibid.*, at annex R/7; application, annex 22.

<sup>7</sup> *Ibid.*, at annex R/8.

<sup>8</sup> *Ibid.*, at annex R/9.

<sup>9</sup> *Ibid.*

<sup>10</sup> Application, annex 25.

## **Parties' submissions**

### ***The Applicant***

13. The Applicant case is summarized below.
  - a. The UNTSO Administration, by its own action, revealed its improper motives when it withdrew the job offer made to the Applicant. The UNTSO Administration decided to withdraw the job offer even before there were clear indications that the Applicant's visa application would be rejected. Rather, the UNTSO Administration based its initial withdrawal of the job offer on the unusual length of the visa process and alleged operational needs. This is curious, given that UNTSO/HR must be well aware that visa applications that involve Iraqi nationality are likely to result in a longer delayed process.
  - b. Only after the Applicant indicated that she would not let the withdrawal go unchallenged, did the UNTSO Administration present a visa rejection in the form of a simple three-line email from the Israeli Ministry of Foreign Affairs ("MFA").
  - c. The timing of the Israeli MFA visa rejection email – one day after the Applicant's response – raises the question if the UNTSO Administration signalled to the Israeli Government that a rejection would be appreciated, so that the UNTSO Administration could close the matter.
  - d. In the case of the Applicant, there are circumstances present that required the UNTSO Administration to apply even more effort and tenacity to securing the visa:
  - e. Given the circumstances, the UNTSO Administration is required to formally ask for the grounds on which the visa for the Applicant was rejected. Then, after learning about possible additional requirements or defects of the application, the UNTSO Administration together with the Applicant should

work towards rectifying those defects.

f. The Applicant fails to understand the urgent operational reason to withdraw the offer, given that her position in UNTSO is that of Assistant to the Senior Advisor, a post which has been vacant since 1 September 2022, neither advertised much less filled yet. A new recruitment process, visa application, and two-month release from another mission/office will delay any deployment much longer.

g. The UNTSO Administration is not acting in good faith. It appears that the UNTSO Administration wants to recruit another person or that it simply considers the visa application process too cumbersome to follow through with it. Neither provides a legitimate legal basis to withdraw the job offer. As a result, the decision to withdraw the job offer is based on an improper motive and therefore unlawful.

h. Given the 11 January 2023 decision notifying the Applicant of the withdrawal of the offer of appointment, the selection of another candidate is imminent and, if accepted, irreversible. The Applicant made attempts to convince UNTSO/HR of the unlawfulness of the decision and asked for underlying documents relating to the rejection of her visa application. For this reason, the Applicant did not file immediately for a suspension of action.

i. Should the application for suspension of action not be granted, the recruitment process will continue and eventually select another candidate, rendering the Applicant unable to have this unlawful decision reversed. The candidate will also lose future job prospects that might present themselves in the position for which she was selected. Monetary compensation should not be used as a shield against blatant and unfair procedure in a decision-making process.

***The Respondent***

14. The Respondent's case is summarized below.

a. The application is not receivable *ratione materiae*. The contested decision has already been implemented and is not capable of being suspended. The Dispute Tribunal lacks jurisdiction, through an application for suspension of action, to order rescission of the contested decision or to order the Applicant's appointment.

b. On 12 January 2023, UNTSO notified the Applicant of the withdrawal of the Offer because of the unusually lengthy visa process and the operational requirement to fill the position as soon as possible. Five days later, upon the Israeli government's rejection of her visa, the Chief of Mission further confirmed to the Applicant of the withdrawal of the offer. The offer was withdrawn on 12 January 2023, when the Chief of Mission notified the Applicant of the withdrawal of the offer due to the delay in Israeli visa issuance. The withdrawal went into effect as soon as it was communicated to the Applicant, and it required no further action on behalf of UNTSO to implement. As such, the withdrawal of the offer cannot be suspended.

c. In the alternative, the withdrawal was implemented upon the selection of an alternative candidate for the advertised job opening. A head of entity may select an alternative candidate in the event a selected candidate does not take up his or her functions. On 20 January 2023, UNTSO notified an alternative candidate of her selection. On 24 January 2023, the alternative candidate acknowledged her selection and confirmed her continued interest and availability for the position. The selection of the alternative candidate was implemented upon the formal notification of that candidate. The implementation of the selection decision creates a legal obligation upon the Organization to appoint the alternative candidate, provided they meet the conditions in the offer of appointment.

d. Should the Dispute Tribunal find the application receivable, it has no merit. The contested decision is lawful. The offer was conditional. Among its explicit conditions, to which the Applicant agreed, were that the offer may be withdrawn, or any contract entered into terminated or cancelled, in the event that a visa was not granted by the relevant authorities. The conditions for the withdrawal of the offer were met. The relevant authorities did not grant the Applicant a visa. The Applicant concedes that her visa clearance took a long time, six months from the time of the offer to the time of the withdrawal of the appointment. The normal release period for a staff member selected from another Mission is 60 days. The UNTSO Head of Mission's assessment of the decision of the host country to not grant the Applicant a visa was correct. On 17 January 2023, the host country, Israel, rejected the Applicant's visa application.

e. The Applicant has not demonstrated urgency. Any urgency is self-created and does not satisfy the requirements for suspension of implementation of the contested decision. The Applicant delayed filing the application. UNTSO notified the Applicant of the contested decision on 12 January 2023. Yet, the Applicant waited fifteen days to seek management evaluation and suspension of action. A delay of 10 days or more without explanation is self-created urgency. The Applicant's request for further documentation and her alleged attempt to convince UNTSO/HR of the unlawfulness of the decision does not justify the delay.

f. The Applicant fails to demonstrate irreparable harm. The Applicant's career prospects have not been irreparably harmed by the withdrawal of the offer. The Applicant is free to apply to other positions to which she believes she is qualified. The Organization cannot appoint a candidate to a position, notwithstanding the failure to meet the prerequisites for such an appointment. The Applicant cannot perform the functions of the position without a visa.

## Considerations

### *Legal framework*

15. An application for suspension of action pending management evaluation is governed by article 2.2 of the United Nations Dispute Tribunal's Statute providing that;

The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

16. According to this provision, the Dispute Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears to be *prima facie* unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative; in other words, they must all be met for a suspension of action to be granted.<sup>11</sup>

17. The burden of proof rests on the Applicant to show that the three requirements are met to the satisfaction of the Dispute Tribunal.<sup>12</sup>

18. However, the Applicant shall only be called upon to prove the case for suspension of action after the Tribunal has determined that the application is receivable. Hence, the first step that the Tribunal must take is to ascertain that it has competence to hear the application.

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<sup>11</sup> See for example, *Hepworth* UNDT/2009/003, para. 8. UNAT noted the cumulative nature of the test in its review of submissions in *Nwuke* 2013-UNAT-330, para. 7 and *Barud* 2020-UNAT-998, para. 12.

<sup>12</sup> See for example, *Danza* Order No. 45 (GVA/2022), para. 14.



*Receivability*

19. The Respondent has argued and the Applicant conceded that the impugned decision was implemented on 11 January 2023 through the withdrawal of the offer of appointment. Nevertheless, the Applicant requests the Tribunal to suspend the recruitment process for which she was selected. Her argument is based on jurisprudence of this Tribunal<sup>13</sup> which in determining on the issue found that;

33. ... Following an interpretation of the application as a whole, it is clear that the relief sought through the instant application is the suspension of the recruitment process pending management evaluation, so that it does not continue to select another candidate.

34. In fact, justice calls for the recruitment process to be suspended pending management evaluation, so as to give an opportunity to the Organization to review the events that led to the withdrawal decision and, if warranted, reconsider it [...], while also providing the Applicant a fair possibility of having the situation reversed.

20. The Tribunal is called upon to determine whether the recruitment process in this matter is ongoing and capable of being suspended. The evidence shows that the recruitment process in the case at bar was already completed through notification of the offer to another candidate and that candidate's acceptance to take up the position.

21. The relevant legislation on completion of a selection process is ST/AI/2010/3/Rev.1 (Staff selection system) providing in relevant part, that;

10.2 The decision to select a candidate shall be implemented upon its official communication to the individual concerned.

22. Going by the evidence on record, this application for a suspension of action is not receivable because the decision to be suspended, lawful or not, has already been implemented.<sup>14</sup>

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<sup>13</sup> *Fleurant* Order No. 026 (GVA/2022).

<sup>14</sup> *Ibid.*, at para. 27.

*Applicant's allegations of improper dealings between UNTSO Administration and the Israeli MFA.*

23. The Tribunal has noted with concern the Applicant's allegation that "the timing of the Israeli MFA visa rejection email – one day after the Applicant's response – raises the question if the Administration signalled to the Israeli Government that a rejection would be appreciated, so that the Administration could close the matter."<sup>15</sup>

24. These are grave allegations which should not be made so trivially. The alleged actions are expressly prohibited under article 100 of the United Nations Charter which stipulates that,

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization

25. Further, paragraph 33 of the Standards of Conduct for the International Civil Service (2013) expresses the duty of international civil servants when dealing with Governments. It states that,

[i]t is the clear duty of all international civil servants to maintain the best possible relations with Governments and avoid any action that might impair this. *They should not interfere in the policies or affairs of Governments.* It is unacceptable for them, either individually or collectively, to criticize or try to discredit a Government. At the same time, it is understood that international civil servants may speak freely in support of their organizations' policies. Any activity, direct or indirect, to undermine or overthrow a Government constitutes serious misconduct (emphasis added).

26. Following these provisions, and the principle that a staff member bears the burden of showing that a decision was arbitrary or tainted by improper motives<sup>16</sup>, the Applicant ought to prove her allegation that staff members of UNTSO interfered with

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<sup>15</sup> Application, para. 6.

<sup>16</sup> See for example, *Obdeijn* 2012-UNAT-201, para. 38.

Israeli MFA's decision-making process in respect of her visa application process. The documents submitted by the Applicant show no evidence of such unlawful interference. The Applicant's contention of improper influence is therefore mere speculation.

27. Counsel for the Applicant's attention is drawn to art. 4.4 of the Code of conduct for legal representatives and litigants in person<sup>17</sup> which states that;

Legal representatives shall maintain the highest standards of professionalism and shall act in the best interests of the party they represent, subject always to upholding the interests of justice and ethical standards.

28. In making serious unsubstantiated allegations in the pleadings, the Applicant's Counsel has failed to meet the highest standards of professionalism. The internal justice system conducts its cases with independence, transparency and professionalism<sup>18</sup>. It would be damaging to the integrity of proceedings before the Tribunal if it were to tolerate irresponsible lawyering that undermines these principles. This harm may extend to the reputation of the United Nations, particularly, in this case where policies or affairs of a Government are concerned and cited in the pleadings.

29. The Tribunal, under art. 10(8) of its Statute, may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability. The conduct of Counsel, in making unsubstantiated allegations against the UNTSO in its dealings with the Israeli MFA, would be such a case.

30. The Tribunal has, however, considered that this is the first act of improper conduct by the Applicant's Counsel in proceedings before this Judge. The Applicant's Counsel stands guided that such conduct shall not be tolerated in the future.

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<sup>17</sup> Adopted as Appendix to General Assembly resolution 71/266 on 23 December 2016.

<sup>18</sup> General Assembly resolution 61/261, Administration of justice at the United Nations, adopted by the General Assembly on 4 April 2007.

### *Other Observations*

31. The Tribunal has also noted with great concern the *laissez-faire* manner in which Counsel for the Applicant went about introducing jurisprudence in his pleadings.

### *Jurisprudence citation*

32. Standardised citation of jurisprudence is aimed at promoting orderliness in judicial proceedings through uniform and consistent citation of cases. There is a standardised system of citing case authorities from the Dispute Tribunal and from the United Nations Appeals Tribunal. Counsel may not choose to depart from the standard citation and cite jurisprudence as ‘*Fleurant*, UNDT/GVA/2022/008, para. 42’<sup>19</sup>. It not only wastes time but may also be a sign of tardiness on the part of Counsel which is reprehensible.

### *Verification of citation*

33. It is the rule of thumb that any case cited by a party must be verified, Counsel ought to know this rule. Citing an unverified case authority may not only waste time but may be construed that Counsel deliberately wanted to mislead the Tribunal by referencing to a principle purportedly found in jurisprudence which jurisprudence it turns out does not exist. A deliberate misrepresentation of the law is a serious act of abuse of process. Counsel’s citing of ‘(see *Tadonki* UNDT/2016/016, para. 13)’ for the principle that ‘monetary compensation should not be used as a shield against “blatant and unfair procedure in a decision-making process” is clearly erroneous’<sup>20</sup>. Counsel for the Applicant is cautioned against misrepresentation of the law.

## **Order**

34. The application for suspension of action pending management evaluation is not receivable *ratione materiae* and is rejected.

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<sup>19</sup> Application, para. VIII(7).

<sup>20</sup> *Ibid.*, para. X(3).

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 6<sup>th</sup> day of February 2023

Entered in the Register on this 6<sup>th</sup> day of February 2023

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi