



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KALLON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
George Irving

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1. By application filed with the Registry of the United Nations Dispute Tribunal in New York on 13 June 2013, the Applicant requested a suspension of action, pending the completion of management evaluation, of the decision taken by the Director of Mission Support in the United Nations Stabilization Mission in Haiti (“MINUSTAH”) to not renew his fixed-term appointment (“FTA”) upon its expiry on 30 June 2013.

2. On 17 June 2013, the Respondent filed his reply to the present application, stating that the Applicant’s appointment had been extended until 31 July 2013 pending the outcome of the management evaluation, thereby rendering his application moot.

Background

3. In May 2007, the Applicant was appointed to a P-4 level post of Procurement Officer in the then United Nations Organization Mission in the Democratic Republic of the Congo (“MONUC”). From 1 October 2008 to February 2010 the Applicant was appointed as Officer-in-Charge of the Procurement Section on a P-5 level Special Post Allowance (“SPA”).

4. On 10 July 2010, the Applicant was appointed as Chief, Procurement Officer, MINUSTAH, at the P-4 level (the Applicant performed and received an SPA for P-5 level functions until June 2011).

5. The Applicant was selected for the position of Chief Procurement Officer at the United Nations Interim Security Force for Abyei (“UNISFA”) in July 2012. On 5 October 2012, the Applicant was advised by the United Nations Field Personnel Division in the Department of Field Personnel that his designation as Chief Procurement Officer, UNISFA, had been denied. On 5 December 2012, the Officer-in-Charge, Administrative Services, informed the Applicant of the decision taken on

28 November 2012 to withdraw his designation and procurement authority as Chief Procurement Officer, MINUSTAH.

6. On 6 December 2012, following the Department of Management's withdrawal of the Applicant's designation to serve as Chief Procurement Officer, he was reassigned to the Office of the Officer-in-Charge, Administrative Services. By memorandum dated 1 March 2013, the Applicant was asked to take over and act as Officer-in-Charge in the Staff Counseling and Welfare Unit, MINUSTAH, effective 6 March 2013. These events form the basis of a separate application by the Applicant in Case No. UNDT/NY/2013/019.

7. On 11 June 2013, the Applicant was informed of the decision of 10 June 2013 not to renew his appointment upon its expiration on 30 June 2013. The memorandum informing the Applicant of the decision not to extend his appointment stated that "following the withdrawal of [the Applicant's] designation by the Department of Management to serve as a Chief Procurement Officer in MINUSTAH effective 28 November 2012 instead of an immediate separation, [the Director of Mission Support, MINUSTAH] decided to reassign [the Applicant] to the [Administrative Services] Office and later to the Staff Counseling and Welfare Unit for the remaining duration of [the Applicant's FTA]". The following day the Applicant requested management evaluation of the contested decision.

8. On 13 June 2013, the Applicant filed the present application for a suspension of action, which was transmitted to the Respondent the following day. The Respondent filed his reply on 17 June 2013.

Applicant's submissions

9. The Applicant's principal contentions may be summarized as follows:

Prima facie unlawfulness

a. The contested decision is the result of a pattern of "procedurally flawed and improperly motivated actions". As expressed by the United Nations Appeals Tribunal in *Ahmed* 2011-UNAT-153, the Organization has an obligation "to act fairly, justly, and transparently in its dealings with the staff members";

b. While FTAs do not carry any expectancy of renewal, the power to make such a decision is not unfettered. The Applicant has consistently earned outstanding performance evaluations and he was never advised of the reasoning behind the decision to remove him from his post in December 2012 (see application in Case No. UNDT/NY/2013/019) nor this latest decision to not renew his appointment even though he has been successfully employed by the Organization since 2006;

c. The process that resulted in the Applicant's removal from his post "amounts to a disguised disciplinary measure" resulting in him being "demoted to a non-sustainable role for which he lacks the professional competency". Such a decision was intentional and was taken for the purpose of sidelining the Applicant thereby enabling the future non-renewal of his appointment which decision therefore amounts to a "constructive dismissal";

Urgency

d. The request for a suspension of action is urgent as the decision will be implemented by 30 June 2013 whereas the management evaluation unit ("MEU") has 45 days from 12 June 2013 to review the contested decision;

Irreparable damage

e. The non-renewal of the Applicant's appointment will result in him being unable to resume a normal career within the Organization. In view of the circumstances that led to the contested decision, it would amount to a disguised disciplinary action and constructive termination, and its implementation would permanently damage the Applicant's professional reputation. Furthermore, he would no longer benefit from the advantages linked to being considered an internal candidate when applying for vacancies.

Respondent's submissions

10. The Respondent's principal contentions may be summarized as follows:

Urgency

a. The MEU has 45 days to respond to the Applicant's request for management evaluation of the decision to not renew his appointment. Therefore, the MEU is required to respond to the Applicant's request by no later than 29 July 2013;

b. On 17 June 2013, the Respondent sent the Applicant a memorandum informing him that his "assignment will be extended until 31 July 2013 pending the outcome of the management evaluation due for 29 July 2013";

c. Considering that the Applicant's appointment has now been extended pending management evaluation, the present application is moot and the Tribunal should dismiss it.

Consideration

11. This is an application for a suspension of action pending management evaluation. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five working

days of the service of the application on the Respondent (art. 13.3 of the Rules of Procedure). It is interim relief intended to preserve the *status quo* pending management evaluation and is not meant to make a final determination on the substantive claims.

12. Pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Applicant's application for suspension must satisfy the following cumulative conditions to succeed:

- a. The application is receivable because it concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The contested decision has not yet been implemented;
- c. The Applicant has submitted a request for management evaluation of the contested decision, which evaluation is currently pending;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable damage.

13. The Tribunal finds that the application is receivable because it concerns a non-renewal decision which can be properly suspended by the Tribunal and the Applicant has submitted a request for management evaluation of the contested decision on 12 June 2013, which evaluation is currently pending.

Irreparable damage

14. The Applicant has over thirteen years financial management experience within various United Nations missions (United Nations Interim Administration in Kosovo, MONUC/MONUSCO and MINUSTAH). The Applicant is facing

the prospect of being subject to the decision not to renew his contract and to separate him from service. Loss of employment within the United Nations should not be seen merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. The damage to one's career opportunities and the consequential effect on one's life chances from a loss of employment within the United Nations cannot be adequately compensated financially (*Khambatta* UNDT/2012/058).

15. The Tribunal finds that, in the particular circumstances of this case, the non-renewal of the Applicant's contract would have an extensive detrimental effect on the Applicant. The Respondent's decision not to separate the Applicant prior to 31 July 2013, while having the effect of delaying the implementation of separation, does not change the nature of the contested decision and its detrimental effects. The Tribunal therefore finds that the contested decision would result in the creation of an irreparable harm for the Applicant. In conclusion, the requirement of irreparable damage is satisfied.

Urgency

16. The Applicant has requested a suspension of the decision not to renew his contract because his FTA expires on 30 June 2013 before the completion of his request for management evaluation of the contested decision by the MEU.

17. In his reply dated 17 June 2013, the Respondent stated that in the present case "the MEU is to provide a response to [the] Applicant's request for review within 45 days of receiving the Application. The MEU is therefore required to respond no later than Monday, 29 July 2013". Consequently, the Respondent decided to extend the terms of the Applicant's appointment *sua sponte* until 31 July 2013, a date which is posterior to that by which the MEU is required to complete its review of the contested decision.

18. Indeed, the memorandum of 17 June 2013 of the Director of Mission Support to the Applicant stated that the Applicant's "assignment [was] extended until 31 July 2013 pending the outcome of the management evaluation due for 29 July 2013". It is clear from this memorandum as well as the Respondent's submission to the Tribunal that the extension was not until 29 July 2013 or an earlier date on which the management evaluation review may be completed, but rather that the Applicant's contract was extended until 31 July 2013 and there is an undertaking by the Respondent not to separate him prior to that date.

19. Consequently, the present case is no longer of particular urgency, as it was when the present application was filed, because the contested decision will not be implemented during the pendency of the management evaluation.

20. The Tribunal notes that since one of the cumulative conditions to suspend the implementation of a contested decision pending the management evaluation is not fulfilled there is no need for the Tribunal to consider whether the contested decision is *prima facie* unlawful.

Conclusion

21. The Applicant's request for a suspension of action pending management evaluation is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 19th day of June 2013