UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2016/051
Order No.:	239 (NY/2016)
Date:	12 October 2016
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SEBILLOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
ALS/OHRM, UN Secretariat

Introduction

1. On 12 October 2016, at 11:57 a.m., the Tribunal received an application from a staff member of the United Nations Stabilization Mission in Haiti ("MINUSTAH"), seeking suspension, pending management evaluation, of the "decision to terminate [her] continuing appointment." The Applicant states that she was notified of the contested decision on 12 October 2016, and that it would be implemented on 13 October 2016.

2. The Applicant submits that the Mission failed to make good faith efforts to retain the Applicant's service against vacant posts, as required by staff rule 9.6(e). Further, no efforts have been made to place the Applicant within the broader Secretariat, i.e., outside MINUSTAH. She states that, even within MINUSTAH, there are suitable available posts against which she can be placed.

3. In view of the fact that the contested decision was received by the Applicant on short notice, it required most urgent consideration by the Tribunal. Accordingly, as this was clearly a pressing matter requiring urgent intervention, the Tribunal did not seek the Respondent's reply (*Khambatta* UNDT/2012/058, affirmed in *Khambatta* 2012-UNAT-252).

Relevant background

4. The following outline of the relevant background is based on the application and the documentation on file.

5. The Applicant joined the Organization in 1998. She holds a continuing appointment and has an excellent performance history. She joined MINUSTAH in 2012 as a P-3 level Claims Officer. In 2015, the Applicant went on an extended

certified sick leave. While she was on sick leave, a civilian staffing review process was conducted at MINUSTAH.

6. On 15 February 2016, the Applicant received a letter informing her that her appointment would not be renewed beyond 30 June 2016. The same letter indicated that the nature of the Applicant's post meant that it could not be subject to comparative review.

7. On 17 February 2016, the Applicant wrote to the Human Resources Section, MINUSTAH, enquiring why no comparative review would be conducted. A reply was received on 15 March 2016 indicating that the Director of Mission Support had indicated that the post was not subject to a comparative review process since it was a "dry retrenchment."

8. On 23 March 2016, the Applicant requested management evaluation of the decision not to conduct a comparative review on her post abolition and to terminate her appointment without such review.

9. On 5 May 2016, the management evaluation unit responded finding that the request was premature as no reviewable decision existed.

10. On 11 October 2016, at 5:29 p.m., the Applicant received an email from the Human Resources Section, MINUSTAH, attaching a letter informing the Applicant of her retroactive termination effective 30 September 2016. The letter stated:

> Date: 11 October 2016
>
> RE: Notice of termination of appointment with MINUSTAH
>
> Pursuant to the General Assembly's approval of the mission's budget for 30 June 2016, I regret to inform you that the Under-Secretary-General for Management has approved the termination of your continuing [appointment] with the United

> Nations on the grounds of abolition of post in accordance with Staff Regulation 9.3 (a)(i) and Staff Rule 9.6 (c)(i).
>
> Your separation will be effective 30 September 2016. This letter constitutes the formal notice of termination of your appointment in line with Staff Rule 9.7.
>
> The Under-Secretary-General for Management also approved payment of termination indemnity pursuant to Staff Regulation 9.3 (c), Staff Rule 9.8 and in accordance with the rates set out in Annex III of the Staff Regulations as well as three months' salary of compensation in lieu of notice in accordance with staff rule 9.7 (d).
>
> I take this opportunity to express the mission's sincere appreciation for your dedication and contribution to the work of the United Nations and wish you the best in your future endeavors.

11. On 12 October 2016, the Applicant submitted a management evaluation request with regard to the decision to terminate her contract. The management evaluation of the Applicant's request is pending.

Consideration

Legal framework

12. Article 2.2 of the Statute of the Dispute Tribunal provides:

> 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.

13. Article 13.1 of the Tribunal's Rules of Procedure states:

> The Dispute Tribunal shall order a suspension of action 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.

14. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

15. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits.

16. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it.

Implementation

17. It follows from art. 2.2 of the Tribunal's Statute, that where an administrative decision has been implemented, a suspension of action may not be granted (*Gandolfo* Order No. 101 (NY/2013)). However, in cases where the implementation of the decision is of an ongoing nature (see, e.g., *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8

(NY/2013); *Gallieny* Order No. 60 (NY/2014), the Tribunal may grant a request for a suspension of action.

18. The Applicant submits that close of business in Haiti is 4:40 p.m., so the letter was sent by the Mission after working hours. Further, at the time the email was sent the Applicant was in France. This was known to the Mission as she was on R&R combined with annual leave. At the time the message was sent in Haiti, it was already 12.29 a.m. on the 12 October 2016 in France. Since notice can only be deemed served on receipt, it is submitted that the document was not served until 12 October 2016. Thus, she should be deemed to have been served the termination letter on 12 October 2016 and the decision cannot be implemented until the end of 12 October 2016 at the very earliest.

19. The Tribunal finds that the letter was provided to the Applicant after working hours and the effective date of notification and implementation cannot be earlier than 12 October 2016. It is clear that, for all intents and purposes, the matter is very much alive.

20. Accordingly, in view of the above, the Tribunal is bound to conclude that the decision to terminate the Applicant's contract has not yet been implemented, and the present application is receivable.

Prima facie *unlawfulness*

21. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient for her or him to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamoran* UNDT/2011/126).

22. The Applicant has a continuing appointment and her post has been abolished.

23. Staff regulation 1.2(c) provides:

> **General rights and obligations**
>
> (c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

24. Staff rule 9.6(e) states:

> **Rule 9.6**
>
> …
>
> **Termination for abolition of posts and reduction of staff**
>
> (e) Except as otherwise expressly provided in paragraph (f) below [concerning staff members in the General Service category and thus not relevant to the present case] and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:
>
> (i) Staff members holding continuing appointments;
>
> (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
>
> (iii) Staff members holding fixed-term appointments.

25. Section 11 of ST/AI/2010/3 (Staff selection system) states:

> **Section 11**
>
> **Placement authority outside the normal process**
>
> 11.1 The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process:
>
> …
>
> (b) Staff, other than staff members holding a temporary appointment, affected by abolition of posts or funding cutbacks, in accordance with Staff Rule 9.6 (c) (i);

26. Accordingly, the Administration is required to make good faith efforts to find suitable and available posts against which the Applicant can be placed (*El-Kholy* UNDT/2016/102; *Hassanin* UNDT/2016/181; *Tiefenbacher* UNDT/2016/183). Staff regulation 1.2(c) allows the Administration to reassign staff laterally, whereas sec. 11 of ST/AI/2010/3 specifically permits the placement of staff affected by abolition of posts outside the normal selection process. The Applicant submits that there are suitable and available posts in the Mission against which she can be placed, but that no efforts have been made to comply with the requirements of staff rule 9.6(e). Indeed, on the papers before the Tribunal, and given the Applicant's status as a staff member on continuing appointment, the Administration appears not to have complied with the requirements of staff rule 9.6(e).

27. Further, the fact that the termination was put in effect retroactively, with a two-week delay in notification raises serious concerns regarding its legality. Staff rule 9.7(a) requires that "[a] staff member whose continuing appointment is to be terminated shall be given not less than three months' written notice of such termination". Although staff rule 9.7(d) allows for a payment in lieu of notice,

there is nothing in the staff rules permitting the Administration to process such termination retroactively, as was done in this case.

28. The Tribunal is also gravely concerned with the manner in which the Applicant was notified of the contested decision. The Tribunal notes that, at 5:29 p.m. in Haiti, it would have been 6:29 p.m. in New York, at which time the Tribunal would be closed. The service of a retroactive notice of termination, after working hours, raises a serious concern, if not a reasonable inference, that this was done in order to deny the Applicant access to judicial review.

29. Accordingly, on the papers before the Tribunal, there are serious and reasonable concerns as to whether the contested decision was lawful.

30. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Urgency

31. According to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

32. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamoran* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

33. The Applicant filed the present application on the same day she was notified of the contested decision to terminate her continuing appointment. This matter is of particular urgency, and the urgency in this case is not self-created.

34. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

35. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (*Adundo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

36. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013); *Finniss* Order No. 116 (GVA/2016)).

37. The Applicant submits that she has been employed with the Organization for 18 years and that the termination of her employment would cause her harm that cannot be compensated for in financial terms.

38. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Conclusion

39. The Tribunal finds that all the cumulative conditions for suspension of action under art. 2.2 of its Statute have been satisfied. Accordingly, the decision

to terminate the Applicant's continuing appointment shall be suspended pending management evaluation.

Orders

40. In light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is granted and the contested decision is suspended pending management evaluation.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 12th day of October 2016