



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/093
Order No.: 218 (NY/2017)
Date: 4 October 2017
Original: English

Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

LEFEBVRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM

Introduction

1. On 25 September 2017, the Applicant, a staff member with the United Nations Stabilization Mission in Haiti (“MINUSTAH”), submitted a request for management evaluation seeking evaluation of the decision not to laterally reassign her “from MINUSTAH to the United Nations Mission for Justice Support in Haiti (“MINUJUSTH”), while authorizing reassignment for certain staff members in the same Police component”.

2. On 26 September 2017, the Applicant filed an application at 5:16 p.m., under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, “recruitment against FS-4 Administrative Assistant in MINUJUSTH”. On the same day, at 6:04 p.m., the case was assigned to the undersigned Judge.

3. In her application, the Applicant sets out the following summary of facts of the case:

This request for management evaluation concerns the decision to refuse [the Applicant] a reassignment from MINUSTAH to MINUJUSTH while authorizing reassignment for certain staff in the same professional category in the same Police component. This constitutes discrimination forbidden under UN Charter and Staff Rules and Regulations.

4. The application for suspension of action pending management evaluation was served on the Respondent on 27 September 2017, at 10:17 a.m., directing, upon the instructions of the assigned Judge, that a reply be filed by 5.00 p.m. on Friday, 29 September 2017. The Respondent duly filed a reply contending that the Application is not receivable, or in the alternative, it is without merit.

5. On 29 September 2017, upon the instruction of the assigned Judge, the New York Registry of the Tribunal instructed the Applicant by email to file a response, if

any, to the Respondent's submissions on receivability, together with a confirmation of her current employment status and a copy of her employment contract by 11:00 a.m. on Monday, 2 October 2017.

6. On 2 October 2017, the Tribunal issued Order No. 216 (NY/2017) pursuant to art. 19 of the Rules of Procedure, ordering the Respondent to file the following information and supporting documents by 5:00 p.m. on Monday, 2 October 2017:

- a. A copy of the Applicant's current job description;
- b. A copy of the Job Opening for FS-4 Administrative Assistant in MINUJUSTH;
- c. To inform the Tribunal if the selection process for this position is ongoing, or completed;
- d. In case the selection process for FS-4 Administrative Assistant in MINUJUSTH is ongoing, the Respondent is to confirm: (1) if the position is supposed to be filled through the roster or through lateral reassignment; (2) if the position is to be filled through roster, confirm if it is to be filled by considering only the MINUSTAH rostered international staff members, or rostered international staff members from all field missions; (3) if the position is to be filled through lateral reassignment to inform the Tribunal if only MINUSTAH eligible international staff members are to be considered or eligible international staff members from all field missions, including MINUSTAH;
- e. In case the selection process was finalized, to provide a copy of the section decision and confirm if the selection decision has been implemented, or is yet to be implemented;

f. To inform the Tribunal if and when the Applicant applied for the position and if:

i. An individual decision not to reassign the Applicant to the FS-4 Administrative Assistant position in MINUJUSTH was taken on or after 13 September 2017 and if such a decision, if any, was implemented; or

ii. Her request is currently under consideration;

g. How many of the 62 MINUSTAH eligible international staff members, who were laterally reassigned as of 10 September 2017, were reassigned to MINUJUSTH. How many of the remaining 43 international eligible staff members in MINUSTAH have been reviewed and laterally reassigned, including to MINUJUSTH, between 10 and 29 September 2017. How many of them are to be laterally reassigned to MINUJUSTH or to other missions by 15 October 2017, and if the Applicant is among these staff members. How many of the total lateral reassignments approved by the USG Field Support to MINUJUSTH were from MINUSTAH and how many from other field missions;

h. To inform the Tribunal if the Applicant is to be separated on 15 October 2017.

7. On 2 October 2017, the Applicant filed additional documents, including a copy of her Personnel Action Form. On the same day, the Respondent submitted his response to Order No. 216 (NY/2017).

The submissions of the parties

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

Prima facie unlawfulness

- a. The UN Charter and staff regulation 1.2 provide that all forms of discrimination are prohibited;
- b. The Administration's position in regard to the staffing of MINUJUSTH has been that "all international staff positions would be filled using the recruit from roster modality" further adding that "lateral reassignments are not technically possible";
- c. However, the Applicant has been made aware that several staff from MINUSTAH, including international civilian staff in the professional category, are being laterally transferred to MINUJUSTH. This constitutes discrimination without justification within certain categories of personnel and constitutes a violation of staff's rights;

Irreparable damage

- d. The Applicant claims that she would lose her job at the United Nations after 18 years of service;

9. The Respondent's principal contention may be summarized as follows:

Receivability

- a. The Application is not receivable *ratione materiae* as the Applicant has not requested management evaluation of the recruitment related to the FS-4 level position. Pursuant to art. 2.2 of its Statute, the Dispute Tribunal has jurisdiction to hear an application for the suspension of

the implementation of a contested decision that is subject of an ongoing management evaluation;

b. The Applicant requests the Dispute Tribunal to “[s]uspend recruitment against FS-4 Administrative Assistant in MINUJUSTH”. This decision is not the subject of an ongoing management evaluation. However, the Applicant has sought management evaluation of an alleged decision to not laterally reassign her to a position in MINUJUSTH. The Dispute Tribunal therefore has no jurisdiction to review the recruitment process related to the FS-4 position;

c. Should the Dispute Tribunal understand the application as a request for an order suspending the implementation of the alleged decision to not laterally reassign the Applicant, then the Dispute Tribunal does not have jurisdiction to make such an order;

d. Article 2.1 of the Dispute Tribunal’s Statute provides that the Dispute Tribunal is competent to review an application filed against the Secretary-General appealing an “administrative decision that is alleged to be in non-compliance with the terms of appointment of the contract of employment”. The former Administrative Tribunal held that administrative decisions are characterized by three factors, namely: (i) they are decisions taken by the Administration, (ii) they are unilateral and of individual application; and (iii) they carry direct legal consequences on the terms and conditions of employment of the staff member. The Appeals Tribunal has consistently upheld these findings. An appealable administrative decision must have a direct impact on the terms and conditions of employment of the staff member;

e. The Applicant cannot identify a specific, unilateral decision which had direct legal consequences on the terms and conditions of her employment. No

administrative decision has been made to not laterally reassign the Applicant. She does not identify any specific position to which she has requested a lateral reassignment and been denied;

f. Furthermore, art. 2.2 of the Dispute Tribunal's Statute provides that the 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;

g. The Dispute Tribunal's jurisdiction is limited to making orders to suspend the implementation of decisions i.e. to preserve the *status quo* (Buff Order No. 396 (NBI/2015)). The *status quo* is that the Applicant will not be laterally reassigned;

h. Lateral reassignment is not automatic. It requires affirmative steps, such as the identification of a vacant position in the new mission, and an assessment of the Applicant's suitability. Under its Statute, the Dispute Tribunal does not have the jurisdiction to make an interim order compelling the Administration to identify such a position, find the Applicant suitable and then laterally reassign her. That would go beyond preserving the *status quo*;

Prima facie unlawfulness

i. The recruitment of staff members for MINUJUSTH from the roster is lawful. It is within the discretion of the Under-Secretary-General of the Department of Field Support ("USG/DFS") to use this method to staff the mission;

j. On 13 April 2017, the Security Council decided that MINUSTAH would close on 15 October 2017. A new mission, MINUJUSTH, will be established from 16 October 2017;

k. All international positions in the new mission will be filled by recruitment from the roster. MINUSTAH staff will have to apply and compete alongside other rostered candidates. This decision was made because MINUJUSTH is a new mission with a different mandate from MINUSTAH. The profiles of candidates for the new mission need to be evaluated against the requirements of the new mandate. In addition, staff members in other missions that have recently closed, are closing or are downsizing, will have the opportunity to compete for these positions;

l. There is no contradiction between this position and that set out in Code Cable No. 1174. That Cable relates to staff members holding permanent or continuing appointments who are affected by downsizing. However, the Applicant holds a fixed-term appointment. The Code Cable is not relevant;

m. Although some MINUSTAH staff members will be laterally reassigned to MINUJUSTH, these are specialized, professional staff members who form the current Police Leadership Team within MINUSTAH. Their immediate presence within the mission as of 16 October 2017 is required, given the police and rule of law focus of MINUJUSTH and the need to ensure police leadership on the establishment of the mission. There is therefore no discrimination in treating this small group of specialized staff differently. Accordingly, the Applicant has not demonstrated that the recruitment process is *prima facie* unlawful.

There is no urgency

n. The Applicant does not aver that the situation is urgent nor does she provide any evidence of such. In the absence of such evidence, the Dispute Tribunal may not presume that urgency exists;

There is no harm

o. The Applicant has not provided any evidence that she will suffer irreparable harm if the recruitment process is not suspended. In fact, the Applicant may benefit from the recruitment process. The Applicant has applied to several positions in MINUJUSTH, including one grade level higher than her current level. These selection processes are ongoing. Should the Applicant be selected, she will be transferred to MINUJUSTH. She would suffer no harm. In any event, any harm can be compensated financially.

10. Pursuant to the Tribunal's request for further information dated 29 September 2017, the Applicant confirmed that she is currently on a fixed-term contract, which, according with her Personnel Action issued on 1 July 2017, expires on 15 October 2017, and filed additional documentation. The Applicant did not provide a response to the receivability issues raised by the Respondent.

11. In his response to Order No. 216 (NY/2017), the Respondent provided additional information and supporting documents relevant to the case as instructed by the Tribunal as follows:

a. The selection process for the FS-4 position ongoing. The position will be filled through a recruitment from the roster. All eligible staff members, or external rostered candidates, were eligible to apply. No selection decision has been taken as yet;

- b. The job opening was open between 28 August and 4 September 2017. The Applicant applied within that window. No individual decision has been taken not to reassign the Applicant. There is no such request pending;
- c. No staff have been laterally reassigned to MINUJUSTH. All positions will be filled through the recruit-from-roster process;
- d. As at 10 September 2017, contrary to the content of the USG/DFS's letter to the Field Staff Union, 167 staff members were eligible. 62 MINUSTAH staff were reassigned outside the normal staff selection process, or were selected. 105 remained pending;
- e. However, the situation has changed since then. As of 1 October 2017, out of a total of 183 staff eligible for placement, 92 MINUSTAH staff have been reassigned outside the selection process or been selected. 13 have declined a reassignment. 78 staff members are therefore in need of a placement;
- f. The Applicant was notified of the non-renewal of her fixed-term appointment in August 2017. In addition to her pending applications, the Applicant is on a list of staff affected by downsizing. If she is not selected or otherwise reassigned by 15 October 2017, her appointment will not be renewed.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

12. Article 2.2 of the Dispute Tribunal's Statute states:

... 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 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

14. 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.

15. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

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

Whether application concerns an administrative decision that may properly be suspended by the Tribunal

16. The Tribunal notes that three posts for “FS4 Administrative Assistant (JO 17-ADM-MINUJUSTH-84767-F-PORT-AU-PRINCE (M))” were posted for the period 28 August to 4 September 2017. As results from the “Special Notice” section of the job opening, the three posts were open only to roster applicants who are already placed on preapproved rosters, following a review by a United Nations Central Review Body, and only rostered applicants who were placed on rosters with similar functions at the same level are eligible candidates.

17. The Respondent confirmed that the three posts will be filled through recruitment from the roster and all eligible staff members, or external rostered candidates, were eligible to apply and that the Applicant applied within the deadline.

18. Further, the Tribunal notes that the Respondent confirmed that the selection process is ongoing and that a selection decision is yet to be taken.

19. It results that no individual decision was taken regarding the Applicant’s application for any of the three posts for “FS4 Administrative Assistant in MINUJUSTH”, including the position within the Office of the Police Commissioner, and consequently, there is no administrative decision to be suspended by the Tribunal in relation to the recruitment process for these posts.

20. The Tribunal considers that the Applicant, by filing the present application, acted diligently but prematurely, since the recruitment for the FS-4 Administrative Assistants posts is ongoing and no intermediary and/or final decision regarding her candidacy with direct legal consequences on the terms and conditions of her employment has yet been taken. Consequently, the first mandatory condition is not fulfilled in the case of the contested decision as identified in the application for

suspension of action, respectively the recruitment for FS-4 Administrative Assistant posts.

21. Regarding the contested administrative decision indicated in the request for management evaluation, namely “the decision to refuse [the Applicant’s] reassignment from MINUSTAH to MINUJUSTH while authorizing reassignment for certain staff in the same professional category in the same Police component”, the Tribunal notes that that is a different decision than the one indicated in the suspension of action. Regarding this decision, which is the only decision currently subject to the ongoing management evaluation, the Tribunal notes that the Respondent informed the Tribunal that there was no individual decision taken regarding the Applicant’s reassignment to MINUJUSTH since no staff members from MINUSTAH, including international staff, were reassigned to MINUJUSTH and there is no such pending request from the Applicant. The Tribunal also notes that the Applicant does not identify a specific position to which she has requested a lateral reassignment and has been denied. In conclusion, there is no individual administrative decision issued denying the Applicant’s reassignment to a similar position from MINUSTAH to MINUJUSTH and the first requirement is not fulfilled.

Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

22. It follows from art. 2.2 of the Tribunal’s Statute and art. 13.1 of its Rules of Procedure that the suspension of action of a challenged administrative decision may only be ordered when management evaluation for that administrative decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256).

23. As results from the case record, the Applicant submitted her request for management evaluation on 25 September 2017, seeking evaluation of the decision not

to laterally reassign her from MINUSTAH to MINUJUSTH. In her request, she contested the following decision:

This request for management evaluation concerns the decision to refuse me a reassignment from MINUSTAH to MINUJUSTH while authorizing reassignment for certain staff in the same professional category in the same Police component. This constitutes discrimination forbidden under UN Charter and Staff Rules and Regulations.

24. As mentioned above in her Application, the Applicant contests the decision to “[s]uspend recruitment against FS-4 Administrative Assistant in MINUJUSTH”.

25. It results that the Applicant has not requested management evaluation of the “[...] recruitment against FS-4 Administrative Assistant in MINUJUSTH”. She has requested management evaluation of a different decision, namely the decision to not to laterally reassign her from MINUSTAH to MINUJUSTH. Consequently, there is no ongoing management evaluation of the recruitment process referred to in the application.

26. Thus, as the application does not concern an administrative decision that may properly be suspended by the Tribunal, and the Applicant has not requested management evaluation of the contested decision as identified in the application for suspension of action, the Tribunal finds that the first two conditions are not fulfilled.

27. The Tribunal considers that since the first two of the cumulative and mandatory conditions for a suspension of action are not fulfilled, there is no need for the Tribunal to further analyze the remaining conditions, notably *prima facie* unlawfulness, urgency and irreparable damage.

Conclusion

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

The application for suspension of action is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 4th day of October 2017