



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/100
Order No.: 233 (NY/2017)
Date: 18 October 2017
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

MULLAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 13 October 2017, at 7:24 a.m., the Applicant, a Contingent Owned Equipment Officer with United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-6 level, step 12, on a permanent appointment, filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure, requesting that “the decision of reassignment to [United Nations Support Office in Somalia, “UNSOS”], Mombasa, on medical grounds” be suspended.

2. On 13 October 2017, the case was assigned to the undersigned Judge.

3. On 13 October 2017, at 10:45 a.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed, by 12:00 p.m. on 13 October 2017, the Applicant to file his request for management evaluation and the Respondent to submit his reply by 12:00 p.m. (noon) on 13 October 2017, including information and supporting documentation, if any, on (a) if travel arrangement for the Applicant have already organized, (b) the level for medical facilities in UNSOS, Mombasa, and (c) if the alleged post with Job Opening No. 83236 in the United Nations Peacekeeping Force in Cyprus (“UNFICYP”), Cyprus, for FS-6 level Supply Officer is still vacant and if any offer for this post has been made to the Applicant.

4. On 13 October 2017, at 11:52 p.m., the Applicant filed a copy of the management evaluation request and also additional documentation consisting in an email correspondence regarding the level and location of the position to which he was to be laterally reassigned in UNSOS, Mombasa and the level of medical service provided in Mogadishu to where the relevant position is to be moved on or before 1 July 2018.

5. Also, on 13 October 2017, at 11:52 p.m., Counsel for the Respondent filed the reply in which he states that, due to the short deadline for the Respondent, it has not been possible to take full instructions and that he therefore was unable to provide full submissions on the three conditions for granting an order under art. 2.2 of the Dispute Tribunal's Statute. Against this background, Counsel submitted that the contested decision is lawful and requested the Tribunal to dismiss the application for suspension of action. In response to the Tribunal's other orders, Counsel submitted as follows:

Travel Arrangements for the Applicant

... The Applicant does not have to travel until Monday 16 October 2017.

Level of medical facilities in UNSOS, Mombasa

... A Level III hospital is available in Mombasa, which is able to deal with the Applicant's immediate medical needs. There is no Level IV medical facility in Mombasa. However, there is one in Nairobi, Kenya. This medical arrangement is similar to that available to the Applicant in MINUSTAH, where he had access to a Level IV medical facility in Miami, USA.

Status of Job Opening 83236

... The selection process for this job opening is ongoing. No final selection decision has been made.

6. By Order No. 231 (NY/2017) issued on 13 October 2017, considering that the requirements for an interim order pending the Tribunal's determination of a suspension of action as set out in *Villamorán* by the Appeals Tribunal have been satisfied, that the urgency appears not to be self-created by the Applicant and underlining that the matter was not at the merits stage, the Tribunal ordered:

... Without prejudice to the Tribunal's determination of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute, the implementation of the decision to reassign the Applicant to UNSOS, Mombasa shall be suspended until the Tribunal has rendered its decision on this application, or until further order. Accordingly, the Applicant is not to be reassigned from MINUSTAH

to UNSOS during the pendency of the Tribunal's consideration of his application for suspension of action of this decision;

... The Respondent is to file a complete reply to the application on suspension of action by **12:00 p.m, Tuesday, 17 October 2017**, including information and supporting documentation regarding:

- a. The level of medical facilities provided in MINUSTAH;
- b. The level of medical facilities currently existing in UNSOS, Mombasa and in UNSOS, Mogadishu;
- c. The level and title of the UNSOS position to which the Applicant was to be laterally reassigned and if he has clearance for it; and
- d. The list of the available suitable posts at the same level or at a lower level presented to the Applicant.

7. On 16 October 2017 at 8:47 a.m., the Applicant filed an email informing the Tribunal that:

... I was scheduled to fly to Spain on Saturday, and a provisional ticket was prepared, However, based on the Suspension of Action currently with UNDT, travel was suspended. As mentioned previously, some of my supply of medication is exhausted, I have already exhausted my supply of sitagliptina which I was rationing over the last few weeks taking one instead of the prescribed two. This drug cannot be found in Haiti.

... Level 2 ceased operations in August and level 1 ceased operations on Friday. Effectively there are no medical facilities upon which I can rely. I now seek permission to return home to Spain where I can resupply my exhausting drugs, and complete a check-up with my doctor pending the outcome of the UNDT.

... Your soonest response would be appreciated.”

8. Having reviewed the information provided by the Applicant the Tribunal considered it necessary to instruct the parties to attend a case management discussion (“CMD”) at 12:00 p.m. on the same day on 16 October 2017.

9. At the CMD the Applicant participated via telephone and the Respondent was represented by his Counsel, Mr. Alister Cumming, who was accompanied by two

representatives of the Department of Field Support,, namely Mr. Berkan Manaigo-Vekil and Mr. Prin Shasimaran.

10. During the discussions it was clarified by the parties that travel arrangements were organized for the Applicant's repatriation to Spain before 15 October 2017 which were not related to the decision to laterally reassign him to UNSOS Mombasa and to the official travel to this duty station. The Tribunal took note that the Applicant's request to travel to Spain (his home country) was under consideration in order to ensure that he receives medical assistance from his doctor and the necessary medical supplies according with his current treatment. The Tribunal expressed its trust that the matter will be resolved by the end of the day and that the Tribunal will be informed accordingly.

11. On 17 October 2017, the Respondent filed a submission pursuant to Order No. 231 (NY/2017) providing his complete reply and the additional information requested by the Tribunal.

Background

12. In his application for suspension of action, the Applicant presents the facts as follows (emphasis omitted):

... I am a Field Service Officer, at the FS-6 level Chief COE in MINUSTAH on a permanent appointment with the United Nations on assignment to MINUSTAH.

... I have been requesting medical reassignment for more than one year, as per [General Assembly resolution 68/265 (Mobility framework), A/RES/68/265], Article 13; which states "..... with the exception of special circumstances in which the movement of staff members earlier than the minimum post occupancy limit is necessary for their health and safety or prompt delivery of mandates" which to date has not been in general ignored.

... While MINUSTAH staff have repeatedly been informed in Town Hall meetings and through Broadcasts that they will not be retained past 15 October 2017 unless they find other employment in the System.

... To satisfy this, in or around August 18, 2017 I applied to an FS-6 Supply officer post in [UNFICYP]. The post also included the duties of a Transport Officer for which I have 24 years of experience, 19 of which are with the United Nations.

13. Under the heading, “Details of the decision you seek to suspend”, the Applicant further submits that:

... I am contesting the decision of reassignment to UNSOS, Mombasa on medical grounds.

... For more than one year I have repeatedly requested medical reassignment due to a heart condition. In January 2017, [Medical Services Division, “MSD”] confirmed that I should be deployed to a mission with Level 4 medical facilities.

... These well documented facts were explained during my meeting with Career Support Unit verbally on 14th September 2017, and on the evening of to October 2017.

... On September 25, 20 17, MINUSTAH [Chief Human Resources Officer] requested that I check out by 15th October 2017, on the evening of 10 October I received an email with attachments reassigning me to UNSOS, Mombasa. As the mission does not have level four medical facilities I was obliged turn down the offer, which I did that evening. Additionally, Mombasa it is out of reach for my family to come to convalesce me should I suffer either another heart attack or an attack of ACS.

... On the evening of 11th October 2017, I received a repeat e-mail from [name redacted, “CK”] insisting that I go to Mombasa and that travel arrangements would be initiated and that MSD said the medical facilities were sufficient. I once again reminded [CK], that my request for medical reassignment remained pending after one year. I emphasized that send me there would only place me in jeopardy.

... Given that [CK] is fully cognizant [of my] medical condition, I consider [CK’s] decision may be prejudiced by my dogged pursuit of reassignment on medical grounds since 2016 and that I have been dogmatic in the petitioning of staff rights related to the MINUSTAH

Drawdown as Chairman of the MINUSTAH [Field Service Union, “FSU”].

Applicant’s submissions

14. The Applicant’s principal contentions may be summarized as follows:

Prima facie unlawfulness

a. It is evident that the Applicant is a staff member in need of placement within the meaning of staff rule 9.6(e) and ST/AI/2010/3 (Staff selection system), sec. 11. Also, with a medical condition that requires Level 4 medical facilities;

b. The Dispute Tribunal has previously determined that the Administration has an obligation to place a staff member in this situation on a suitable post for which he/she is qualified, even though the staff member may not be the best qualified candidate (*Lemonnier* UNDT/2016/186, para. 36). Indeed, the Applicant has a right to be accorded preference and be placed without competing with external candidates or other internal candidates not in need of placement, or with a lower priority of retention as listed in ST/AI/2010/3, sec. 11. The Applicant’s medical condition would also contribute to the level of his priority;

c. By the Administration insisting that the Applicant is to deploy to a mission without level 4 medical facilities, and being fully cognizant of his medical condition, he would be placed at significant risk;

d. By advertising a Recruit from Roster vacancy for which the Applicant is obviously qualified, the Administration is in fact disregarding this right and forcing him to accept a post without the required medical facilities, while the post in UNFICYP remains unencumbered and has appropriate medical

facilities. In *Lemonnier*, the Dispute Tribunal qualified this practice as a “material irregularity”;

e. On 13 October 2017, the Applicant filed an additional submission regarding *prima facie* unlawfulness stating:

It is established law that it is an unlawful criminal offense to place any person at risk or peril or expose a person to material danger.

As demonstrated above the Director of Field Personnel Division [CK], ‘the decision maker’ is cognizant of my medical condition; [The Director] is aware the Mission UNSOS does not have appropriate level 4 medical facilities as prescribed in [reference to annex omitted]; placing a staff member to a duty station without appropriate level 4 medical facilities would therefore, constitute ‘reckless endangerment’ a recognized crime of behaving indifferently to the consequences in such a way as to create a substantial risk of injury or death to another person.

It is therefore concluded that this decision was not only unlawful but could potentially expose the organization to significant and unavoidable financial encumbrance for medical evacuation, had that staff member been assigned to a duty station where all levels of medical support are readily available.

Additionally, prior to taking any such decision [The Director] [CK] would have been obligated to discuss the matter with the director of the receiving mission to determine if a suitable position was available. It was conveyed to the staff member through a colleague that the position was not a position of a COE Officer but in fact a post for a Receiving & Inspecting Officer.

It was also documented by the mission director of UNSOS, that the post was, in fact, a temporary post, and was scheduled to be moved to Mogadishu in Somalia, where there are even less medical facilities and limited evacuation capacity.

The singular conclusion that can be drawn from these facts is that [The Director] did with malevolence design the reassignment with a malicious intent and to the detriment of the staff member and the Organization.

In closing, the authority to reassign a staff member from one mission to another is not contested. However, arriving at such decision does not preclude the consideration of related facts such as the staff members' health, safety, wellbeing and medical condition. In the practice of good corporate responsibility and duty of care, such a decision would not have taken place. Therefore, I would conclude that the lawfulness or unlawfulness of the decision is established on this basis.

Urgency

f. The Administration can at any moment decide to fill the Recruit from Roster vacancy with a rostered applicant, which would result in the position not being available for placing the Applicant, it would also place him in jeopardy not to have appropriate medical facilities as his condition requires, thereby obliging his separation on 15 October 2017. The Tribunal is requested to suspend all action on filling the post pending management evaluation;

g. As a candidate may be selected at any moment, the Applicant further requests the Tribunal to suspend recruitment pending the deliberation on this suspension of action request;

Irreparable damage

h. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm. If the Applicant is not placed, he will be obliged to separate from service effective 15 October 2017;

i. Additionally, being aware of the Applicant's medical condition and as the Organization has placed sufficient emphasis on the health and safety of staff, as per art. 13 of General Assembly resolution 68/265, placing him in a

mission without appropriate medical facilities would knowingly endanger his life and wellbeing and put him at unnecessary risk;

j. The Applicant also seeks immunity from further retaliation against him for his activities as Chairperson of the MINUSTAH FSU.

Respondent's submissions

15. The Respondent's submissions presented on 13 October 2017 are as follows:

a. All the Applicant's allegations are denied, except where expressly admitted under art. 2.2.2 of the Dispute Tribunal's Statute, the Applicant must establish that: (i) the contested decision was prima facie unlawful; (ii) there is a particular urgency; and (iii) implementation of the decision would cause irreparable harm. All three statutory requirements have to be satisfied in order for the implementation of a contested decision to be suspended. The onus is on the Applicant to prove all three elements;

b. The contested decision is lawful, and the Applicant has not provided any evidence that the contested decision is unlawful;

c. On 13 April 2017, the Security Council decided that MINUSTAH would close on 15 October 2017. A new mission, the United Nations Mission for Justice Support in Haiti (or MINUJUSTH), will be established from 16 October 2017. As the Applicant holds a permanent appointment, the Organization has decided to laterally reassign him under sec. 11.2 of ST/AI/2010/3 to UNSOS, Mombasa. In taking this decision, the Organization took the Applicant's medical situation into account. Based on an assessment done recently by the medical officers in Nairobi, as per the last medical report on file the Applicant's urgent medical needs can be met in a Level III hospital

in Mombasa. The Applicant will also have access to the level 4 hospital in Nairobi to meet any medical needs that arise.

16. In his 17 October 2017 reply, the Respondent further submitted that:

The lawfulness of the contested decisions

a. The contested decision is lawful, and the Applicant has not provided any evidence that the contested decision is unlawful;

b. Staff Regulation 1.2(c) provides that “[s]taff 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”;

c. In the case of *Rees* 2012-UNAT-266, the Appeals Tribunal held that in cases of reassignment that “[i]t is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures”;

d. The Dispute Tribunal will give due deference to such relocation and reassignment decisions, unless they are illegal, irrational or procedurally flawed, or in exceptional cases, where a measure is disproportionate. The Dispute Tribunal will only interfere where the staff member meets his or her burden with regard to such decisions being based on a mistake of fact, a lack of due process, or if it is arbitrary or motivated by prejudice or other extraneous factors. It is not for the Dispute Tribunal to conduct a *de novo* review of the merits of the reassignment decision;

e. On 13 April 2017, the Security Council decided that MINUSTAH would close on 15 October 2017. A new mission, MINUJUSTH, was

established from 16 October 2017.⁶ As a result of the closure of MINUSTAH, the post encumbered by the Applicant has been abolished;

f. As the Applicant holds a permanent appointment at the FS-6 level, and pursuant to its obligations under staff rule 9.6(e), the Organization sought to retain the Applicant in a suitable, available position at the same level;

g. The Organization took into account the Applicant's considerable experience in various field missions. It decided that the most suitable position was that of Contingent Owned Equipment Officer at the FS-6 level in UNSOS, Mombasa. Accordingly, the Applicant was laterally reassigned to that position;

h. The Applicant has not provided any evidence that the contested decision was based on a mistake of fact, a lack of due process, or that it was arbitrary or motivated by prejudice or other extraneous factors. On the contrary, in taking this decision, the Under-Secretary-General for Field Support took the Applicant's medical situation into account. Based on an assessment done recently by the medical officers in Nairobi, as per the last medical report on file, the Applicant's urgent medical needs can be met in a level 3 hospital in Mombasa. The Applicant will also have access to the level 4 hospital in Nairobi to meet any additional medical needs that arise. The Applicant had been medically cleared for Port-au-Prince, which at the time had only level 2 facilities. Accordingly, upon his reassignment to Mombasa, the Applicant will have access to an increased level of medical facilities than he had access to during his service with MINUSTAH;

i. The Applicant's allegation that that the Contingent Owned Equipment Officer position is to be moved to Mogadishu is incorrect. No final decision has been taken. The Secretary-General has not made any proposal for redeployment, nor has the General Assembly approved any such

redeployment. Should redeployment take place, it would not be until at least 1 July 2018. The Applicant's mandatory retirement date is 31 August 2018. Should the post be redeployed, the Organization would reassess the Applicant's situation, taking into account his medical condition at that time;

Level of medical facilities provided in MINUSTAH

j. MINUSTAH had a level 2 military medical facility;

Level of medical facilities in UNSOS, Mombasa and UNSOS Mogadishu

k. A level 3 hospital is available in Mombasa, which is able to deal with the Applicant's immediate medical needs. There is no level 4 medical facility in Mombasa. However, there is one in Nairobi, Kenya;

l. A level 1+ medical facility is available in Mogadishu, managed by a contract company. This facility is for stabilization and evacuation, though they have performed vascular surgery when required. In past, they have reviewed a case of a patient suffering from a massive myocardial infarction in shock, saving the life of a contractor;

Level and title of UNSOS position to which the Applicant was to be reassigned and if he has clearance

m. The Applicant has been laterally reassigned the Applicant to the position of Contingent Owned Equipment Officer at the FS-6 level in Mombasa, Kenya;

n. The Applicant is medically cleared to be reassigned to this duty station. This is based on an assessment done recently by the medical officers in Nairobi. As per the last medical report on file, the Applicant's urgent medical needs can be met in a Level III hospital in Mombasa. The Applicant

will also have access to the Level IV hospital in Nairobi to meet any additional medical needs that arise.

List of available suitable posts at the same level or at a lower level presented to the Applicant

- o. No such list was presented to the Applicant.

Applicant's travel to Spain

- p. The Applicant is booked on a flight from Port-au-Prince on the morning of Wednesday, 18 October 2017, to New York. He will then leave for Spain the same day, arriving in Alicante on 19 October 2017.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

17. 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.

18. 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".

19. 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.

20. 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

21. The Tribunal notes that it is uncontested that the contested decision in the present case, namely “the decision of reassignment to [United Nations Support Office in Somalia, “UNSOS”], Mombasa, on medical grounds” is an administrative decision subject to being reviewed by the Tribunal, including its implementation being suspended pending management evaluation.

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

22. The Tribunal notes that it is uncontested that the Applicant filed a management evaluation request of the contested decision on 13 October 2017, within 60 days from the day of notification, which is currently pending.

The contested decision has not yet been implemented

23. The Tribunal notes that pursuant to Order No. 231 (NY/2017) issued on 13 October 2017, the Tribunal suspended the contested decision until the Tribunal has rendered its decision on this application, or until further order. Accordingly, the Applicant is yet to be reassigned from MINUSTAH to UNSOS during the pendency of the Tribunal's consideration of his application for suspension of action of this decision. The contested decision has therefore not yet been implemented.

24. Consequently, the first three of the cumulative and mandatory conditions presented above have been fulfilled.

The impugned administrative decision appears prima facie to be unlawful

25. The Tribunal notes that, on 10 October 2017, pursuant to sec. 11.2 of ST/AI/2010/3 (Staff selection system), a Director of the Department of Field Support decided to laterally reassign the Applicant with immediate effect from MINUSTAH to UNSOS (with duty station in Mombasa, Kenya) to the position of FS-6 level, Contingent Owned Equipment Officer.

26. The Tribunal notes that the Respondent informed the Tribunal that there is no level 4 medical facility in Mombasa, Kenya but a level 3 hospital is available, which is able to deal with the Applicant's immediate medical needs. In addition, a level 4 medical facility is available in Nairobi, Kenya, if needed. Further, the Respondent indicates that a level 1+ medical facility is available in Mogadishu, Somalia, which is

managed by a contract company. This facility is for stabilization and evacuation, though they have performed vascular surgery when required.

27. As results from the letter issued on 9 January 2017 by the Chief Medical Officer, Peacekeeping Medical Services Division, Office of Human Resources Management (“MSD/OHRM”), based on the review of the Applicant’s medical reports and information, the Medical Services Division “supports the reassignment of [the Applicant] to a duty station where he has access to a level [4] facility”. It results that the Applicant’s medical condition from his initial appointment with MINUSTAH changed since February-April 2016, as recognized by the MSD/OHRM, and the medical facilities which existed in MINUSTAH were no longer fit for the Applicant’s medical needs since they were not at level 4. Therefore the level of the medical facilities which existed in MINUSTAH cannot be used as a reasonable justification for the Applicant’s redeployment to Mombasa.

28. The Tribunal considers that the 9 January 2017 letter from the Chief Medical Officer clearly states that the Medical Services Division supports the reassignment of the Applicant to a duty station where he has access to a level 4 facility. As there is no level 4 facility in the Mombasa duty station, the contested decision to laterally reassign the Applicant to Mombasa from 16 October 2017 until on before 1 July 2018 appears to not respect the requirement of MSD/OHRM and consequently appears to be unlawful.

29. Further, the Tribunal observes that a future redeployment, if any, of the temporary post to which the Applicant was laterally reassigned from Mombasa to Mogadishu may also not respect the required level of the medical facilities.

30. The Tribunal also considers that it appears from the parties’ submissions that the Applicant, a staff member with a permanent appointment, was laterally reassigned for less than one year to a temporary post, which may be moved to Mogadishu before or on 1 July 2018 and therefore the contested decision appears:

- a. To exceed the area of application of sec. 11.2 of ST/AI/2010/3, since this provision refers explicitly only to the “transfer” of a staff member (emphasis added):

11.2 The Under-Secretary-General for Field Support, after consultations with the heads of the Departments of Peacekeeping Operations and Political Affairs, the head(s) of the missions involved and the staff members(s) concerned, shall have the authority to *transfer* staff members whose appointment is not limited to a specific mission or department, outside the normal process, between activities away from Headquarters that are administered by the Department of Field Support as well as between those activities and the Departments of Peacekeeping Operations, Political Affairs and Field Support, to suitable job openings at the same level without advertisement of the job opening or further review by a central review body.

- b. To contradict the mandatory provisions of sec. 1(q) of ST/AI/2010/3, which requires a lateral move to be “a movement to a different position at the same level for the duration of at least one year”, and defines lateral move as:

Lateral move: movement of a staff member to a different position at the same level for the duration of at least one year. The new position may be in the same or a different department or office, in the same or a different duty station and in the same or a different occupational group. Inter-agency loans or other movements to and from other organizations of the United Nations common system are recognized as “lateral moves”. Within the same department or office, a lateral move will normally involve a change in functions with or without a change of supervisor. When the supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member. A change in supervisor without a change in functions does not represent a lateral move. Temporary assignments of at least three months but less than one year, with or without special post allowance, shall also qualify as a lateral move when the cumulative duration of such assignments reaches one year;

c. To contradict sec. 3.2(b) of ST/AI/2010/3, which states that the staff selection system as established does not apply to temporary appointments (also reiterated in the definition of lateral move above) and sec. 2.5(g) of ST/AI 2016/1 (Staff selection and managed mobility system), which states that “[t]he present instruction shall not apply to the following: ... (g) The filling of vacant positions available for less than one year...”;

d. To contradict the mandatory provisions of staff regulation 9.3 (a)(i) and staff rule 9.6 (c)(i) and 9.6(e)(i), regarding the right of any staff member, including the Applicant, with a continuous/permanent appointment in case of the abolition of his/her post to express his/her interest and be retained in any available suitable post(s), without having to go through a competitive selection process, based on a transparent and fair information process, which includes full disclosure of all available suitable posts at the staff member’s level vacant or occupied by staff members with a fixed term appointment and a temporary appointment or at a lower level, vacant or occupied by staff members with permanent appointment, fixed term appointment and temporary appointment. The Tribunal observes that in August 2017 the Applicant has expressed his interest in being reassigned to a vacant position at the same level to the one he occupied in MINUSTAH, but has not been provided with a response and the competitive selection process is currently on-going.

31. The Tribunal is therefore satisfied that the condition of *prima facie* unlawfulness is fulfilled.

Is there an urgency?

32. The Tribunal considers that the condition of urgency is fulfilled since the lateral reassignment with an immediate effect was notified to the Applicant on 10 October 2017, only five days before the official closure of MINUSTAH on Sunday, 15 October 2017.

33. Noting that the Applicant requested, as part of the present application under the heading, “Why do you consider this matter to be urgent”, “the suspension of the recruitment process initiated by vacancy announcement JO 83236 pending management evaluation”, the Tribunal considers that the alleged implied decision not to place him on the advertised position and/or to conduct a competitive selection process for this post was not included as a contested decision in the management evaluation request filed on 13 October 2017. There is no evidence on the record that such a request was filed separately and is currently pending or that an individual administrative decision was taken in this regard. Consequently, the Tribunal has no jurisdiction to grant such a relief in the present case.

Is there an irreparable harm to be caused by the implementation of the contested decision?

34. The Tribunal considers that the contested decision to, with immediate effect, laterally reassign the Applicant to Mombasa, if implemented, has the potential to deprive the Applicant at any moment from the necessary medical services at a level 4 facility, as required by his heart condition, and may put his life in danger. Therefore, the Tribunal is satisfied that the condition of irreparable harm is fulfilled.

35. Further, in relation to the Applicant’s request for “immunity from further retaliation against him for his activities as Chairperson of the MINUSTAH FSU” which was included under the heading, “What is the irreparable harm that would be caused by the administrative decision”, of the application for suspension of action, the Tribunal notes that pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure, it does not have the jurisdiction to grant such relief in the present case and there are specific legal provisions to be followed in respect to such a request.

36. Noting the particular circumstances of the present case, the Tribunal commends the Respondent and the DFS for making all necessary arrangements

pending the present proceedings for the Applicant to be repatriated from Haiti to Spain in order to benefit from medical care and to receive the required medication

37. In the light of the above,

IT IS ORDERED THAT:

38. The application for suspension of action is granted in relation to the decision to laterally reassign the Applicant to the position of Contingent Owned Equipment Officer at the FS-6 level in Mombasa, Kenya and the implementation of this decision is suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 18th day of October 2017