



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

NJINKENG

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 19 October 2017, at 4:55 p.m., the Applicant, a Political Affairs Officer at the P-4 level, step 7, with the former United Nations Stabilization Mission in Haiti (“MINUSTAH”), on a continuing 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: “(a) the decision to terminate [his] Continuing Appointment” and (b) the “wrongful decision taken against [him] to repatriate to [him to his] home country where there are serious political and cultural crisis characterised by indiscriminate killings and terrorist attacks” be suspended.

2. On the same date (19 October 2017), at 4:55 p.m., the Registry acknowledged receipt of the application, assigned the case to the undersigned Judge and transmitted it to the Respondent, who was instructed by the assigned Judge to the case to file a reply by 4:00 p.m. on 20 October 2017.

3. On 20 October 2017, at 4:48 p.m., the Respondent filed his reply in which he contended that the application was not receivable as the decision to terminate his appointment had already been implemented.

4. On 23 October 2017, at 12:00 p.m. a Case Management Discussion (“CMD”) was held at which the Applicant participated via telephone from Haiti and Counsel for the Respondent was present in person.

5. At the CMD, the Applicant stated that he contested the termination decision which he considered to be unlawful because he applied for, at least, four positions, including a similar position in the United Nations Mission for Justice Support in Haiti (“MINUJUSTH”). However, he had not been offered any position before his termination despite the fact that he was told that staff members having continuing appointments were to be reassigned either to MINUJUSTH or to other missions. Instead of the Applicant being reassigned to a similar position, and according to his knowledge, a staff member, who had previously held a fixed-term appointment in

MINUSTAH and whose selection was made by a panel in which the Applicant participated as a member, was appointed to MINUJUSTH in a similar position with the one that the Applicant had occupied in MINUSTAH, without the Administration had taken into consideration the Applicant's length of service, good performance, the difficult duty stations in which he served over the years, and right as a staff member with a continuing appointment to be retained in another available similar position. Further, the Applicant mentioned that he had not received any travel authorization for the repatriation travel to his home country and that he had no opportunity to discuss an alternative destination. The Applicant only received the itinerary last week and he had informed the Administration that he could not confirm the travel until he the pending issues related to his termination had been resolved.

6. The Tribunal underlined that it appeared that the Applicant's case was similar with other two applications for suspension of actions previously before the Tribunal, namely Case No. UNDT/NY/2017/098 (Foy) and Case No. UNDT/NY/2017/098 (Debljkovic), where the Administration decided by its own initiative to suspend the implementation of the contested decision pending management evaluation. The two contested decisions were identical in form and content with the contested termination decision of the present case and were all issued on 9 October 2017. Also the Applicant had timely filed a management evaluation request to the Management Evaluation Unit ("MEU") (the decision was notified on 9 October 2017 and the management evaluation request was filed on 18 October 2017) invoking, in principle, the same alleged irregularities. The Tribunal instructed Respondent's Counsel to further discuss with the Administration all the circumstances of the present case, including the ones indicated by the Applicant during the CMD, and to inform the Tribunal either by 23 October 2017, at 5:00 p.m. or by 24 October 2017, at 9:30 a.m., if the Administration would take a similar decision to suspend the implementation pending management evaluation of the contested decision regarding the Applicant's termination and expressed its trust that, by this, the MEU will have the opportunity to fully conduct its review.

7. By submission dated 23 October 2017, filed at 4:54 p.m., the Respondent contends that the application is moot as it has been decided not to implement the contested decision pending management evaluation.

Background

8. Appended to the application for suspension of action, the Applicant filed his termination letter from the Chief of Mission Support (a staff member from Department of Field Support was also copied) dated 9 October 2017 in which is stated as follows (emphasis in the original):

Notice of termination of continuing/permanent appointment

[Name of the Applicant and his index no.]

Dear [name of the Applicant],

Reference is made to my earlier letter to you on the subject **Advance information letter**. Termination of appointment with MINUSTAH. This letter serves to inform you that efforts by Field Personnel Division for your lateral re-assignment under the delegation of [the Under-Secretary-General for Department of Field Support] has not been successful and therefore the Under-Secretary-General for Management has approved the termination of your appointment with the United Nations in accordance with Staff Regulation 9.3 (a)(i) and Staff Rule 9.6 (c)(i).

This is an official notice that your appointment will be terminated in line with Staff Rule 9.7, and your separation will be effective **15 October 2017**.

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. In addition a compensation in lieu of notice will be paid in line with Staff Rule 9.7(d).

The Human Resources Section of MINUSTAH will follow up with you on the necessary arrangements.

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 endeavours.

Parties' submissions

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

Prima facie unlawfulness

a. The termination of his continuing appointment was *prima facie* unlawful as it was in breach of staff rule 9.6(e) and the jurisprudence established in *Lemonnier* 2017-UNAT-762;

b. The decision to repatriate the Applicant to his home country, where there is serious political and cultural crisis characterized by indiscriminate killings and terrorist attacks, is in breach of the Universal Declaration of Human Rights authored and art. 5 of the United Nations Charter;

Urgency

c. The Applicant finds himself caught in "a kind of limbo in Haiti as he have already been served a termination letter but he cannot leave to his home country because of the current crisis;

d. The situation is very urgent as he believes that the Organization would decline any responsibility if anything were to occur to him;

e. His flight to his home country is scheduled for 25 October 2017, and he might need to leave Haiti for his home country on that day if the decision to terminate his contract is not suspended in time;

Irreparable harm

f. The contested decisions will cause the Applicant irreparable pain and suffering as well as physical and personal damages and violate his human rights.

10. In the Respondent's additional submissions of 23 October 2017, he informed that the contested decision will not be implemented pending management evaluation. Based thereon, the Respondent contends that the application is moot because the Applicant has been provided with the relief he is seeking and that there is no matter for the Dispute Tribunal to adjudicate. Upon the instruction of the Tribunal, subsequent to receiving the Respondent's additional submissions on 23 October 2017, the Registry phoned Counsel for the Respondent, who informed that the both contested decisions will be suspended during the management evaluation process.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

11. 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.

12. 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".

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. 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

15. The Tribunal notes that it is uncontested that the contested decisions in the present case, namely the decisions to terminate the Applicant's continuous contract on 15 October 2017 and to repatriate him to his home country, are administrative decisions subject to being reviewed by the Tribunal, including being suspended pending management evaluation and that the Applicant filed a management evaluation request of the decision to terminate his continuing appointment on 18 October 2017, which is currently pending.

16. Further, the Tribunal notes that the Respondent, on behalf of the Secretary-General, has informed the Tribunal that the Administration has decided—and, consequently, obliged itself—not to implement the contested administrative decisions during the pendency of the management evaluation.

17. The Tribunal considers that it results that the relief the Applicant has requested, namely that the decisions to terminate his continuous appointment and repatriate him to his home country be suspended during the pendency of management evaluation, has already been granted by the Administration.

18. Consequently, the Tribunal also considers that since the implementation of the contested decisions pending management evaluation was suspended by the Administration pending management evaluation, there is no further determination to be made by the Tribunal in the present case.

19. The Tribunal commends the Administration for its swift and appropriate response in line with the position it had adopted in previous and similar cases, which prevented further litigation before the Tribunal.

Conclusion

20. Taking act that the Administration has already granted the requested relief, and that the implementation of the contested decisions is already suspended pending management evaluation, the Tribunal ORDERS:

The application for suspension of action is moot.

(Signed)

Judge Alessandra Greceanu

Dated this 23rd day of October 2017