



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

SINGH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. On 28 November 2017, the Applicant, a Chief of Unit, Finance and Budget Section at the P-4 level on a fixed-term appointment with United Nations Stabilization Mission in Haiti (“MINUSTAH”), filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure. The Applicant requested the Tribunal to order the suspension, pending management evaluation, of the implementation of the decision not to renew his fixed-term appointment with MINUSTAH beyond 30 November 2017 and to separate him from the Organization.

2. On 28 November 2017, the case was assigned to the undersigned Judge.

3. On 28 November 2017, the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 5:00 p.m. on 29 November 2017, together with all supporting documentation relating to the Applicant’s contractual status before and after 15 October 2017, the official date of closure of MINUSTAH.

4. On the same day, the Applicant filed additional documentation, including a copy of his request for management evaluation dated 28 November 2017 and email correspondence with MINUSTAH relating to the contested decision.

5. On 29 November 2017, the parties were instructed via email to inform the Tribunal if any travel arrangements have been made, or are to be made, in relation to the Applicant’s move to United Nations Mission in Liberia (“UNMIL”) and provide supporting documentation, if any, by 3:00 p.m. 29 November 2017. The Applicant informed the Tribunal that “[n]o travel arrangement has been made yet to move to UNMIL, however, request for travel to home country has been requested with itinerary for travel on the 1 December 2017 on a separation travel”. The Applicant further informed the Tribunal that “[r]epatriation travel to home country has been

initiated. Travel date is 1 Dec 2017. Travel to UNMIL will be initiated by UNMIL on 1 January 2018 to take up the temporary vacancy”. The Respondent informed the Tribunal “that no travel was raised for UNMIL at this time”.

6. On 29 November 2017, the Respondent filed his reply at 4:56 p.m. and subsequently filed additional supporting documentation concerning the Applicant’s Personnel Action forms.

7. By Order No. 260 (NY/2017) dated 29 November 2017, the Tribunal granted, 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 suspension of the implementation of the decision to terminate the Applicant’s fixed-term appointment until the Tribunal rendered its decision on the application for suspension of action, or until further order.

8. On 30 November 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.

9. At the CMD, at the request of the Judge, the Applicant explained his career history with the Organization stating that he has been serving the Organization for 23 years, including within several hardship duty stations, including Rwanda, Cambodia, East Timor, and Cote d’Ivoire. He further mentioned that his fixed-term appointment was due to expire on the same day (30 November 2017) despite the fact he had made repeated good faith efforts to find suitable positions and follow up on recruitment processes. He was still awaiting feedback on a job application with “the Police Commissioner Office” without stating at which duty station. The Applicant stated that he only recently was informed that he was not serving in his position against a specified post and that he had been on a temporary position since 2014 when he commenced his role with MINUSTAH. The Applicant stated that the contested decision would have a significant financial impact on him as he would lose the benefits associated with his fixed-term contract, including entitlements relating to

home leave, educational grant, mobility and pension. The Applicant further explained that he was informed around 13 or 14 October 2017 that he together with two other staff members from MINUSTAH (one international and one national) would continue their contracts with MINUSTAH until 30 November 2017 as members of the MINUSTAH Liquidation Team. He also mentioned that the contract of the other international staff member from “the Liquidation Team” had been extended till end of December 2017 and that the national staff member was recruited in United Nations Mission for Justice Support in Haiti (“MINUJUSTH”). 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 provide further relevant information by 30 November 2017, at 5:00 p.m. Further, the Tribunal expressed its trust that the Administration would take all the necessary measures for the safety and security of the Applicant during his presence in Haiti.

10. By Order No. 260 (NY/2017) issued on 30 November 2017, the Tribunal ordered that:

... At **5:00 p.m. on Thursday, 30 November 2017** the Respondent is to inform the Tribunal of the following:

- a. The contractual status of the international team member within the Applicant’s team at the Liquidation Unit of MINUSTAH and the difference in his status compared to the Applicant’s;
- b. An update on the consideration of the Applicant’s request to utilize his annual leave entitlement;
- c. The status of the ongoing recruitment process involving the Applicant in regard to his application for a position with the Police Commissioner Office; and
- d. Whether the Administration would consider appropriate to suspend by its own initiative the implementation of the contested decision pending management evaluation of the contested decision.

11. On 30 November 2017, the Respondent filed a submission pursuant to Order No. 260 (NY/2017).

12. On 1 December 2017, upon the instructions of the Judge, the Applicant filed a copy of his contract with UNMIL.

Background

13. In his application for suspension of action, the Applicant presents the facts as follows:

... I was re-assigned to MINUSTAH while on [Temporary Vacancy Announcement] assignment in [United Nations Multidimensional Integrated Stabilization Mission in Mali] from ONUCI [United Nations Operation in Côte d'Ivoire] in October 2014 as Chief of Unit, Finance and Budget Section, pending recruitment of the post in MINUSTAH. I accepted the reassignment to MINUSTAH instead of returning to my duty station in ONUCI due to the fact that CMS [Chief of Mission Support] at that time in ONUCI decided to abolish the post and asked me to find other assignments instead of returning to ONUCI to be separated. Hence I decided to accept the re-assignment in MINUSTAH.

... The recruitment process started in MINUSTAH for the post in early 2015. Among other candidates, I have been invited to participate in the written assessment as well as interview. However, due to various reason, the Mission took longer than normal time to complete the process and the interview held in January 2016 for the recruitment.

... Pending the selection process, Mission continued to extend me in the post on a monthly basis under fixed-term contract. I was told that selection is pending with the FCRB (Field Central Review Board) for clearance as the board requested further information from the interview panel members for which Mission was not able to provide on time due to Chair of the interview panel member left the Mission along with another panel member that delayed the finalization of FCRB clearance.

... Finally, in February 2017 FCRB endorsed my membership to the position from where the selection may be made by the Mission. In addition, although FCRB endorsed my clearance in

February 2017, it was only in June 2017 the clearance triggered in my Inspira due to Mission hiring manager (CMS) did not complete process of selection and close the [vacancy announcement] in the system. Given the circumstances, roster membership is granted to me under the condition that I would waive the requirement of issuing me a contract for one year in June 2017 for which I have agreed.

... The Mission did not [make] any selection from that vacancy announcement from the time when recruitment process completed back in 2016 and/or when FCRB endorsed the candidates for selection for the post. The Mission did not select any staff member for the post, but asked me to continue my fixed-term contract issuing a contract on a monthly basis even though I was one of the candidate in the roster for the post and performing the similar functions for three years.

... As a result I was not able to participate in a possible lateral move during the liquidation of MINUSTAH.

... A follow-on Mission established in Haiti after the closure of MINUSTAH on 16 October 2017. Unfortunately, I have not been selected for the post even though I was performing the similar function in the same office, and rostered candidate for the same post.

... I was also not offered any re-assignment until today.

... I have now received an offer to work in UNMIL (Liberia) on a [temporary job opening, "TJO"] as UNMIL [...] will end its mandate in 30 June 2018.

... At this point, I was asked to separate and the organization is not willing to continue my fixed-term contractual status for which I am submitting my case for review.

14. In addition, the Applicant has filed a copy of email exchanges with MINUSTAH personnel, including an email dated 22 November 2017 from the Applicant to the Chief of Mission Support ("CMS"), MINUSTAH, in which the Applicant states:

... Dear [CMS],

... Please assist me in resolving my contractual entitlement issue. I am taking up a TJO post now due to no other posts available for me after working for 23 years straight on fixed-term contract. I was also not able to take any leave due to heavy

workload preparing for MINUJUSTH [United Nations Mission for Justice Support in Haiti] in early this year, but wanted to utilize my leave entitlement in December after joining UNMIL, but it seems there are some issues related to the contract. Kindly resolve in the best interest of staff member.

...

15. On 25 November 2017, the CMS responded to the Applicant stating that:

... Dear [the Applicant]

... Sorry for got getting back to you earlier as I was off for thanksgiving. Regarding your question below, as you know, although you were FCRBd, your limitations of service remain since you have not been selected for a regular post to allow the limitations to be removed. This has created a problem as we are not able to reassign you to UNMIL. Therefore the only option is to be separated and be appointed on a TJO. This means that you would not be able to utilize home leave and balance of leave would be cashed out (subject to a maximum of 60 days).

... We have really tried to see how we can move you to UNMIL while maintaining your FT [fixed-term] appointment, but it has been difficult to make an exception for your case since we have used the same process for other staff members who have contract limitations.

...

16. While not appearing to contest the Applicant's presentation of the factual background, the Respondent adds that:

... On 13 April 2017, by Security Council Resolution 2350 (2017), MINUSTAH's mandate ended on 15 October 2017. The Applicant's appointment was renewed until 30 November 2017 because he was a member of MINUSTAH's liquidation team. His appointment has not been renewed because MINUSTAH has closed.

...

Parties' submissions

17. The Applicant states in his application and supporting documentation that his fixed-term appointment would unlawfully not be renewed if the contested decision is not suspended, and he will lose the benefits associated with his fixed-term appointment, including his leave entitlements. The Applicant's principal contentions may be summarized as follows:

- a. The Applicant has been serving in the United Nation since March 1995 on a fixed-term appointment;
- b. Given the unfair treatment with regard to the selection of the post that the Applicant was performing from October 2014 till 30 November 2017, the Applicant requested that he be able to continue his next short-term assignment with UNMIL under a fixed-term appointment without separating from the organization and being reappointed on a temporary appointment;
- c. The Applicant's wellbeing has suffered during the last 3 years due to the uncertainty of his contractual status, and not knowing whether he will continue the work that he has been doing for the last 23 years.

18. The Respondent states that the application has no merit as the contested decision was lawful and the implementation of the contested decision will not cause the Applicant irreparable harm. The Respondent's principal contentions may be summarized as follows:

- a. The Applicant has not demonstrated that the contested decision is *prima facie* unlawful. The Applicant has no right to have his appointment renewed. A fixed-term appointment does not carry any expectancy of renewal in accordance with staff regulation 4.5(c);
- b. In accordance with staff rule 4.13(c), the Applicant has no right to renewal of appointment beyond 30 November 2017. The Administration

created no legitimate expectancy of renewal beyond that date. An expectation of renewal requires an express promise that the appointment, will be renewed. No such promise was made;

c. The decision not to renew an appointment may be challenged on the grounds that the staff member had a legitimate expectancy of renewal, procedural irregularity, or the decision was arbitrary or motivated by improper purposes. The Applicant has provided no evidence for such a challenge. On 13 April 2017, by Security Council Resolution 2350 (2017), MINUSTAH's mandate ended on 15 October 2017. The Applicant's appointment was renewed until 30 November 2017 because he was a member of MINUSTAH's liquidation team. His appointment has not been renewed because MINUSTAH has closed. The contested decision is lawful;

d. The Applicant has not established irreparable harm. Any harm the Applicant might suffer can be adequately compensated through a monetary award.

19. The Respondent provided further information in its submission dated 30 November 2017, stating *inter alia* that:

a. In regard to the contractual status of the international team member within the Applicant's team at the Liquidation Unit of MINUSTAH, that the other staff member is a cashier (at the FS-5 level) and his appointment was renewed until 31 December 2017 to process final payments as there is no other cashier in the new mission. The Applicant cannot perform the functions of a cashier;

b. The Applicant cannot carry over the balance of his annual leave into the next appointment with UNMIL. He is required to separate and be appointed to the temporary job opening at UNMIL after a break in service in accordance sec. 5.2 of ST/AI/2010/4.Rev.1 (Administration of temporary

appointments). A renewal of the Applicant's appointment beyond 30 November 2017 would impact his taking up the position in UNMIL as he is expected to perform critical functions as UNMIL Chief Finance Officer at the P-4 level. The Applicant's appointment would have to be renewed for the sole purpose of granting him annual leave. This would require the approval of the Under-Secretary-General of Field Support ("USG/DFS");

c. On 9 October 2017, the Applicant agreed to the renewal of his appointment to 30 November 2017 to serve on the liquidation team. The Applicant cannot be laterally reassigned by the USG/DFS as his appointment is limited in service to MINUSTAH;

d. While the MINUSTAH's mandate and operations closed on 16 October 2017, a small team, including the Applicant was identified to be renewed through 30 November 2017 to undertake liquidation activities. MINUSTAH has an authorized budget for liquidation activities, such as the closing of accounts, payment of final entitlements to staff, and disposal of assets;

e. The recruitment process for a position in the Police Commissioner's Office is ongoing;

f. The Administration is not willing to suspend implementation of the decision not to renew the Applicant's appointment beyond 30 November 2017.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

20. 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.

21. 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".

22. 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.

23. 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

24. The Tribunal notes that it is uncontested that the contested decision in the present case, namely the decision not to renew the Applicant's fixed-term appointment with MINUSTAH and to separate him from the Organization, is an administrative decision subject to review 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

25. The Tribunal notes that it is uncontested that the Applicant filed a management evaluation request of the contested decision on 28 November 2017, within 60 days from the day of notification, and that the evaluation is currently pending.

Whether the contested decision has not yet been implemented

26. The Tribunal notes that pursuant to Order No. 260 (NY/2017) dated 29 November 2017, the Tribunal granted, 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 suspension of the implementation of the decision not to renew the Applicant's fixed-term appointment until the Tribunal rendered its decision on the application for suspension of action, or until further order.

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

The impugned administrative decision appears prima facie to be unlawful

28. The Tribunal notes the following uncontested aspects in relation to the Applicant's contractual status:

a. His fixed-term appointment with MINUSTAH was due to expire 15 October 2017, the date of the official closure of MINUSTAH;

b. However, the Applicant, being a member of the Liquidation Unit at MINUSTAH, received an extension of his contract with MINUSTAH on 9 October 2017 until 30 November 2017 in order to complete the process of liquidation of the mission;

c. On 15 November 2017, the Applicant signed the letter of assignment with UNMIL, where he was selected to serve as Chief of Section, Finance and Budget on Temporary Assignment subject to release by his Office (MINUSTAH) from 23 November 2017 through 30 June 2018.

29. On 22 November 2017, the Applicant informed the Chief of Mission Support that he was planning to travel to UNMIL on Friday, 24 November 2017 and expressed his will to carry over his leave entitlements.

30. On 25 November 2017, the Applicant was informed that it is not possible to reassign him to UNMIL and that he would have to separate first from the Organization and then to be appointed to the temporary appointment. On 28 November 2017, the Applicant was further informed that "due to the fact that [his] appointment was limited to MINUSTAH only, [he] will have to separate and receive a temporary appointment after a 31 day break in service in order to join UNMIL on temporary job opening [he] was selected for".

31. Having reviewed the parties' submissions the Tribunal considers that the contested decision not to renew his fixed-term appointment and to separate him from the Organization appears to be *prima facie* unlawful due to following

irregularities/inconsistences related to the contested decision. First, the Respondent contends that the Applicant is required to separate from the Organization and be appointed to the temporary job opening at UNMIL after a break in service pursuant to sec. 5.2 of ST/AI/2010/4.Rev.1 (Administration of temporary appointments) issued on 26 October 2011 which states as follows (emphasis added in sec. 5.2):

Section 5

Eligibility

Eligibility of a staff member who has held or is holding a fixed-term, continuing or permanent appointment

5.1 A current staff member who holds a fixed-term, permanent or continuing appointment may apply for temporary positions no more than one level above his or her current grade. However, a current staff member who holds an appointment at the G-6 or G-7 level may also apply to temporary positions in the Professional category up to and including the P-3 level, subject to meeting all eligibility and other requirements for the position as set out in section 3.4 above.

5.2 *Upon separation from service, including, but not limited to, expiration or termination of, or resignation from, a fixed-term, continuing or permanent appointment, a former staff member will be ineligible for re-employment on the basis of a temporary appointment for a period of 31 days following the separation. In the case of separation from service on retirement, a former staff member will be ineligible for re-employment for a period of three months following the separation. This equally applies, mutatis mutandis, with respect to a former or current staff member who has held or holds an appointment in another entity applying the United Nations Staff Regulations and Rules and who applies for a temporary position with the Secretariat.*

32. However, the Tribunal considers that as the Applicant is on a fixed-term appointment, the provisions of sec. 5.2 of ST/AI/2010/4.Rev.1 above must be read together with subsequent mandatory provisions of sec. 3.10 of ST/AI/2013/1 (Administration of fixed-term appointments) issued on 22 April 2013. In this regard, the Tribunal notes that sec. 3.10 of ST/AI/2013/1 states as follows (emphasis added in sec. 3.10):

Section 3

Appointment and re-employment

...

3.10 Upon *separation from service following resignation* from a fixed-term appointment, a former staff member will be ineligible for re-employment for a period of 31 days following the separation.

33. The Tribunal considers that in accordance with the rules of interpretation of law, which requires that the newest legal provision take precedent over older provisions, ST/AI/2013/1 supersedes ST/AI/2010/4.Rev.1. It results from sec. 3.10 of ST/AI/2013/1 above that a former staff member will only be ineligible for re-employment for a period of 31 days following the separation if they have resigned from their fixed-term appointment and therefore the area of application of sec. 5.2 of ST/AI/2010/4.Rev.1 was limited to the separation from service of staff members under fixed-term appointments only if the separation results from a resignation by the staff member.

34. As results from sec. 3.11 of ST/AI/2013/1, a break in service up to seven days before being re-employed is required exclusively in case of a staff member in the General Service category, which is not applicable to the Applicant who is a staff member in the Professional Service category.

35. It is uncontested that the Applicant's fixed-term appointment was due to expire on 30 November 2017, and the Applicant did not resign from the Organization. Moreover, his new assignment was to start on 24 November 2017, when he was to officially travel to UNMIL, without any break in service. Consequently, the Respondent's contention that the Applicant is required to separate from the Organization and be appointed to the temporary job opening at UNMIL after a break in service pursuant to sec. 5.2 of ST/AI/2010/4.Rev.1 appears to be incorrect.

36. Secondly, the Tribunal notes that although the Respondent contends that the Applicant cannot be laterally reassigned by the USG/DFS as his appointment is limited in service to MINUSTAH and that he is required to undertake a 31 day break

in service before he may commence his appointment with UNMIL, the Applicant's letter of appointment from UNMIL dated 15 November 2017 states as follows:

...

Subject: Assignment to the United Nations Mission in Liberia (UNMIL)

...

I am pleased to inform you that you have been selected to serve as Chief of Section. Finance and Budget on Temporary Assignment at the P-4 Grade, 13 Step level, subject to medical clearance, designation (if applicable) and release by your Office, from 23 November 2017 through 30 June 2018, to the United Nations Mission in Liberia (UNMIL), Monrovia.

...

37. The UNMIL appointment letter issued to the Applicant above states that the Applicant has been offered and accepted the "Assignment" to UNMIL on 15 November 2017, with a start date of 23 November 2017. The appointment letter issued by the Organization mentions no requirement for break in service in order for the Applicant to commence his position with UNMIL. Consequently, it appears that the Applicant's temporary assignment with UNMIL for period less than one year and subject to an extension up to a maximum of two years as mentioned in the letter of assignment is a lateral move as defined on sec. 1(q) of ST/AI/2010/3 (Staff selection system). Therefore, the Respondent's contention that the Applicant is required to undertake a break in service is incorrect.

38. Thirdly, the Applicant informed the Tribunal at the CMD that he only recently was informed that although he has been serving on a fixed-term appointment with MINUSTAH since 2014, he had been placed against a temporary post for the entire period of his service with MINUSTAH. He also submitted that pending the 2015 selection process mentioned in his Application, MINUSTAH continued to extend the Applicant's fixed-term appointment on a month by month basis for the past 2 years. Consequently, since these facts were not contested, it appears that the Applicant has

been serving at a hardship duty station for several years on a temporary position but serving under a fixed-term contract.

39. The Tribunal also notes that in relation to the Respondent's position regarding the Applicant's annual leave that according with the mandatory provisions of Regulation 5.1, staff members "shall" be allowed appropriate annual leave and these provisions are superior to Staff rule 9.9 regarding the commutation of accrued annual leave.

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

Is there an urgency?

41. The Tribunal considers that the condition of urgency is fulfilled since the Applicant's appointment is due to expire on the date the Tribunal rendered its decision on the application for suspension of action, pursuant to Order No. 260 (NY/2017) dated 29 November 2017.

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

42. The Tribunal considers that the contested decision, with immediate effect, if implemented, has the potential to cause the Applicant irreparable harm. At the CMD the Applicant submitted that he has served with the United Nations for 23 years and the non-renewal of his fixed-term appointment will cause him loss of career opportunity, financial loss deriving from the loss of the benefits and entitlements under his current appointment and stress. In the circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled.

43. In the light of the above,

IT IS ORDERED THAT:

44. The application for suspension of action is granted in relation to the decision not to renew the Applicant's fixed-term appointment and to separate him from the Organization, and the implementation of this decision is suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 4th day of December 2017