



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

BELLAGOTTI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON A SUSPENSION OF ACTION
APPLICATION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat
Clémentine Foizel, ALD/OHR, UN Secretariat

Introduction

1. On 19 October 2021, the Applicant, an Electoral Officer with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”), filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, requesting the suspension, pending management evaluation, of the decisions (a) not to renew his temporary appointment beyond 31 October 2021 and, (b) in case of non-renewal, to reassign him to another, but downgraded, post as he had otherwise been promised.

2. The application was initially filed with the Nairobi Registry of the Dispute Tribunal, but redirected to the New York Registry on 21 October 2021. On that date, the Tribunal acknowledged receipt of the application and served it on the Respondent.

3. On 25 October 2021, as directed by the Tribunal, the Respondent filed a reply in which he contends that the application is without merit.

Background

4. By interoffice memorandum dated 3 June 2021, the Applicant was notified by a Human Resources Officer in MINUSCA that his temporary appointment with MINUSCA would not be renewed upon its expiration on 30 June 2021 and that he would thereafter be separated from service.

5. In a letter dated 8 June 2021, the Applicant complained to the Special Representative of the Secretary-General of MINUSCA (“the SRSG”) concerning the non-renewal of his temporary appointment. The Applicant explained that the Director of the Electoral Assistance Division had notified him of this decision at a meeting on 4 June 2021 and that he was to be replaced by a legal expert.

6. On file, there is no documentation on the subsequent extension of the Applicant's temporary appointment, but the Applicant explains that it was first extended until 30 September 2021 and then until 30 October 2021.

7. By interoffice memorandum dated 18 August 2021, the Officer-in-Charge of the Human Resources Section, notified the Applicant that his post was downgraded from the P-4 level to the P-3 level. It was indicated that the downgrading was "necessitated to reinforce MINUSCA's capacity to meet the new requirements of the Mission's mandated activities, in preparation for the local elections" and that "[t]he downgrading of the position will allow the reinstatement of the P4 Legal and Procedures Officer post that was originally planned and budgeted for in the Electoral Division in 2020/21". The Applicant was referred to the Director of the Electoral Assistance Division for any further clarification.

8. By email of 20 September 2021, the Chief of Human Resources notified the Applicant and others that the "Chief Electoral [*sic*] has pointed out re the mistake in language—it is not downgrade[d] from P4 for the P3", and that "[t]he P4 post [the Applicant] occupied at the P4 level for Civic Education is no longer needed for the function as the elections [are] over and this post is now needed for Legal Officer [*sic*"]". It was further stated that the Applicant was "to be placed on Post # 31033900 P3 Electoral Officer to release Post # 31033915 / P4 Electoral", because there were "no other P4 posts to place him on and functions [*sic*] no longer required. The Chief of Human Resources further indicated that "a decision was reached between [the Chief of Staff, the Deputy SRSG] and Chief of Electoral and approved by the SRSG for [the Applicant's] placement against the P3 Electoral position".

9. By interoffice memorandum dated 6 October 2021, the Chief of Human Resources informed the Applicant of his "[s]eparation upon completion of temporary appointment effective 31 October". Making reference to a "memo dated 23 September 2021 from the Director Electoral Assistance Division" regarding "staffing changes in the division", which the Applicant submits that he has never seen, the Chief of Human Resources explained that "the functions of the post [the Applicant]

currently incumbent will be changed to Electoral Officer (Legal and Procedures Officer) effective 01 November 2021”, which was done “to meet the needs of the Electoral Division leading into local elections”. The Chief of Human Resources further noted that “[t]he change will require a new recruitment to fill the position and [the Applicant’s] subsequent separation upon completion of [his] temporary appointment”.

Consideration

10. Under art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of the Rules of Procedure, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements have been met.

Prima facie unlawfulness

11. In considering whether to suspend an administrative decision pending management evaluation, the Dispute Tribunal’s Statute does not require the Tribunal to make a definitive finding regarding the legality of the impugned decision. Any determination made in the present case is not binding in a possible subsequent substantive case. Rather, based on case record at hand, the Tribunal is merely to make a precursory finding regarding the lawfulness of the impugned decision.

The non-renewal decision

12. The Applicant contends that the non-renewal of his temporary appointment is unlawful because no valid reason was provided for the decision. He submits that the “elections are not over” as “[l]ocal elections are scheduled for September 2022” and Security Council resolution 2552 (2020) mandated MINUSCA to assist the national authorities “in preparation and delivery of peaceful presidential, legislative and local elections”. He argues that his “colleagues” received “extension of contracts until 30

June 2022”, that the “needs in Civic and Electoral Communication are huge”, and that in MINUSCA’s “Electoral Support Budget”, there is “a line called ‘communication and information’ of around 1,500,000 USD for this budget year”.

13. The Respondent, in essence, contends that the non-renewal decision was lawful.

14. The Tribunal observes that under the consistent jurisprudence of the Appeals Tribunal, “an international organization necessarily has the power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff” (see, for instance, *Abdeljalil* 2019-UNAT-960). Also, it is trite law that a temporary appointment carries no expectation of non-renewal (see staff rule 4.12(c) and sec. 1.2 of ST/AI/2010/4 Rev.1). If the staff member affected by a non-renewal decision requests to be provided a reason therefor, the Administration must do so and the reason must be lawful and supported by facts (see, for instance, *Islam* 2011-UNAT-115, *Obdeijn* 2012-UNAT-201, and *El-Arqan* 2019-UNAT-911).

15. At the same time, the Tribunal notes that MINUSCA’s discretion is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, “[w]hen judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”.

16. The Appeals Tribunal further underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General” (see *Sanwidi*, para. 40). In this regard, the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the

decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

17. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

18. In the present case, the Tribunal does not find that the Applicant has established on a *prima facie* basis that MINUSCA overstepped the scope of its authority when deciding not to renew the Applicant's P-4 level appointment as an Electoral Officer in order to instead hire a legal expert with the title of an "Electoral Officer (Legal and Procedures Officer)".

19. Most importantly, under sec. 2 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments), the Applicant's temporary appointment on the P-4 level post has reached the maximum period of service of 364 days and it does not follow from the case record that any exceptional circumstances require its further extension.

20. In addition, the Tribunal notes that the Administration's explanation on replacing the Applicant with a legal expert has been consistent throughout all its communications and does not seem unreasonable. The circumstance that other colleagues might have had their time limited appointments extended does not change this conclusion. Also, nothing in the budget for MINUSCA indicates that the Applicant's role at the P-4 level is further needed.

21. The Applicant's claim regarding the non-renewal of his P-4 level temporary appointment is therefore rejected.

The reassignment decision

22. The Applicant submits that he had “confirmed [his] availability to accept the post even at a lower level to release the P4 post ‘legal electoral officer’ [he] was, apparently, sitting on”, but was never given any further information and the downgrade “never took effect indeed”.

23. The Respondent contends that the email from the Chief of Human Resources on 20 September 2021 “is not an express promise to renew the Applicant’s P4 appointment, nor a clear offer of a position following the expiration of his appointment”. With reference to the Appeals Tribunal in *Kellie* 2018-UNAT-875 and *Houenou* 2021-UNAT-1091, the Respondent further submits that the 20 September 2021 email “lacked the essential elements of a proper and concrete offer of renewal, such as the duration of the extension”. He also argues that the Applicant cannot “be placed against the P3 Electoral Officer post”, because “the position financed by that post is subject to a competitive recruitment process”.

24. The Tribunal observes that under the jurisprudence of the Appeals Tribunal, a staff member can only expect to have a time limited appointment renewed if an express promise has been made in that regard and typically this would need to be made in writing (see, for instance, *Kellie* and *Loose* 2020-UNAT-1043).

25. Contrary to the Respondent’s submissions, the Tribunal finds as a matter of fact that an express promise was made in the 20 September 2021 email. The Chief of Human Resource explicitly stated that a “decision” had been made by the Chief of Staff, the Deputy SRSG and Chief of Electoral, which was even “approved” by the SRSG, to place the Applicant against a P-3 level post of Electoral Officer. This cannot be interpreted as anything but an express promise.

26. The problem is, however, that this promise is unlawful, and therefore non-executable, on its own terms. While the Respondent has not demonstrated that the relevant P-3 level post is to be filled through a competitive selection process, a reassignment of the Applicant to this post could only be administrated as a new

temporary appointment—if undertaken as a fixed-term appointment, a competitive selection process would necessarily be required in accordance with ST/AI/2010/3 (Staff selection system). In this regard, the Applicant could only be reemployed on a new temporary appointment in MINUSCA three months after the expiry of his current temporary appointment under ST/AI/2010/4/Rev.1, and this appointment expires on 31 October 2021.

27. As a reassignment to the P-3 level post is not a viable option under any circumstances, it makes no difference that the Tribunal, in fact, finds that MINUSCA is in bad faith when now forsaking its previous promise in this regard.

28. Accordingly, the Tribunal rejects the Applicant's claim on reassignment.

Other conditions under art. 2.2 of the Dispute Tribunal's Statute and art. 13.1 of the Rules of Procedure

29. As the Tribunal finds no *prima facie* unlawfulness in the present case, it is not necessary to examine whether the present case is particularly urgent or if the impugned decision would cause irreparable harm to the Applicant.

IT IS ORDERED THAT:

30. The application for suspension of action is rejected.

(Signed)

Judge Joelle Adda

Dated this 25th day of October 2021