



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

HERSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for Applicant:

Seth Levine, OSLA

Counsel for Respondent:

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant joined the United Nations Mission in Sudan (UNMIS) on 27 July 2005 as a Broadcast Technology Officer on a fixed-term appointment of one year which was subsequently renewed on an annual basis. On 22 August 2011, she filed the present Application for a suspension of the implementation of the administrative decision to separate her from service effective 31 August 2011 on the basis that it was not possible to transition her from UNMIS to either United Nations Mission in South Sudan (UNMISS) or to the United Nations Interim Security Force for Abyei (UNISFA) (“the impugned decision”).

Facts

2. By resolution S/RES/1978 (2011) adopted on 27 April 2011, the Security Council extended the mandate of UNMIS until 9 July 2011. By resolution SC/10317 1997 (2011) authorizing closure of UNMIS adopted on 11 July 2011, the Security Council, *inter alia*, decided to withdraw UNMIS effective 11 July 2011 and called upon the Secretary-General to complete withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission’s liquidation, by 31 August 2011.

3. On 1 June 2011, Nicholas Von Ruben, Director of Mission Support, UNMIS, issued Information Circular No. 218/2011 (Movement of International Staff to South Sudan). The purpose of the Information Circular was to inform UNMIS personnel of the transition of international staff to the new mission in South Sudan.

4. Also on 1 June 2011, the Applicant received an email with an attached “Reassignment Form” stating that she had been reassigned to Juba effective 1 July 2011. This relocation was in line with the expiry of the UNMIS mandate and the movement of all Public Information Office (PIO) international staff from the North to South Sudan. This “Reassignment Form” was signed by Martin Ojjerro, Officer-in-Charge of the Human Resources Services Section and Nicholas Von Ruben, Director of Mission Support, UNMIS.

5. The Applicant signed an offer of a fixed-term appointment for the period 1 July 2011 – 30 June 2012 for the position of Broadcast Technology Officer with UNMIS on 26 July 2011. On 27 July 2011, the Applicant received a Letter of Separation, signed by Martin Ojjerro, in his capacity as Chief Civilian Personnel Officer (CCPO), UNMIS.

6. On 28 July 2011, the CCPO and UNMIS Visa Office advised the Applicant to check out of the Mission and leave Sudan as soon as possible as Sudanese visas would only be effective and recognized as valid by the Sudanese Government until 7 August 2011. The Applicant left Sudan on 4 August 2011.

7. The Applicant filed a request for management evaluation on 12 August 2011 and on 23 August 2011 she filed the present Application seeking suspension of the impugned decision. The Respondent's Reply was filed on 26 August 2011. The case was heard by the Tribunal on 29 August 2011 during which the Tribunal received testimony from the Applicant via teleconference from Egypt. The Respondent filed additional submissions on 31 August 2011 to which the Applicant filed their Reply on the same date.

The Applicant's case

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

9. She should have been transitioned to either UNMISS or UNISFA in accordance with section 2(A) of Information Circular No. 218/2011 on the movement of International staff to South Sudan.

10. The decision to terminate her fixed-term appointment, which expires on 30 June 2012, is reserved to the Secretary-General, who has not delegated this authority to the author of the decision, Martin Ojjerro, the Chief Civilian Personnel Officer of UNMIS. ST/AI/234 (Administration of the Staff Regulations and Staff Rules) contains no provision on the delegation of the Secretary-General's authority to terminate the appointments of staff members to the Chief Civilian Personnel Officer of Peacekeeping Missions.

11. Whereas the terms of paragraph 2(A) of UNMIS Information Circular No. 218/2011 mandate that “[i]n cases where the number of posts in the new mission is equal [...] staff members [...] will be reassigned [...] provided other conditions such as satisfactory performance are met. Whereas the Applicant is aware that the staffing table of UNMISS confirms a similar position she held in UNMIS and at the same level, she was entitled to be reassigned, which vitiates her impending separation.

12. Staff rule 9.6 (c) states that “[t]he Secretary-General may, giving the reasons therefore, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds [...].”

13. In the Letter of Separation, Ojjerro states that “[f]ollowing the completion of the UNMIS mandate, the human resources post-matching and comparative review exercises regarding the transition of international staff from UNMIS [...] we were unable to transition you to UNMISS or UNISFA.” This statement stands in marked contrast with (i) the renewal of her appointment for a period of twelve months on 1 July 2011 and (ii) the “Reassignment Form” dated 25 May 2011, which states that,

Broadcast Technology Officer, Ms. Nanci Hersh (P4), sitting against Post #75684, is reassigned to Juba effective 1st July 2011. This relocation is in line with the expiry of the UNMIS mandate and the movement of all Public Information Office (PIO) international staff from the North to South Sudan.

14. Delegation of authority must precede the taking of a decision and is not synonymous with retrospective rubber-stamping by the person who had the original authority. In the present case, the Applicant received the notice of separation on 27 July 2011. On 29 July 2011, authorization to terminate the appointments of 62 staff members, including the Applicant, was requested from the ASG/OHRM. This shows scant regard for the carefully mandated chain of authority.

15. Where a particular authority is in the first instance reserved for the Secretary-General and thereafter only delegated to named, specific senior positions, it is done so for a reason. That reason is that the unilateral termination of a contract of employment

in the Organization is something that can only be done in exceptional circumstances with the highest authority. The decision to terminate the Applicant's employment was taken at the Mission level and was unlawful. The fact that it was subsequently rubber-stamped cannot cure what was *ab initio* unlawful.

16. UNMISS has catered for one position of Broadcast Technology Officer and she was the only Broadcast Technology Officer in UNMIS. Accordingly, if a similar post is catered for in the staffing table of UNMISS, she is entitled to be reassigned based on Section 2(A) of UNMIS Information Circular No. 218/2011. Alternatively, under section 2(B) of the said Information Circular, in cases of fewer posts, a comparative review process was to be instituted to determine who would be transferred. If indeed there were fewer posts in UNMISS, the failure to transfer is based on a failure to conduct a comparative review.

17. There is now the Broadcast Technology Officer in the new Mission in Juba. It is inconceivable how the person encumbering that post could fulfil criteria for the transfer of staff better than the Applicant. The Applicant should have been considered under sections 2(A) and (B) of UNMIS Information Circular No. 218/2011.

18. The transfer of the Mission had been under contemplation for some time. It is bad faith for the Secretary-General to have granted her an extension of contract if there was no intention of honouring it.

19. In respect to the element of irreparable harm, she is now essentially outside the UN making it difficult for her to find suitable employment. The Secretary-General's action of entering into a contract which he never intended to comply with was not only unlawful but a serious breach of the duty to act in good faith. Any harm that flows from that including her ongoing grievance and her strong conviction that injustice has been done to her is irreparable.

20. Harm to professional reputation and career prospects, or harm, or sudden loss of employment constitutes irreparable damage. Separation from service will occasion irreparable harm in that she will lose the prospect of applying for positions within the

UN as an internal candidate. A termination will result in damage to career prospects, her personal integrity, her reputation and aspirations, which are not matters that can be compensated for by a monetary reward. In addition, implementation of the impugned decision will result in a break-in service, which will disrupt her continuous service for the purposes of her eligibility for a permanent/continuing appointment and entitlements such as home leave, which also cannot be compensated for by a monetary award.

21. The fact that she has completed her check-out does not mean that the impugned decision has been implemented and therefore is no longer open to suspension. Her appointment expires on 31 August 2011 and she will be remunerated until such date. However, on instruction and as a result of purported communications with the Sudanese Government, she completed her check-out and left Sudan prior to 31 August 2011.

22. The Application is urgent based on the fact that her contract terminates in two days, that is, 31 August 2011.

23. Based on the foregoing, the Applicant requests that this Tribunal suspend the implementation of the impugned decision until the completion of the pending process of management evaluation.

The Respondent's case

24. The Respondent's case may be summarized as follows:

25. Following the end of the mandate of UNMIS, the appointment of the Applicant, together with other UNMIS staff members, was extended for a one-year period, until 30 June 2012, in order for the staff members to receive payment of a termination indemnity in accordance with Annex III of the Staff Regulations and Rules.

26. The liquidation of UNMIS is to be completed by 31 August 2011. As a consequence, more than 1,600 posts within UNMIS will have been abolished by this date. In view of the time constraints, and the decision of the Government of Sudan not to extend most staff members' visas beyond 31 July 2011, the Field Personnel Division

(FPD), Department of Field Support (DFS), sought and received prior verbal approval of OHRM for the termination of the appointment of 62 staff members, including the Applicant. On the basis of OHRM's verbal approval, FPD, DFS, advised UNMIS to proceed with the issuance of termination notices.

27. On 27 July 2011, the CCPO, UNMIS, issued a termination notice to the Applicant under staff rule 9.6 (b), giving notice of termination effective 31 August 2011. On 29 July 2011, the Director, FPD/DFS, wrote to the ASG/OHRM seeking approval to terminate the appointments of 62 staff members, including the Applicant. On 1 August 2011, the ASG/OHRM approved the request to terminate the appointment of the 62 staff members.

28. In June 2011, a Comparative Review Panel was established to review the international posts in UNMIS where the number of current staff in UNMIS was in excess of the number of the proposed posts in UNMISS for particular job categories and post levels. The comparative review process of over 700 staff members took place from 25 June to 5 July 2011.

29. On 31 August 2011, the Respondent's Counsel informed the Tribunal by email that they had received additional documentation on the case which they included. The said documents sought to establish that a comparative review was actually carried out.

30. The Applicant states that she understands that UNMISS has catered for one position of Broadcast Technology Officer and she was the only Broadcast Technology officer in UNMIS. Accordingly, she argues that if a similar post is catered for in the staffing table of UNMISS, she is entitled to be reassigned to that post under section 2(A) of UNMIS Information Circular No. 218/2011. However, she has failed to adduce sufficient evidence that a post under the same occupational group and level as her post exists in UNMISS, and that she is automatically entitled to a reassignment to the UNMISS post under the Information Circular.

31. Any damage that might ultimately be suffered by the Applicant can be remedied through an award of damages. Accordingly, the Applicant has failed to meet

her burden of establishing that she would be irreparably harmed in the event her Application for suspension of action is not granted. Under the new staff selection system, internal candidates are no longer considered first for any vacancy or given any preference. The Applicant would not suffer any irreparable harm if she is no longer an internal candidate. Moreover, as explained in the letter from the CCPO, UNMIS, to the Applicant, dated 27 July 2011, the Applicant's details would be forwarded to FPD to continue the efforts to reassign her to another mission.

32. There is no evidence that a termination of appointment as a result of the liquidation of UNMIS would call into question her integrity, affect her reputation or affect her career prospects with future employers. The Respondent notes that it is no longer possible for a staff member to receive a permanent appointment under the Staff Regulations and Rules. Further, the Applicant has not accrued any entitlement to a continuous appointment. Conversion to a continuous appointment can only take place against an identified post. The conversion of appointments is within the discretion of the Secretary-General, and any decision would be taken following a competitive process.

33. The Respondent concedes that the Application is urgent.

34. In view of the foregoing, the Respondent requests that the Tribunal should reject the Application in its entirety.

Consideration

Is the Impugned Decision unlawful?

35. Having considered the Parties' submissions on the element of unlawfulness, the Tribunal finds:

- a. The decision to terminate the Applicant's contract was taken at the Mission level, without the delegated authority required by ST/AI/234 and was

therefore unlawful. The *post facto* approval of the decision by the ASG/OHRM does not cure the unlawfulness.

b. The Secretary-General's ability to carry on the employment relationship with the Applicant was frustrated by the coming into effect of resolution S/RES/1978 (2011). The legal effect of the frustration of the contract is that it came to an end at the time of the frustrating event, that is, the Security Council Resolution requiring the Secretary-General to complete the withdrawal of all uniformed and civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011.

c. The Secretary-General's action of entering into a contract of employment with the Applicant for the reason only of securing termination indemnities for the Applicant does not appear to be supported by any Staff Regulation, Staff Rules or any known principles of an employment contract.

d. At the hearing, the Tribunal received evidence that showed that there is a position of Broadcast Technology Officer in UNMISS. There was also unchallenged evidence that para. 2(B) of the Information Circular 219/2011, of 1 June 2011, was not complied with as no comparative review panel had considered the Applicant's possible reassignment.

36. The Tribunal finds that the Applicant has satisfied the first condition precedent for the grant of a suspension of action, that is, she has established a case of *prima facie* unlawfulness.

The element of urgency

37. The second condition precedent for the grant of a suspension of action is urgency. In the present case, the Respondent has conceded that the Application is urgent and there is no need to belabour the point.

Irreparable damage

38. Having considered the Parties' submissions on the element of irreparable damage, the Tribunal finds that the Applicant has failed to satisfy this requirement for the following reasons:

- a. The termination of the Applicant's appointment as a result of the liquidation of UNMIS does not call into question her integrity, affect her reputation or affect her career prospects with future employers.
- b. Any damage that might ultimately be suffered by the Applicant as a result of the Tribunal's findings in relation to the lawfulness of the impugned decision can be remedied through an award of damages.

Conclusion

39. The Tribunal has taken into account all arguments and submissions made in this case. In particular, the Tribunal has identified a number of shortcomings in the way that the Applicant's contract was terminated thereby making the impugned decision unlawful.

40. A suspension of action application requires the cumulative presence of *prima facie* unlawfulness, urgency and irreparable harm in order to be successful. The absence of one of these conditions, while not allowing the grant of this Application, does not extinguish an applicant's cause of action where an unlawful decision has been taken to his or her detriment.

41. This is even more evident in this case where the check-out or separation of the Applicant, perhaps owing to a combination of factors, has been somehow carried out by UNMIS, a mission which is currently defunct.

42. Granted that the conditions were met for a suspension of action application, it must be borne in mind that the Tribunal will not make an order in vain. Were the defunct UNMIS still to be in existence, an order for the suspension of the impugned

decision can be situated within that mission, which had reassigned her to Juba and then almost immediately turned around to terminate her employment.

43. It is the finding of this Tribunal that the subject matter of this suit cannot properly be addressed and determined in a suspension of action application. The Application for suspension of action is hereby refused for not having satisfied one of the three conditions required under the Statute and Article 13 of the Tribunal's Rules of Procedure for its grant.

44. In view of its finding above, the Tribunal, in the interests of justice and in exercise of its inherent powers and the provisions of Articles 19 and 36 of its Rules of Procedure, hereby transfers the instant Application to the general cause list to be heard on the merits.

45. The Applicant shall, within 28 days from the date of this Judgment, file additional documentation, if necessary, in order to provide an exhaustive application on the merits. Thereafter, the Respondent shall have 14 days to file a comprehensive case and Reply.

(Signed)

Judge Nkemdilim Izuako
Dated this 31st day of August 2011

Entered in the Register on this 31st day of August 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi