



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

SHENGULA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for the Applicant:**

Brandon Gardner, OSLA

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

## **Introduction**

1. On 12 July 2019, the Applicant, a Heavy Vehicle Operator at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) based in Goma, filed an application for suspension of action (SOA). He seeks suspension of the decision to separate him from MONUSCO, effective 19 July 2019, pending management evaluation.

2. The Respondent filed a reply on 16 July 2019.

## **Facts**

3. The Applicant has been working in MONUSCO since August 2009 on fixed-term contracts and is currently at the GL-3 level.

4. On 28 October 2016, the Applicant was involved in a traffic accident in Goma whilst driving a United Nations vehicle.<sup>1</sup>

5. The MONUSCO Special Investigation Unit (SIU) investigated the incident and concluded that the Applicant lost control of the United Nations vehicle because he was driving under the influence of alcohol. The Report recommended administrative action be taken against the Applicant for, among other things, driving under the influence of alcohol and failure to take a breathalyzer test.<sup>2</sup>

6. On 5 April 2017, the MONUSCO Chief Transport Officer (CTO) informed the Applicant that following an investigation into his traffic accident and in accordance with the MONUSCO Administrative Instruction No. 2013/15, (Advisory Committee on Traffic Safety) his driving permit was withdrawn for 210 days.<sup>3</sup>

7. On 5 May 2017, the CTO informed the Applicant that his driving permit would be reinstated after a reassessment of his driving skills, and following a

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<sup>1</sup> Application, para. 6 and annex 2.

<sup>2</sup> Reply, annex 3.

<sup>3</sup> Application, annex 2.

briefing on Safe and Defensive driving.<sup>4</sup> Since April 2017, the Applicant has not held a driving permit and he has not performed driving functions.<sup>5</sup>

8. On 29 May 2019, the Applicant received a notice of extension of appointment with MONUSCO. The notice informed him that following a comparative review process (CRP), he was among those who had been identified to be retained and that his current appointment, which was to expire on 30 June 2019, would be further extended.<sup>6</sup>

9. On 8 June 2019, the Applicant received a “notification of sanction measure” which informed him that based on his accident in 2016, the Director of Mission Support (DMS) had approved the decision to permanently withdraw his driving permit.<sup>7</sup>

10. On 13 June 2019, the Applicant appealed the decision to permanently withdraw his driving permit to the DMS.<sup>8</sup>

11. On 20 June 2019, the Applicant received a notice of non-extension of appointment, which stated in part:

Further to the letter sent on 29 May 2019 notifying you of the extension of your current appointment, it is with regret that due to the permanent withdrawal of your driving permit as communicated to you on 8 June 2019 and further inability to carry out the main functions of a Heavy Vehicle Operator G3, I must inform you that your fixed-term appointment expiring on 30 June 2019 will only be renewed until 19 July 2019.<sup>9</sup>

12. On 11 July 2019, the Applicant received a final decision on his appeal which upheld the permanent withdrawal of his driving permit.<sup>10</sup>

13. On 12 July 2019, the Applicant requested management evaluation of the decision not to renew his appointment beyond 19 July 2019.<sup>11</sup>

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<sup>4</sup> Application, annex 3.

<sup>5</sup> Reply, para. 7 and application, para. 8.

<sup>6</sup> Application, annex 5.

<sup>7</sup> Application, annex 6.

<sup>8</sup> Application, annex 7.

<sup>9</sup> Application, annex 8.

<sup>10</sup> Application, annex 9.

## **Applicant's submissions**

### *Unlawfulness*

14. The facts make clear that, but for the MONUSCO Administration's decision to sanction him by permanently withdrawing his driving permit, he would have had his appointment extended for the next year. As the MONUSCO Administration has shown, with the Applicant being a Heavy Vehicle Operator, the sanction of permanently withdrawing his driving permit is tantamount to sanctioning him with dismissal, because it renders him unable to perform his job. However, the MONUSCO Administration neither notified him of any allegations against him in writing nor gave him an opportunity to respond prior to permanently withdrawing his driving permit; as such the Applicant was afforded none of his due process rights pursuant to staff rule 10.3(a).

15. In May 2017, upon the conclusion of the investigation into his accident in October 2016, the MONUSCO Administration decided that he was fit to perform his role as driver and re-instated his driving permit. Specifically, the facts of his case were reviewed and it was determined that he should not be sanctioned. It is unfair for the Administration to attempt to sanction him now, more than two years after the last investigation concluded, on the exact same facts, as this amounts to a violation of the principle of double jeopardy.

16. His non-renewal on the ground of withdrawal of driving license is a poorly disguised mechanism to circumvent his due process rights and the Administration's duty of care to its staff.

### *Urgency*

17. The contested decision to separate him was sent on 20 June 2019 with an effective date of 19 July 2019.

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<sup>11</sup> Application, annex 10.

18. The doctrine of self-created urgency does not arise on the facts of this case. He acted with diligence by filing his pending management evaluation request on 12 July 2019, only a few weeks after he became aware of the contested decision.

19. The delay between his receipt of the contested decision and his filing this application was only because he was awaiting the outcome of his appeal of the decision to withdraw his driving permit, which he filed on 13 June 2019. He only received the final decision on his appeal on 11 July 2019.

20. To date, the Management Evaluation Unit (MEU) has not responded to his request. The MEU has no obligation to issue a decision. Therefore, to preserve his rights, he is compelled to seek a suspension of action in the eventual case that the MEU does not issue its decision before his separation date.

*Irreparable harm*

21. If the Applicant separates from the Organization, his employment prospects with the United Nations will be significantly and adversely affected.

22. An SOA is the only remedy available to the Applicant which can prevent the MONUSCO Administration from unlawfully depriving him of continued employment with the United Nations. If he is separated from service, the Administration is under no legal obligation to ever reinstate him. To this end, he is aware that even if he ultimately succeeds in an application on the merits in this case, the Administration will enjoy the prerogative of paying a staff member monetary compensation in lieu of reinstatement recalls pursuant to art. 10.5(a) of the Statute of the UNDT.

23. No amount of monetary compensation can adequately repair the damage caused by such an egregious violation of a staff member's fundamental rights to at least review whether the MONUSCO Administration was compelled to utilize the disciplinary process prior to sanctioning him with the permanent withdrawal of his driving permit and subsequently not renewing his appointment on that basis.

*Relief sought*

24. The Applicant prays the Tribunal to order the suspension of the administrative decision to separate him from service on 19 July 2019 pending management evaluation, pursuant to art. 13 of the UNDT Rules of Procedure and art. 2.2 of the UNDT Statute.

**Respondent's submissions**

*Unlawfulness*

25. The contested decision was lawful. The SIU investigation determined that the Applicant had driven under the influence of alcohol and refused to take a breathalyzer test in violation of the Driving Under the Influence (DUI) Administrative Instruction (AI). This required the withdrawal of the Applicant's driver permit for the duration of his appointment. After the CTO issued the 5 May 2017 memorandum stating that the Applicant's driver permit would be reinstated, MONUSCO realized that the more recently issued DUI AI precluded the reinstatement of the permit.

26. The Applicant acknowledges that since 2017 he has been aware of the decision not to reinstate his driving permit and has performed only non-driving functions. The Applicant never contested the decision to withdraw his driving permit. Although for the past two years, MONUSCO has retained the Applicant and assigned him non-driving functions, it cannot continue to do so. To meet operational requirements, MONUSCO needs Heavy Vehicle Operators who can perform the primary function of the Position, i.e., operating vehicles.

27. Contrary to the Applicant's allegation, there has been no disciplinary sanction against him. The non-renewal of the Applicant's appointment is not a disciplinary measure under staff rule 10.2. Administrative instruction ST/AI/371 is not applicable. The withdrawal of the Applicant's driving permit was not a disciplinary measure, but rather an administration action. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of

the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action. The Organization exercises discretion in deciding whether the staff member's conduct attracts administrative and/or disciplinary actions.

*Urgency*

28. By letter dated 20 June 2019, the MONUSCO Chief Human Resources Officer (CHRO) notified the Applicant that his fixed-term appointment would not be renewed due to his inability to carry out the main function of the position. However, the Applicant waited three weeks thereafter to file the application. The Applicant's explanation that he delayed because he was awaiting the outcome of his appeal to the DMS regarding the permanent withdrawal of his driver permit, is without merit.

29. The Application contests the non-renewal decision, not the DMS's approval of the permanent withdrawal of his driving permit. The Applicant was not required to await the outcome of his appeal to the DMS before filing the Application contesting the non-renewal decision, which was final. Any urgency is self-created.

*Irreparable harm*

30. The Applicant has not established irreparable harm. The Applicant has no right to renewal of his appointment. The Applicant will separate in good standing and the non-renewal of the Applicant's appointment does not preclude the Applicant from being considered for other positions with the Organization.

31. Harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. He has no right to be subjected to the disciplinary process. Nor does he have a right to reinstatement of his driving permit. The Applicant violated the zero-tolerance policy against driving under the influence of alcohol and refused to take a breathalyzer. Any harm that the Applicant might suffer is not irreparable and can be adequately compensated through a monetary award.

32. In view of the foregoing, the Respondent requests that the Dispute Tribunal dismiss the application.

### **Considerations**

33. This application is made under art. 2.2 of the UNDT Statute and art. 13 of the UNDT Rules of Procedure, which allow the Tribunal to suspend implementation of the impugned decision where it appears *prima facie* to be unlawful, that it is a case of particular urgency and its implementation would cause irreparable damage. All three elements of the test must be satisfied before the impugned decision can be stayed. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an applicant to show that there is a judicable issue before the court.<sup>12</sup>

34. In the present case, the impugned decision on non-extension is based on another decision, one permanently depriving the Applicant of the United Nations driving permit (predicate decision). As such the legality of the impugned decision depends on the legality of the predicate decision. Given that the predicate decision is not final – the deadline for challenging the predicate decision through management evaluation and application before the Tribunal is still open - the Tribunal is neither bound by it nor prevented from assessing whether it is legal.

35. While the Tribunal agrees that the applicable rules leave the Secretary-General a wide discretion in deciding whether to resort to administrative or disciplinary measures<sup>13</sup>, this discretion is not unlimited and is subject to the test established by the Appeals Tribunal in *Sanwidi*:

When 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. The Tribunal can consider whether relevant

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<sup>12</sup> See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

<sup>13</sup> See UNDT in *Goodwin*; UNDT/2011/104 para 40; *Elobaid* UNDT/2017/054 para. 56.



matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.<sup>14</sup>

36. The abuse of discretion in cases involving administrative measures occurs, among other, if the administrative measure, due to lack of transparency and/or onerousness, is utilized as a disguised disciplinary sanction, in denying the Applicant the usual protections which constitute the disciplinary process.<sup>15</sup>

37. The Tribunal finds that this is the case regarding the predicate decision on withdrawal of the driving permit. The Tribunal has considered that onerousness of this sanction is such that practically deprives the Applicant of his employment, whereas he had no due process rights afforded prior to the taking of this decision. Moreover, in deciding for the second time on the measure in the same case, the Respondent violated the *ne bis in idem* principle, departing from the basic precept of fairness. These factors indicate *prima facie* unlawfulness and, hence, render the impugned decision likewise unlawful.

38. The requirements of urgency and irreparable harm are fulfilled for the reasons stated by the Applicant. The Tribunal also wishes to reiterate what it has lately stated in *Igunda*<sup>16</sup>, that it finds faulty the Respondent's argument denying the irreparable harm element merely because of the nature of the fixed-term appointment. Accepting such a stance would effectively remove any decision on non-extension from the realm of art 2.2 of the UNDT Statute, which is clearly against the letter and the purpose of the law.

### **Conclusions**

39. The application is granted and the impugned decision is suspended pending management evaluation.

(Signed)

Judge Agnieszka Klonowiecka-Milart  
Dated this 19<sup>th</sup> day of July 2019

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<sup>14</sup> *Sanwidi* 2010-UNAT-084.

<sup>15</sup> *Goodwin* UNDT/2011/104 para 62

<sup>16</sup> *Igunda* Order No. 079 (NBI/2019), para. 22.

Entered in the Register on this 19<sup>th</sup> day of July 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi