



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

ABEDRABOH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Bart Willemsen, OSLA

**Counsel for Respondent:**

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant has been serving as a Procurement Assistant in the United Nations Stabilization Mission in Haiti (“MINUSTAH”) since May 2004. On 11 May 2012, she was informed that she was being placed on the list of staff members subject to a retrenchment exercise and, on 31 May 2012, that her fixed-term contract would not be renewed beyond 30 June 2012 due to unavailability of post. She contests the decision not to renew her contract.

2. The Registry received her application for suspension of the impugned decision at 9:04 a.m. on 26 June 2012, through its eFiling portal. It was served on the Respondent at 11:31 a.m. the same day, with a request for the filing and service of a written reply by 4:00 p.m., 27 June 2012.

## **Relevant background**

3. The following factual chronology is based on the information contained in the Applicant’s application and the Respondent’s reply and the annexes appended to these submissions.

4. In December 2011, following the completion of Presidential elections in Haiti in 2011, MINUSTAH commenced a drawdown of its post-earthquake surge capabilities. According to the Respondent, a nationwide review was conducted in order to identify within each occupational group which positions would be retained and which ones would be abolished.

5. On 5 December 2011, the Director of Mission Support announced that a Comparative Review Panel (“CRP”) would be put in place in order to evaluate the staffing structure in MINUSTAH after 30 June 2012.

6. On 14 March 2012, the Chief of the Procurement Section, to which the Applicant is assigned, informed her that she had been placed on the list of staff members subject to retrenchment.

7. On 9 April 2012, the Applicant filed a request for management evaluation of the decision to place her on the list of staff members subject to retrenchment. On 18 May 2012, the Management Evaluation Unit (“MEU”) informed the Applicant that her request was not receivable as it found that the contested decision to include her on the list of staff members subject to retrenchment did not constitute an administrative decision within the meaning of staff rule 11.2.

8. By letter dated 31 May 2012, the Director of Mission Support informed the Applicant as follows: “Due to non-availability of post, I regret to inform that your fixed-term appointment with MINUSTAH which expires on 30 June 2012 will not be further extended”.

9. On 7 June 2012, the Applicant filed a request for management evaluation of the decision not to renew her fixed-term appointment.

10. On 13 June 2012, the Applicant submitted to the Secretary-General a request for suspension of action pursuant to staff rule 11.3(b)(ii) with the MEU.

11. On 25 June 2012, the Applicant was informed that the Secretary-General had rejected her request for suspension of action.

## **Applicant's submissions**

12. The Applicant's principal contentions may be summarised as follows:

### *Prima facie unlawfulness*

a. Whereas the reason provided to the Applicant regarding the contested decision is that as a result of a retrenchment exercise her appointment can not be extended, the 2012–2013 budget actually appears to increase the number of fixed-term Field Service (“FS”) staff members in the Procurement Section. Similarly, it appears from a staffing table provided by the MEU that the number of FS staff members in the Procurement Section would remain constant. Consequently, the non-renewal of the Applicant's appointment due to the Applicant's post being abolished appears unsubstantiated, and is *prima facie* unlawful;

b. Due to a number of transfers and resignations there are a number of vacant FS level posts in the Procurement Section;

c. Should the retrenchment exercise be deemed lawful, the procedure followed to evaluate staff members subject to the retrenchment exercise is nonetheless flawed as it awarded extra points to staff members who received “good comments” in their evaluation even though there is no actual obligation for the reporting officer to include any type of comments;

### *Urgency*

d. The implementation of the decision on 30 June 2012 renders this application for suspension of action urgent;

*Irreparable damage*

e. The implementation of the decision will cause harm such as “loss of self-esteem and career prospects, in particular after more almost [sic] twelve years of continuous service” that cannot be compensated by a financial remedy.

**Respondent’s submissions**

13. The Respondent’s principal contentions may be summarised as follows:

*Prima facie unlawfulness*

a. The General Assembly approved reduced staffing levels for the Procurement Assistant positions at the FS-5 level and each of the seven current Procurement Assistants were evaluated by the CRP in accordance with the established criteria for the six remaining posts. Following the evaluation process, the Applicant was ranked last out of the seven FS-5 Procurement Assistants;

b. While the Procurement Section currently has two vacant P-3 level posts, the Applicant is mistaken in stating that there are vacant positions as a result of resignation and reassignment as professional level posts cannot be used to retrain retrenched staff at the FS-5 level and below;

c. The Applicant was not recruited against a specific post number and the assignment of a post number did not create any continued right to remain on that post. All the staff members holding fixed-term appointments in occupational groups were part of the retrenchment exercise and all of them were evaluated for the remaining posts, regardless of the status of the post they encumbered;

d. A review of the organizational charts for the 2012–2013 budget shows that there was not an increase in the number of available posts but actually a decrease from ten posts to eight;

e. The retrenchment exercise was not flawed as all of the selection criteria were agreed upon by the CRP. Furthermore, the Applicant received the maximum number of points for the comments in her electronic performance appraisal report and was therefore not negatively impacted by that criterion. The CRP assessment of staff members was conducted independently without interference from the Administration;

*Urgency*

f. The current circumstances are solely the result of the Applicant’s self-created urgency. Even though the Applicant had been informed of the decision not to renew her contract on 31 May 2012, she waited until four days before the expiration of her contract to request a suspension of action;

*Irreparable damage*

g. The Applicant has not demonstrated why any personal or professional harm she may suffer cannot be repaired through the award of damages following a successful appeal under art. 2.1 of the Tribunal’s Statute;

**Consideration**

*The nature of an application for suspension of action and its conditions*

14. This is an application for suspension of action pending management evaluation. An application filed under art. 2.2 of the Tribunal’s Statute (and art. 13 of the Rules of Procedure) is, by its nature, a request for urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is

generally not subject to appeal, and which requires consideration by the Judge within five days of the service of the motion on the Respondent (see art. 13.3 of the Tribunal's Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal. Therefore, both parties must do their best to provide sufficient information for the Tribunal to decide the matter preferably on the papers before it within the time limit. Such motions disrupt the normal day-to-day business of the Tribunal, and indeed on this occasion, as the sole presiding judge in New York, I received three such applications on Tuesday 26 June 2012, which all had to be decided by Friday, 29 June 2012.

15. Article 2.2 of the Statute of the Dispute Tribunal provides that 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 cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

#### Prima facie *unlawfulness*

16. The Applicant's principal case is that the reason that she was provided for the non-renewal of her contract, namely that it was "[d]ue to non-availability of post", was false as such a post actually still existed and was available in MINUSTAH's 2012–2013 budget.

17. In a case concerning the non-renewal of a fixed-term contract, as in the present case, the United Nations Appeals Tribunal has determined that, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (*Islam* 2011-UNAT-115, para. 29).

18. In support of the contention that a post is available for her, the Applicant adduced two organisational tables for MINUSTAH: a staffing table for 2011–2012

and another for 2012–2013 (both these tables were also submitted in evidence by the Respondent). The table for 2011–2012 indicates that, in the Procurement Section where the Applicant works, there was a total of ten budgeted FS posts, of which four were temporary. It was not indicated what the status was of the remaining six posts. The 2012–2013 table refers to a total of eight posts; two of these posts would be temporary, while nothing is noted as to the status of the six other posts.

19. The Respondent in his reply admits that the Procurement Section is to be downsized by a total of two FS positions (from ten to eight), although he does not clarify the status of these positions.

20. In her request for suspension of action, the Applicant indicates that she is currently serving on a fixed-term FS contract at level 5, step VII. The Applicant has been working in MINUSTAH since its inception in May 2004, i.e., long before the surge efforts that followed the January 2010 earthquake, and has a total of 15 years of service with the Organization. The Respondent has not challenged these assertions.

21. The Respondent submits that the General Assembly, for the budget year 2012–2013, reduced the number of Procurement Assistants from seven to six, but has failed to provide any documentation in support of this submission. The Respondent further contends that the General Assembly had decided that the number of Procurement Assistants in MINUSTAH should be downsized. In support of this, he adduces in evidence a draft resolution submitted by the Chair of the Fifth Committee of the General Assembly, “Financing of the United Nations Stabilization Mission in Haiti”, dated 12 June 2012 (A/C.5/66/L.57) and a report of the Fifth Committee of the General Assembly with the same title dated 14 June 2012 (A/66/846). However, not only do these documents post-date the decision not to renew the Applicant’s contracts, but the Respondent fails to make any specific reference to where, in any of these documents, it follows that no post would be available for the Applicant. After closely reviewing the documents, the Tribunal cannot discern any such mention as



the document sets out the general budget for MINUSTAH but makes no reference to the post of the Applicant.

22. Based on the information before it, the Tribunal finds that the only reasonable inference to be drawn from the information before it, particularly the organisational tables, is that the reduction of the FS posts in the Procurement Section only relates to temporary posts, which are to be reduced from four to two. This means that the six other FS post in the Procurement Section are not to be affected by the retrenchment.

23. The next question is then whether the Applicant encumbered one of those two temporary FS post that are to be cut down, or one of the six FS posts that are unaffected by the retrenchment exercise.

24. The Tribunal notes that it follows from the “Update to MINUSTAH Staff regarding the Retrenchment Exercise” dated 5 December 2011” (Information Circular No. DMS/028/2011), submitted in evidence by the Respondent, that the downsizing was to counter the fact that:

[T]he majority of MINUSTAH’s operations in response to the 2010 earthquake are expected to phase out by mid-2012, as the Mission refocuses its efforts on core stability and institution-building tasks ... As a result, the structure of the Mission will change and most of the temporary positions established as part of the surge effort will be abolished by the end of the 2011/2012 budget year.

25. Furthermore, the Respondent in his reply observes that staff members hired prior to and in connection with the 2010 earthquake were to be subjected to the retrenchment exercise. This submission appears to contradict the scheme outlined in the update of 5 December 2011, which states that only positions “established as part of the surge effort” are to be abolished. This is confirmed by an interoffice memorandum dated 2 March 2012 from the Special Representative of the Secretary-General, MINUSTAH, to the Chairperson, Field Staff Union Committee, in which it is indicated that MINUSTAH was informed through two code cables that:

[T]he temporary civilian staffing positions required by the Mission as part of the surge effort would be phased out by the end of the budget period and that staffing levels in 2012/2013 (numbers and grades) should therefore effectively return to pre-earthquake levels. In that respect any exception with regards to temporary staffing since the earthquake should be minimal and reviewed on a case-by-case basis.

26. The above is consistent with the Applicant's contention that MINUSTAH's Administrative Information Circulars emphasized that staff members recruited as a result of the surge effort post earthquake would be the subject of review for the retrenchment exercise ( see the Applicant's request for management evaluation dated 7 June 2012).

27. The Tribunal notes that the Applicant was not employed in MINUSTAH in response to the 2010 earthquake in a temporary position, but has since 2004 served as a Procurement Assistant on what appears to be a regular fixed-term contract. In this regard, the Respondent has failed to make any submissions or provide any evidence why the Applicant should, nevertheless, be considered as having being hired against one of the two temporary FS post that are now being downsized, or why she should be the subject of review for the retrenchment exercise in any event.

28. Consequently, the Tribunal finds that, based on the evidence presently before it, it appears that the proposed budget and the staffing tables do not substantiate the abolition of the Applicant's post, and that her post is not affected by the retrenchment exercise of the Procurement Section, MINUSTAH. Therefore, the reason given by the Administration for the non-renewal of her contract, namely that there was no post available for her, is incorrect and therefore *prima facie* unlawful. There is also serious doubt whether the Applicant should be a subject of the retrenchment exercise.

29. As a result, it is not necessary for the Tribunal to examine the Applicant's other contentions regarding unlawfulness, for example in respect of the criteria regarding "good comments" which appears to have no basis in law. The Tribunal observes that the financial implications of extending the Applicant's contract until the

completion of the management evaluation is very limited as the time limit for MEU to reply to the Applicant's request for management evaluation would appear to be 23 July 2012. Thus, the balance of convenience supports the granting of a suspension.

*Urgency*

30. It is undisputed that the Applicant's contract expires on 30 June 2012, i.e., one day from the date of the present Judgment, and that she was informed about the non-renewal on 31 May 2012.

31. Considering the imminent risk of the Applicant being separated from MINUSTAH, the Tribunal finds that her case is one of particular urgency. The Respondent does not deny this, but contends that the urgency is self-inflicted in that the application for suspension of action was only filed four days before the expiration of her contract.

32. The Tribunal notes that the Applicant only received the reply from the Secretary-General that her request for suspension of action filed with the MEU was rejected on 25 June 2012, i.e., the same day as she filed her application with the Dispute Tribunal. Accordingly, the Tribunal finds that the urgency is not self-created.

*Irreparable damage*

33. The Applicant joined MINUSTAH in May 2004, long before the post earthquake surge effort, and has a total of 15 years of service with the United Nations. She now faces the uncertainty of sudden unemployment as the Respondent has made no submissions regarding her redeployment or alternative assignment within the United Nations system.

34. In *Khambatta* UNDT/2012/058, the Tribunal stated:

Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.

35. The Tribunal finds the reasoning in *Khambatta* persuasive and applicable to this case (see also *Tibouti* UNDT/2012/093). Thus, the Tribunal finds that the implementation of the decision not to renew the Applicant's fixed-term contract would cause her irreparable harm.

### **Observation**

36. This is one of three applications for suspension of action received on the same day arising from the same retrenchment exercise in MINUSTAH. On the face of it, it appears that the retrenchment exercise was to apply not across the board, but only to post earthquake temporary positions. If indeed this assertion is correct, it may be prudent for the Respondent to review the relevance and impact of the process on individual cases.

### **Conclusion**

37. The Tribunal finds that the three elements required for the granting of a suspension of action pending management evaluation have been established.

**Order**

38. The Tribunal orders that the decision not to renew the Applicant's current fixed-term contract be suspended during the pendency of management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 29<sup>th</sup> day of June 2012

Entered in the Register on this 29<sup>th</sup> day of June 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York