



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

AWOYEMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR
INTERIM MEASURES**

Counsel for Applicant:

Daniel Trup, OSLA

Counsel for Respondent:

ALS/OHRM, UN Secretariat

Introduction

1. By application filed on Sunday, 30 August 2015, the Applicant contests the decision not to extend her temporary reassignment to the functions of Legal Officer, Office of the Director, United Nations Logistics Base/United Nations Global Service Centre (“UNLB/UNGSC”).

2. In the context of these proceedings, the Applicant also filed, on the same day, a motion requesting the suspension of the implementation of the same decision pending the outcome of the application on the merits.

Facts

3. The Applicant holds a fixed-term appointment as Procurement Officer (P-3) with the United Nations Mission in Liberia (“UNMIL”).

4. Effective 2 July 2014, she was temporarily reassigned to UNLB/UNGSC as Legal Officer, Office of the Director, UNLB/UNGSC. This position had become vacant following the temporary reassignment of its incumbent to New York. Further to the extension of the latter’s temporary reassignment in March 2015, the Applicant’s temporary reassignment with UNLB/UNGSC was extended until 30 June 2015. The reassignment of the Legal Officer post’s incumbent to New York was subsequently extended until the end of the year.

5. By email of 11 June 2015, the Director, UNLB/UNGSC, informed the Applicant that he would not be extending her temporary reassignment beyond 30 June 2015. In the same email, he offered a further extension until no later than 15 July 2015, in case she needed some additional time to check out.

6. By email of 25 June 2015, the Director, UNLB/UNGSC, informed the Applicant that he had agreed to extend her temporary reassignment to 30 August 2015 to enable her to settle her personal affairs and take some leave prior to her departure.

7. On the same day, the Applicant requested the Director, UNLB/UNGSC, to “provide an official reason for not extending [her] post as the post [was] budgeted for and the position [was] vacant”. No reply followed.

8. The Applicant requested management evaluation of the decision at issue on 7 August 2015. By letter dated 28 August 2015, the Applicant was informed of the Management Evaluation Unit’s (“MEU”) determination that said decision was not in accordance with the Applicant’s terms of appointment and, in this view, recommended an award of compensation for moral damage in the amount of USD3,000.

9. The application on the merits, as well as the instant motion for interim relief under art. 14 of the Tribunal’s Rules of Procedure, were filed on Sunday, 30 August 2015.

10. In view of the fact that UNMIL intends to transfer her back to UNMIL effective immediately, in her motion for interim measures, the Applicant also requested the Tribunal to suspend the implementation of the contested decision pending the determination of the motion under art. 14 of its Rules of Procedure.

Parties’ contentions

11. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The Applicant was not provided with any cogent and believable explanation, let alone objectively verifiable reasons, as to why her temporary reassignment would not be extended;

b. A renewal depends on a number of factors, i.e., availability of the position, availability of funds, good performance of the staff member and the interests of the Organization. None of these grounds was adequately put forward;

c. In fact, in this case the post is available as its current incumbent's temporary reassignment has been extended through 31 December 2015, and there is only one Legal Officer post within the relevant office in UNLB/UNGSC, which means that if the Applicant leaves, the Administration will have to undertake recruitment to fill the post, at least temporarily. In addition, there is no issue with the funding of the post and the explanation of poor performance has been put forward only lately and with no evidence in any evaluation document. Lastly, MEU has pointed out that the reassignment of the post to Umoja, as the Administration claims it intends to do, is in and of itself an unlawful act, as the post is a regular budgeted one established by the General Assembly to perform legal functions;

d. Having showed a *prima facie* case of illegality of the contested decision, and given that the information on the reasons behind it rests in the Administration's hands, the burden to prove that the motives for such decision was not nefarious or capricious has shifted to the Respondent;

Urgency

e. The Applicant is being forced to check out on 31 August 2015, with a flight leaving on 1 September 2015;

f. There is urgency where the contested decision may be implemented before the consideration of the substantive appeal on the merits and, as a result, the Applicant might be denied the chance of regaining the position he or she was occupying or should be occupying in the event that the substantive application be successful;

Irreparable damage

g. Damage to professional reputation and career prospects falls within the definition of irreparable harm. While in UNLB/UNGSC, the Applicant has the opportunity to develop contacts and professional relationships outside UNMIL to enhance her career within the Organization. Returning

back after serving only 12 months, without any legitimate explanation, will inevitably have a detrimental impact on the Applicant's career and reputation. Her reputation would be undermined as from her return; it would be reflected in her Personal History Profile that she performed the Legal Officer role at UNLB/UNGSC for only 12 months, despite the post's incumbent remaining on temporary reassignment in New York.

Consideration

Preliminary issues

12. Given that the impugned decision is scheduled to be implemented today—that is, the first working day after the filing of the motion—the Tribunal has exceptionally proceeded to make a determination on the motion without seeking comments from the Respondent, who is based in New York, thus, has a six-hour time difference with the Geneva Registry of the Tribunal. In deciding to adopt this unusual course of action, the Tribunal is mindful that the Respondent has provided input at previous stages of the procedure, notably during management evaluation, and also that, in the interest of justice and legal certainty for both parties, it is desirable that a determination be made on the temporary relief sought before the implementation is completed.

13. For similar reasons, and since the Tribunal considers itself sufficiently informed to decide exclusively on the matter of interim relief, the Tribunal finds preferable to rule on the motion at hand, rather than suspending the decision provisionally to subsequently render such a ruling.

Receivability

14. Art. 10.2 of the Statute reads:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, **except in**

cases of appointment, promotion or termination. (emphasis added)

15. Accordingly, suspending the implementation of a decision related to appointment, promotion or termination goes beyond the jurisdiction of the Tribunal. While the present motion for interim relief requests indeed suspension of the decision at stake, the case does not fall under the exception set out in the above provision for the decision not to extend the Applicant's temporary assignment does not concern appointment, promotion nor termination.

16. The contested decision does not constitute one of appointment. In *Allen UNDT/2010/009*, a case relating to a transfer, the Tribunal found that:

[The term "appointment"] has both a broad and a narrow meaning. On the one hand, it may include any movement to a new position. On the other hand, a narrow interpretation of the term would refer exclusively to the initial conclusion of a contract between the employee and the Organization under the UN Staff Regulations and Rules. Notwithstanding the lack of a legal definition of appointment, it should be noted that Article IV of the Staff Regulations, *Appointment and Promotions*, and more specifically staff regulation 4.2, makes a clear distinction between "appointment", "transfer" and "promotion", thereby indicating that the terms of "appointment" and "transfer" cover distinct notions.

17. The Tribunal sees no grounds to depart from this reasoning. The reassignment at hand is to be considered as a transfer, not as a case of appointment. Importantly, the Appeals Tribunals followed a similar approach in *Parker 2010-UNAT-012*, as it concluded that a decision to remove a staff member who had been placed against certain duties, while remaining in employment and conserving the same appointment, was not an appointment decision.

18. For all the above, the Tribunal finds itself competent to examine the motion at hand.

Cumulative conditions

19. In addition to the above-quoted art. 10.2 of the Statute, art. 14 of the Tribunal's Rules of Procedure, along the same lines, provides:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

20. Based on the language of these provisions, the Tribunal has the power to order suspension of a decision only if all three cumulative conditions, namely *prima facie* unlawfulness, particular urgency and irreparable damage, are fulfilled. It is well-settled jurisprudence that in case one or more conditions are missing no interim measures can be ordered.

Irreparable damage

21. In arguing that she would suffer irreparable harm should the litigious decision be given effect, the Applicant brings forward essentially two contentions.

22. The first is that she will lose the opportunity to develop contacts and professional relationships outside of UNMIL. Suffice it to recall, in this respect, that staff members have no legal right to network, or to be placed against positions that facilitate such networking. In any event, since the temporary reassignment to New York of the incumbent of the Legal Officer post is approved only until 31 December 2015, any foreseeable extension of the Applicant's own reassignment—not entering in the realm of speculation—would be limited to four additional months. This relatively short period does not carry such a great networking potential that its loss might amount to irreparable damage.

23. The second argument mentioned is that the Applicant's professional reputation will be hindered by the fact that she served only 12 months in UNLB/UNGSC and was returned back to UNMIL without a legitimate explanation. In this respect, it should be noted that the initial reassignment was supposed to last for six months only. Moreover, the Tribunal wishes to emphasise that the very nature of a temporary reassignment entails that, after a certain time, the concerned staff member will be placed anew against his or her original

functions. Far from being abnormal, even less infamous, returning to one's initial duties is the natural outcome after a temporary assignment. Also, twelve months is not a short period for a temporary reassignment; as such, contrary to what the Applicant implies, there is no reason why an assignment of this length in her career history should be viewed as suspicious or stigmatising.

24. Finally, the Tribunal stresses that the Applicant retains the possibility of pursuing formal contestation of the decision at issue if she feels it was in breach of her rights, and that she may receive redress in a variety of manners, including compensation, should she prevail on the substance of her claim before the Tribunal.

25. In sum, the Tribunal does not see any irreparable damage that would stem from the implementation of the decision in question.

Urgency

26. It is obvious that the implementation of the decision at issue is imminent. Notwithstanding, according to a well-established jurisprudence, the condition of particular urgency is not met when this circumstance is self-created (see e.g., *Applicant* Order No. 164 (NY/2010), *Longone* Order No. 27 (GVA/2013)).

27. In this connection, it is noteworthy that the Applicant was first informed of the decision on 11 June 2015. While it is true that a new decision was made and notified later, modifying the effective date of the end of the Applicant's temporary assignment, this dates back to 25 June 2015, i.e., over two months ago. However, the Applicant did not submit her management evaluation request until 7 August 2015. Moreover, although the Applicant was entitled to seek suspension of action during the pendency of management evaluation, she did not come before the Tribunal until the very last day of her assignment with UNLB/UNGSC, leaving the Tribunal to consider her motion on the eve of her travel back to Liberia.

28. No circumstance preventing the Applicant from launching formal contest of the non-extension of her reassignment at an earlier date was brought before the

Tribunal. Rather, especially bearing the Applicant's position as a Legal Officer, she had at her disposal all the elements allowing her to assess the opportunity to resort to the Tribunal already at the end of June 2015, when, after being notified of the impugned decision, she asked the decision-maker for the reasons behind it, and the latter left for a three-week leave without having answered. As a matter of fact, she did not follow up on this question even after the decision-maker returned to the office in July 2015.

29. In view of the chronology of facts, the Tribunal has serious doubts about the urgency in this case was not being self-created.

30. Since at least one of the three cumulative conditions required for temporary relief under art. 10.2 of the Statue—i.e., irreparable damage—is not met, if not two—i.e., urgency, the Tribunal will not grant the requested suspension of the implementation of the refusal to extend the temporary reassignment of the Applicant with UNLB/UNGSC.

Conclusion

31. In view of the foregoing, the motion for interim measures is rejected.

(Signed)

Judge Thomas Laker

Dated this 31st day of August 2015

Entered in the Register on this 31st day of August 2015

(Signed)

René M. Vargas M., Registrar, Geneva