



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

DE LUCA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Self-represented

Counsel for Respondent:

AAS/ALD/OHRM, UN Secretariat

Introduction

1. By an application filed on 8 October 2019, the Applicant, a staff member of the United Nations Interim Administration Mission in Kosovo (“UNMIK”), requested suspension of action pending management evaluation of the decisions to:
 - a. Laterally reassign her to the newly established P-5 position of Chief, Service Delivery, UNMIK; and
 - b. Advertise the P-5 position of Chief, Supply Chain, UNMIK.

Facts

2. The Applicant entered the United Nations system on 1 June 2004. In October 2016, she joined UNMIK as Chief, Supply Chain and Service Delivery. She is currently serving at UNMIK as Chief, Service Delivery, at the P-5 level with a continuing appointment.

3. By interoffice memorandum dated 7 October 2019 from the Officer-in-Charge, Human Resources Section, the Applicant was informed *inter alia* that due to the implementation of a new mission support structure in UNMIK:

- a. The position that she encumbered, i.e., Chief, Supply Chain and Service Delivery, would be reclassified and advertised as Chief, Supply Chain, and that she could applied to it if interested; and
- b. She would be laterally reassigned to the newly established position of Chief, Service Delivery, at the P-5 level, with immediate effect.

4. The above-mentioned memorandum reads in its relevant part as follows:

3. In order to ensure that the reclassification of the post currently encumbered by you does not negatively affect your existing contractual status, salary and other entitlements, the [Special Representative of the Secretary-General and Head of Mission] has decided, based upon the delegated authority given to the UNMIK, to *laterally reassign you to the newly established position of Chief Service Delivery (P-5)*. This lateral reassignment takes into consideration that you are rostered for

Chief Service Delivery (P-5), the post is at the P-5 level and the functions of the post are commensurate with your skills and experience taking into consideration the duties performed by you related to service delivery since your entry on duty in UNMIK (emphasis added).

4. This lateral reassignment takes immediate effect and a Personnel Action will be provided to you.
5. By interoffice memorandum also dated 7 October 2019 to the Special Representative of the Secretary-General and Head of Mission, UNMIK, the Applicant expressed her concerns and her disagreement with her lateral reassignment and the decision to advertise the position of Chief, Supply Chain.
6. On 8 October 2019, the Applicant filed a request for management evaluation of the decision to laterally reassign her to the newly created position of Chief, Service Delivery, to change her Personnel Action and to advertise “[her] post (30048214)”.
7. By email dated 8 October 2019, the Applicant filed her application for suspension of action.
8. On 15 October 2019, the application for suspension of action was transmitted to the Respondent, without requiring him to submit a reply.

Parties’ contentions

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

Prima facie unlawfulness

- a. The position that she encumbered, i.e., Chief, Supply Chain and Service Delivery, should not be reclassified but redeployed. Therefore, there is no need to conduct a recruitment for the post of Chief Supply Chain;
- b. The decision to remove her from the post that she encumbered is not in her best interest and it is, in fact, a career demotion as it is not at the level of her capabilities, experience and responsibilities; and

c. The contested decisions are motivated by personal reasons that are meant to punish and humiliate her and they are a clear example of “retaliation”;

Urgency

d. The reassignment to the post of Chief, Service Delivery is with immediate effect and this movement has a detrimental effect on her; and

e. She is being suddenly removed, with no reason and no justification, of her responsibilities as a team leader;

Irreparable damage

f. The contested decision entails “[l]oss of all [her] responsibilities, dignity, reputation, detrimental physical and psychological effect, stress and depression”.

Consideration

10. Applications for suspension of action are governed by art. 2.2 of this Tribunal’s Statute and art. 13 of its Rules of Procedure. They both provide that the Tribunal shall be competent to 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”. These three requirements are cumulative and must all be met for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

11. Furthermore, in accordance with arts. 13.2 and 13.3 of its Rules of Procedure, the Tribunal is under a duty to transmit a copy of the request for suspension of action to the Respondent and to issue a decision within five days thereof. However, there is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to order the Respondent to file a response to consider the Applicant’s request. In fact, service on the Respondent is all that is required under the Rules and, in the present case, the Tribunal sees no need to request a

response from the Respondent and finds that it is fully informed about the matter with the information contained in the application and its annexes.

The decision to laterally reassign the Applicant

12. It is clear from art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure that an application for suspension of action requires that the contested decision has not yet been implemented and is the subject of an on-going management evaluation.

13. Indeed, relief under an application for suspension of action is, in substance and effect, akin to an *interim* order of injunction in national jurisdictions. It is a order limited in scope and time to provide temporary relief by maintaining the *status quo* between the parties. It follows, therefore, that an order for suspension of action cannot restore a situation or reverse an allegedly unlawful act that has already been implemented.

14. It is well established by the jurisprudence of this Tribunal that, where a contested decision has been implemented, suspension of action cannot be granted (see *Dalgamouni* Order No. 137 (NBI/2014), *Tadonki* UNDT/2009/016, *Applicant* UNDT/2011/158, *Kweka* UNDT/2011/122, *Tiwathia* UNDT/2012/109, *Laurenti* Order No. 243 (NBI/2013)).

15. In the present case, the Tribunal notes that following management meetings and consultations with the Applicant since August 2019, the latter was informed of the decision to laterally reassign her to the newly established P-5 position of Chief, Service Delivery, by interoffice memorandum dated 7 October 2019. This communication provides that the Applicant's lateral reassignment was with "immediate effect". The Applicant does not contest this and indicates in her application that the decision was notified to her on 7 October 2019 and that it was implemented the same day.

16. The Tribunal further notes that a Personnel Action was issued on 7 October 2019 reflecting the Applicant's reassignment, and that the Applicant filed her application for suspension of action on 8 October 2019.

17. Under such circumstances, the Tribunal finds that the decision to laterally reassign the Applicant to the position of Chief, Service Delivery within UNMIK has been implemented. Therefore, the application for suspension of action against this decision fails.

The decision to advertise the position of Chief Supply Chain

18. While it seems from the UN careers portal that said vacancy has not yet been published to this date, the Tribunal reiterates that the advertisement of a position does not, in itself, affect the Applicant's terms of appointment and, as such, is not an administrative decision that can be challenged before the Tribunal (see Order No. 73 (GVA/2019)).

19. Even considering that the decision to advertise the position of Chief, Supply Chain, is a challengeable administrative decision, there is no evidence to consider that it is *prima facie* unlawful. The evidence rather shows that the advertisement of the position takes place in the context of a restructuring exercise and that the Applicant can apply to it.

20. Consequently, the application for suspension of action also fails in this respect and there is no need to examine whether the other requirements for the granting of a suspension of action are met.

Conclusion

21. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Teresa Bravo

Dated this 15th day of October 2019

Entered in the Register on this 15th day of October 2019

(Signed)

René M. Vargas M., Registrar, Geneva