



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/037

Order No.: 125 (NBI/2014)

Date: 23 May 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GUZMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is the Chief, Conduct and Discipline Unit at the P-4 level in the United Nations Assistance Mission for Afghanistan (UNAMA). On 13 May 2014, she filed an Application for suspension of two contested decisions pending management evaluation:

- a. Her removal from post number 61573.
- b. The cessation of her functions as a Conduct and Discipline Officer (CDO).

2. The Respondent filed a Reply to the Application on 15 May 2014.

Facts

3. On 15 December 2013, the Applicant filed two Applications:

- a. An Application on the merits contesting a decision taken by the UNAMA Chief Civilian Personnel Officer (CCPO), Jeanie Fraser, to separate her from service effective 31 December 2013 and sought rescission of the contested decision.
- b. An Application for Interim Measures Pending Proceedings under art. 10.2 of the Statute of the Dispute Tribunal seeking an order for the suspension of the contested decision.

4. On 20 December 2013, the Tribunal issued Order No. 264 (NBI/2013) in which it ordered that the implementation of the decision to separate the Applicant from service on 31 December 2013 be suspended pending the substantive hearing and determination of her application on the merits.

5. On 8 January 2014, Vincent Smith, Chief, Mission Support, UNAMA, informed the Applicant that she would not be separated from the Organization on 31 December 2013 and that the General Assembly had approved the

reclassification of the P-4 post she encumbered to the P-5 level in the 2014 budget.

6. In January 2014, the Applicant participated, as the incumbent, in the reclassification exercise for post number 61573 from P-4 to P-5.

7. On 9 April 2014, while updating her profile on the Field Support Suite (FSS) database, the Applicant noticed a certain entry in relation to the post she was encumbering. The entry indicated that the “FSS Authorization Unit” for the Conduct and Discipline post was the Security Section. The Applicant immediately sought clarification on the issue.

8. On 10 April 2014, the Applicant was informed by a Human Resources Officer that effective 1 January 2014, her appointment was being charged against a borrowed post from the UNAMA Security Section for administrative purposes only.

9. On 10 April 2014, the UNAMA Chief of Staff (COS), Dominique Eliaers-Wouters informed the Applicant as follows:

The result of the reclassification decision was that the previous UNAMA P-4 CDO function ceased to exist, as the post was reclassified upwards. There is no longer a dedicated UNAMA-specific CDO; there is only a P-5 Regional CDO, just as there is only a Regional CDT (rather than separate UNAMA and UNAMI CDTs). Despite the General Assembly’s decision to abolish the UNAMA-specific CDO role, you remain on your current appointment, in accordance with the Dispute Tribunal’s Order 264 (NBI/2013), which UNAMA has and will continue to comply with.

10. On 8 May 2014, the Applicant requested for management evaluation of the decisions which she described as follows:

Removal from post number 61573 thereby removing her as the dedicated CDO for UNAMA;

Non-recognition of staff member as the most senior and only CDO *in situ* at the KJSO therefore denying participation to the CDU/CDT workshop held at UNHQ from 30 April -2 May.

11. The Applicant filed the present Application on 13 May 2014. The Respondent filed a Reply on 15 May 2014.

12. The Tribunal heard the case on 19 May 2014.

Applicant's submissions

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

Prima facie unlawfulness

a. The UNAMA Administration has acted in breach of ST/AI/1998/9 (System for the classification of posts) and there is no Staff Rule or Regulation stating that the incumbent of a post reclassified to a higher grade should be removed/transferred/reassigned to another post or a borrowed post pending recruitment for that upgraded post.

b. The UNAMA CCPO, Niramol Jirapokakul, had no authority to remove her from post number 61573 and therefore abused her authority.

c. The UNAMA COS has no authority to remove her as the CDO and has abused her authority.

d. She has been belittled, insulted, maligned and undermined in her profession, function and appointment as the CDO by the COS.

Urgency

e. She intends to sign her contract renewal before 22 June 2014 and would like the relevant forms and databases to reflect that she continues to encumber post number 61573.

Irreparable damage

f. She will lose opportunities for professional growth and career advancement and suffer economic damage due to no further job placement and recruitment opportunities.

g. She has been placed on a “black list” because of filing requests for management evaluation and for arguing her cases before the Tribunal.

h. She has suffered damage to her professional reputation and career as well as moral and emotional injuries and physical stress. The decisions have had a negative impact on her social status and have unnecessarily damaged her relations with her colleagues.

Respondent’s submissions

14. The Respondent submits that the decision to finance the Applicant’s position from post number 77591 instead of post number 61573 has already been implemented and hence cannot be suspended.

15. The Respondent’s case may be summarized as follows:

Prima facie unlawfulness

a. The decision to change the financing of the Applicant’s position was lawful. The question of which post number is used to finance a specific position is an administrative matter. It does not impact a staff member’s terms of appointment or contract of employment. Staff members have no right in their terms of appointment to be appointed against any specific post.

b. A “post” is simply a technical term referring to the financial authorization given for a job to be performed, irrespective of its budget source. Staff members contract to perform services for the Organization in return for the benefits and entitlements described in their terms of appointment and the rules of the Organization. They do not contract to perform services against any particular post number. The source of funding for any position is a matter within the discretion of the Administration, which is entitled to determine how a staff member’s position will be financed.

c. Post number 61573 was previously used to finance the Applicant's position as P-4 CDO. Following a restructuring exercise, this post has been reclassified to the P-5 level in accordance with ST/AI/1998/9. The original functions of the P-4 CDO were to provide service and support to UNAMA and the United Nations Military Observer Group in India and Pakistan (UNMOGIP). Following the reclassification, the P-5 position will oversee the functions in those missions, together with the United Nations Assistance Mission to Iraq (UNAMI) and the United Nations Regional Centre for Preventive Diplomacy for Central Asia ("UNRCCA"). Nevertheless, given the undertaking by the UNAMA Administration to the Applicant, she continues to perform her CDO functions in relation to UNAMA and UNMOGIP.

d. Accordingly, the funding previously in place for the Applicant's position of P-4 CDO is no longer available. Given that the Applicant's appointment does not expire until 30 June 2014, the UNAMA Administration had to identify another funding source to finance the remainder of the term of the Applicant's appointment to ensure that she receives the salary, benefits and entitlements due to her. Once the Applicant's appointment expires on 30 June 2014, it will not be renewed. The Applicant has been notified of this decision.

e. The CDO functions of the Applicant remain unchanged. The UNAMA Administration has taken no unilateral decision to remove any CDO functions from the Applicant. The Administration previously undertook that the Applicant would continue to perform her previous duties and responsibilities in accordance with the terms of her appointment. In accordance with this undertaking, Ms. Guzman has continued to perform the same P-4 CDO functions as before the reclassification of the post previously used to finance her position. She remains the CDO for UNAMA and UNMOGIP, based in Kuwait. The Applicant has not identified any evidence to the contrary.

f. Although the Applicant's request to attend a workshop in New York was not approved, the reason for that decision was explained to her. This decision had nothing to do with the Applicant's CDO functions in relation to UNAMA and UNMOGIP; the Under Secretary-General for Peacekeeping specifically requested the participation of the most senior CDO. The Applicant was not, following the restructuring of the Conduct and Discipline Team.

Urgency

g. The change in the financing of the Applicant's position was implemented on 1 January 2014. Given that this decision was taken four months ago, the Applicant has not established a situation of particular urgency.

Irreparable damage

h. The fact that the Applicant's position is financed from a different funding source since 1 January 2014 does not affect her benefits and entitlements, or the terms of her appointment. Accordingly, she has suffered no harm from the implementation of this decision.

Consideration

16. Article 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure provide that it may order the suspension, during the pendency of management evaluation, of the implementation of a contested administrative decision that is the subject of an on-going 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 shall proceed to determine whether the case meets the three requirements for the grant of a suspension of action as stipulated in the said art.13.

17. The Applicant submitted that the contested decisions were unlawful because: the UNAMA Administration acted in breach of ST/AI/1998/9; the CCPO had no authority to remove her from post number 61573; and that the COS has no authority to remove her as the CDO. The Respondent's submissions on the issue of unlawfulness were that staff members have no right in their terms of appointment to be appointed against any specific post and that the Applicant's CDO functions remained unchanged.

18. It is not in contention that the Applicant's post has been reclassified. What is at issue in this case is the question of rights enjoyed by a staff member encumbering a reclassified post and whether those rights have been violated.

19. Section 4.2 and 4.3 of ST/AI/1998/9 are relevant in determining the issue. They provide as follows:

4.2 The classification of a post shall not negatively affect the existing contractual status, salary or other entitlement of the staff member encumbering the post. Staff members whose posts are classified at a level below their personal grade level will retain their current grade and salary level, on the understanding that every reasonable effort will be made to reassign them to a post at their personal grade level.

4.3 Staff members whose posts are classified at a level above their current personal grade level in the same category may be considered for promotion in accordance with established procedures, including issuance of a vacancy announcement, where applicable.

20. The Tribunal has carefully reviewed the documentary and oral evidence adduced by the parties in this case and does not find any breach of the above-cited applicable rule on classification. The Applicant has failed to adduce any evidence that her existing contractual status, salary or other entitlements have been negatively affected nor has she adduced any compelling evidence to show that her functions as CDO have ceased or that the decision to finance her position from post number 77591 instead of post number 61573 is in breach of section 4.2.

21. The Tribunal does not find any urgency in this Application. The Applicant has also failed to establish that she will suffer any irreparable harm. In accordance

with section 4.2 and 4.3 of ST/AI/1998/9, the classification of her post has not negatively affected her existing contractual status and she is currently being considered for promotion to the upgraded P-5 post.

Conclusion

22. In view of the foregoing, the Tribunal rejects the Application for suspension of action.

(Signed)

Judge Nkemdilim Izuako

Dated this 23rd day of May 2014

Entered in the Register on this 23rd day of May 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi