



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/109

Order No.: 378 (NBI/2015)

Date: 24 November 2015

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CHAMA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**

Edwin Nhiliziyo

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM  
Alister Cumming, ALS/OHRM

## **Introduction**

1. The Applicant is a staff member of the United Nations Interim Force in Lebanon (UNIFIL).
2. On 27 October 2015, he filed an Application for suspension of action pending management evaluation with the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the decision to move him from the Joint Geographic Information System (JGIS) section to the Public Information Section on a three month Temporary Job Opening (TJO) contract.
3. The Respondent filed a Reply to the Application on 28 October 2015.

## **Relevant Facts**

4. On 19 January 2015, the Report of the Secretary-General A/69/731 (Budget for the United Nations Interim Force in Lebanon for the period from 1 July 2015 to 30 June 2016) was issued. Paragraph 37 of the Report proposed to convert one FS level post in the JGIS section to a national post.
5. By letter dated 21 April 2015, the Applicant was informed that his post in the JGIS section was being abolished/nationalized in the 2015/2016 budget and that his contract would not be extended beyond 30 June 2015. The Applicant informed the Tribunal at the hearing that this contract was subsequently extended to 31 October 2015.
6. On 23 May 2015, the Applicant requested management evaluation of this decision. On 27 May 2015, the Management Evaluation Unit (MEU) informed the Applicant that his challenge was not receivable.

7. On 25 June 2015, the General Assembly adopted resolution A/RES/69/302 (Financing of the United Nations Interim Force in Lebanon). Paragraph 10 of the resolution endorsed the conclusions and recommendations contained in the Report of the Advisory Committee on Administrative and Budgetary Questions A/69/839/Add. 8 (Budget performance for the period from 1 July 2013 to 30 June 2014 and proposed budget for the period from 1 July 2015 to 30 June 2016 of the United Nations Interim Force in Lebanon) of 29 April 2015. This Report also proposed to convert one FS level post in the JGIS section to a national post.

8. The Applicant requested a second management evaluation of this decision on 22 October 2015. On 27 October 2015, MEU again informed the Applicant that his second challenge was not receivable.

9. On 29 October 2015, the Respondent filed Annex R5, the GIS Staffing Tables for the 2014/15 and 2015/16 Budget Cycles.

10. Later on 29 October 2015, the Respondent's Counsel filed a Motion seeking leave to file further submissions. In the said Motion, the Respondent submits,

1. During the hearing held on 29 October 2015, Counsel for the Respondent advised the Dispute Tribunal that a staff member had returned from MINUSMA to UNIFIL, and was an Engineering Assistant within the GIS section of UNIFIL. This was based on the content of the mission's staffing table for the 2015-2016 budget cycle. Pursuant to the Dispute Tribunal's directions, Counsel for the Respondent filed this staffing table as Annex R5.
2. Following the filing of this staffing table, Counsel for the Respondent was informed by UNIFIL Administration that the staffing table was incorrect, insofar as it relates to the staff member who returned from MINUSMA. Contrary to the submission from Counsel during the hearing, UNIFIL Administration has clarified that this staff member is performing the functions of a Geographic Information Systems Assistant, at the FS-5 level.

3. In order to prevent the Dispute Tribunal from being misled about the functions performed by this staff member, the Respondent seeks leave to file these further submissions.

11. On 30 October 2015, the Applicant filed an Organizational chart for UNIFIL GIS. In that chart, one SB, described in the Respondent's Motion as performing the functions of a GIS Assistant at the FS5 level, is shown to be a New Zealand<sup>1</sup> national from his identity information.

12. On 30 October 2015 the Tribunal issued Order No. 347 (NBI/2015) in which it suspended the decision to remove the Applicant from the function of Geographic Information System (GIS) Assistant until 2 November 2015 when it would have an opportunity to receive additional evidence.

13. On 2 November 2015, the Tribunal held a further hearing and heard oral testimonies from the Chief JGIS, Ms. Béatrice Puyo and one SB, GIS Assistant at the FS5 level. The Tribunal subsequently issued Order No. 348 (NBI/2015) in which it rejected the Application for suspension of action and informed the Parties that its reasoned decision would be issued in due course.

### **Applicant's submissions**

14. The Applicant's case as deduced from his pleadings and oral testimony is summarized below.

15. On 12 October 2015, he was offered a three month TJO contract in the Public Information Section. This offer effectively moves him out of JGIS, and changes his functions. This comes at a time when he is trying to contest the original management decision to abolish his post as a GIS Assistant responsible for blue line marking, a continuing function under the UNIFIL mandate. Acceptance of this new offer would force him to relinquish his regular functions, rendering moot the possibility that his

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<sup>1</sup> In Order No. 347 (NBI/2015) the Applicant's nationality was erroneously indicated as British.

post should be reinstated. There were no lawful grounds for abolishing his post and it should be reinstated.

16. In the meantime, an encumbered post has been brought into JGIS. The result is that there is no net reduction in posts in the Section after abolishing his post. The only net change is that a P2 level staff member is to be moved to Brindisi by 1 December 2015. What seems to have happened is the staff member has been replaced by one SB, whose post in the Engineering Section was abolished. Ultimately therefore, it would appear that this was nothing but a disguised move to replace him with another civilian staff member. UNIFIL is also seeking additional military resources for the blue line marking project. This is evidence that the function is not only continuing, but is expanding.

*Prima facie unlawfulness*

17. The reasons UNIFIL Management gave for abolishing his post were based on a mistaken understanding of the facts. The functions of the GIS Assistant post cannot be performed by a Lebanese National yet UNIFIL management did not state so in their budget document.

18. The UNIFIL management is required to give a reason for abolishing his post but in this case the reason given was based on a mistake of fact with respect to the functions of the GIS Assistant post.

19. There is a possibility that the exercise of abolishing his post was a camouflage to replace him with SB in the context of nationalization of UNIFIL posts or the movement of posts to Brindisi, Italy. The Applicant further submitted that SB, an international staff member, had been brought in to perform the functions for the post he previously encumbered and which had been nationalized.

20. The functions of JGIS remain the same. The question has to be asked whether going forward someone other than an internationally recruited UNIFIL civilian staff member will perform the GIS Assistant functions. It has also not been explained what

different functions will be performed by the new civilian JGIS staff member who has just been moved into the Section, and why those functions could not have been performed by the staff member who was already in the Section.

*Urgency*

21. The matter is urgent because he was to have made a decision by 31 October 2015 to accept the new offer of a post in the Public Information Section. If he accepted the new post before resolving this matter, he would effectively relinquish his rights as a staff member not to be discriminated against.

*Irreparable harm*

22. Accepting the latest offer without resolving the abolition of post issue would spell an end to his career in the United Nations.

**Respondent's submissions**

**Receivability**

23. The Applicant's challenge to the decision to nationalize the Post is not receivable. On 23 May 2015, the Applicant requested management evaluation of this decision. On 27 May 2015, the Management Evaluation Unit (MEU) informed the Applicant that his challenge was not receivable. The Applicant requested a second management evaluation of this decision on 22 October 2015. On 27 October 2015, MEU again informed the Applicant that his second challenge was not receivable.

24. Since the management evaluation in relation to this decision has been completed, there is no basis for the Applicant's request for suspension of the implementation of the contested decision and the Dispute Tribunal does not have jurisdiction to hear the Application under art. 2.2 of its Statute.

25. Furthermore, the General Assembly's decision to nationalize the post is not an administrative decision. In *Lee* 2014-UNAT-481, the United Nations Appeals

Tribunal (UNAT) held that a decision by the General Assembly to abolish a post is not a contestable administrative decision, but a staff member may contest a subsequent administrative decision which follows from the General Assembly's actions. Accordingly, the Applicant may not challenge the decision to nationalize the Post.

26. The Applicant's challenge to the decision to reassign him to the position of Administrative Assistant within the Public Information Section is not receivable. The Applicant applied for and was selected for this position. It is not a decision adverse to the Applicant's terms and conditions of employment, and may not be challenged before the Dispute Tribunal.

*Prima facie unlawfulness*

27. The Applicant has not provided any evidence that the alleged decisions are unlawful.

28. The Applicant previously encumbered post number 64621, as a GIS Assistant at the FS-4 level. On 1 July 2015, following a Civilian Staff Review (CSR), and the submission of the Secretary-General's Report on UNIFIL's budget from 2015-2016, this post was converted to a national post by the General Assembly.

29. In the 2014-2015 budget, the entire GIS Unit consisting of 1 P-4, 1 P-3, 1 P-2, 3 FS and 3 NGS posts, was redeployed from the Engineering Section to the Regional Information and Communications Technology Service (RICTS). An FS-5 staff member who was on temporary assignment to the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) returned to his function and post in UNIFIL GIS effective 20 September 2015. There is accordingly no basis in the Applicant's averment that an additional staff member has been brought in to the GIS unit at the expense of the Applicant. The post previously encumbered by the Applicant was the only FS-4 post in the GIS Unit. Thus, this position was nationalized effective 1 July 2015 in line with the CSR recommendation. As a result

of this conversion and since that date, there have been no functions for the Applicant to perform.

30. No other position has been moved into GIS Unit after the original redeployment of the entire GIS Unit (nine posts in total) from ESS to RICTS effective 1 July 2014.

31. Since that date, the Applicant has applied for and been selected for two TJOs. These job openings were initiated by UNIFIL to enable staff members affected by the CSR an opportunity to remain employed in the mission, while seeking more long-term opportunities within the Organization.

32. Of the 14 staff members who were directly impacted by the CSR, 11 had found alternative options by or before 30 September 2015. Three staff members, including the Applicant, had not. On instructions from the Head of Mission to allow these staff members a further extension, another TJO was initiated on an administrative assistant post, which was vacant and required its functions to be carried out. The position was advertised as a ring-fenced recruitment to allow the impacted staff members to apply. All those remaining from the impacted group applied. The Applicant was selected for this position.

33. Furthermore, it is not possible to simply reassign the Applicant to another position because he has not been cleared by a Field Central Review Body. He must apply and be selected following a competitive selection process in accordance with ST/AI/2010/3 (Staff Selection System). Additionally, due to the implementation of the Umoja system on 9 November 2015, it is not possible to administratively ‘place’ staff members against posts for which they have not been properly selected.

34. Contrary to the Applicant’s assertions, there is no convention or rule that the functions of the Post cannot be performed by national staff and therefore cannot be nationalized. UNIFIL is carrying out an ongoing project to demarcate the boundary between Israel and Lebanon (“the blue line marking project”). This project involves field and office work. The field work directly along the blue line is performed by five



international civilian and military and four GIS staff. The mission has requested additional military personnel for several areas of the mission since those personnel are not covered by the UNIFIL Staffing Budget and are instrumental to integrated mission activities. However, this has no bearing on the reduction or nationalization of civilian posts.

35. Accordingly, contrary to the Applicant's assertion, there is no mistake in the reason for the Administration's decision. The post used to finance the Applicant's appointment is no longer available due to the General Assembly's decision. The Applicant has provided no evidence to suggest that the decision was discriminatory.

36. The alleged decision to move the Applicant to other functions is in fact UNIFIL's offer made to the Applicant following his selection for the TJO to which he physically applied. As the selected candidate, the Applicant cannot challenge the outcome of the recruitment exercise, which was ultimately in his favor. Accordingly, there is no unlawfulness in offering the Applicant an appointment to that position.

#### *Urgency*

37. The Applicant has provided no evidence of urgency. He has the option of accepting the offer of appointment to the post which he applied and was selected, and continuing to serve with UNIFIL until 31 January 2016. That period is well outside the 45-day period for management evaluation.

#### *Irreparable harm*

38. The Applicant has provided no evidence of irreparable harm. He has been offered an appointment that will enable him to continue in service until 31 January 2016. This will give him more time to find a more long-term position and possibly be placed on the roster by the Field Central Review Body. The Applicant's claim that accepting the offer will "spell an end" to his career has no merit. In fact, it will prolong it. The fact that the Applicant's previous functions are continuing is irrelevant – they are being performed by a national staff member in accordance with

the General Assembly's decision. The Applicant, as an international staff member, cannot perform those functions or encumber that post without violating the General Assembly's resolution.

## Considerations

### Receivability

39. The Respondent submitted that the Applicant's challenge to the decision to nationalize the Post is not receivable because, on 23 May 2015, the Applicant requested management evaluation of this decision and on 27 May 2015, MEU informed him that his challenge was not receivable. The Applicant requested a second management evaluation of this decision on 22 October 2015 and, on 27 October 2015, MEU again informed him that his second challenge was not receivable.

40. The Tribunal will here refer to what it stated in *Igbinedion* UNDT/2013/023<sup>2</sup>:

The crux of the Respondent's position is that the provision of Article 8 (3) which enjoins the Tribunal from "suspend[ing] or waive[ing] the deadlines for management evaluation" necessarily means that a finding of receivability by the MEU as to timelines and limits binds the court. [...]

The submission by the Respondent that this finding by the MEU binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word 'deadline.'

Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It does not bind the Tribunal to findings of timelines made *by* management evaluation.

Put very simply, the Tribunal would be acting in excess of its jurisdiction if it allowed a litigant to seek management evaluation after the sixty (60) day deadline. It would also be exceeding its jurisdiction if it ordered the Management Evaluation Unit to consider a request by a staff member outside of the time-limits prescribed for such a request.

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<sup>2</sup> Affirmed by the Appeals Tribunal on the issue of receivability in 2014-UNAT-411.

The MEU made a finding that the request before it was time-barred for the purposes of being reviewed by the Unit. To suggest that that finding is a 'deadline' for the purposes of litigation before the Tribunal is both misconceived and erroneous.

The UNDT and Management Evaluation Unit operate on different receivability thresholds. A litigant must seek management evaluation before looking to have his or her dispute litigated and, for the purposes of litigation, time begins to run either from receipt of a response from the MEU or the expiry of the time-limit set for such a response.

41. While art. 8.3 of the Statute prohibits the Tribunal from waiving or suspending deadlines for management evaluation, it does not bind the Tribunal to findings of timelines made by MEU. A decision of MEU is therefore not binding on the Tribunal.

42. The same reasoning that was made in the case above is also applicable when the MEU determines that the case is not receivable. It is still for the Tribunal to decide that issue.

43. The Respondent also submitted that the General Assembly's decision to nationalize the GIS Assistant post is not an administrative decision that can be challenged before the Tribunal.

44. The Tribunal initially entertained this Application because it considered that the Applicant had established a *prima facie* case of unlawfulness because the evidence before it at that time showed that, contrary to the General Assembly resolution A/RES/69/302, an international staff member, SB, had been brought in to the Regional Information and Communications Technology Service to perform the same functions previously performed by the Applicant.

45. The oral evidence received on 2 November 2015 from Ms. Puyo and SB, showed that SB was performing the role of a GIS Assistant at the FS5 level and was not encumbering the post previously held by the Applicant. The Tribunal is now convinced that the Applicant's post was nationalized by the General Assembly and

that decision cannot be the subject of an application before it as held by UNAT in *Lee*.

**Conclusion**

46. This Application for suspension of action fails because it is not receivable.

*(Signed)*

Judge Vinod Boolell

Dated this 24<sup>th</sup> day of November 2015

Entered in the Register on this 24<sup>th</sup> day of November 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi