



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/091
Order No.: 173 (NBI/2017)
Date: 20 October 2017
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOURE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
INTERIM RELIEF PURSUANT TO
ARTICLE 14 OF THE UNDT RULES
OF PROCEDURE**

Counsel for the Applicant:
Marisa MacLennan, OSLA

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is a former Human Rights Officer (HRO) at the P-3 level, step 7, with the United Nations Organization Stabilization Mission (MONUSCO) in the Joint Human Rights Office (JHRO) in Kinshasa, the Democratic Republic of the Congo (DRC).

2. On 12 October 2017, she filed an application on the merits challenging “the failure to pay her salary and the failure to issue any formal contract extension since 1 July 2017.” As part of the application, the Applicant filed a Motion for interim measures pursuant to art. 14 of the Dispute Tribunal’s Rules of Procedure seeking to “suspend or seeks interim relief of MONUSCO’s failure to act or decision not to pay her salary or issue her contract since 30 June 2017.”

3. The Motion and the application on the merits were served on the Respondent on 13 October 2017 with deadlines to file replies on 16 October 2017 and 14 November 2017 respectively. On 16 October 2017, the Respondent filed a reply to the Motion.

Facts

4. Facts described below are undisputed and/or result unambiguously from the submitted documents.

5. On 8 November 2014, the Applicant was issued with a Letter of Appointment (LOA) as a HRO with MONUSCO, in Kinshasa, DRC, for a one year fixed-term appointment at the P-3 level, step 6.¹ Her appointment was subsequently renewed until 6 February 2017.²

¹ Annex 1 - application.

² Annex 2 - application.

6. On 7 February 2017, the Applicant was informed by Munga Kalenzi, MONUSCO Human Resources Assistant (HRA), that her next month's salary may be delayed since her e-performance outcome had not been received in time.³

7. On 7 March 2017, the Applicant was informed by Rosette Ruyonga, HRA with the Regional Service Centre Entebbe (RSCE), that her appointment had been extended until 30 April 2017.⁴ A related personnel action was processed on 7 March 2017 with effect from 7 February 2017.⁵ The Applicant was informed, however, that she had not been payrolled for the month of February since her contract was not extended in time for payroll and consequently, a salary advance had been requested.⁶

8. Between 14 March 2017 and 16 June 2017, the Applicant was on certified sick leave which was subsequently extended from 17 June 2017 till 17 July 2017.⁷

9. On 30 May 2017, the Applicant informed Ms. Ruyonga that she had not received her salary for the month of May. She received a response on the same day that her appointment had not been extended and that she should contact the Mission's human resources department.⁸

10. Between 21 June 2017 and 25 June 2017, the Applicant communicated with Chris Xaba-Motsa, MONUSCO Chief Human Resources Officer (CHRO), about her appointment since the last extension was until 30 April 2017.⁹

11. On 27 June 2017, the Applicant's appointment was retroactively extended from 1 May 2017 until 30 June 2017.¹⁰

³ Annex 4 - application.

⁴ Annex 6 - application

⁵ Annex 5 - application.

⁶ Annex 6 - application.

⁷ Annex 7 - application.

⁸ Annex 16 - application.

⁹ Annex 8 - application.

¹⁰ Annex 9 - application.

12. On 10 July 2017, the Applicant received medical clearance to travel back to her duty station in Kinshasa, DRC, from the Medical Services Division (MSD).¹¹

13. Between 10 July 2017 and 27 July 2017, the Applicant informed both RSCE and MONUSCO that she had been cleared for travel back to Kinshasa but was uncertain about her appointment and therefore, she could not travel to Kinshasa her duty station to resume her duties. On 27 July 2017, the Applicant was informed by Tinkamanyire Mugisha, HRO/MONUSCO, that her inquiries regarding her appointment had been communicated to the Mission management for review and advice.¹²

14. On 24 July 2017, the Applicant submitted an Off-line Appraisal Form on Performance Management and Development to the JHRO department. She received a rating of “Does not meet expectations” from her First Reporting Officer (FRO), Koffi Wogomebou and which was upheld by her Second Reporting Officer (SRO), Jose Maria Aranaz.¹³ The Applicant submitted a separate document dated 23 July 2017, in which she contested the evaluation.¹⁴

15. On 4 August 2017, the Applicant requested for a rebuttal of her performance evaluation.¹⁵ On 23 August 2017, Safia Boly, acting Director of Mission Support (DMS)/MONUSCO, acknowledged receipt of the rebuttal request and informed the Applicant that she would revert with the applicable procedural steps.¹⁶

16. On 24 August 2017, the Applicant requested management evaluation of the failure to pay her salary for the month of July and requested the following remedies: (a) formal contract extension; (b). immediate payment of salary and; (c) one month’s net base salary for unreasonable delay.¹⁷

¹¹ Annex 10 - application.

¹² Annex 11 - application.

¹³ Annex 12 - application.

¹⁴ Annex 13 - application.

¹⁵ Annex 14 - application.

¹⁶ Annex 15 - application.

¹⁷ Annex 19 - application.

17. On 20 September 2017, Stefania Ascitti, a Medical Officer with MSD, sent a memorandum to Wolfgang Weiszegger, acting DMS for MONUSCO, in which it is stated that the Applicant was cleared to return to work on 17 July 2017.¹⁸

18. On 21 and 22 September 2017, there was correspondence exchanged within MONUSCO's Human Resources Section, whereby Human Resources Officers forwarded to one another's attention the matter of the Applicant's appointment.¹⁹ There is no basis to assume that the Applicant was informed thereof.

19. By email dated 26 September 2017, Salieu Mbye, an Investigator with MONUSCO's Special Investigations Unit (SIU), sent a questionnaire to the Applicant and informed her that she was the subject of an investigation into alleged misconduct. He required her to inform him whether she had reported back to work and what her present duty station was.²⁰ On the same day, the Applicant replied to the questionnaire and informed Mr. Mbye that she had not had any extension of contract since 30 June 2017 and was therefore not at her duty station, Kinshasa.²¹

20. On 29 September 2017, Mr. Mbye sent an additional questionnaire to which the Applicant responded on the same day. Among the questions posed, one challenged the Applicant's failure to return to the duty station despite the existing practice of appointments being issued retroactively.²²

21. On 3 October 2017, the Applicant wrote to Mr. Mugisha requesting information that pertained to her 4 August 2017 rebuttal request. The response from Mr. Mugisha was:

I have requested for a review of your case and we will get back to you with a response.²³

¹⁸ Annex 2 – reply.

¹⁹ Annex 3 – reply.

²⁰ Annex 21 – application.

²¹ *Ibid.*

²² Annex 22 - application.

²³ Annex 23 - application.

22. On 13 October 2017, one day after filing this application, a personnel action was processed reflecting that the Applicant's fixed-term appointment had been retroactively extended until 16 July 2017.²⁴ Again, there is no evidence that the Applicant was informed thereof before the documents were filed as annexes to the Respondent's reply.

23. The Respondent submits that the Applicant will accordingly be paid her salary for the period 1 July 2017 to 16 July 2017.²⁵

Applicant's case

24. The facts described above underpin both the application on the merits and the Motion for interim measures. The Applicant avers that the application satisfies the three-prong test of unlawfulness, irreparable harm and urgency:

a. The contested decision is unlawful because MONUSCO has kept her in a limbo regarding her salary and contractual status; moreover, it extended her appointment only through 30 June 2017 despite the fact that beyond that date she remained on sick leave and her performance rebuttal process has not been completed.

b. The case is of particular urgency because the Applicant continues to suffer financial as well as reputational harm.

c. Irreparable harm will be caused if the inaction by MONUSCO continues. The Applicant and her family will be put into greater financial hardship and her career and reputation are being damaged by the unexplained gap of work for over three months.²⁶

²⁴ Annex 1 - reply.

²⁵ Para 2 - reply.

²⁶ Application, section VIII paras. 43-51.

25. The Applicant seeks to “suspend or seeks interim relief of MONUSCO’s failure to act or decision not to pay her salary or issue her contract”; she however did not specify what particular action she was seeking.

Respondent’s case

26. The Respondent interprets the application as directed at a decision to not renew her appointment beyond 30 June 2017 and to not pay her salary.²⁷ The Tribunal lacks jurisdiction to order interim measures under art. 10.2 of the UNDT Statute that pertain to either an appointment, promotion or termination. As such, he contends that the application is not receivable *ratione materiae*.

27. Besides, the Respondent submits that the contested administrative decision has already been implemented because the Applicant’s appointment has been extended until 16 July 2017, the last day of the Applicant’s sick leave, in accordance with section 3.9 of the Administrative Instruction on sick leave. Accordingly, the application has become moot.²⁸

Considerations

28. The primary issue concerns the *petitum* of the application. The Applicant contests “the failure to pay her salary and the failure to issue any formal contract extension since 1 July 2017”²⁹ and specifies that the subject of the application on the merits is the implied decision to not issue a decision or to delay issuance of a decision in the matters concerned.³⁰ She further submits that MONUSCO has been delinquent in processing her salary and contract extension, which put her in a limbo regarding her salary and contractual status.³¹ As such, contrary to the Respondent’s interpretations, the application on the merits is not about a non-renewal of appointment – a decision that the administration apparently had not issued until 13 October 2017 and of which

²⁷ Reply, paras. 1 and 9 and references cited therein.

²⁸ Reply, para. 11 and references cited therein.

²⁹ Application, section V para. 1.

³⁰ Ibid., section VIII, para. 23.

³¹ Ibid., paras. 29-30.

the Applicant was , in all probability, not informed at the date of the application – but is clearly directed against the inaction on the part of MONUSCO Administration, where a non-renewal was one of the possible options.

29. Whereas, as noted *supra* at para. 24, the Applicant was not specific about the temporary relief sought, an application must be interpreted so as to reasonably dispose of its content³² and this interpretation must be *bonae fidei* to give it a sense consistent with the applicant's presumed intention and legal interest.³³ On the other hand, the gist of an application properly under art 10.2 of the UNDT Statute is to obtain a temporary relief, and not to satisfy the main claim. Applying these considerations to the case at hand, at the time of the filing of the application there was nothing to suspend because no decision had yet emanated from the MONUSCO Administration. The only relief that could have reasonably been expected, which does not amount to exhausting the main claim - and circumventing limitations from art 10.2 of the UNDT Statute - was to obligate MONUSCO to issue an administrative decision removing the uncertainty of the Applicant's status.

30. The reply confirms that the relevant action has now been taken, *i.e.*, the Applicant's appointment has been extended by the date of her certified sick leave; implicitly - not extended thereafter. This development constitutes a new administrative decision with all the attendant options for contesting it, starting with management evaluation. For the case before the Tribunal, however, the Respondent is correct that the application for an interim relief has become moot and thus inadmissible.

Conclusion

31. The Applicant's Motion for interim relief is not admissible and is denied.

³² *Massabni* 2012-UNAT-238.

³³ *Lahoud* UNDT/2017/009, at para. 37.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 20th day of October 2017

Entered in the Register on this 20th day of October 2017

(Signed)

Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi