



The Application

1. The Applicant is a Budget Officer at the Regional Service Centre in Entebbe, Uganda (RSCE). She serves at the level on a fixed term appointment.

2. This Application for *interim* relief pursuant to art14 of the UNDT Rules of Procedure, was filed annexed to the Applicant's substantive application before the Tribunal.

3. The Applicant's substantive application challenges "a series of actions" by the Respondent "which cumulatively amount to a decision to constructively dismiss her by depriving her of her functions".

4. By way of the present Application, the Applicant seeks stay of the 'decision to deprive her of her functions and responsibilities.'

5. Taking into account the substantive application before the Tribunal, this is the Applicant's fifth challenge at the UNDT.

6. On 16 May 2014, the Applicant filed an application for suspension of action challenging the decision not to extend her fixed-term appointment. The Tribunal issued Order No. 137 (NBI/2014) on 23 May 2014, granting the application. As part of Order No. 137, the Tribunal recognised the hostile work environment in which the Parties found themselves and urged them to engage in meaningful consultations towards having this matter resolved".

7.

8. The Respondent argued that the Applicant's second application for suspension of action was not receivable as a matter of substance; that it did not meet the statutory timelines; and that it had, in any event, been implemented.

9. On 24 September 2014, the Tribunal issued Order No. 214 (NBI/2014) setting the matter down for hearing.

10. The Tribunal heard the Parties on 25 September 2014. The Applicant and one other witness testified. The Tribunal admitted the written statement of one further witness for the Applicant without objection from the Respondent. For his part, the Respondent called one witness. Closing submissions were filed by both Parties on 26 September 2014.

11. On 30 September 2014, the Tribunal issued Order No. 218 (NBI/2014) in which it found the second application receivable and granted the stay that the Applicant sought, pending management evaluation.

12. On 10 October 2014, the Tribunal issued Order No. 224 (NBI/2014) in which it fully set out its position in respect of the receivability and merits of the second application.

13. Recalling its observations in Order No. 137 (NBI/2014), the Tribunal held (in Order No. 224) as follows:

The Tribunal believes this advice to be that much more relevant now given the deterioration of the situation facing the Applicant.

The circumstances described to the Tribunal by both the Applicant and the witness who testified on her behalf paints the picture of a bad working environment. Staff members cannot be expected to work effectively and productively while being marginalised and humiliated. It makes for poor morale. From the Organisation's perspective, it is equally poor for to have a staff member on payroll with no functions to perform. It is a waste of the Organisation's resources, which cannot be condoned.

14. On 7 November 2014, the Applicant moved for execution of Order No.224 (NBI/2014) pursuant to arts. 32.2 and 36 of the Rules of Procedure.

15. Also, on 7 November 2014, the Applicant received the outcome of her second request for management evaluation.

16. In response to the motion for execution the Respondent took the position that the Tribunal does not have the jurisdiction to decide on the motion for execution as Order No. 224 (NBI/2014), which was issued pending management evaluation, was no longer in force.

17. On 12 November 2014, the Applicant filed an application on the merits and with it the present Application for interim relief pursuant to art. 14 of the Rules of Procedure.

18. The Respondent replied to the Application on 13 November 2014, and the Applicant filed her Rejoinder to the Respondent's Reply on 16 November 2014.

Submissions

Receivability

Respondent

19. The Applicant presents two arguments that this Application is receivable *ratione temporis*. First, the Applicant argues that the contested decision only crystallized in September 2014, when the Respondent sought to remove her UMOJA access. Secondly, she argues that the contested decision was the 5 May 2014 decision, which formed part of Order No.37 (NBI/2014) and therefore was part of

Dispute Tribunal further held that Order No. 137 (NBI/2014) implicitly included a prohibition on the Respondent removing the Applicant from her functions.

26. The Applicant accepts that the decision to remove her from her functions is linked to the non-renewal decision and therefore asserts that Order No. 137 (NBI/2014) suspended both decisions.

27. Article 8(1)(d)(i)(a) of the Statute of the Dispute Tribunal provides that an Application is only receivable if it is filed within 90 days of the Applicant's receipt of the response to the request for management evaluation. Having received the response on 16 June 2014, the Applicant had until 14 September 2014 to file an application on the merits before the Dispute Tribunal challenging the decisions that had been the subject of a request for management evaluation. As this Application was not filed until 12 November 2014, it is not receivable *ratione temporis* and should be dismissed.

28. If the Dispute Tribunal holds that the response to the request for management evaluation did not address the issue of removal of the Applicant's functions and therefore the timeline in Article 8(1)(d)(i)(b) of the Statute applies, then the Applicant had until 29 October 2014 to file an application on the merits and this Application remains not receivable.

29. Furthermore, the Application is not receivable *ratione materiae*. Article 10.2 of the UNDT Statute precludes the Dispute Tribunal from making an order for interim measures in an appointment related case. The Applicant asserts that this contested decision is linked to the non-renewal decision that was the subject matter of Order No. 137 (NBI/2014). The Dispute Tribunal held in Order No. 218 (NBI/2014) that the issue of whether the Applicant could continue to perform her functions was an intrinsic part of Order No. 137 (NBI/2014). This makes the present matter an appointment related case, in which the Dispute Tribunal has no jurisdiction to make an order for interim measures.

47. Stripping the Applicant of her functions is not a remedial measure provided for in any statutory provision. It is disingenuous to offer administrative leave with full pay.

48. The impugned decision put the Applicant in an impossible situation. She was supposed to have her midpoint performance review in November 2014 but has nothing to show for her review period.

49. Ms. Boly communicated a draft workplan for 2014/15 on 17 October 2014 that drastically reduced the role of the Applicant and contains no more than 20% of the functions of a Budget Officer.

50. The circumstances have not changed since the Tribunal issued Order Nos. 218 and 224 (NBI/2014). If anything, it has deteriorated since the MEU decision on 7 November 2014.

51. MEU told the Applicant that:

your physical location away from other RSCE staff members was done out of courtesy to you, given that you were asked not to take any official action on behalf of the RSCE.

52. This reasoning is outrageous. There is no presumption that staff members are incapacitated and cannot make decisions on their own. If the Applicant wanted to be isolated, she would have said as much. The Organization cannot take adverse and unlawful decisions against staff members without consulting them and contend that it is doing so in their interest.

53. If the rebuttal panel concludes that the Applicant's performance was appraised unfairly, her final rating will be upgraded. Her performance during the current appraisal cycle will become a decisive factor when determining whether her fixed-term appointment should be extended. If the current situation is allowed to persist, the Applicant will have nothing to show for the period 2014-2015.

54. The more this situation is allowed to continue, the more the Applicant will be

Organization. It is not obliged to wait unt

Case No. UNDT/NBI/2014/102

Order No. 255 (NBI/2014)

estimates and staffing requirements are ~~not~~ stated and are well justified to withstand the review of several departments and legislative bodies in UNHQ;

- b) Monitoring Budget Execution: Monitor and report to leadership on the execution of the budget throughout the financ

74. The Applicant is not accused of misconduct or gross negligence resulting in a financial loss. Before placing staff members accused of misconduct on administrative leave with full pay, the Respondent has a duty to ensure that alternative arrangements such as redeployment were not feasible. The Respondent could have reasonably eliminated any risk of financial loss without depriving the Applicant of her functions. However, the Respondent chose the most drastic measure without exploring any alternatives. This is a textbook example of bad faith.

75. At paragraph 5 of his Reply, the Respondent contends that the Applicant was aware that her responsibilities included post management since at least June 2013. The Applicant had personally sought access to the necessary IT systems to be able to carry out the post management functions”.

76. The Respondent filed as his Annex R-2, an email where the Applicant requests access to a system which would allow her to perform post management functions. It is interesting to note that the date mentioned on that email is 13 August 2013. In other words, the Respondent’s Annex R-2 states that as of 13 August 2013, the Applicant was still not performing post management functions. Yet, on 6 September 2013, she was already placed on a PIP with regard to post management functions. The Respondent does not explain how a manager can determine within a few days that a staff member is a poor performer. Annex R-2 is detrimental to his own position.

77. At paragraph 7 of his submissions, the Respondent alleges that “there were genuine attempts made to resolve the disagreement between the Applicant and her FRO”. This assertion is inconsistent with paragraph 18 of the Applicant’s Statement where she clearly states that the Chief RSC refused on three occasions to participate in any sort of informal dispute resolution through the Ombudsman’s Office. She also refused the involvement of several senior officials who offered to mediate the

² Applicant’s Exhibit F.

dispute. The CRSCE did not deny this allegation during her testimony in Case No. UNDT/NBI/2014/086. The Respondent's allegation at paragraph 7 is not credible.

78. The assertion that two Human Resources Officers took "part in counselling of the Applicant" is also misleading. The Applicant was ambushed in the Office of the Chief RSCE and humiliated in front of the

83. The Applicant started her duties with the RSCE as a Budget Officer at the P4 grade on 1 June 2013. She had previously worked as a United Nations Volunteer (UNV) with the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in August 2002. She was subsequently appointed a Supply Officer at the P3 level in the same Mission in October 2004.

84. The Applicant has served in various capacities within the Organization and has, throughout her career, been appraised as “exceeding performance expectations” or as “fully satisfactory.” Her appointment as a Budget Officer in RSCE was her fifth posting.

85. The Applicant’s first reporting officer is Ms. Boly, who at the time of the posting of the Applicant was Operations Manager and now is the CRSCE.

86. On 2 September 2013, Ms. Boly asked the Applicant to sign a document confirming that a specific post against which the Respondent intended to appoint a new candidate was vacant. The Applicant declined to sign the document explaining that she had no authority to carry out functions that fall within the exclusive purview of a Human Resources Officer.

87. Four days later, on 6 September 2013, the Applicant was served with a PIP by Ms. Boly on the ground that the Applicant was not performing.

88. On 27 November 2013, Ms. Boly informed the Applicant that there had been no progress in her performance.

89.

90. The Applicant requested rebuttal of her performance and the process is still pending as no rebuttal panels have been established.

91. On 16 May 2014, the Applicant sought management evaluation of the decision not to extend her fixed term appointment and filed an Application for suspension of action.

92. On 19 June 2014, MEU informed the Applicant that it considered the Application to be moot as the Appointment was being renewed on a monthly basis pending the completion of the e-PAS rebuttal procedure.

93. On 23 May 2014, the Tribunal granted the Application for suspension of action.

94. On 23 September 2014, the Applicant filed a second application for suspension of action challenging "a seri

decision not to renew the Applicant is separate from the decision to deprive her of her duties.

97. As a suspension of action was in effect pending the management evaluation of the impugned decision, Order No. 224 (NBI/2014) lapsed on 7 November 2014.

98. MEU overruled the findings of the Tribunal that the second application for suspension of action in September 2014 was receivable and found it time-barred. MEU took the view that that the Applicant had on 24 April 2014 been “requested not

Tribunal is incorrect. Both the Management Evaluation request and the initial application for suspension of action make mention of her constructive dismissal.

It is entirely reasonable and proper for a staff member who is challenging her performance appraisal, and who has won an injunction against the decision to terminate her employment, to expect that the status quo is preserved so that she is able to continue performing the functions for which she was recruited.

The impugned decision of stripping the Applicant off her functions cannot be seen to have been fully properly implemented so as to make it inadmissible before this court”.

100. Two observations are called for in the light of the MEU decision.

101. It is striking that the finding of the MEU on the stripping of the Applicant’s duties is an endorsement of the testimony of CRSCE. There does not seem to have been any independent inquiry into the evidence leading to the performance appraisal, the decision not to renew the Applicant, or the motivation behind the removal of her duties from her.

102. On the removal of the Applicant from UMOJA, all that the MEU found is that the decision was taken “to implement the removal of the delegation of authority approved by the Controller...”. Nothing is mentioned on the manner in which this was done and whether there were extenuating factors behind that decision.

103. It should be recalled that when Ms. Bolyst testified before the court in September 2014, and was asked why she had asked a staff member to sign the UMOJA User Registration Form “for” the Applicant without first asking the Applicant to sign it herself, she told the Tribunal that the Applicant was a staff member who has repeatedly refused tasks and has on several occasions administratively/formally challenged the Organization’s decisions. Ms. Boly also told Brian Cable of MONUSCO in an email that the Applicant “is not part of RSCE anymore and was

informed of the same in May 2014". Ms. Boly wrote that email to Mr. Cable in September 2014, months after the issuance of Order No. 137 (NBI/2014) and while a rebuttal panel was still being considered.

104. None of these issues were addressed by the MEU.

105. The mandate is prescribed in ST/SO/0/9 (Organization of the Department of Management). One of the core functions of the MEU is to conduct:

an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations. The MEU is also mandated to propose means of informally resolving disputes between staff members and the Respondent.

106. The functions of the MEU should not only be impartial but be seen to be so. The process of management evaluation is to

108. This case has once again brought into focus a rather peculiar feature of the injunctive relief provided for in art. 13 of the Rules of Procedure and art. 2 of the Statute of the Tribunal.

109. The Tribunal has made observations on this peculiar aspect of the rules governing injunctive relief. In the case of *Masmani* Order No.75 (NBI/2010) the Tribunal stated:

The Appeals Tribunal's reading of the Rules in effect means that a judicial finding of prima facie unlawfulness may be reversed, or in any case come to nought, by decision of the Management Evaluation Unit of the Department of Management of the Secretariat. It is difficult to see why a court should be seised on an application to suspend when its decision can, in anything from 30 to 45 days, be reversed by a decision of the Respondent endorsing its own impugned decision. The framers of the new system and drafters of the Statute could not have intended for the new system to be one in which the Secretary-General's review of a judicial decision would result in a preceding judicial order, on the same set of facts, being rendered empty and therefore useless. If that is the reality of the judicial process and all that it entails is to mean anything at all, such a reading of the Statute and Rules must not be correct.

110. In *Abosedra* Order No. 010 (NBI/2011) the Tribunal observed:

Article 2.2 as it stands would be against the general principle of law relating to the independence of the judiciary. By making the Respondent the judge of the duration of the management evaluation, the Article is thereby curtailing the power conferred on the Tribunal to decide in its wisdom the duration of the suspension. General principles of law have been applied in a number of cases in spite of the existence of rules when it was considered that these rules were not in conformity with basic fundamental principles of the rule of law.

111. Be that as it may the Tribunal's hands are tied. Litigants may question whether art.13 of the Rules and art. 2 of the Statute still have the *raison d'être*.

Is the Applicant entitled to the *interim* measures?

Case No. UNDT/NBI/2014/102

Order No. 255 (NBI/2014)

reporting officer in conjunction with performance discussions, which should be held on a regular basis.

116. Under section 10.2:

If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as “partially meets performance exp

also dictate the conclusion that it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance.

119. The Tribunal adopts the position taken by the court in *Stijn*⁴:

The Tribunal is not required to make a finding that the impugned decision is, in fact, unlawful. For the prima facie unlawfulness test to be satisfied, it is enough for an Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively ineffective, or was contrary to the Respondent's obligation to ensure that its decisions are prepared and made in good faith.

120. The Tribunal therefore finds that the continuous deprivation of the Applicant of her duties, in view of the flaws in the appraisal performance process, cannot be allowed to stand. Further by not following procedures and jumping to a PDFa.15 TDa0002 t0t t

[I]t should not be allowed to continue simply because the wrong doer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.

129. The Tribunal finds that the Applicant has been subjected to an unfair procedure right from May 2014 that has necessitated a removal of applications to be filed before this court. It would too easy and a denial of justice to allow this to continue and leave the Applicant with monetary compensation only.

130. The Tribunal finds irreparable harm proved.

Conclusion

131. The Application for Suspension of Action is GRANTED pending the determination of this case on the merits.

132. A case management order will shortly issue in respect of the Applicant's substantive application.

(signed)

Judge Vinod Boolell

Dated this 19th day of November 2014

Entered in the Register on this 19th day of November 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi