
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/079

Order No.: 245 (NBI/2015)

Date: 28 July 2015

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHEMINGUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON THE APPLICATION FOR
SUSPENSION OF ACTION PURSUANT TO
ARTICLE 14 OF THE RULES OF
PROCEDURE

Counsel for the Applicant:

The Application and Procedural History

1. The Applicant is a Senior Economist at the Economic and Social Commission for Western Asia (ESCWA). He serves on a fixed term appointment, at the P5 level, on an “established” post.
2. On 21 July 2015, the Applicant filed an Application for Suspension of Action seeking an injunction, pending a determination on the merits, against the decision to laterally reassign him as the Regional Adviser on Trade.
3. The Tribunal is informed that, as far as the Applicant is aware, ESCWA intends “to issue a memo today, 21 July, to reassign him effective immediately.”
4. The Application was filed along with a substantive merits application, which has been served on the Respondent.
5. On 21 July 2015, the Tribunal issued, in the interim, Order No. 240 (NBI/2015) suspending the impugned decision until 28 July 2015.
6. On 22 July 2015, the Respondent filed his Reply to the Application for Suspension of Action. The Respondent argues *inter alia* that Order No. 240 (NBI/2015) should be vacated on the ground that the Applicant has not satisfied the tripartite test required for the issuance of an injunction.
7. On the same day, the Tribunal issued Order No. 242 (NBI/2015) directing the Respondent to file documentary evidence in support of the assertions in his Reply, particularly those in paragraphs 13, 14 and 22. The same Order afforded the Applicant the opportunity to respond to the Respondent’s submissions.
8. Both Parties filed their respective submissions on 23 July 2015.

Deliberations

9. Applications for suspension of action are governed by art. 2 of the Statute and arts. 13 and 14 of the Rules of Procedure of the Tribunal. Art. 13 provides as follows:

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.**

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

10. Art.14, in relevant part, provides

1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be **unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.** This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

11. Both provisions require the Applicant to seek a review of the impugned decision by the Management Evaluation Unit (MEU), before resorting to litigation. The identical wording of Articles 13 and 14 contain one critical difference, and that is the stage at which the application for suspension of action is filed.

12. In the present case, the court is seized with an application in which MEU has concluded its review and upheld the impugned decision which the Applicant is seeking to challenge. The test for an application under both articles is identical.

13. The current application must thereTDTs ide7o litigaj2805 Tcb atdjud(t)3Twagic s(in t theurtp

Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

17. The Tribunal will now turn to consider the Application before it based on the Parties' submissions.

Prima Facie Unlawfulness

18. The Respondent's contention is that the decision to reassign the Applicant was made for "operational reasons" and that the post he is being reassigned to is at the Applicant's current grade and carries responsibilities that correspond to his level, skills and competencies. Specifically, the Respondent submits:

Contrary to the averment by the Applicant, the Job Opening to which the Applicant is to be reassigned does have a post number. The post in

21. However, this discretion is not unfettered as the Appeals Tribunal held in *Abdulla*².

[M]anagerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

22. It is clear from the Respondent's own submissions that the decision to reassign the Applicant was made before the post was even created. It is also clear from the Respondent's annexes that the post is of limited duration and is funded by general temporary assistance (GTA) funds, so that it does not have the security of the post currently encumbered by the Applicant.

23. The potential "economic prejudice" to the Applicant that would occasion from being reassigned to a less secure position requires little explanation.

24. The Respondent has the option of giving the Applicant a *lien* on his current established post, which would address the job security concerns expressed by him.

Observations

30. In *Cranfield*,⁵ the Court held that,

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility thereof and act with due expedition once alerted to the unlawful act.

31. The Tribunal has carefully reviewed both Parties' submissions on this matter, and strongly believes that the parties should engage in meaningful

34. **NOTICE** is hereby issued that the matter of *Chemingui v Secretary-General of the United Nations* (UNDT/NBI/2015/079) is set down for a case management hearing at **1030hrs on Tuesday, 15 September 2015** in the **UNDT Boardroom**.

35. The Parties are directed to advise the Tribunal on the status of their consultations and the likelihood of this matter being settled by **Tuesday, 15 September 2015**.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of July 2015

Entered in the Register on this 28th day of July 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi