

Introduction

1. The Applicant is currently serving as a Security Specialist with the United Nations Mine Action Service (UNMAS) in Baidoa, Somalia.

2. He filed an Application on the merits with the United Nations Dispute Tribunal (UNDT) on 25 May 2016 to contest the decision to separate him from service on 31 May 2016 while he is on certified sick leave (the Contested Decision). This Application was served on the Respondent on 26 May 2016 with a deadline of 27 June 2016 to file his Reply.

3. On 26 May 2016, the Applicant filed a Motion for

8. He commenced certified sick leave (CSL) on 30 November 2015 and has remained on CSL which is presently approved through 23 July 2016.
9. In December 2015, pursuant to an internal restructuring the Applicant's post was earmarked for abolishment. Consequently, he received an initial Separation Notice form UNOPS in January 2016, with his separation from service being effective as of 31 March 2016.
10. He was notified on 17 March 2016 that his contract would be extended until 31 May 2016. On 7 April 2016, his Portfolio Manager advised him that notwithstanding his approved CSL, he would be separated since UNOPS did not have the funding.
11. He was notified by UNOPS on 21 April 2016 that he would shortly receive a separation notice.
12. The Applicant received the Separation Notice from UNOPS on 29 April with an effective date of 31 May 2016. This Separation Notice also stated:

Given your current medical condition, we would like to offer you the option of being on Special Leave Without Pay (SLWOP) from 01 June 2016 until your medical condition improves or 30 November 2017 (whichever is the earlier). Your medical condition will need to be certified by the UN Medical Services Division. For the duration of this SLWOP (i) UNOPS will exceptionally pay the portion of the medical insurance premium ordinarily paid by you, as well as the Organization's portion of the premium, (ii) your appointment will be extended month-to-month; and (iii) you will not be entitled to any other benefits and entitlements. At the end of your SLWOP, you will be separated from service. If you would like to avail of this option, please sign in the space provided below and return the signed document to me by 15th of May 2016.

13. The Applicant did not respond to the offer contained in this second Separation Notice.

14. On 29 April 2016, the Applicant requested management evaluation of the Contested Decision. He received a response to his request for management evaluation on 23 May 2016, which upheld the Contested Decision.

Summary of Applicant's submissions

15. The Applicant submits that his Motion for interim measures is receivable because he is not contesting the non-renewal of his fixed-term appointment due to lack of project funding per se but rather is contesting the refusal of UNOPS to allow him to avail himself of certified sick leave prior to being separated from service. It is thus the effective date of his separation which is at issue. As such, this case is not a matter of appointment and may be subject to interim measures to suspend his separation from service for the duration of his certified sick leave.

16. The Applicant submits that the Contested Decision is unlawful for the following reasons:

a. Sick leave is a social benefit that is earned through service. It is therefore a contractual right which may not be terminated unilaterally.

b. In ST/AI/2005/3 (Sick leave), the Secretary-General has recognized the need to extend staff on fixed-

- c. This time sensitive matter may not be capable of appropriate remedy by the Tribunal should the Applicant prevail.

Summary of Respondent's submissions

19. The Respondent submits that the Applicant's Motion for interim measures is not receivable because art. 10.2 of the UNDT statute prohibits the Dispute Tribunal from suspending the implementation of a contested decision in cases of appointment, promotion and termination. Relying on *Siri* 2016-UNAT-609, the Respondent contends that the exclusionary clause in art. 10.2 applies in the present matter because reversal of the underlying contested decision would result in the issuance of a new appointment.

20. The Respondent submits that the Contested Decision is lawful for the following reasons:

- a. The Applicant's post of Security Specialist was abolished together with other Security Specialist posts. It is not disputed that the abolition of these posts was lawful.

- b. The United Nations Appeals Tribunal (the Appeals Tribunal) confirmed in *Weerasooriya* 2015-UNAT-517 that administrative issuances of the United Nations Secretariat, such as ST/AI/2005/3

21. The Respondent concedes that the matter is urgent in light of the fact that the Applicant's appointment is expiring shortly.

22. The Respondent submits that there is no irreparable harm because:

a. The Applicant has not highlighted any regulation, rule or policy that supports his argument that non-renewal of his appointment would exclude him from applying for a disability pension. On the contrary, art. 33 of the United Nations Joint Staff Pension Fund Regulations and Rules shows that the Applicant would receive the same disabilityir43.44 J ET Q q BT /F1 12 Tf 0 0 0 rg 0.998

temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

24. The issue for determination now is whether the Contested Decision is receivable. Is this a “case of appointment” that would fall under the exclusionary rule in art. 10.2 of the UNDT Statute?

25. In reliance on *Siri*, the Respondent is urging the Tribunal to dismiss the Applicant’s motion for interim measures on the basis that a reversal of the underlying contested decision would result in the issuance of a new appointment. Thus, the exclusionary rule in art. 10.2 of the UNDT Statute would become applicable.

26. In *Siri* Order No. 306 (NBI/2015) Corr. 1 dated 30 September 2015, the Applicant filed a motion for interim measures before UNDT pursuant to art. 10.2 of the UNDT Statute and art. 14 of the UNDT Rules of procedure to suspend the decisions to separate him from service on the basis of mandatory retirement and to conduct a recruitment process in relation to his post. The Respondent argued that the matter fell under the exclusionary rule in art. 10.2 because the contested decision concerned a case of appointment. The UNDT Tribunal held that art. 10.2(c)(3)(i)17(s)-11(i)13)-2(h)1sion

Siri was not asking for a renewal of his appointment. Rather, he was contesting the decision to separate him from service based on what he considered to be an erroneous calculation of his retirement age. The Appeals Tribunal concluded that “while necessarily linked to his appointment, his retirement age is a term of his current appointment and, as such, does not constitute “a case of appointment” under art. 10.2 of the UNDT Statute. Additionally, the Appeals Tribunal held that the decision to conduct a recruitment exercise for Mr. Siri’s position was a direct consequence of the

renewal constitute a case of appointment and fall under the exclusionary clause of Article 10(2) of the UNDT Statute”².

32. Being mindful of the Appeals Tribunal’s reminder in *Igbinedion* 2014-UNAT-410 that “the Dispute Tribunal should recognize, respect and abide by the Appeals Tribunal’s jurisprudence”, this Tribunal sees no reason to depart from the precedent that has been set in *Siri* 2016-UNAT-609.

Decision

33. In light of the foregoing, the Tribunal holds that due to the unique circumstances of this matter the Applicant’s Motion for interim measures is not receivable. Since the Motion is not receivable, the Tribunal does not have the jurisdiction to review the elements of *prima facie* unlawfulness, urgency and irreparable harm.

Order

34. The Applicant’s motion for suspension of action during the proceedings is rejected.

(Signed)

Judge Vinod Boolell

Dated this 3rd day of June 2016

Entered in the Register on this 3rd day of June 2016

² See also *El Komy* 2013-UNAT-324; *Benchebbak* 2012-UNAT-256.

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi