



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MUWAMBI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1.

an application for interim measures within five working days of the service of the application on the respondent”.

4. Although the Applicant initially filed his application on Tuesday, 18 June 2013, he filed an amended application on Thursday, 20 June 2013. The application was served on the Respondent on 20 June 2013. Therefore, the Tribunal had until close of business on Thursday, 27 June 2013, to consider the present application. The Respondent’s reply was duly filed, as directed, on 24 June 2013.

5. On 24 June 2013, the New York Registry informed the Applicant that he was granted leave to file a response to the Respondent’s reply by 3 p.m. on 25 June 2013. The Applicant chose not to exercise that option.

Background

6. The following background section is based on the parties’ written submissions and documents included in the case record.

Initial appointment

7. It appears that the Applicant joined the Organization for the first time in June 2009, when he was appointed as Contracts Management Officer at the P-3 level in the United Nations Mission in the Central African Republic and Chad (“MINURCAT”). He served with MINURCAT for almost two years, until April 2011, when the mission closed. The Applicant’s performance evaluation report for the first year (July 2009 to March 2010) indicates that his record.

Reassignment to MINUSTAH in April 2011

8. In April 2011, upon the closing of MINURCAT, the Applicant was reassigned to the post of P-3 Contracts Management Officer in MINUSTAH's Contracts Management Unit. The Applicant's offer of appointment, which he accepted on 4 April 2011, stated that he was "provisionally reassigned" to MINUSTAH "as Contracts Management Officer" for an initial period of three months and that his reassignment was "subject to a competitive selection process". It further stated that "[a]ny subsequent

French and demonstrate sufficient managerial experience. According to the Respondent, since the Applicant did not have sufficient managerial experience, and did not speak French, he was not retained as the Chief of the Contracts Management Unit and was instead reassigned to a vacant post in MINUSTAH's Procurement Section, where his main task was to maintain the mission's vendor contract database. The Respondent submits that it was not intended that the Applicant would be given full responsibility for all functions authorized to be performed against a P-3 post in the Procurement Section.

11. On 18 June 2012, the Director of Mission Support sent a memorandum to the Applicant, informing him that, as a result of a review of the offices involved in the retrenchment exercise, to effectively address the evolving operational requirements in Haiti, the Applicant would be reassigned to the Procurement Section as a Procurement Officer. The memorandum stated that his profile was "considered against suitable vacant positions" and he was recommended to be reassigned to the Procurement Section. The reassignment was "subject to designation as required". The Applicant was informed that this reassignment would become effective 1 July 2012 and that it was "expected to be extended through 30 June 2013 subject to mandate and availability of post". The text of the memorandum of 18 June 2012 is reproduced below:

Subject: Re-assignment within mission[.]

MINUSTAH has completed the review of the offices involved in the retrenchment exercise, intended to effectively address the evolving operational requirements in Haiti, in line with MINUSTAH's 2012-13 budget proposal. As a result of this review, your profile was considered against suitable vacant positions in the new mission's structure effective 1 July 2012 and you were recommended to be reassigned to Procurement Section as Procurement Officer at your current level, subject to designation as required.

Within the authority delegated to me by the [Special Representative of the Secretary-General], I would like to inform you that you will be reassigned to the above mentioned position on 1 July 2012.

In this regard, please make necessary hand-over arrangements by that date.

Your fixed-term appointment in MINUSTAH is therefore expected to be extended through 30 June 2013 subject to mandate and availability of post. Your Letter of Appointment will be sent to you by the Personnel Section in due course.

I am truly aware that the uncertainties of the retrenchment process have been stressful and unsettling for everyone involved, and I would like to thank you for your understanding and patience while the process was underway.

12. On or about 4 July 2012, the Applicant received a letter of appointment for the position of Contracts Management Officer (although the memorandum of

- I would like to confirm to you that I will diligently undertake my assigned tasks and can work and support the Mission as Procurement Officer. I am dedicated and committed and do have the past experience to support this.

14. On 15 April 2013, the Administrative Officer, DMS Office, responded to the Applicant and his first reporting officer via email, stating that “we need to formalize the process for [the Applicant] to take full responsibilities in Procurement activities at P-3 level, as designation is not required anymore for him”.

Incomplete performance evaluation for the period of April 2012 to March 2013

15. On 18 April 2013, the Applicant sent an

19. On 6 June 2013, the Applicant received a response from the Administrative Officer, DMS Office, stating that she did not see how the absence of a finalized performance evaluation report could disadvantage him in the context of retrenchment. She further stated that she had additional information from the Field Personnel Division (“FPD”) of the Department of Field Support (“DFS”) regarding the Applicant’s placement in procurement and the absence of delegation of procurement authority, and would like to meet with him to discuss the matter. The meeting took place on 7 June 2013.

20. The incomplete performance evaluation for the period of 1 April 2012 to 31 March 2013 indicates that, in addition to managing the vendor roster and performing other tasks, the Applicant also “executed and completed buying activities for established contracts, and initiated new solicitations [such as] [Requests for Proposals], [Invitations to Bid], [Requests for Quotation], and Contract Management”. The performance evaluation also indicates that the Applicant completed several procurement-related online courses.

Decision of non-renewal

21. The Respondent submits that MINUSTAH, pursuant to the decisions of the General Assembly, continued in 2012 and 2013 its efforts to downsize its operations, which included the phase-out of 352 civilian positions, including 162 international positions.

22. It appears that, sometime in the period of early to mid-2013, MINUSTAH started to make enquiries regarding the Applicant’s qualifications with the Procurement Division and FPD in New York. It is not clear from the record what prompted these enquiries.

23. On 3 June 2013, the Officer-in-Charge, FPD, sent a facsimile to the Director of Mission Support, MINUSTAH, informing him that the Applicant does not meet the requirement of at least two years of directly-related first-hand procurement and

contracting experience required for a P-3 Procurement Officer position; that he had only completed two of the four mandatory online procurement training courses; and that the Applicant was not rostered as a P-3 Procurement Officer and did not receive the delegation of procurement authority. The facsimile concluded that FPD supported MINUSTAH's decision of not extending the Applicant's appointment after 30 June 2013.

24. On 7 June 2013, following his meeting with the Administrative Officer, DMS Office, the Applicant requested a copy of the facsimile of 3 June 2013, which was provided to him by email on 10 June 2013. Upon receiving the facsimile, the Applicant sent an email to the DMS Office, stating that he was "very shocked at

a procurement officer at the P-3 level. Your transfer was made possible under the Head of Mission's delegation of authority to laterally transfer staff members within the Mission.

As you are aware, in the 2013–2014 downsizing process, Procurement Section lost three posts (1 P-3 and 2 FS). The section is currently also facing serious challenges due to the absence of a Section Chief at P-4 level: the absence on long-term sick leave of the [Officer-in-Charge] and the shortage of serving staff members with appropriate delegation of procurement authority. The proper functioning of the section is at significant risk.

In the absence of a FCRB clearance for you to perform as a P-3 procurement officer and no delegation of procurement authority, after various consultations with your previous and current supervisors in MINUSTAH, the Mission contacted Procurement Division and FPD at [the Headquarters] in order to receive advice on your qualifications to perform the functions of the P3 procurement officer post. You were informed of those proceedings in mid-April 2013 by the [Officer-in-Charge], Administrative Services.

The Mission subsequently received confirmation from [the Headquarters] that your current qualifications do not meet the requirements to serve as a procurement officer at the P-3 level.

Therefore, I regret to inform you that your fixed-term appointment with MINUSTAH which expires on 30 June 2013 will not be further extended.

In this regard, your separation from the Organization will be initiated and the MINUSTAH Personnel Section will be forwarding the necessary separation forms and instructions.

27. On 12 June 2013, the Applicant requested management evaluation of the decision communicated to him by memorandum of 12 June 2013. The Management Evaluation Unit confirmed the receipt of the Applicant's request on 13 June 2013, notifying him that, pursuant to staff rule 11.2(d), its review would be completed within 45 days, i.e., by 28 July 2013.

the Tribunal within five working days of the service of the application on the Respondent. Therefore, parties approaching the Tribunal must do so with

defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011), *Villamorán* UNDT/2011/126).

32. Although staff members do not have an automatic right to renewal, they have a right to a fair consideration for renewal and for a decision based on proper reasons (*Obdeijn* UNDT/2011/032, *Obdeijn* 2012-UNAT-201).

33. The Respondent submits that the reasons for the non-renewal of the Applicant's appointment are set out in the letter of 12 June 2013. The reasons are: (i) the Applicant had not received the necessary clearance by the field central review board for a Procurement Officer position at the P-3 level; (ii) the Applicant does not possess the required qualifications for the position; (iii) the Applicant has not received delegation of procurement authority for a Procurement Officer position at the P-3 level; and (iv) since the Applicant was assigned to the position, he has been performing a limited range of functions against the post.

FCRB clearance

34. The Respondent submits that even after the reassignment to the Procurement Section in July 2012, the Applicant was still required to undergo a competitive selection process for the position endorsed by FCRB. The Respondent submits that the Applicant was recommended for reassignment with MINUSTAH to the Procurement Section in April 2012, prior to any FCRB roster process being completed. Although the Applicant subsequently applied for a Generic Job Opening of a Procurement Officer at the P-3 level, he was not successful, and was therefore not cleared by the FCRB or granted procurement authority. Thus, he cannot assume the full functions supported by the P-3 post.

35. The Applicant submits that there are still many non-FCRB cleared staff members continuing to perform their functions at MINUSTAH. Thus, he is not

treated equally to other staff members. Further, there have not been many vacancy announcements to apply to.

36. A number of concerns arise regarding the circumstances of the Applicant's reassignment to the Procurement Section and the terms of this reassignment.

37. Although his initial offer of appointment for MINUSTAH stated that his reassignment was "subject to a competitive selection process" and that "[a]ny subsequent extension [of his appointment]" was "subject to competitive selection endorsed by the relevant central review body", the Applicant submits that that "there have not been jobs advertised regularly to enable competitive recruitment". This submission stands unrebutted. Further, the offer of appointment, signed on 4 April 2011, was initially for three months. It is doubtful that the Applicant is presently employed under the terms of that offer. For instance, the letter of appointment of 4 July 2012 did not contain any references to any special conditions of designation, mandate, participation in a competitive selection process, or availability of post.

38. According to the Respondent, on 15 June 2012, the Applicant was notified that his application to the Generic Job Opening was unsuccessful. It was therefore known that he had no FCRB clearance. Nevertheless, he was reassigned to the position of Procurement Officer at the P-3 level effective 1 July 2012 (see the memorandum of 18 June 2012 and the letter of appointment dated 4 July 2012).

Experience, designation, and delegation of procurement authority

39. The Respondent submits that those staff members who, as part of their duties, exercise delegated procurement authority, are required to possess the requisite qualifications and experience. The Respondent submits that, upon his reassignment to the Procurement Section, the Applicant was assigned vendor database management functions, on a P-3 level post, and that at no time has he been recommended for or received a delegation of procurement authority.

was feasible to keep the Applicant on a P-3 post, allowing him to perform basic database management activities that did not require a delegation of procurement authority. This state of affairs changed during the 2013–2014 downsizing process. The Respondent further states that the mission needs to fill the P-3 Procurement Officer post in MINUSTAH with an individual who has the requisite qualifications and experience to perform the full range of procurement functions and activities.

44. Even assuming that the Applicant's functions have been and would be limited primarily to the management of the vendor roster, no authoritative document has been provided to the Tribunal demonstrating that it would not be possible for the Procurement Section to properly operate should the Applicant remain there. Further, there is no indication in any of the documents that issues have been raised with the Applicant regarding his performance with respect to any of the assignments given to him. To the contrary, he has a record of consistently successful performance in difficult conditions.

Applicant's qualifications

45. The Respondent submits that, in light of the Applicant's failure to obtain FCRB clearance and the need to ensure that the staff member placed against the P-3 post be qualified to perform all procurement officer functions, pending a decision on the Applicant's renewal of appoint

the Applicant has access to it. There is no information as to how the Procurement Division—and later FPD—reached the conclusion that the Applicant does not have the required years of relevant experience. The Applicant clearly disputes this finding.

47. Notably, the Director of Mission Support's memorandum of 18 June 2012 stated that the Applicant's "profile was considered against suitable vacant positions in the new mission's structure effective 1 July 2012 and [he was] recommended to be reassigned to Procurement Section as Procurement Officer at [his] current level, subject to designation as required". Thus, MINUSTAH considered that his qualifications and profile made him "suitable" for an appointment as a Procurement Officer.

48. On the documents presently before the Tribunal, there are doubts as to whether management in New York had all the relevant and complete information before it when making its determinations regarding the non-renewal of the Applicant's appointment.

Training courses

49. The Respondent submits that the Applicant completed only two of the four mandatory online procurement training courses. However, no authoritative documents have been provided to the Tribunal as to which courses are actually *required* to perform P-3 level functions in the Procurement Section in MINUSTAH. No evidence has been provided also with regard to the consequences of non-fulfillment of the alleged course requirement. In any event, the Applicant's incomplete performance evaluation for the period of 2012 to 2013 provides the names of four courses with their completion dates—(i) Fundamentals of Procurement (February 2012); (ii) Best Value for Money (July 2012); (iii) Client Orientation (March 2012); Integrity Awareness (November 2011). The Applicant also mentioned at least two other courses, without providing their completion dates—Quality Management Foundations (as part of Contracts Management training) and Supply Chain Management.

Notice and non-renewal procedures

50. It is unclear whether the Administration followed its own procedures with regard to the non-renewal of the Applicant's contract. As the Tribunal noted in *Castillo Cabrera* UNDT/2012/035, administrative procedures regarding extensions of appointments and assignments of staff members serving in field missions are explained in the Human Resources Handbook of the Department of Peacekeeping Operations. The parties did not address the Human Resources Handbook in their submissions, however, to the extent the Handbook may still be applicable, it states (as explained in *Castillo Cabrera*) that the process of obtaining recommendations for extensions of appointment and assignment should commence 16 weeks in advance of the expiry date of appointment or assignment. Having informed the Applicant of the non-renewal less than three weeks prior to the last day of the contract, it may well be that the Administration did not comply with its own procedures, which resulted in a belated decision being made in the App

Irreparable damage

52. The Applicant submits that the implementation of the contested decision would cause him irreparable harm. He states that his family relies on his income for support. He further states that, if he were to leave the United Nations, it would be difficult for him to find another position with the United Nations as an external applicant. In this regard, he indicates that the contested decision is based on incorrect reasons that seriously damage his reputation.

53. The Respondent submits that, although in many instances staff members seeking suspension of non-renewal may establish irreparable harm, their previous experience and career path in the Organization must be considered. The Respondent contends that the Applicant has been with the Organization for approximately four years and was aware throughout his employment that his assignments were limited in time. The Respondent states that the Applicant had the opportunity to apply for positions and obtain FCRB clearance, which he failed to do.

54. The Tribunal finds that, if the Applicant's contract is not extended, he will lose his employment with the United Nations. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013)). As the Tribunal stated in *Kananura* UNDT/2011/176,

[L]oss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money.

55. The Tribunal finds that the reasons articulated in *Kananura* are applicable to the present case. The Tribunal therefore finds that the implementation of the contested decision would cause the Applicant irreparable harm.

Conclusion

56. The three conditions for the granting of an interim measure under art. 2.2 of the Tribunal's Statute have been met. In view of the Tribunal's finding that all three requirements of art. 2.2 of the Tribunal's Statute are satisfied, the Tribunal will order that the decision not to extend the Applicant's contract beyond 30 June 2013 be suspended during the pendency of the management evaluation.

57. The Applicant's situation is, indeed, very unusual and requires careful consideration by the Administration. The situation in which the Applicant now finds himself is a result of the way in which the Administration handled his assignments and contractual situation since early 2011. The Applicant is obviously a dedicated staff member with a very good performance record. There is no evidence that his particular post is being abolished or that there is no funding for it. The Applicant appears to have gone through and survived the 2012 retrenchment exercise and was reassigned as a result. No authoritative contemporaneous documents have been provided to the Tribunal to indicate that the Procurement Section is presently undergoing a properly-authorized restructuring exercise that would make it impossible for the Applicant to continue working there. The reasons for the Applicant not having proper clearances and delegations, if such are presently required, need further examination before any final conclusions are reached. Further, there is a clear dispute between the parties as to the exact nature of the duties performed by the Applicant. It may well be that procurement operations in the mission *are* being performed by staff members without proper delegated authority, which is a separate issue for the Administration to examine, including with regard to any measures that may need to be taken. These and other related issues are matters that give rise to a substantial dispute of facts which cannot be reconciled on the papers, and which would need to be addressed in substantive proceedings, if any are to follow. The Tribunal invites the parties to carefully consider the particular and exceptional circumstances of this case and to attempt resolving this situation amicably.

Order

58.