

Introduction

1. On 13 October 2017, at 7:24 a.m., the Applicant, a Contingent Owned Equipment Officer with United Nations Stabilization Mission in Haiti (MINUSTAH) at the FS-6 level, step 12, on a permanent appointment,

Case No. UNDT/NY/2017/100

Order No. 233 (NY/2017)

application for suspension of action of this decision;

The Respondent is to file a complete reply to the application on suspension of action by **12:00 p.m, Tuesday, 17 October 2017**, including information and supporting documentation regarding:

- a. The level of medical facilities provided in MINUSTAH;
- b. The level of medical facilities currently existing in UNSOS, Mombasa and in UNSOS, Mogadishu;
- c. The level and title of the UNSOS position to which the Applicant was to be laterally reassigned and if he has clearance for it; and
- d. The list of the available suitable posts at the same level or at a lower level presented to the Applicant.

7. On 16 October 2017 at 8:47 a.m., the Applicant filed an email informing the Tribunal that:

I was scheduled to fly to Spain on Saturday, and a provisional ticket was prepared, However, based on the Suspension of Action currently with UNDT, travel was suspended. As mentioned previously, some of my supply of medication is exhausted, I have already exhausted my supply of sitagliptina which I was rationing over the last few weeks taking one instead of the prescribed two. This drug cannot be found in Haiti.

Level 2 ceased operations in August and level 1 ceased operations on Friday. Effectively there are no medical facilities upon which I can rely. I now seek permission to return home to Spain where I can resupply my exhausting drugs, and complete a check-up with my doctor pending the outcome of the UNDT.

8. Having reviewed the information provided by the Applicant the Tribunal considered it necessary to instruct the parties to attend a case management discussion on 16 October 2017.

9. At the CMD the Applicant participated via telephone and the Respondent was represented by his Counsel, Mr. Alister Cumming, who was accompanied by two

representatives of the Department of Field Support,, namely Mr. Berkan Manaigo-Vekil and Mr. Prin Shasimaran.

10. During the discussions it was clarified by the parties that travel arrangements were organized for the Ap

While MINUSTAH staff have repeatedly been informed in Town Hall meetings and through Broadcasts that they will not be retained past 15 October 2017 unless they find other employment in the System.

To satisfy this, in or arouqius0

Drawdown as Chairman of the MINUSTAH [Field Service Union,

14.

Prima facie unlawfulness

a. It is evident that the Applicant is a staff member in need of placement within the meaning of staff rule 9.6(e) and ST/AI/2010/3 (Staff selection system), sec. 11. Also, with a medical condition that requires Level 4 medical facilities;

b. The Dispute Tribunal has previously determined that the Administration has an obligation to place a staff member in this situation on a suitable post for which he/she is qualified, even though the staff member may not be the best qualified candidate (*Lemonnier* UNDT/2016/186, para. 36). Indeed, the Applicant has a right to be accorded preference and be placed without competing with external candidates or other internal candidates not in need of placement, or with a lower priority of retention as listed in al condition would also contribute to the level of his priority;

c. By the Administration insisting that the Applicant is to deploy to a mission without level 4 medical facilities, and being fully cognizant of his medical condition, he would be placed at significant risk;

d. By advertising a Recruit from Roster vacancy for which the Applicant is obviously qualified, the Administration is in fact disregarding this right and forcing him to accept a post without the required medical facilities, while the post in UNFICYP remains unencumbered and has appropriate medical

facilities. In *Lemonnier*, the Dispute Tribunal qualified this practice as a

e. On 13 October 2017, the Applicant filed an additional submission regarding *prima facie* unlawfulness stating:

It is established law that it is an unlawful criminal offense to place any person at risk or peril or expose a person to material danger.

As demonstrated above the Director of Field Personnel

medical condition; [The Director] is aware the Mission UNSOS does not have appropriate level 4 medical facilities as prescribed in [reference to annex omitted]; placing a staff member to a duty station without appropriate level 4 medical facilities would t

recognized crime of behaving indifferently to the consequences

The singular conclusion that can be drawn from these facts is that [The Director] did with malevolence design the reassignment with a malicious intent and to the detriment of the staff member and the Organization.

In closing, the authority to reassign a staff member from one mission to another is not contested. However, arriving at such decision does not preclude the consideration of related facts such as the staff members medical condition. In the practice of good corporate responsibility and duty of care, such a decision would not have taken place. Therefore, I would conclude that the lawfulness or unlawfulness of the decision is established on this basis.

Urgency

f. The Administration can at any moment decide to fill the Recruit from Roster vacancy with a rostered applicant, which would result in the position not being available for placing the Applicant, it would also place him in jeopardy not to have appropriate medical facilities as his condition requires, thereby obliging his separation on 15 October 2017. The Tribunal is requested to suspend all action on filling the post pending management evaluation;

g. As a candidate may be selected at any moment, the Applicant further requests the Tribunal to suspend recruitment pending the deliberation on this suspension of action request;

Irreparable damage

h. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm. If the Applicant is not placed, he will be obliged to separate from service effective 15 October 2017;

i. Additionally, being aware of the App medical condition and as the Organization has placed sufficient emphasis on the health and safety of staff, as per art. 13 of General Assembly resolution 68/265, placing him in a

in Mombasa. The Applicant will also have access to the level 4 hospital in Nairobi to meet any medical needs that arise.

16. In his 17 October 2017 reply, the Respondent further submitted that:

The lawfulness of the contested decisions

a. The contested decision is lawful, and the Applicant has not provided any evidence that the contested decision is unlawful;

b. the authority of the Secretary-General and to assignment by him or her to any

;

c. In the case of *Rees* 2012-UNAT-266, the Appeals Tribunal held that in t is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures ;

d. The Dispute Tribunal will give due deference to such relocation and reassignment decisions, unless they are illegal, irrational or procedurally flawed, or in exceptional cases, where a measure is disproportionate. The Dispute Tribunal will only interfere where the staff member meets his or her burden with regard to such decisions being based on a mistake of fact, a lack of due process, or if it is arbitrary or motivated by prejudice or other extraneous factors. It is not for the Dispute Tribunal to conduct a *de novo* review of the merits of the reassignment decision;

e. On 13 April 2017, the Security Council decided that MINUSTAH would close on 15 October 2017. A new mission, MINUJUSTH, was

will also have access to the Level IV hospital in Nairobi to meet any additional medical needs that arise.

List of available suitable posts at the same level or at a lower level presented to the Applicant

o. No such list was presented to the Applicant.

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managed by a contract company. This facility is for stabilization and evacuation, though they have performed vascular surgery when required.

27.

c. To contradict sec. 3.2(b)

33. Noting that the Applicant requested, as part of the present application under the heading,

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