UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/028
Judgment No.: UNDT/2011/136
Date: 29 July 2011
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SLADE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON SUSPENSION OF ACTION

Counsel for Applicant:
André Sirois, Attorney-at-Law

Counsel for Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Friend-of-Court
James Butler, President, United Nations Field Staff Union

Introduction

1. On 31 January 2011 and 29 March 2011, the Applicant requested management evaluation of the decision to discontinue payment of the Personal Transitional Allowance (PTA) by the United Nations Stabilization Mission in the Democratic Republic of Congo (MONUSCO) Administration.

2. On 18 April 2011, the Management Evaluation Unit (MEU) informed the Applicant that since she had submitted the management evaluation request as part of a collaborative effort, representing thirty four (34) other staff members, the MEU's Terms of Reference did not make provision for evaluating administrative decisions based on "class action" or representative claims. In order to consider the requests for

the parties and submissions from the President of the FSU. On 5 July 2011, the Respondent filed a Reply to the FSU's "friend-of-court" brief.

6. On 8 July 2011, the Tribunal issued Order No. 71 (NBI/2011) in which it refused the Application for suspension of action for not having satisfied the three conditions required under the Statute and Article 13 of the Tribunal's Rules of Procedure for its grant. The Tribunal also informed the parties that a reasoned judgment on this Application would be issued on 29 July 2011 and that it would formulate questions that ought to be further and properly addressed by the parties and the amicus curiae in the hearing on the merits.

The Applicant's case

7. The Applicant's case may be summarized as follows:

8. The United Nations Administration intended to begin implementing, on 1 July 2011, the Harmonization of Conditions of Service for Internationally-Recruited Staff

The Respondent's case

18. The Respondent's case may be summarized as follows:

19. On 27 August 2010, the Chairman of the International Civil Service Commission (ICSC) transmitted its thirty-sixth annual report to the General Assembly setting out its decisions and recommendations, inter alia, on conditions of service of staff in field operations.

20. Following the issuance of the ICSC's recommendations, the Secretary-General submitted his report, A/65/305/Add.1 (Human resources management reform: contractual arrangements and harmonization of conditions of service) of 7 September 2010, to the General Assembly. In paragraphs 12 and 13 of the said report, the

23. Following the approval by the General Assembly, the Department of Field Support, Field Personnel Division (DFS/FPD), conducted town hall meetings through video-conferences with all missions including MONUSCO, the Applicant's mission, to inform staff of the upcoming changes during the months of February and March 2011. In addition, DFS/FPD provided several missions with detailed information on General Assembly resolution A/RES/65/248 (United Nations Common system: report of the International Civil Service Commission) and its implications. It further requested further dissemination of the information to staff members, including operational guidance to missions for implementation of General Assembly resolution A/RES/65/248, particularly regarding preparation and planning for changes effective 1 July 2011.

24. With the approval by the General Assembly of the recommendation to harmonize conditions of service, offset by the discontinuance of PTA, there is no basis for paying the PTA beyond 30 June 2011.

25. Based on the facts set out above, the Respondent submits that the instant Application is not receivable as the contested decision was not a discretionary decision taken by the Secretary-General and, as such, is not an 'administrative

policy decision was of general application to all staff and cannot be deemed to affect the terms of appointment or contract of employment of any one staff member. Where a decision does not affect the terms of appointment or contract of employment of a staff member, such a matter would not come within the scope of the Dispute Tribunal's jurisdiction, as defined in Article 2(1)(a) of the UNDT Statute.

28. The three statutory prerequisites contained in art 2.2 of the Dispute Tribunal Statute, must be satisfied for an application for suspension of action to be granted. When considering an application for suspension of action, the Tribunal is only required to determine, based on a review of the evidence presented, whether the contested decision "appears" to be prima facie unlawful. This means that the Tribunal need not find that the decision is incontrovertibly unlawful. The Applicant bears the burden of proof to prove all three elements in order for her Application to be granted.

29. The Applicant has failed to demonstrate that the contested decision is prima facie unlawful. The Dispute Tribunal has held that the requirement of prima facie unlawfulness is met if it has "serious and reasonable doubts about the lawfulness of the contested decision[2]." Under this standard, there is no evidence before the Dispute Tribunal upon which it can reasonably conclude that the Secretary-General's acted prima facie unlawfully in implementing the decision of the General Assembly.

30. The Applicant's contention that the staff members' associations were not consulted during the ICSC's or the General Assembly's deliberations is without merit. The General Assembly's decision regarding the conditions of service at non-family duty stations was reached following extensive consultations with concerned parties, including the Federation of International Civil Servants' Associationnnnnn.34 -nn.34 -n

31. The ICSC's recommendations therefore formed the basis for the General Assembly's decision. UNISERV, amongst other Staff Unions, were directly involved in the formulations of the recommendations

is eventually found to be incorrect having been decided on the merits. Accordingly, there is no need for an urgent relief such as suspending the decision to implement the General Assembly's resolution.

38. The Applicant has only asserted a potential financial loss as a result of the contested decision and no non-pecuniary loss such as harm to her career prospects or reputation. Accordingly, the Applicant has therefore failed to meet her burden of establishing that she would be irreparably harmed in the event her application for suspension of action is not granted.

39. The Applicant further submits that the matter is urgent because the implementation of the contested decision takes effect on 1 July 2011. Though the decision will be implemented on 1 July 2011, the Applicant, however, has not satisfied the two other elements above in order to prevail.

40. In view of the foregoing, the Respondent requests the Tribunal to reject the Application in its entirety.

ST/SGB/274 (Procedures and Terms of Reference of the Staff Management Consultation Machinery at the Departmental or Office Level).

45. In adopting resolution A/RES/65/248, the General Assembly has not, and could not have released the administration from its duty to act in accordance with the law and from its obligation to respect the terms and conditions of employment of the individual contracts it has signed with its various staff members. Neither has it released the administration from its other legal obligations. In resolution A/RES/65/251, the General Assembly has stated specifically that "all elements of the new system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly" and this includes the United Nations recruitment procedure done exclusively by individual contracts.

46. Since the legal and regulatory framework approved by the General Assembly provides for individual contracts with United Nations staff members as the exclusive means of recruitment, the United Nations has nothing but individual contracts with staff members and the only way therefore to modify an existing contract would be by consent of the United Nations and each and every staff member.

47. Since the United Nations does not recognize collective bargaining and as none of the staff members has ever delegated his or her contractual rights, neither the associations of staff members nor their various federations, are mandated to agree to the modification of the individual contracts of its staff members on their behalf. They can talk, discuss and consult on behalf of their members, when and if consulted by the management, but they cannot substitute themselves to the individual employees who have signed contracts to modify their individual contracts. They have neither the authority nor the mandate to do so. This is part of the legal and regulatory framework approved by the General Assembly.

48. In order to implement the changes

intent to modify the existing contract between them and of the proposed changes, and then obtain their agreement to these modifications.

49. The United Nations Administration has decided to proceed unilaterally in this case and to impose its modifications to the contract without any consultation with the staff members, without informing them individually and without bothering to obtain their agreement.

50. The FSU, which represents more than 7200 staff members working in various UN missions, has not been consulted and, even if it had been, would not have consented to modify the contracts of individual staff members. In its Reply to the present Applicant's Application, the UN Administration claims that it has consulted some staff unions and some federations of staff unions but it has never consulted FSU, the union of the staff members directly concerned.

51. In its actions concerning the implementation of the impugned decision, the UN Administration seems to have confused information and consultation. It is not sufficient to inform the staff members or the associations for the Administration to claim that they have been consulted. Those are two very different administrative actions. Moreover, the UN Administration cannot satisfy its obligation to inform the concerned staff member and get his or her agreement by having some town hall meetings, much less, by presenting, as it does, exchange of communications between various administrators of UN as these are totally irrelevant.

52. A large number of staff members have never been informed at all of the administrative decision to substantially modify the contracts they entered into with

present Applicant and her colleagues have demonstrated. The changes to the individual contracts of the staff members are of three main types: changes of the conditions of service for the Field Service Officers Category; discontinuation of the Personal Transitional Allowances (PTA); and changes in the status of duty stations from non-family to family duty stations. These changes have some considerable consequences on the terms and conditions of employment of each of the staff members concerned. Resolution A/RES/65/248 does not mention any of these changes but the way the UN Administration is trying to implement it has the effect of changing the terms and conditions of employment of each of the staff members concerned.

54. In its Reply, the Respondent states that the impugned decision is not of an individual application because it will also affect other similar situated staff members. It is impossible to reconcile that with the fact that the United Nations has chosen not to have collective bargaining and to establish only individual contracts with its staff members. The United Nations has chosen to reject the proposition to allow class actions in the reform of the internal justice system. To accept such a reasoning would mean that as soon as more than one staff member is affected by an administrative decision these staff members would have no remedy.

55. The Respondent refers to Andati-Amwayi. That case dealt with a policy decision which is not the case here where the challenged decision is a very specific decision of implementation and which is not at all the same thing. Moreover, beside having to do with a policy decision, Andati-Amwayi refers to a policy decision that affected all staff members. In this instance, the Applicant is not challenging a policy decision and the decision she is challenging does not affect all staff members. Hence Andati-Amwayi is not relevant in the present instance.

56. With respect to irreparable harm, the United Nations has a long institutional tradition of never correcting any wrong decisions and harm done even in the most blatant cases where the Administrative Tribunal had condemned the administration in no uncertain terms and had underlined the excellent quality of service of the members

such as in the case of Dzuverovic[4]. Once a decision is implemented, the administration pleads expediency and it is only extremely exceptional cases that it will be revised and the staff member must live with it and this would be especially

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provision in the Rules for a staff association to intervene in a case by way of filing a "friend-of-court" brief, which is meant to assist the Dispute Tribunal in its determination of the case.

61. The Respondent submits that the purpose of a "friend-of-court" brief is not to make arguments on behalf of one of the parties, but to assist the Dispute Tribunal by addressing the issues that are raised by the parties. The brief does not assist the Dispute Tribunal. It is argumentative in nature and does not make any informed, substantive and cogent submissions on the legal framework regarding the conditions of service of Field Service. Insofar as the Applicant and the FSU share the same Counsel, the brief is in effect a second opportunity for the Applicant to file submissions in addition to those made in her Application.

62. The FSU was represented by UNISERV during the ICSC's review of the Organization's conditions of service for field staff. In the Reply to the Application, the Respondent attached documentary evidence indicating that the FSU's concerns were already reviewed and communicated to the ICSC, the Secretary-General and the General Assembly, before resolution 65/248 was adopted.

63. The Secretary-General, as the chief administrative officer, does not have the authority not to implement the General Assembly's resolution. At best, the Secretary-General may advise the General Assembly on the financial costs that would be incurred in implementing a specific resolution. In this case, the report of the Secretary-General on the financial implications of the ICSC's recommendations makes it clear that the abolishment of PTA would be a consequence of the harmonization of conditions of service.

64. The report of the Secretary-General on the harmonization of conditions of service, which was submitted to the General Assembly before the adoption of resolution 65/248, expressly states that the PTA would be eliminated.

65. On 5 July 2011, the Applicant filed additional documents in support of her Application. In the memorandum from the Chief, CCPO, to the Applicant, dated 30

April 2009, concerning the new contractual arrangements for international staff holding 300 series mission appointments in special missions, the Applicant was offered a new fixed-term appointment for one year effective from 1 July 2010. Paragraph 3 of the memorandum addressed the payment of the PTA and stated, in part, that the Personal Transition Allowance would be gradually phased out. The Applicant signed the memorandum on 8 May 2009.

66. The submission by the FSU that the Or

> alleged to be in non-compliance with the terms of appointment or the contract of employment.

70. Article 2 first confers the Tribunal with the jurisdiction to determine, in any application filed by an individual before it, whether the contested decision is an "administrative decision" and whether it was made in compliance with or contrary to an individual's terms of appointment or contract of employment. In other words, it is for the Tribunal to determine, inter alia, in any given case, whether a contested decision qualifies as an "administrative decision" or not.

71. The Tribunal finds that the facts of the present case raise important substantive matters for its consideration. Among these worthy issues is the question of whether the Applicant's terms and conditions of employment have been breached. In view of this, the Tribunal finds that the present Application is receivable.

Friend-of-Court brief

72. The Respondent had requested the Tribunal to reject the Application by the FSU to file a "friend of court" brief on the grounds that: the brief was not an impartial submission aimed at assisting the Dispute Tribunal; the brief was a supplementary submission in support of the Application; and that there is no provision in the Tribunal's Rules of Procedure for a staff association to intervene in a case by way of filing a "friend-of-court" brief.

73. Contrary to the Respondent's contentions, art. 24(1) of the Tribunal's Rules of Procedure expressly provides that a staff association may submit a signed application to file a "friend-of-court" brief on the form to be prescribed by the Registrar. As a matter of law and practice, a "friend-of-court" brief is a legal position on the issues for determination before the Tribunal from the point of view of the said "friend-of-court". Article 24(2) provides that the Tribunal will grant the Application to file such a brief if it considers that the filing of the brief "would assist the Dispute Tribunal in its deliberations."

74. In the present case, the Tribunal is of the view that the FSU's "friend-of-court" brief will assist in its deliberations in this case.

Is the Impugned Decision unlawful?

75. In dealing with the first requirement of the conditions precedent to establishing the grounds for the grant of a suspension of action under the Statute of the Dispute Tribunal, the Applicant submitted that she was not challenging General Assembly resolution A/RES/65/248 but was challenging the way the said resolution was being implemented. She argues that the implementation is unilateral, that her employment contract had been changed without her agreement and that the decision would have retroactive effects. The Applicant also argues that the impugned decision is discriminatory in that it affects mainly single women without dependants much more than any other employees.

76. With respect to the question of unlawfulness, the amicus curiae submitted, inter alia, that the FSU was not contesting the resolution A/RES/65/248 but rather the means the United Nations Administration had taken to implement it. The amicus curiae further submitted that in its Reply, the Respondent stated that the impugned decision was not of an individual application because it would also affect other similar situated staff members. It would also be impossible to reconcile that with the fact that the United Nations has chosen not to allow collective bargaining and by establishing only individual contracts with its staff members. The amicus further submits that the United Nations has chosen to reject the proposition to allow class actions in the reform of the internal justice system and therefore to accept such reasoning would mean that as soon as more than a staff member is affected by an administrative decision these staff members would have no remedy.

77. The Respondent argues that the instant Application is not receivable as the contested decision was not a discretionary decision taken by the Secretary-General and, as such, is not an "administrative decision" within the meaning of art. 2(1) of the Statute of the Tribunal. The Respondent argues that the contested decision is also not

of an individual application because it will also affect other similar situated staff members. The Respondent further submits that in paragraph 23 of Andati-Amwayi the Appeals Tribunal ruled that a policy decision that was of "general application to all staff and cannot be deemed to affect the terms of appointment or contract of employment of any one staff member".

78. Having established that the instant Application falls within its competence as stipulated in art. 2(1)(a) of the Statute of the Dispute Tribunal, the Tribunal, however, finds that the Applicant, has failed to establish the element of unlawfulness.

The element of urgency

79. The second condition precedent for the grant of a suspension of action is urgency. The Applicant's Counsel submitted that the matter is of an urgent nature because the United Nations Administration planned to start implementation on 1 July 2011 without having considering the Applicant's objections, her pending case at the MEU as well as the objections of numerous other staff members who object to these changes to their contracts.

80. The Tribunal observes that the Applicant was aware of the impugned decision as far back as 31 January 2011 and that the instant Application for suspension of action was filed only on 27 June 2011. The Tribunal reiterates that parties appearing before it must actively and diligently pursue their courses of action. The Tribunal, therefore, finds that the element of urgency is not met.

Irreparable damage

81. It is the case of the Applicant that the irreparable harm that would be caused by the impugned decision is the fact that from the end of July her salary will reduce by $1300. She submits that due to the high cost of living in Kinshasa, the rent payable for a one bedroom apartment costs, on average, $1300 and that this will force her to share an apartment which would mean loss of privacy for her.

82. The Applicant submits that she has a second house in her home country and that she has to pay someone to look after her house there. The Applicant further submits that the impugned decision will also affect her ability to afford plane tickets to visit her family and would also affect her career in the United Nations and that, in addition, the harm to her would be irreparable because the Administration will never want to go back once the changes have been made. This would present staff members with a fait accompliand argues that it is impossible to go back and correct the harm that would have been caused.

83. Having considered the Applicant's submissions, the Tribunal finds that any harm suffered by the Applicant as a

on the merits. The Tribunal recalls that in Order No. 71 (NBI/2011), it ordered that the hearing of this matter on the merits should be accelerated.

87. Further to the Tribunal's directions in Order No. 71 (NBI/2011), Counsel for the parties and the amicus curiae are required to provide the Registry, by or before 1 September 2011, with further and substantive submissions on the following issues:

a. Whether the Personal Transitional Allowance is part of the terms and conditions of service of the Applicant;

b. Whether the receipt of a Personal Transitional Allowance is a legitimate expectation for a staff member in the Applicant's position and station;

c. Whether the impugned decision constitutes a unilateral modification of the terms and conditions of the employment contract;

d. Whether, in view of the facts in the present case, the Administration had a duty to consult staff members and/or staff associations regarding the implementation of the General Assembly resolution in issue;

e. Whether, in view of the facts in the present case, the Administration has unlawfully ignored the protests of staff associations and individual staff members; and

f. Whether international labour standards and the United Nation's Charter have been breached in the process of the implementation of the General assembly resolution on the Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions.

(Signed)

Judge Nkemdilim Izuako
Dated this 29th day of July 2011

Entered in the Register on this 29th day of July 2011

(Signed)