



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Louis-Philippe Lapicerella, OSLA

Counsel for the Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Economic Commission for Africa (ECA), based in Niamey, Niger, is applying for suspension of the decision to place her on administrative leave with full pay with immediate effect from 11 January 2012.

2. The Applicant requested a management evaluation of this decision on 7 February 2012 and is awaiting the outcome. On 9 February, pending management evaluation, the Applicant filed the present request for suspension of action pursuant to article 13 of the Rules of Procedure of the United Nations Dispute Tribunal (UNDT). On the same day, it the request was served on the Respondent.

3. On 10 February 2012, the Respondent filed a Reply, and on 14 February, in response to the Reply, the Applicant filed a Motion to File Additional Evidence.

Facts

4. The Applicant joined the ECA on 14 November 2009 as Director of the Niamey Sub-Regional Office for West Africa (SRO-WA).

5. When she took up her duties the Applicant began a restructuring and reform programme in the office. However, within months, a number of staff members lodged complaints against the Applicant with the Executive Secretary of ECA, Mr. Abdoulie Janneh, alleging *inter alia* that the Applicant had repeatedly accused them of dishonesty or incompetence; that she had threatened their contractual status; that she repeatedly shouted at them; that she delayed payment of, or threatened not to pay, entitlements; and that she improperly used office property. These complaints amounted to allegations of harassment, discrimination and abuse of authority, and indeed formal complaints pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) were presented to Mr. Janneh on 28 February and 30 March 2011.

6. On 4 May 2011, the Executive Secretary established a fact-finding panel (“the Panel”) to review the complaints, and the Panel travelled from Addis Ababa, Ethiopia, to Niamey to conduct their investigation from 10-13 May 2011.

7. The Panel met with the Applicant on 12 May 2011. The Panel also conducted interviews with 18 staff members. When the investigation was complete, the Panel sent a report to the Executive Secretary on 11 June 2011 [“the Report”]. The Report concluded that some of the complaints were well-founded.

8. On 18 November 2012, Mr. Janneh wrote to Ms. Catherine Pollard, Assistant Secretary-General for Human Resources Management (“ASG/OHRM”), summarising the findings of the Panel and expressing the view that he shared the Panel’s conclusions that the Applicant’s behaviour did constitute harassment and created a hostile environment in the Niamey office. He further agreed with the Panel that in certain areas, the Applicant’s conduct amounted to abuse of authority, and may constitute misconduct. Mr. Janneh indicated that it would be unwise to leave the Applicant in charge of the Niamey office “in which she has created a high degree of hostility and tension, and where the potential for further staff harassment is high.” Mr. Janneh requested the guidance of the ASG/OHRM.

9. On 29 November 2011, the ASG/OHRM responded to Mr. Janneh, citing ST/AI/371 (Revised disciplinary measures and procedures), and requesting further information so as to ascertain whether it would be appropriate to place the Applicant on administrative leave or to redeploy her to a position commensurate with her qualifications and experience. The letter contained a document entitled “Guidelines for placement on special leave with pay in the context of an investigation”, dated 7 August 2008 (“the Guidelines”).

10. On 12 December 2011, the Executive Secretary replied to the ASG/OHRM, indicating that he did not believe that the Applicant could function properly as the Director of SRO-WA in view of the existing situation and also that there was no commensurate post to which she could be moved. Consequently, the Executive

Secretary's view was that "it would be best in the circumstances to ask [the Applicant] to proceed on administrative leave."

11. On 15 December 2011 a letter from the ASG/OHRM to the Applicant informing her that she was to be placed on administrative leave with full pay was prepared ("the Administrative Leave Letter"). It was delivered to ECA on 20 December. Due to absences from the office over the Christmas period, including that of the Applicant, the Administrative Leave Letter was not in fact delivered until 11 January 2012.

12. There is a dispute between the Parties as to how the Administrative Leave Letter was delivered and how the Applicant was treated thereafter. The Applicant maintains that on 11 January 2012, the Chief of Human Resources Staff Services ("Chief/HRSS") and the Chief of Security Services ("Chief/SS") from ECA in Addis Ababa, Ethiopia, entered the Applicant's office and informed her that she had been put on administrative leave. The Applicant's portable computer, iPad, mobile phone and high frequency radio were confiscated. The Applicant was then presented with the Administrative Leave Letter and escorted out of her office without any prior notice or warning. The Applicant describes this as a "humiliating expulsion" from the office.

13. The Respondent, on the other hand, states that on 12 January 2012, the Chief/HRSS and Chief/SS attended the Applicant in her office at approximately 9.10 a.m. and gave her the Administrative Leave Letter. The Applicant expressed reservations about the visitation without any prior notice, and asked for time to consider the situation. The Applicant led the Chief/HRSS and Chief/SS to a vacant office and they waited there. After some time, the Applicant and the Chief/HRSS and Chief/SS met again and the Applicant asked to remain in the office until the end of the day so that she would not be seen removing her possessions. She did not leave the office until 8.30 p.m., after the other staff had left, and drove off in her own personal vehicle, taking her access card and her official mobile phone with her. The Applicant had asked to retain her phone so that she could transfer the contact details to her personal phone. The following day the Applicant returned the phone, but retained the SIM cards.

14. The content of the Administrative Leave Letter is as follows:

Dear Ms. Ba,

By memorandum dated 18 November 2011, Mr. Abdoulie Janneh, Executive Secretary, Economic Commission for Africa (ECA), referred your case to me for appropriate action. The referral was based on the contents of an investigation report, concerning allegations that you had acted contrary to the provisions of ST/SGB/2008/5 (“Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority”). The Office of Human Resources Management (OHRM) is currently reviewing the investigation report.

The purpose of this letter is to advise you that I have decided, on behalf of the Secretary-General, and based on the information provided to me by ECA, to place you on administrative leave with full pay with immediate effect, pursuant to staff rule 10.4. The administrative leave will continue for a period of three months or until completion of OHRM’s review of the investigation report, whichever is earlier, at which point the matter will be revisited. The reasons for your placement on administrative leave include ECA’s assessment that, given the nature of the complaints against you, it is unlikely that you will be able to function effectively in your role as head of the Niamey Sub-Regional Office in the immediate future.

Please note that your placement on administrative leave is without prejudice to your rights and does not constitute a disciplinary measure. It will be subject to review depending on the development of your case and may, if the circumstances so warrant, be extended. You will be informed promptly of any decisions made regarding your status.

During the period of administrative leave, you are required to obtain permission before leaving the duty station and you must provide current contact information. You may only enter United Nations premises under escort and with prior permission from ECA Headquarters.

In addition, during your placement on administrative leave, please note that you remain a staff member of the United Nations and you are, accordingly, subject to the Staff Regulations, the Staff Rules and other administrative issuances.

15. Apart from the Administrative Leave Letter cited above, the Applicant states that she has not been provided with any further information about the investigation or the reasons for her being placed on administrative leave.

The Applicant's submissions

Prima Facie unlawfulness

16. The Applicant contends that being placed on administrative leave in the manner detailed above is unlawful for a number of reasons. Firstly, the Applicant has not been given adequate reasons for being placed on administrative leave. Staff Rule 10.4(b) requires the Respondent to give a written statement of the reason(s) for the leave, and the Applicant contends that the letter of 15 December provides insufficient detail to fulfil that requirement.

17. Secondly, the Applicant contends that the reasons that were given for placing the Applicant on administrative leave were improper reasons, such as the likelihood that the Applicant “will not be able to function effectively”, which does not constitute a proper reason under the relevant provisions of ST/AI/371 (Revised Disciplinary Measures and Procedures).

18. Thirdly, the Applicant contends that the ASG/OHRM “simply rubberstamped the recommendation of the Executive Secretary of ECA”, thereby failing properly to exercise the jurisdiction granted to her by ST/AI/371, which requires that the ASG/OHRM considers the evidence herself. Since the ASG/OHRM’s letter indicates that “OHRM is currently reviewing the investigation report”, it is clear that the ASG/OHRM has not herself reviewed the evidence.

19. Fourthly, the Applicant contends that the decision to place the Applicant on administrative leave was premature, since section 3 of ST/AI/371 requires that the report of alleged misconduct is “well-founded”. Since the ASG/OHRM’s letter indicates that the ASG/OHRM “shall decide whether the matter should be pursued, and if so, whether [administrative leave] is warranted”, the obvious implication is that, at the time of writing the letter, the case against the Applicant was not established. Further, the Applicant contends that the Administration should first have considered redeployment, as provided

by paragraph 4 of ST/AI/371, and only where redeployment is “not feasible”, should administrative leave be imposed.

20. The final contention of the Applicant regarding the unlawfulness of the decision is that it violated the Applicant’s right to dignity, liberty, and security. The Applicant states that she was treated like a high-profile criminal and that her personal security has been put at risk by the actions of the Respondent. The removal of her mobile phone and high frequency radio—which is used exclusively for security reasons—renders her particularly vulnerable in a country where even local staff members are provided with radios for security reasons.

21. The Applicant contends that the restrictions on her movements imposed in the ASG/OHRM’s letter are nowhere provided for in ST/AI/371 or elsewhere in the rules and regulations governing the Applicant’s employment. In particular, the Applicant contends that the requirement that the Applicant obtain authorization in order to leave the duty station is *ultra vires*.

Urgency

22. The Applicant contends that the urgency stems from the confinement of the Applicant to a hardship duty station without any protection. She is completely isolated in a dangerous place.

Irreparable harm

23. The Applicant argues that without a suspension of action, her rights cannot be preserved. She has been and continues to be subjected to humiliation and her reputation is at stake. Monetary compensation is not enough to rectify this and the Applicant ought to be permitted to continue performing her duties as Director of SRO-WA, or to be redeployed.

The Respondent's Submissions

24. The Respondent opposes the Application. The respondent contends that suspension of action cannot be granted where the contested decision has been implemented, and that in the present case, the decision has indeed been implemented, since the Applicant was placed on administrative leave on 11 January 2012.

25. The Respondent further contends that the Applicant has not established the *prima facie* unlawfulness of the decision. The record shows that the decision-making process complied with the applicable rules.

26. The Respondent contends that the Applicant has not shown the matter to be urgent, or, if there is any urgency, it has been created by the Applicant herself, since the Applicant waited for some 4 weeks after the decision was implemented, before contesting it.

27. Finally, the Respondent argues that the decision has no impact on the Applicant's career prospects and that therefore any loss may be fully compensated by a financial award and as such, the element of irreparable harm required by the Statute of the Dispute Tribunal has not been fulfilled.

Consideration

28. In view of the documentation filed by the Applicant and the Respondent and in light of the requirements of article 13.3 of the Tribunal's Rules of Procedure, the Tribunal does not consider it necessary to hold a hearing in this case.

29. Pursuant to article 13 of its Rules of Procedure, the 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.

Has the decision been fully implemented?

30. The first question for consideration is whether or not the decision can be said to have been fully implemented, as argued by the Respondent, rendering the Application moot. As stated in *Nwuke* UNDT/2012/002, “[i]t is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.” However, in *Calvani* UNDT/2009/092, at paragraph 21, it was held that “the decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effects during that period of time and can only be deemed to have been implemented in its entirety at the end of the administrative leave.” The Respondent seeks to distinguish the present case because here the Applicant is on administrative leave *with* pay. The Respondent argues that where a staff member such as in *Calvani* is being deprived of their pay and other benefits, there is a continuing legal effect, but where a staff member is in receipt of pay, this does not occur.

31. There is no logic to this argument and it cannot be accepted. The continuing legal effect is carried forward by the suspension from duties, regardless of whether or not a staff member is being paid. Thus it is firmly the view of this Tribunal that a decision to place a staff member on administrative leave—with or without pay—is a decision with continuing effect which may be suspended by the Tribunal at any time as long as the administrative leave endures. As Judge Ebrahim-Carstens stated in *Hassanin* Order No. 83 (NY/2011), at paragraph 15:

To allow the Respondent’s interpretation would be to render the Tribunal impotent. It cannot have been the intention of the drafters of the Statute that the Tribunal should have no power to dispense justice (in this context, by granting urgent and limited interlocutory relief) where the Respondent notifies a staff member of a decision at the time of, or at the eleventh hour before the “implementation” of a decision. This would allow even the most tainted and unlawful decision to stand, so long as it has been implemented hastily.

Prima facie unlawfulness

32. The next question for the Tribunal is whether or not the Applicant has made out a *prima facie* case of unlawfulness in the decision to place her on administrative leave with full pay.

33. The contested decision was taken pursuant to staff rule 10.4, which provides that:

- (a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time pending an investigation until the completion of the disciplinary process.
- (b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration, which, so far as practicable, should not exceed three months.
- (c) Administrative leave shall be with full pay unless, in exceptional circumstances, the Secretary-General decides that administrative leave without pay is warranted.
- (d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal, any pay withheld shall be restored without delay.
- (e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

34. Thus it is apparent that the Secretary-General has a broad discretion to place a staff member on administrative leave at any time from the moment an investigation is pending until the completion of a disciplinary process, should such occur. ST/AI/371 gives the ASG/OHRM the authority to place staff member on administrative leave, and states that “as a general principle, suspension may be contemplated if the conduct in question might pose a danger to other staff members or the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible”. The

Tribunal's role is to consider whether, in light of the information before him, the Secretary-General or his delegated authority, exercised his discretion reasonably and fairly and without breaching the due process rights of the Applicant.

Adequacy and propriety of reasons for placing the Applicant on administrative leave

35. Regarding the Applicant's argument that she was given inadequate and/or improper reasons for being placed on administrative leave, the Tribunal does not concur. In accordance with ST/AI/371, the Executive Secretary established a fact-finding panel to look into the allegations of harassment, discrimination and abuse of authority which had been made against the Applicant by a number of staff members. The Panel so established conducted what appears to be a very careful and thorough review of the evidence, including conducting a large number of interviews and spending a considerable time interviewing the Applicant and informing her of the nature of their enquiry. The Tribunal observes that the Panel took great care in preparing the Report and was apparently very fair, indicating when certain allegations fell more into the ambit of performance management or performance-related issues than the matters covered by ST/AI/371, and dismissing other allegations for lack of evidence.

36. Whilst the Panel did not consider all of the allegations to be well-founded, it is clear that some of the allegations were, on the face of it, substantiated.

37. Although the Administrative Leave Letter did not spell out the precise allegations that had formed the basis of the fact-finding investigation, the Tribunal is satisfied that the Panel had made it clear to the Applicant what their investigation was about and that the references made thereto in the Administrative Leave Letter could have left the Applicant in no doubt as to the reasons behind her suspension. As to the propriety of the reasons, whilst it is not the duty of the Tribunal at this stage to consider the merits or not of the substance of the allegations, it is clear that where allegations involve the creation of a climate of hostility in an isolated office, there may very well be no other option than to remove the alleged perpetrator from that environment.

Breach of the Applicant's right to dignity, liberty and security

38. The Applicant argues that the manner of her expulsion from the office breached her right to dignity, liberty, and security. Having considered the Respondent's perspective on the manner in which the Applicant was placed on administrative leave, the Tribunal does not feel able to find that the Applicant has made out a *prima facie* case in this regard. However, the Tribunal is disturbed at the suggestion that a staff member based in Niamey, Niger, has had her high frequency radio taken away apparently without any good reason. Since the Applicant remains a staff member, and is not the subject of any disciplinary measure it seems to the Tribunal that this is an unnecessary measure which may well compromise her safety. The Tribunal trusts that the Respondent will take appropriate action to rectify this situation as soon as possible.

39. As to the Applicant's argument that the Respondent's requirement that the Applicant obtain authorization to leave the duty station is *ultra vires*, the Tribunal takes the view that a staff member in active service needs to seek authorization to be absent from his or her duty station, whether for purposes of annual leave or a temporary absence of a different nature. What the Respondent has told the Applicant, who, as pointed out above is still a staff member, albeit on paid leave, is that she should seek authorization before leaving her duty station. This is well within the ambit of the general rules governing the movement of staff and is not *ultra vires*. If such authorization is unreasonably withheld—and there is no evidence that it has even been sought, let alone withheld—the Applicant can always seek the appropriate remedy. What would have been unlawful would be a total prohibition on her freedom of movement. This seems not to be the case here.

Feasibility of redeployment

40. It is clear to the Tribunal that in the present case, the ASG/OHRM, Ms. Catherine Pollard, approached the decision-making process in as fair a manner as could be expected. The ASG/OHRM, based in New York, must rely to a considerable extent, on

the information provided to her by the senior management of ECA, and the Executive Secretary in particular.

41. The ASG/OHRM, upon receipt of the Executive Secretary's submission, made further enquiries, cited the relevant rules and regulations and provided the Executive Secretary with the Guidelines to assist him. This, it seems to the Tribunal, indicates that the ASG/OHRM took great care over the decision-making process, and that as far as she was concerned, it was not a mere rubber-stamping exercise as indicated by the Applicant.

42. However, the Executive Secretary, Mr. Janneh, provided with clear guidance from the ASG/OHRM, does not, *prima facie*, appear to have acted entirely within the law.

43. When questioned by the ASG/OHRM on the subject of redeployment—a highly relevant question—the Executive Secretary stated:

Although the Panel did not pursue in its investigation [sic], there have been allegations of poor management, lack of leadership and vision, which will be addressed separately through performance evaluation. In short, we do not believe that Ms. Ba will be able to function effectively as the Director in the Sub-Regional Office in Niamey in view of the existing situation and in view of the ongoing process, which must be protected in order to arrive at a fair and just settlement. As there is not commensurate post to which Ms. Ba can moved [sic], and if it did exist such option would be very costly for the organization, it would be best in the circumstances to ask her to proceed on administrative leave.

44. The ASG/OHRM appears to have accepted this statement as indicating that redeployment was not feasible. However, the Applicant's evidence suggests that there is a vacant D-1 post in Addis Ababa to which she has recently applied. If such is the case—and *prima facie* it appears to be so—then redeployment was feasible, but as far as the Executive Secretary was concerned, it was not desirable.

45. It is apparent from the above statement by the Executive Secretary that he was contemplating redeployment in the light of the performance-related issues which had been discussed by the Panel in its Report. There are proper procedures for addressing performance issues and using the opportunity provided by the investigation as an excuse

to exclude the Applicant from any work (rather than just from the Niamey office) has only one effect: it taints with prejudice the whole decision-making process and renders it unlawful.

46. Most alarming is the statement by Mr. Janneh that “if [a suitable post] did exist such option would be very costly for the organization”. Cost should have absolutely nothing to do with the feasibility of redeployment. And indeed, nothing can be more costly than paying a staff member their full pay whilst they twiddle their thumbs on administrative leave.

47. ST/AI/371 is quite clear that as a general principle, a staff member should not be placed on administrative leave unless *redeployment is not feasible*. It seems to this Tribunal that there will be very few situations where redeployment really is not feasible in an Organization as large as the United Nations. In a case like that of the Applicant, where the allegations against her do not suggest she is a danger to staff at large or to the security of the Organization or its property, redeployment should be the normal course of action.

48. In light of the above, the Tribunal finds that the Applicant has made out a case of *prima facie* unlawfulness in the decision to place her on administrative leave with full pay and excluding a redeployment exercise.

Urgency

49. Having found a *prima facie* case of unlawfulness, the Tribunal must consider the question of urgency. The Applicant contends that the urgency stems from the confinement of the Applicant to a hardship duty station without any protection. The Tribunal considers there is more to it than that. As stated above, the continuing legal effect of the unlawful decision means that at any stage during its continuance, there is an element of urgency.

50. As to the Respondent's contention, citing *Evangelista* UNDT/2011/212, that "the Applicant cannot seek [the Tribunal's] assistance as a matter of urgency in this case when she has had knowledge of the decision for more than six weeks. Any urgency in this case is [...] of the Applicant's own making"¹—it has been held many times that the Tribunal will not consider matters to be urgent where that urgency is self-created, but by 'self-created', the Tribunal means that the Applicant has delayed approaching the Tribunal until the eve of the implementation of the decision.²

51. In the present case, the decision to place the Applicant on administrative leave has to some extent been implemented, albeit not fully. It is on-going. The urgency derives from the nature of the effect on the Applicant, and is also on-going. For each day that the administrative leave continues, the Applicant suffers a renewed assault on her reputation and her career prospects.

52. The Oxford English Dictionary defines 'urgency' as "[t]he state, condition, or fact of being urgent; pressing necessity; imperativeness. [...] An instance of this; a pressing or urgent need."³ The word 'urgent' is defined as "[d]emanding or requiring prompt action or attention; pressing." The Tribunal considers that the circumstances of this case absolutely fit in to these definitions: the matter is pressing.

53. As stated in *Amar*, "in the face of the gross nature of the unlawfulness of the Impugned Decision and its adverse impact on the Applicant,"⁴ the Tribunal finds that the element of particular urgency is met. The Tribunal takes the view that what would amount to late filing of an application for an interim measure is a matter of procedure and must be decided by considering procedural fairness and the sound administration of justice.

¹ UNDT/2011/212, paragraph 34.

² See for example, *Villamorán* UNDT/2011/126; *Yisma* Order No. 64 (NY/2011).

³ *Shorter Oxford English Dictionary*, 6th Edition, (Oxford University Press, 2007)

⁴ UNDT/2011/040, paragraph 38.

Irreparable harm

54. In *Amar*, the Tribunal stated:

...in depriving [the Applicant] of the opportunity to continue to gain meaningful professional experience in her work, she is exposed to hardship for which she cannot be compensated monetarily. The Respondent submitted orally that any harm including reputational damage can be cured by the award of compensation.

The Tribunal finds no merit in the argument that any harm suffered by the Applicant may be cured by damages. The deprivation of continuing professional experience especially where the administrative decision on which it based is not only unlawful but patently so cannot be adequately compensated in monetary terms.⁵

55. The same would appear to apply in the present case. It is further the view of this Tribunal that Mr. Janneh's memorandum indicates that he does not consider it desirable to continue to employ the Applicant in view of certain performance-related issues. The continuance of the administrative leave will only compound the prejudice against the Applicant in that regard and the Tribunal cannot but conclude that the harm caused by the on-going effect of the decision cannot be remedied by damages alone. Very often the possibility of an irreparable harm to the interest of a staff member may be considered a sufficient indicator of irreparable harm. Irreparable harm should not be confined to material harm but must also encompass moral harm.

Conclusion

56. The Application is granted.

57. The decision to place the Applicant on administrative leave is hereby suspended. The Respondent is ordered to return the Applicant to her post as Director of the Niamey Office of ECA, or to redeploy her elsewhere forthwith.

⁵ UNDT/2011/040, paragraphs 39-40.

(Signed)

Judge Vinod Boolell
Dated this 15th day of February 2012

Entered in the Register on this 15th day of February 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi