



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/028

Order No.: 036 (NBI/2019)

Date: 19 March 2019

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ELDIASTY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Elizabeth Brown, UNHCR
Rebecca Britnell, UNHCR

Introduction

1. On 12 March 2019, the Applicant filed the current application for suspension of action, pending management evaluation, with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi to suspend the decision to place her on Administrative Leave with Full Pay (ALWFP) effective 6 March 2019.

2. The Respondent filed a reply on 18 March 2019.

3. The Applicant filed an application on the merits of her claim on 15 March 2019.

Background facts

4. The Applicant is serving as a Senior Field Coordinator, P-4, in Tripoli, Libya, with the United Nations High Commissioner for Refugees (UNHCR).

5. Between May and December 2018, the Applicant submitted complaints alleging serious irregularities by senior management to the UNHCR Inspector General's Office (IGO) and was interviewed by investigators from the IGO and the Office of Internal Oversight Services (OIOS).

6. Between July and December 2018, the Applicant alleges that she was harassed and mobbed by senior management and other UNHCR staff. Consequently, she submitted a request for protection against retaliation to the UNHCR Ethics Office and a complaint to the IGO on the systematic harassment, abuse of authority and sexual harassment in the workplace in December 2018. The request for protection and the complaint are still pending with the IGO and the Ethics Office.

7. On 11 December 2018, the IGO received allegations of harassment, abuse of authority, intimidation and discrimination against the Applicant. An investigation commenced on 1 February 2019.

8. Between 15 and 20 February 2019, the nine complainants of the 11 December 2018 joint complaint were interviewed by the IGO.

9. The Head of Investigation Service in the IGO subsequently sent a memorandum entitled “Placement of Staff on Administrative Leave – [the Applicant] to the Director, Division of Human Resources (D/DHR). The memorandum highlighted the allegations against the Applicant and the complainants’ fear of retaliation by the Applicant. In light of the foregoing, the IGO informed the D/DHR that it believed there were reasons to believe that the continued presence of the Applicant in her current function in the office might pose a risk to the Organization and that she could retaliate against complainants and witnesses involved in the investigation, destroy, conceal or otherwise tamper with evidence, or interfere with the investigation as per paragraph 4.12.1 of UNCR/OG/2016/04 (Operational Guidelines on Conducting Investigations and Preparing Investigation Reports).

10. On 6 March 2019, the Applicant received a letter dated 4 March 2019 from D/DHR, informing her that: (i) DHR had received initial reports of alleged misconduct against her and that the allegations are of a serious nature; and (ii) due to the allegations, the D/DHR had decided to place her on ALWFP with effect “as of the date of receipt of this letter and continue until 16 May 2019, or until completion of an investigation and any disciplinary process, whichever is earlier.”

11. The Applicant submitted a request for management evaluation on 6 March 2019.

12. On 6 and 7 March 2019, the Applicant wrote to the D/DHR seeking clarification on five issues. The D/DHR responded to her on 14 March 2019. The Applicant responded on 15 March 2019.

13. On 7 March 2019, an investigator from the IGO invited the Applicant for an interview on 19 March 2019 regarding the allegations against her. The investigator provided the Applicant with a notice of investigation that summarized the alleged misconduct and explained the IGO mandate and investigations, the duty to cooperate and the interview.

Considerations

14. Applications for suspension of action are to be decided in accordance with

art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of the Tribunal's Rules of Procedure. Article 2.2:

The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

15. Article 13 of the Rules of Procedure:

1. The Dispute 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.

16. The Tribunal will grant urgent injunctive relief where the Applicant satisfies the three cumulative requirements in art. 2.2 of the Statute and art. 13 of the Tribunal's Rules of Procedure, namely that the decision appears to be *prima facie* unlawful, that the matter appears to be of particular urgency, and that the implementation of the decision would appear to cause irreparable damage.

17. The first issue before the Tribunal is whether the decision to place her on ALWFP is *prima facie* unlawful.

18. The Applicant submits that the contested decision is *prima facie* unlawful for the following reasons:

a. The decision to place her on ALWFP is ill-informed. The D/DHR appears to not have been: (i) fully apprised of the situation in the Libya Office; (ii) aware of the Applicant's role in the IGO's investigations between May

and July 2018 and the retaliation she started facing as a result thereof; or
(iii) aware of the complaints she filed with the IGO and the Ethic's Office.

- b. The decision to place her on ALWFP was issued on 4 March while the first interview with the IGO is scheduled for 19 March 2019. She has not been provided with details of the allegations against her nor has she been given a fair chance to comment or present facts refuting the allegations. The notice that was sent to her for the interview presents false accusations and describes the allegations in a very generic manner.
- c. Placing her on ALWFP while her complaint to the IGO and request for protection are pending is a violation of her rights as a staff member, fails to protect her as a whistleblower and constitutes punitive measures that are unwarranted and unfair.

19. The Respondent submits that the contested decision is lawful for the following reasons:

- a. The question whether the Applicant ought to be entitled to protection from retaliation is currently under review by the Ethic's Office and is not the subject of this Application. This is a separate matter from the Applicant's placement on ALWFP.
- b. The threshold conditions required by staff rule 10.4 and UNHCR/AI/2018/18 for placing the Applicant on ALWFP have been established and were clearly communicated to the Applicant on 7 March 2019.
- c. Contrary to the Applicant's submission, the investigation into the allegations of misconduct commenced on 1 February 2019 although her interview has been scheduled for 19 March 2019.
- d. The Applicant has been provided with an overview of the allegations and will be provided an opportunity to comment and present facts refuting the allegations, both during and after the interview.

20. When considering an application for urgent injunctive relief, the Tribunal is not required to make a conclusive finding but merely to apply the statutory test by forming and expressing an opinion based on the material presented in support of the application.¹

21. The Tribunal notes that staff rule 10.4 is phrased broadly. It allows the Secretary-General to place a staff member on administrative leave “at any time after an allegation of misconduct and pending the completion of a disciplinary process”. The one requirement under this rule is that a staff member should be provided with a written statement of the reason(s) for such leave and its probable duration. Further, administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant placement of a staff member on administrative leave with partial pay or without pay.

22. Additionally, UNHCR/AI/2018/18 on misconduct and the disciplinary process allows the D/DHR, in consultation with the IGO where appropriate, to place a staff member on administrative leave with pay at any time following a report of suspected misconduct if certain factors exist, including: “Continued service by the staff member would create a risk that he/she could destroy, conceal or otherwise tamper with potential evidence, or interfere in any way with the investigation or disciplinary process, including by retaliating against individuals protected under UNHCR’s retaliation policy”.

23. In the present matter, the Applicant was placed on ALWFP almost three months after the nine complainants submitted their joint complaint to the IGO and about a month after the IGO started investigating the allegations. The letter of 4 March 2019 from the D/DHR sets out the reasons for her placement on ALWFP and informs her of the probable duration i.e. until 16 May 2019 or until completion of an investigation and any disciplinary process, whichever is earlier.

24. It appears that the IGO is faced with serious allegations of harassment, abuse of authority, intimidation and discrimination against the Applicant from

¹ *Kebede* Order No. 211 (NBI/2017).

nine staff members. The Tribunal notes that the decision to place the Applicant on ALWFP was not made in a vacuum but was made because of interviews the IGO had with the complainants in February 2019. The IGO ascertained during these interviews that the complainants are scared of and fear retaliation from the Applicant. Under these circumstances, the Tribunal cannot find that the Respondent acted unlawfully by making best efforts to protect the complainants during the pendency of the investigation.

25. It is evident from the record that the Applicant has made allegations of misconduct to the IGO against managers in her office and has sought protection from retaliation from the UNHCR Ethics Office. While the facts of these two events may be intertwined with the facts of the allegations against her, the procedures for the complaints and request for protection that she has made are separate and distinct from the process that resulted in her placement on ALWFP.

26. Having examined the documentary evidence provided by the parties, the decision to place the Applicant on Administrative Leave with Full Pay (ALWFP) does not, without more, give the appearance of an unlawful or otherwise impermissible exercise of discretion on the part of the Respondent.

27. Based on the facts before it, the Tribunal concludes that the Applicant has not made out a case of *prima facie* unlawfulness.

28. Since the threefold test is cumulative, it is not necessary for the Tribunal to examine whether the other two limbs of the test for a successful application for suspension of action have been met.

29. Lastly, the Tribunal notes that the Applicant filed a substantive application only nine days after submitting a request for management evaluation although a response is not due on her request for another 36 days. In the circumstances, her application is premature and will not be considered by the Tribunal at this time. Should she wish to contest the matter once she receives a response to her management evaluation request or the response period lapses, she may submit a new application that will be considered afresh.

ORDER

30. The application for suspension of action is accordingly refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 19th day of March 2019

Entered in the Register on this 19th day of March 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi