



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

ANDRYSEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON INTERIM MEASURES**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Marisa MacLennan, UNHCR

Jan Shrankel, UNHCR

Introduction

1. On 27 November 2019, the Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application with the Tribunal contesting the decision to place him on Special Leave Without Pay (“SLWOP”) effective 11 June 2019.
2. On the same date, the Applicant filed a “Motion for Interim Measures pending proceedings” requesting the Tribunal to order the suspension of the contested decision so that he can return to full pay status or, in the alternative, to order the payment of an amount that is commensurate with the Applicant’s previous salary, benefits and entitlements until a judgment in his application is issued.
3. The motion was served to the Respondent on 28 November 2019 and he filed his reply on 2 December 2019.

Facts

4. The Applicant joined UNHCR in August 1990 at the P-2 level. He has served on various positions during his almost 30 years with UNHCR, including at the P-5 and D-1 level. He holds an indefinite appointment.
5. From 1 October 2015 to 17 July 2016, the Applicant’s administrative status was that of a staff member in between assignments (“SIBA”).
6. From 18 July 2016 to 1 January 2017, the Applicant was assigned temporarily to UNHCR Budapest Office as a Senior Staff Development Officer at the P-5 level.
7. From 2 January 2017 to 25 November 2017, the Applicant was again placed on SIBA status.
8. On 15 August 2017, UNHCR promulgated its Recruitment and Assignments Policy (“RAP”, UNHCR/HCP/2017/2) and its Recruitment and Assignments Administrative Instruction (“RAAI”, UNHCR/AI/2017/7), which were circulated to its staff on the same day. They contained provisions regarding UNHCR staff on SIBA status.

9. From 26 November 2017 to 26 September 2018, the Applicant was on certified sick leave. The Applicant was declared fit to work in September 2018, but he was granted a Medical Constraint on 3 October 2018, such that he can only be assigned to H, A and B duty stations (not C, D and E duty stations).¹

10. On 12 June 2018, the Applicant received a memorandum from the Director, Division of Human Resources Management, UNHCR, informing him that following a change in the rules governing SIBA status effective 1 January 2018, staff members holding an indefinite appointment would be placed on Special Leave with Full Pay (“SLWFP”) for a maximum cumulative period of nine months and thereafter on SLWOP.

11. The Applicant was further informed that as of 1 January 2017 he had been “administratively placed on SLWFP” pending his next assignment and that in view of the new rules, his SLWFP “may continue for a maximum cumulative period of nine months starting on 1 January 2018”.

12. By letter dated 27 May 2019, the Applicant was informed that he would reach the nine cumulative months on SLWFP on 10 June 2019 and that his SLWOP would, therefore, commence on 11 June 2019 unless he was to undertake an assignment, mission or request annual leave in the meantime.

13. On 11 June 2019, the Applicant was placed on SLWOP.

14. On 12 June 2019, the Applicant received a memorandum from the Head of Unit, Personnel Administration Section, UNHCR, regarding administrative details of his SLWOP status. The letter indicated, *inter alia*, that during the first nine months of SLWOP, UNHCR would continue to disburse his and the Organization’s contributions to the United Nations Joint Staff Pension Fund, as well as his and the Organization’s “components to the UN Staff Mutual Insurance Society against Sickness and Accident”.

¹ All United Nations duty stations are categorized by the International Civil Service Commission in one of six categories: H (which comprises headquarters duty stations and other duty stations in similar locations where the United Nations has no developmental or humanitarian assistance programmes or in member countries of the European Union) and A to E (a scale that assesses the difficulty of working and living conditions with A being the least difficult and E the most difficult).

15. On 19 July 2019, the Applicant filed a request for management evaluation.
16. On 2 September 2019, the Applicant received the response to his request for management evaluation upholding the contested decision.

Consideration

17. Suspension of action during the proceedings is an interim measure the conditions of which are governed by art. 10. 2 of the Tribunal's Statute and art. 14.1 of the Tribunal's Rules of Procedure. The former reads as follows:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

18. It follows that an order on interim measures may be granted when the following cumulative conditions are met:

- a. The motion for interim measures is filed in connection with a pending application on the merits before the Tribunal and at any time during the proceedings;
- b. The application on the merits does not concern issues of appointment, promotion or termination;
- c. The contested administrative decision appears prima facie to be unlawful;
- d. There is particular urgency in requesting the interim measures; and
- e. The implementation of the contested administrative decision would cause irreparable damage.

19. The Tribunal notes that a request for an interim measure must be connected to an ongoing application on the merits in that if the interim measure is not granted,

an applicant's *status quo* will change to his/her detriment before the Tribunal adjudicates on the merits of said application.

20. In the case at hand, there is an application on the merits registered before the Tribunal where the Applicant challenges the decision of the Director, Division of Human Resources, UNHCR, to place him on SLWOP. This is the same decision that the Applicant seeks to suspend through his motion until the adjudication of his application.

21. There is also a common denominator between the main application and the motion for an interim measure: the factual context of the employment relationship between the Applicant and the Organization and the applicable legal framework. Furthermore, in the case at hand the contested administrative decision does not pertain to issues relating to appointment, promotion or termination.

22. It follows that the first two conditions set out in paras. 18.a and 18.b above are met, and the Tribunal will now turn to the analysis of the three remaining requirements, namely, *prima facie* unlawfulness, urgency and irreparable harm.

Prima facie unlawfulness

23. The Tribunal recalls that the threshold required in assessing this condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

24. To support his claim of *prima facie* unlawfulness, the Applicant equates his placement on SLWOP to a termination of appointment that, in his view, triggers UNHCR's “obligation for [his] priority placement under [s]taff [r]ule [9.6(e.)]”, which he alleges has not been afforded to him.

25. The Applicant further claims that UNHCR's own rules provide for priority placement of SIBA staff on regular and temporary assignment and that UNHCR has failed to exercise its discretion in conducting such placement.

26. The Respondent argues that staff rule 9.6(e) is not applicable because the Applicant is not being terminated or separated. The Respondent also claims that the Applicant enjoys standing as an internal staff member and that he can therefore continue to apply to internally advertised positions, to accrue pension contributions and retain continuity of service.

27. The Respondent further argues that SIBA status does not in and of itself override the principle of competitive selection enshrined in the United Nations Charter and the United Nations Staff Regulations and Rules, and that the RAPP and RAAI provisions do not require UNHCR to impose recruitments of SIBA staff members on managers and teams, particularly if said staff members are found unsuitable for the respective vacant position.

28. The Tribunal considers that since the Applicant is not being terminated, there is no need to decide on the applicability of staff rule 9.6(e) at this stage. The main issue to consider is rather whether the Administration has done a *bona fide* effort to find a suitable position for the Applicant as a staff member on SIBA status.

29. The Administration has a duty of care vis-à-vis the Applicant who, as long as he remains a UNHCR staff member, has a “right to be given work” as recognized by the Appeals Tribunal in *Lauritzen* 2013-UNAT-282. In this Judgment, the Appeals Tribunal also emphasised that “[i]t is the moral right of a staff member to be given work to do in order to earn his or her salary”.

30. There is evidence on record that the Applicant has applied to at least 27 positions since 2017 when he resumed SIBA status. This shows that the Applicant has made attempts to find suitable positions.

31. The Respondent argues that the Applicant has deliberately sabotaged his placement opportunities by applying for positions at a grade higher than his own and, in several cases, without even having the basic requirements for the post. However, the question of whether the Administration has minimally showed that it has honoured its commitment of priority consideration of the Applicant’s situation as a staff member on SIBA status remains.

32. The Tribunal is not convinced that the Administration has made *bona fide* efforts to find a suitable position for the Applicant as a staff member on SIBA status. This is particularly relevant considering para. 134 of the RAP, whereby the United Nations High Commissioner for Refugees “may assign a staff member on SIBA to any suitable position, subject to recognized special or medical constraints, irrespective of whether the staff member applied for that position”. There is no evidence that the Administration proposed a position to the Applicant since 2017 to address his placement on SIBA status and his subsequent placement on SLWFP followed by SLWOP.

33. Consequently, the Tribunal finds that the decision to place the Applicant on SLWOP is *prima facie* unlawful.

Urgency

34. The Tribunal held in *Ba* UNDT/2012/025 that a decision to place a staff member on administrative leave has a continuing effect and that “the urgency derives from the nature of the effect on the Applicant, and is also on-going”. The Tribunal also indicated in *Ba* that “[f]or each day that the administrative leave continues, the Applicant suffers a renewed assault on [his/her] reputation”.

35. Although the present case relates to placement on SLWOP, not on administrative leave, the Tribunal finds that the reasoning in *Ba* applies as SLWOP also has a continuing effect and for each day that the SWLOP continues, the Applicant suffers, at least financially. In fact, it is reasonable to estimate that without a salary, the Applicant has been forced to subsist on savings and that the availability of such savings is limited. Therefore, the Tribunal finds that the requirement of urgency is met.

Irreparable damage

36. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. In each case, the Tribunal must look at the particular factual circumstances, and in *Ba* the Tribunal held that

“irreparable harm should not be confined to material harm but must also encompass moral harm”.

37. In *Lauritzen*, the Appeals Tribunal recalled the jurisprudence of the former United Nations Administrative Tribunal quoting Judgment No. 1172, *Ly* (2004) where it was considered that “[a] staff member is greatly harmed when confronted to staying home without duties or office, resulting in a loss of self respect and morale”. The Appeals Tribunal also referred to the Administrative Tribunal of the International Labour Organization’s Judgment No. 2324 (2004) that found that “[a] decision to place a senior officer on leave with or without pay ... is one that will most certainly carry adverse consequences for his or her career”.

38. Based on the above, the Tribunal finds that the Applicant’s placement on SLWOP has caused him reputational harm that could not be remedied by financial compensation alone.

39. The Tribunal is particularly concerned about the Applicant’s situation in relation to his pension benefits and coverage of medical insurance. The Respondent confirms that the Organization will cover the Applicant’s pension contributions and health insurance premiums, as well as health insurance premiums for his adult daughter, for a period of nine months. However, he also indicates that the Applicant “is around two years away from normal retirement age and around five years away from the mandatory age of separation”.

40. In such circumstances, the implications of the decision to place the Applicant on SLWOP are not only limited to a lack of salary but could also impact, for instance, his eligibility for after service health care, which the Tribunal understands cannot be reinstated once lost.

41. In light of the above, the Tribunal finds that the requirement of irreparable harm is met.

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Conclusion

42. In view of the foregoing, the application for interim measures is granted and the decision to place the Applicant on SLWOP is suspended, as of the date of the present decision and until the completion of the proceedings in the present case.

(Signed)

Judge Teresa Bravo

Dated this 5th day of December 2019

Entered in the Register on this 5th day of December 2019.

(Signed)

René M. Vargas M., Registrar, Geneva