



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Counsel for the Respondent:

Susan Maddox, ALS/OHRM

Adrien Meubus, ALS/OHRM

The Application and Procedural History

1. The Applicant in the present case is a satellite technician at the United Nations Operations in Cote d'Ivoire (UNOCI). He holds a fixed term appointment at the GS-5 level.

2. On 2 April 2014, the Applicant was placed on administrative leave without pay (ALWOP/impugned decision) and notified of the decision on 4 April 2014. The letter informing him of the impugned decision was signed by the Under-Secretary-General of the Department of Field Support (USG/DFS). The letter explains that the Applicant is being placed on administrative leave because "there is sufficient *prima facie* evidence that [he] engaged in" the collection of "pornographic images and videos, including that of children, using United Nations owned equipment" at UNOCI.

3. The Applicant responded to that letter on 4 April 2014, raising a number of objections to the imposition of the measure and objected particularly to the deprivation of income pending the outcome of the investigation. There has been no response to that letter.

4. The Applicant submitted his request for management evaluation on 15 April 2014.

5. On 23 April 2014, the Applicant sought suspension of action (Application) of the decision of the Under-Secretary-General of the Department of Management (USG/DM) to place him on administrative leave without pay (ALWOP) pending "investigation into the allegations of misconduct" (impugned decision).

6. The Respondent filed his Reply to the Application for Suspension of Action on 24 April 2014.

Submissions

7. The Applicant filed the present Application pursuant to the provisions of article 13 of the Rules of Procedure of the United Nations Dispute Tribunal and is seeking a stay of the decision to place him on administrative leave without pay pending management evaluation.

8. He also moves the Court to redact his name from the public domain, as the allegations against him are “sufficiently embarrassing and serious” to allow the motion.

9. He has been placed on leave for ninety days, at the end of which period the matter “will be revisited.” The Applicant submits that while he does not object to being placed on administrative leave while the investigation is carried out, he cannot afford to not be paid during that time.

10. The Applicant submits that the conditions of the tripartite test for suspension of action have been met.

11. The Respondent erred in placing him on administrative leave without pay.

12. The Applicant cites the provisions of staff rule 10.4(c) and paragraph 5 of ST/AI/371 and its Amend.1 (Revised Disciplinary Measures and Procedures) - read together with the jurisprudence set out in *Calvani* UNDT/2009/092 and *Gallieny* Order No. 60 (NY/2014) – in support of his argument that the impugned decision is *prima facie* unlawful.

13. Imposing administrative leave without pay is akin to the disciplinary sanction in staff rule 10.2 (a)(iv) of “suspension without pay for a specified period”. The Applicant argues that the distinction between the two is a matter of timing in that

“administrative leave may be imposed during the investigation whereas the suspension without pay is a disciplinary measure imposed at the end of the process”.

14. The Applicant argues that there is no reason to refuse to pay a staff member who “remains available to work”.

It was not open to the Administration to unilaterally impose a temporary cessation of performance of the correlative obligations while requiring that the employee continue to be available. The Applicant is not required to endure the suspension, imposed on him by the Administration, of the performance of his work and also be denied the consideration for that work, namely his salary. Essentially, this constitutes “constructive dismissal”.¹

15. The impugned decision is “draconian” and prejudices the outcome of the disciplinary process. The Applicant argues that staff rule 10.4 makes no mention of the severity of an allegation being a factor to be considered in a decision to place a staff member on administrative leave without pay. What the rule does say is that such a measure may be warranted in “exceptional circumstances.”

Exceptional circumstances exist when, for instance, a staff member who has been arrested and detained by the authorities of the host country and is therefore not available to perform his functions. In such scenarios, administrative leave without pay may be an appropriate measure.

16. In the circumstances of the present case, the impugned decision is an unduly harsh measure as it deprives the Applicant not only of his wage but also of the opportunity to seek other employment for the duration of the investigation.

17. The impugned decision will cause irreparable harm because the Applicant is the sole breadwinner and will be unable to provide for his wife and school-going children.

¹ Application, para. 21.

18. The dire financial situation facing the Applicant as a result of the impugned decision also makes this matter urgent.

19. The Respondent submits that the Applicant has not discharged his burden of proving that the impugned decision is *prima facie* unlawful, which was made well within the confines of staff rule 10.4 and the facts on record to substantiate the allegations against the Applicant.

20. The relevant rules do not define “exceptional circumstances.” The “strong *prima facie* evidence” available coupled with the fact that the alleged conduct represents an “inherent threat to the reputation of the Organisation” were correctly and properly considered to be factors justifying the impugned decision.

21. The Respondent submits that “where there is no *prima facie* illegality in the decision to place a staff member on ALWOP, there is by definition no urgency in a request to make such placement”.

22. Any damage to the Applicant “resulting from the decision to place him on ALWOP may be later compensated by damages”. No irreparable harm has therefore been occasioned by the impugned decision.

Deliberations

23. Applications for suspension of action are governed by article 2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and article 13 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted. Under art. 13.3 of the UNDT Rules, the Tribunal has five working days from the service of an application on the respondent to consider an application for *interim* measures.

24. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

25. Neither Party has submitted on the implementation of the impugned decision. But the Applicant's submissions indicate that the "Applicant has been deprived of his salary only two weeks ago."

26. Therefore, before entering into a discussion on whether the Applicant has met the test for the injunctive relief that is sought, the Tribunal must *proprio motu* determine whether or not the impugned decision has been implemented.

27. The preliminary question for the Tribunal, therefore, is whether there are exceptions to the principle that decisions which have been implemented cannot be stayed. In other words, are there situations/circumstances in which the Parties can in fact be restored or which are materially reversible without prejudicing the positions of the parties and/or others.

28. The record suggests that the Applicant was placed on ALWOP with immediate effect from 4 April 2014. What would be the consequences of that decision being stayed? Can the positions of the Applicant and the Respondent be restored to *status quo ante* and can this be done without prejudice being caused to either Party or the process. In other words, will rescinding or varying the impugned decision compromise the investigation, affect the rights of the Applicant in the investigative process or deprive the Respondent of any material benefit derived from placing the Applicant on ALWOP?

29. The facts of the present case suggest that this may one of those situations which can be properly construed as such an exception. That is to say, all of those questions may be answered in favour of the Applicant.

30. Be that as it may, the Tribunal notes that although the Applicant has framed his Application to ask for a stay of the impugned decision, he is *in fact* asking that the decision either be reversed or varied so that he is at least paid for the duration of the investigation.

31. At this stage of the process, the question is whether the administrative measure was properly imposed on the Applicant. This goes to the substance of the dispute and cannot properly be construed as a matter for injunctive relief.

32. The Application is **DISMISSED**.

(signed)

Judge Vinod Boolell

Dated this 29th day of April 2014

Entered in the Register on this 29th day of April 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi