



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/033

Order No.: 097 (NBI/2014)

Date: 13 May 2014

Original: English

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

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER 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 serving as a radio broadcast technician with the United Nations Operations in Cote d'Ivoire (UNOCI). He holds a fixed term appointment at the GS-4/IV level.
2. In a letter dated 1 April 2014, the Under-Secretary-General of the Department of Field Support (USG/DFS) informed the Applicant that the Under-Secretary-General for Management (USG/DM) had decided to place him on administrative leave without pay (ALWOP) as of the date of his receipt of her letter. The letter explained that the Applicant was being placed on ALWOP due to the existence of *prima facie* evidence that he had engaged in the collection and dissemination of pornographic images and videos using United Nations owned equipment. The letter further indicated that the initial duration of the ALWOP would be 3 months at the end of which the matter "will be revisited".
3. The Applicant received the letter from the USG/DFS on 4 April 2014 and on the same day, he responded to her. He raised a number of objections in his response, including an objection with regard to the decision to withhold his salary pending the outcome of the investigation. He has not as yet received a response to his letter.
4. The Applicant submitted a request for management evaluation on 15 April 2014.
5. On 6 May 2014¹, the Applicant filed the current application seeking suspension of the decision of the USG/DM to place him on ALWOP pending investigation into allegations of misconduct (Contested Decision).

¹ The Application was filed at 7:56 pm after the Registry was closed. Thus, it was served the next working day, 7 May.

6. The Application was served on the Respondent on 7 May 2014 and he filed his Reply on 9 May 2014.

Applicant's 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 ALWOP pending management evaluation.

8. As a preliminary matter, he moves the Court to redact his name from the public domain, as the allegations against him relate to the collection and dissemination of pornographic materials and these allegations are “sufficiently embarrassing and serious” to allow the motion.

Receivability

9. The Applicant noted that in Order No. 087 (NBI/2014)², the Tribunal rejected an application for suspension of action in a similar case because the Tribunal found that the Applicant was in fact asking that the decision to place him on ALWOP either be reversed or varied so that he could be paid for the duration of the investigation. In this respect, the Applicant submits that the Contested Decision is a matter for injunctive relief because he is not asking for the reversal of the decision but is merely seeking a temporary suspension of 45 days pending the outcome of his request for management evaluation. He submits that if the management evaluation request is dismissed on 21 June 2014, the date on which a response is due from the Management Evaluation Unit (MEU), the suspension of action will immediately cease to operate, yet the ALWOP will continue to be imposed until 4 July 2014.

² Case No. UNDT/NBI/2014/028.

10. He further submits that an administrative decision which has not been fully implemented is subject to a suspension of action and that if the reasoning of the Tribunal in Order No. 087 (NBI/2014) is retained, “staff members would never be allowed to request a suspension of a decision to place them on administrative leave for a period of one, three, four, or even six months. This would be an extremely dangerous precedent to set”.

11. Lastly, he submits that dismissing the application for suspension of action would deprive him of a real opportunity to challenge the decision on the merits because he might not survive the economic hardship caused by the impugned decision until the application on the merits is adjudicated and that this would defeat the purpose of having interlocutory remedies.

Tri-partite test

12. He submits that the conditions of the tripartite test for suspension of action have been met for the following reasons:

Prima facie unlawfulness

13. The Applicant asserts that the Respondent erred in placing him on ALWOP. In this respect, he submits that staff rule 10.4(c) and paragraph 5 of ST/AI/371 as amended by ST/AI/371/Amend.1 (Revised disciplinary measures and procedures) stipulate that administrative leave is imposed with full pay unless exceptional circumstances warrant leave without pay. He points out that in his case the Contested Decision does not contain any reasons for imposing leave without pay.

14. The Applicant cites the jurisprudence set out in *Calvani* UNDT/2009/092 and *Gallieny* Order No. 60 (NY/2014) in support of his argument that the Respondent had an obligation to elaborate on the exceptional circumstances and that *prima facie* unlawfulness is established when no exceptional circumstances have been stipulated.

15. 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”.

16. The Applicant argues that there is no reason to refuse to pay a staff member who “remains available to work”. In the circumstances of the present case, the impugned decision is an unduly harsh measure as it deprives him not only of his wage but also of the opportunity to seek other employment for the duration of the investigation.

17. 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.”

18. The Applicant submits that exceptional circumstances exist when, for instance, a staff member 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.

Urgency

19. The Applicant asserts that he was diligent in submitting his request for management evaluation and his application for suspension of action. He submits that he is already having difficulty meeting his financial obligations as a result of the Contested Decision and that this dire financial situation makes this matter urgent.

Irreparable harm

20. The impugned decision will cause irreparable harm because he will be unable to provide financial support for his wife and school-going children. In this respect, he submits that in *Gallieny* Order No. 060 (NY/2014), the Dispute Tribunal held that the irreparable harm prong of the tri-partite test is met in circumstances where a staff member is unable to provide financial support to his family as a result of the impugned decision.

Respondent's submissions

Receivability

21. Citing *Nwuke* UNDT/2012/002, the Respondent submits that the current application is not receivable because the Contested Decision was fully implemented upon the Applicant's receipt of the letter informing him of his placement on ALWOP.

22. The Respondent avers that the Applicant is in actuality seeking either a reversal or variation of the Contested Decision so that he can be paid for the duration of the investigation and until the completion of the disciplinary process or an outcome of his management evaluation request favourable to him.

23. Lastly, the Respondent submits that the nature of relief sought by the Applicant would create a new, intermediary situation and that the power to vary an administrative decision has not been "conferred to the Tribunal in a recourse brought under Article 2(2) of the Statute of the United Nations Dispute Tribunal. The Tribunal may only suspend an administrative decision".

Tri-partite test

Prima facie unlawfulness

24. 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.

25. The “strong *prima facie* evidence” available coupled with the impracticality of redeployment of the Applicant, because it would not satisfactorily alleviate the reputational risk to the Organization, were correctly and properly considered to be factors justifying the impugned decision.

26. The USG/DM decided that the Applicant’s placement on ALWOP was warranted in light of the following exceptional circumstances:

- a. The allegations against the Applicant involve an egregious breach of the standards of conduct expected of a staff member of the Organization in that it involved, among other things, exploitative material involving children;
- b. The *prima facie* case of misconduct against the Applicant is sufficiently serious that it would, if proven, lead to his dismissal; and
- c. The *prima facie* evidence that the Applicant engaged in the alleged conduct and the serious nature of the conduct poses a serious risk to the reputation of the Organization, which adversely affects the effective and credible discharge of the Mission’s mandate.

27. The exceptional circumstances upon which the Contested Decision was based were communicated to the Applicant in the letter from the USG/DFS dated 1 April 2014.

28. In cases of placement on ALWOP, any pay withheld is restored without delay where the allegations of misconduct are not sustained or the conduct at issue does not result in dismissal.

Urgency

29. 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”. Additionally, placement on ALWOP entails deprivation of income. It cannot be said therefore that placement on ALWOP inherently creates an element of urgency. The element of urgency must be determined on a case-by-case basis as supported by appropriate evidence. The Applicant has not provided evidence supporting his contention that he will not be able to support his family.

30. Furthermore, the Applicant may engage in other employment during his ALWOP provided he makes a request to the Secretary-General and is authorized, pursuant to Staff Rule 1.2(p) and the provisions of ST/AI/2000/13 (Outside activities).

Irreparable harm

31. The Respondent submits that no irreparable harm has been occasioned by the Contested Decision to the Applicant because:

- a. The power to place a staff member on ALWOP, by definition, results in the staff member losing his or her salary. Accordingly, such a loss should not, in itself, be considered as something that irreparably harms the rights of the Applicant as a staff member; and

- b. Any damage to the Applicant resulting from the decision to place him on ALWOP may be, if proven, later compensated by damages.

Considerations

Receivability

32. Before entering into a discussion on whether the Applicant has met the tripartite test for the injunctive relief that is sought, the Tribunal must *proprio motu* determine whether or not the impugned decision has been implemented as has been asserted by the Respondent.

33. Article 10.2 of the Statute of the Tribunal reads:

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.

34. Article 13.1 of the Rules of Procedure of the Tribunal reads:

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.

35. In *Applicant* Order No. 087 (NBI/2014) of 29 April 2014, this Tribunal held that:

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.

36. The provisions of article 10.2 of the Statute and article 13 of the Rules of Procedure of the Dispute Tribunal empower the Tribunal to grant interim relief to an individual aggrieved by an administrative action. These provisions are in the nature of injunctive relief. The basic notion of an injunction is to momentarily put on hold a proposed course of action or conduct at the request of an individual. In other words the purpose of such a relief is to let a matter remain in its *status quo* until it is determined on the merits or until the parties have satisfactorily resolved their dispute. The injunction is meant to **prevent** a course of action or conduct that would be detrimental to an individual. There is however another strand to this injunctive relief known as the *quia timet* injunction, the purpose of which is to prevent the apprehension of a wrongful act or conduct which is threatened or imminent but has not yet commenced.

37. On the face of it, the above provisions do give the Tribunal the jurisdiction to grant an injunction by way of the suspension of the contested administrative decision once the following conditions have been met namely that the administrative act is prima facie unlawful; there is urgency in the situation and irreparable damage would be caused by the refusal to grant the interim relief. Even if and when the Tribunal is satisfied that these three criteria have been satisfied the Tribunal cannot grant any suspension of action if the impugned decision has been implemented.

38. The record suggests that the Applicant was placed on ALWOP with immediate effect upon his receipt of the letter from the USG/DFS on 4 April 2014. Similar to the submission by the applicant in Order No. 087, the Applicant in the current case has framed his Application to ask for a temporary stay of the Contested Decision, even

though 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 management evaluation.

39. This submission however does not change this Tribunal's view that the decision was implemented on 4 April 2014 upon the Applicant's receipt of the USG/DFS' letter. Seeing that the Applicant is averring that he is currently out of work and is complaining of dire financial circumstances, the Tribunal is at a loss as to how it can logically conclude that the Contested Decision has not as yet been fully implemented.

40. In *Mills-Aryee* UNDT/2011/051, the Tribunal dismissed an application for suspension of action on the basis that:

[T]he selection decision was officially communicated to the selected candidate by HRMS/UNON before the Applicant filed her application for suspension of action. Thus, the Tribunal can only conclude that the contested decision in this case had already been implemented prior to the filing of the application for suspension of action.

41. Even though this is not an application regarding a selection decision as was true in *Mills-Aryee*, the same receivability situation pertains in this matter in that the Contested Decision had been implemented about a month prior to the Applicant moving the Tribunal for suspension of action. The current application is therefore not receivable.

42. The Tribunal finds however that the implementation element contained in article 10.2 of the Statute and Article 13.1 of the Rules of Procedure provides the Administration a convenient avenue by which to circumvent judicial review in matters pertaining to ALWOP and thereby gives the imprimatur of legitimacy to what may have otherwise been an unlawful administrative decision. Cases have come before this Tribunal where the Administration has implemented an administrative decision within minutes or hours of the decision-making process. In *Nwuke* UNDT/2011/107, the Tribunal expressed its grave concern at the manner in which the

staff members of ECA, including the Applicant, were informed of decisions hours or a mere day or two before implementation so as to defeat the element of urgency.

43. The Tribunal finds it regrettable that the Respondent is brazenly using this lacuna in the rules to prevent a measure, as stringent and extreme as ALWOP, from being brought under the scrutiny of the Tribunal by way of an application for injunctive relief. It is a usurpation of the very fibre of judicial review to use a colorable legal device to ensure that ALWOP can never be the subject of a successful application for suspension of action due to the immediate implementation of the administrative decision upon the unsuspecting staff member's receipt of the decision letter.

Tri-partite test

44. 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 3 statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must all be satisfied for an application for suspension of action to be granted.

45. Since the Tribunal has determined that the Contested Decision has been implemented and the application is therefore not receivable, it will not proceed to make determinations on the 3 statutory prerequisites set out above.

46. The above notwithstanding, the Tribunal wishes to highlight an observation from *Mills-Aryee* that:

It is rather unfortunate however that a suspension of action can only be granted if the implementation of the administrative decision would cause irreparable damage but if the decision has been implemented, as in the present case, the question of suspension does not arise. In other words a patently unlawful act is allowed to survive in view of the legal provisions that do not authorize the Tribunal to suspend the execution of such an illegal act.

Decision

47. The Application is **DISMISSED**.

(Signed)

Judge Vinod Boolell

Dated this 13th day of May 2014

Entered in the Register on this 13th day of May 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi