



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 holds a fixed term appointment as a National Officer at the United Nations Operation in Côte d'Ivoire (UNOCI).

2. On 19 June 2014, the Applicant filed an application for suspension of action for injunctive relief from the decision of the Under-Secretary-General of the Department of Management (USG/DM) to continue his placement on administrative leave without pay (ALWOP) beyond the initial three months it was imposed for.

3. The Respondent filed his Reply to the Application on 23 June 2014.

4. On 24 June 2014, the Tribunal afforded the Applicant the opportunity to respond to the Respondent's Reply. The Applicant filed his submissions in response on 25 June 2014.

Facts

5. On 28 February 2014, the Under-Secretary-General for Field Support (USG/DFS) informed the Applicant that the Under-Secretary-General for Management had decided to place him on ALWOP effective that day, as there was sufficient evidence that he engaged in the collection and dissemination of pornographic images and videos.¹

6. The Applicant was also told that the measure was being put in place for "three months at which point the matter will be revisited."

¹ Applicant's Exhibit 1. The letter is dated 25 February 2014.

7. On 31 March 2014, the Applicant sought management evaluation of the decision to place him on ALWOP taking issue with the deprivation of salary rather than the administrative measure as a whole.²

8. On 14 April 2014, the Applicant received a letter from Ms. Ruth de Miranda, Chief, Human Resources Policy Service, Office of Human Resources Management, charging him with misconduct related to the distribution of pornographic material through the UN email system and with storing various pornographic images. The letter offered the Applicant the opportunity to comment on these charges of misconduct.³

9. The Applicant responded to the charges on 14 April and 16 May 2014.

10. On 16 May 2014, the USG/DFS requested that the USG/DM extend the placement of the Applicant on ALWOP.⁴ This request was approved.⁵

11. On 21 May 2014, the USG/DFS wrote to the Applicant informing him of the decision to extend the ALWOP for a further three months or until the completion of the disciplinary process, whichever is earlier.⁶

12. The Human Resources Section at UNOCI contacted the Applicant several times to have the letter picked up/delivered to him, to no avail.

13. On 23 May 2014, the Chef de Cabinet wrote to the Applicant informing him that the Secretary-General had decided to “endorse the findings and

² Respondent’s Exhibit A.

³ Respondent’s Exhibit B.

⁴ Respondent’s Exhibit D.

⁵ Respondent’s Exhibit E.

⁶ Respondent’s Exhibit F.

recommendations” of the Management Evaluation Unit (MEU) and uphold the decision to place him on ALWOP.⁷

14. On 19 June 2014, the Applicant sought management evaluation of the decision to extend his placement on ALWOP.

15. On 23 June 2014, the Applicant received the letter dated 21 May 2014 from the USG/DFS.⁸

Preliminary Motion

16. As a preliminary matter, the Applicant requests that his name be redacted from the record. Citing the cases of *Ahmed*⁹ and *Applicant*¹⁰, the Applicant submits that the circumstances of his case are “embarrassing and serious enough to warrant an order redacting the Applicant’s name” from the record of proceedings.

Submissions

Applicant

17. 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 *continue* his placement him on administrative leave without pay pending management evaluation.

18. The Applicant was initially placed on leave without pay for three months, at the end of which period the matter was to 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.

⁷ Respondent’s Exhibit C.

⁸ Respondent’s Exhibit G.

⁹ *Ahmed v. Secretary-General*, Order No. 132 (UNAT/2013).

¹⁰ *Applicant v. Secretary-General*, 2012-UNAT-209.

19. On the question of receivability, the Applicant asks the Court to depart from its reasoning in *Applicant* and distinguish this case from that by arguing that the Applicant in this case is not asking for the impugned decision to be reversed; “he merely seeks a temporary suspension of the decision to continue his ALWOP pending the outcome of Management Evaluation.” The Applicant appreciates that the relief being sought will not reinstate the loss of salary so far. What he is seeking is a suspension of the decision for a maximum period of 45 days pending management evaluation so that he will have the benefit of having worked and being paid during that time.

20. The Applicant argues that as the “decision to continue [...] the ALWOP involves an ongoing harm to the Applicant, the suspension of action would have the effect of suspending this continued harm, pending the decision of the MEU”.

21. Citing the cases of *Ba* UNDT/2012/025, *Calvani* UNDT/2009/092 and *Hassanin* Order No. 83 (NY/2011) the Applicant submits that the impugned decision has not been implemented and can therefore be properly suspended.

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

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

24. The Applicant cites the provisions of staff rule 10.4 read together with the decision in *Gallieny* Order No. 60 (NY/2014), the Applicant submits that the impugned decision is *prima facie* unlawful. The Respondent has not articulated any extraordinary or exceptional circumstances that warrant a continuation of the Applicant’s placement on administrative leave beyond three months.

25. The Application is urgent in that the deprivation of salary has begun causing the Applicant numerous difficulties, the inevitable consequence of which will be his

inability to meet his financial obligations covering such basic needs as food, rent, and tuition fees.

26. The extended period of administrative leave without pay is harmful to the Applicant's reputation and career prospects.

Respondent

27. The Respondent submits that the impugned decision has already been implemented and is therefore not properly a subject for an application for suspension of action.

28. Even if the Tribunal was minded to find the Application receivable, the Applicant has not met the tripartite test.

29. The impugned decision is not *prima facie* unlawful. The USG/DM made the decision to extend the ALWOP based on a review by the USG/DFS of the record and all relevant facts. The deprivation of income "does not inherently create an element of urgency." Should the administrative measure be found to have been improperly imposed or unwarranted, the Applicant stands to be compensated in damages and have his salary refunded. The harm in question is therefore not irreparable.

Deliberations

30. 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.

31. This Tribunal has previously held that¹¹

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.

Has the decision been implemented?

32. Both Parties have made submissions on the status of the implementation of the impugned decision.

33. Before entering into a discussion on whether the Applicant has met the requirements for the test of suspension of action, the Tribunal must first determine whether or not the impugned decision has been implemented.

34. The Applicant has been on ALWOP since 28 February 2014. Before the end of the three month period, two administrative decisions were issued by the Respondent. On 21 May 2014, the USG/DM approved the USG/DFS' request to extend the duration of the administrative leave for a further three months. On 23 May 2014, the Chef de Cabinet, further to the Applicant's request for management evaluation at the end of March 2014, informed the Applicant that the Secretary-General was upholding the decision to place him on ALWOP. Both decisions, albeit with some difficulty, were communicated to the Applicant.

¹¹ See *inter alia* Applicant Order No. 087 (NBI/2014).

35. Having examined the chronology of events in this, the Tribunal finds that the Applicant is in fact challenging the decision of the USG/DM as made on 21 May 2014 and communicated to the Applicant on 23 June 2014. It is a decision which had, at the time of this Application, been already implemented.

36. The Applicant wants little more than to be allowed to return to work and be paid for the duration of the period for management evaluation.

37. The Applicant urges the Tribunal to distinguish the facts in this case from that decided in *Applicant* Order No. 087 (NBI/2014).

38. In *Applicant*, the Tribunal was moved to vary the administrative measure so that the staff member was paid for the duration of the leave imposed on him. There too, the alleged offence had to do with the storage of pornographic material.

39. In the present case, the Tribunal is being moved to order the “temporary suspension” of the administrative measure imposed so as to allow the Applicant to “return to work and perform his functions” and therefore be paid for that duration.

40. In both cases, both applicants do not dispute the propriety of being placed on leave. It is the severity of the administrative measure that they both dispute and want this Tribunal to vary or rescind.

41. The Tribunal is satisfied that the administrative measure imposed on the Applicant was properly extended and so implemented.

42. The Applicant’s motion for a 45 day hiatus of that extension is in effect a request for the implemented administrative measure to be varied.

43. The Tribunal is fully conscious of the injustice that may be caused by the wording and interpretation of Article 13.1 of the Rules Procedure.

44. An application for a suspension of action cannot be granted if the impugned administrative action has been implemented. Neither a staff member nor the Tribunal has any control on the timing for the implementation of an administrative decision. But should implementation of a decision debar an applicant from an injunctive relief in all cases indiscriminately to the point of rendering the powers granted to the Tribunal in matters of injunctive relief impotent? This appears to be the legal situation today. A staff member will never be in a position to become aware of a decision to place him/her on administrative leave until he receives notification of same. By this time the decision is implemented. Does that mean that staff members cannot seek *interim* relief even if the decision is tainted and leave that staff no option but to seek a remedy from the Tribunal by filing a substantive application? The answer is sadly a positive one.

45. The Applicant is of course entitled to question whether the administrative measure was properly imposed on him. This would however require deliberation on the substance of the dispute and is not a matter for injunctive relief.

Decision

46. The Tribunal **GRANTS** the Applicant's motion for the redaction of his name from the public record of proceedings.

47. The Application for Suspension of Action is **DISMISSED**.

(signed)

Judge Vinod Boolell

Dated this 27th day of June 2014

Entered in the Register on this 27th day of June 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi