



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

WOODSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR
SUSPENSION OF ACTION DURING
THE PROCEEDINGS**

Counsel for the Applicant:
Miles Hastie, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Cristiano Papile, ALS/OHRM

Introduction

1. The Applicant is a Team Assistant/Administrative Clerk at the GS-4 level in the United Nations Mission in Liberia (UNMIL). On 11 September 2014, she filed an Application contesting the decision dated 23 June 2014 to extend her Administrative Leave Without Pay (ALWOP) for an additional three-month period.

2. Also on 11 September 2014, the Applicant filed a Motion for interim measures (“the Motion”) in which she seeks the suspension of the ALWOP until a judgment is issued on her Application on the merits

3. The Respondent filed a Reply to the Motion on 15 September 2014 in which it was asserted, inter alia, that the Application was not receivable.

Facts

4. The Applicant commenced service with the United Nations Mission in Liberia (UNMIL) in August 2004. She holds a fixed-term appointment and normally performs the function of Team Assistant/Administrative Clerk, at the GS-4 level. Additionally, the Applicant is the President of UNMIL’s National Staff Association (NASA).

5. On 27 December 2013, the UNMIL’s NASA staged a sit-in action outside the UNMIL base. During this time, different forces were deployed to observe, including the Jordanian Police Unit, Nigeria forces, and Liberian National Police.

6. The Applicant participated in the sit-in action although the extent and nature of her participation is in dispute and became the subject of an investigation. The Respondent claims, inter alia, that the Applicant:

- a. organized or chaired the NASA meeting on 27 December 2013;
- b. instructed protesters to close the gate to the UNMIL Star Base;

- c. made threatening statements towards international staff members;
- d. instructed protesters to switch off the Star base generators and refused to turn them on; and
- e. instigated national staff members to assault a United Nations Police (UNPOL) officer.

7. On 2 January 2014, the Applicant received a letter which informed her that she was the subject of an investigation into misconduct, and that she was being placed on Administrative Leave with Full Pay (ALWFP) for three months, or until the completion of the investigation, effective 29 January 2014. The Applicant was on maternity leave at the time.

8. By a letter dated 2 April 2014, she was informed that she was being placed on Administrative Leave without Pay (ALWOP) for three months, effective upon her receipt of the letter. By letter dated 23 June 2014, the Applicant was notified that her ALWOP had been extended by a further three months.

9. The Applicant requested management evaluation of the decision on 14 July 2014. She received an unfavourable response to her management evaluation request on 24 July 2014.

10. The Applicant filed the Application on the merits on 11 September 2014 and, on the same day, filed the present Motion.

11. The Respondent filed a response to the Motion on 13 September 2014. The Tribunal held an oral hearing on 16 September 2014.

Receivability

12. It was argued by the Respondent that the Motion was not receivable for the following reasons:

- a. The decision to extend the Applicant's placement on ALWOP has already been fully implemented and, as such, it cannot legally be the subject of a suspension of action.

- b. The Respondent cited *Nwuke*, UNDT/2012/002 as authority that where a contested decision has been fully implemented, suspension of action cannot be granted.
- c. Also cited in support were three orders rendered in the matters of *Applicant*, Order No. 087 (NBI/2014), *Applicant*, Order No. 097 (NBI/2014) and *Applicant*, Order No. 167 (NBI/2014) where the applicants challenged the renewal of their placement on ALWOP were all rejected on the basis that the decisions to place the applicants on ALWOP had already been implemented.
- d. There is a distinction between the implementation of a decision and the completion of its consequences. Once the renewal of the Applicant's ALWOP was administratively implemented on 30 June 2014, there was nothing further to be done to implement the decision and, in this sense, the decision was fully implemented. The fact that the Applicant may feel the *consequences* of that decision for some time does not mean that the decision has not been fully implemented.

13. In response, the Applicant argued that while the UNDT has found that a suspension of action cannot be obtained to restore a situation or reverse an unlawful act which has already been implemented, it has also found that a decision with "ongoing legal effects" is receivable because it can only be deemed to be implemented in its entirety at the end. In support of her submission the Applicant cited *Freeman*, Order No. 197 (NBI/2014) and *Howard*, Order No. 198 (NBI/2014).

14. On the issue of receivability, the Tribunal finds and holds that the latest ALWOP on which the Applicant was placed is without a doubt still ongoing and has not been fully implemented. Its full implementation will happen only sometime in October 2014, if it is not discontinued by the Respondent or set aside by the Tribunal.

15. The Respondent's argument that the decision has been fully implemented is rejected as a basis for a claimed lack of jurisdiction of this Tribunal to entertain this Application. The Application is receivable.

Applicant's case

16. The Applicant's case may be summarized as follows:

Prima facie unlawfulness

a. Staff rule 10.4 (c) stipulates that a staff member shall be placed on ALWFP except when the Secretary-General decides that exceptional circumstances exist warranting the placement of a staff member on administrative leave with partial pay or without pay. Staff Rule 10.4(b) provides that, in terms of duration, administrative leave so far as practicable should not exceed three months.

b. The Applicant remains in limbo, suffering significant reputational, financial and emotional harm. The length of time being taken by the Administration to conclude the investigations as to the 27 December 2013 incident is plainly unreasonable and manifestly excessive.

c. The Applicant's circumstances concerning the timing of the placement on ALWOP are similar to the circumstances of two other applicants subject to Orders No. 197 (NBI/2014) and 198 (NBI/2014). Consistent with previous findings of the Dispute Tribunal, it is contended that the ALWOP decisions are inconsistent with the terms of staff rule 10.4(b).

d. Staff rule 10.4(c) provides that in "exceptional circumstances" the Secretary-General can take away all or part of a staff member's pay while on administrative leave. The ALWOP decisions in this case do not contain any "exceptional circumstances" that justify ALWOP. In *Calvani* UNDT/2009/092, it was found that the failure to indicate exceptional circumstances vitiated the decision to make a decision as to administrative leave without pay. This decision appears to follow the requirement under

staff rule 10.4(b) that the written statement provided to a staff member placed on administrative leave should include the reasons for the decision.

e. The ALWFP and ALWOP decisions arise out of the same allegations – and there is no additional information in the ALWOP decisions when compared with the 2 January decision that gives any indication of why any exceptional circumstances exist that may justify changing the status of the Applicant’s administrative leave from ALWFP to ALWOP. The prima facie evidence of misconduct, which is alleged, is present in the case of all disciplinary cases to be pursued, so cannot possibly constitute exceptional circumstances so as to justify ALWOP.

f. In reaching the ALWOP decision, it is said that the ALWOP is warranted because of the seriousness of the acts alleged. The Administration has only examined whether there is prima facie evidence of such alleged misconduct; the seriousness of unproven (and contested) allegations cannot be dispositive. The Administration has declined to present the evidence upon which it relies, notwithstanding an apparent decision that the case is to be pursued.

g. The ALWOP decisions are inconsistent with staff rule 10.4(d). Staff rule 10.4(d) states that placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. The Applicant submits that the Organization is purporting to continue to hold her to her contract, including her responsibility not to undertake other work (outside activities). At the same time, she is being denied salary and work. An unwarranted placement on ALWOP constitutes constructive dismissal. The Applicant contends that the ALWOP decisions are in breach of staff rule 10.4(d).

Urgency

h. The decision to place the Applicant on administrative leave without pay is a decision with continuing legal effect meaning that it gives

rise to the required urgency following *Calvani* UNDT/2009/092 and *Ba* UNDT/2012/025.

i. In this case, the Applicant has incurred medical expenses arising out of the 27 December 2013 incident, she has two young children to care for, one of whom is less than one year old; and is generally responsible for the upkeep of the family. In a time where there exists a significant Ebola health outbreak in Liberia, the situation is dire, giving rise to urgency.

Irreparable harm

j. The Applicant submits that the element of irreparable harm is satisfied given the extent of financial, emotional and reputational harm she has suffered being harm that creates uncertainty and significant stress.

Respondent's case

17. The Respondent's case may be summarized as follows:

Prima facie unlawfulness

a. Section 4 of ST/AI/371 (Revised Disciplinary Measures and Procedures), as amended, provides that administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible. In compliance with these provisions, the Applicant was placed on administrative leave because:

i. There was sufficient prima facie evidence to indicate that the Applicant had engaged in misconduct.

ii. The Applicant's conduct was serious in nature and posed a serious risk to the safety and security of United Nations personnel.

- iii. The Applicant's redeployment would not satisfactorily alleviate the safety, security and reputational risk posed by the Applicant's presence in the workplace.
- b. Staff rule 10.4(c) provides that, in exceptional circumstances, administrative leave may be without pay. The Respondent submits that exceptional circumstances were met in this case, due to the serious nature of the Applicant's conduct and the strength of the evidence against her.
- c. Staff rule 10.4(b) provides that a staff member placed on administrative leave shall be given a written statement of the reason(s) for such leave. In compliance with this provision, by letters dated 2 January 2014, 2 April 2014 and 23 June 2014, the Applicant was informed of the reasons for her placement on administrative leave.
- d. Staff rule 10.4(b) further provides that, insofar as practicable, the period of administrative leave should not exceed three months. As described below, the Respondent submits that it was not practicable, in this case, for the Applicant's period of administrative leave to be limited to three months.
- e. Regarding the length of the ALWOP, the Respondent notes that the legislative instruments of the Organization specifically contemplate that administrative leave may extend beyond three months. In this respect, staff rule 10.4(a) states that "[a]administrative leave may continue throughout the investigation and until the completion of the disciplinary process", without imposing a time limit on those processes. Staff rule 10.4(b) further recognizes that a hard and fast timeframe cannot be imposed on the investigation and disciplinary processes, by noting that the three-month time limit should be adhered to only insofar as practicable.
- f. The Respondent submits that the notion of practicability in staff rule 10.4(b) must be read with reference to the investigation and disciplinary processes at issue in staff rule 10.4(a). In this light, staff rule 10.4(b) envisages that administrative leave may continue for longer than

three months, in those cases where the investigation and disciplinary process, if any, continues for longer than three months.

g. In this case, given the nature of the matter under investigation and the number of implicated staff members, the investigation was complex and required interviews with many individuals and a review of available video footage. Furthermore and prior to the initiation of any disciplinary action, the contents of the investigation report must be thoroughly reviewed, as the Administration cannot simply rubber stamp the investigation report. In the circumstances, the Respondent respectfully submits that the continuation of the Applicant's ALWOP beyond three months is proper and necessary.

h. The "exceptional circumstances" requirement was met in this case because:

i. the seriousness of the Applicant's alleged actions was such that, if established, her actions could lead to her separation or dismissal; and

ii. the strength of the evidence against the Applicant is such that her participation in the alleged actions appears to be established on a prima facie basis.

i. The Respondent submits that it would have been permissible to place the Applicant on ALWOP immediately following the 27 December 2013 incidents. The fact that this was not done, and that the Respondent preserved the Applicant's salary for a further three months, cannot be held against the Respondent. Indeed, the decision to wait for the investigation report to be issued was to the Applicant's benefit, in that it ensured the continuation of her salary during that period.

j. Regarding the contention that the Applicant's placement on ALWOP amounted to constructive dismissal and was, therefore, a disciplinary measure, the Respondent submits that the wording of staff

rule 10.4(d) demonstrates that placement on ALWOP is not a disciplinary measure.

k. Contrary to the imposition of a disciplinary measure, the Applicant's placement on ALWOP includes an internal review mechanism, in that, if the reasons for her placement on ALWOP are not ultimately found to warrant her separation or dismissal, all pay withheld will be restored to her without delay. Moreover, a finding that a staff member's placement on ALWOP constitutes a *de facto* disciplinary measure would be contrary to the Organization's legislative issuances, because it would effectively mean that every placement on ALWOP, regardless of the reasons therefor, would be *prima facie* unlawful as amounting to a disciplinary measure

Urgency

l. The Respondent submits that there is no urgency because the Applicant has delayed her request that the Tribunal suspend the implementation of the contested decision for more than 11 weeks. Her placement on ALWOP was notified to her by letter dated 2 April 2014, and the renewal of her ALWOP was notified to her by letter dated 23 June 2014. Since then, more than 11 weeks have elapsed, with the Applicant having requested no intervention from the Tribunal in respect of her placement on ALWOP.

Irreparable harm

m. In relation to the Applicant's contention as to the harm that will result if the decision to renew her placement on ALWOP is not reversed, the Respondent submits that the placement of a staff member on ALWOP, by definition, results in the payment of the staff member's salary being suspended. If this were considered to irreparably harm a staff member's rights, then every placement on ALWOP would automatically meet this branch of the tripartite test.

n. The Respondent submits that the withholding of a staff member's salary is a financial measure. Any damage to the Applicant resulting from the decision to place her on ALWOP may be directly compensated by damages.

Consideration

18. Applications for suspension of action pending the completion of proceedings are governed by art 14.1 of the Tribunal's Rules of Procedure. The three statutory pre-requisites contained in art 14.1, that is, *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action during the proceedings to be granted.

19. Staff rule 10.4 is the legislation relied upon by the Respondent to place the Applicant on administrative leave and provides as follows:

a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the initiation of an investigation. Administrative leave may continue throughout an investigation and until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration, which, so far as practicable, should not exceed three months.

(c) *Administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.* (Italics mine).

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

20. From the foregoing, it is apparent that the Secretary-General may place a staff member on administrative leave at any time after an allegation of misconduct is made against him or her pending the start of an investigation into the alleged misconduct and until the completion of a disciplinary process, if any is instituted.

21. In the instant case, the Applicant was placed on administrative leave a few days after the commencement of investigations into certain events of 27 December 2013 said to have been instigated by UNMIL NASA in which she was alleged to have participated. The said placement on administrative leave which was for a period of three months was made with pay.

22. One of the core issues before this Tribunal in the present case is whether there were any exceptional circumstances that justified the decision of the Secretary-General's agents to convert the Applicant's placement on ALWP to ALWOP when they decided to extend it for another three months from 2 April until the beginning of July 2014 and for a further three months thereafter from 23 June 2014. In this regard, the starting point is to examine why a staff member whose alleged misconduct is under investigation is removed from the workplace during the said investigation.

23. Section 4 of ST/AI/371 (as amended), provides a clear answer in stating that "as a general principle, administrative leave may be contemplated if the conduct in question may pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible."

24. In the letter dated 2 April 2014, which conveyed the first extension of the Applicant's administrative leave, she was informed by the Under-Secretary-General for Field Support (USG/DFS) that based upon a review of the evidence set out in the investigation report into allegations of misconduct against her; it had been decided that she be placed on ALWOP.

25. On 30 June 2014, the Applicant received yet another letter, dated 23 June 2014, which stated that her ALWOP was being extended for an additional three

months from 14 July 2014, or until the completion of the disciplinary process, if any, whichever came earlier.

26. The reasons given for the conversion of the Applicant's ALWFP to ALWOP were that the Respondent had assessed that there was sufficient prima facie evidence that she engaged in serious misconduct by:

- a. organizing or chairing the NASA meeting on 27 December 2013;
- b. instructing protesters to close the gate to the UNMIL Star Base;
- c. making threatening statements towards international staff members;
- d. instructing protesters to switch off the Star base generators and refused to turn them on; and
- e. instigating national staff members to assault a United Nations Police (UNPOL) officer.

Also that the nature of the conduct she is alleged to have engaged in is sufficiently serious that it could, if proven, lead to her dismissal.

27. The Respondent submitted that whilst "exceptional circumstances" are not defined by the Staff Rules and Regulations, "where the conduct at issue is one that can lead to dismissal" should be the correct standard for justifying the conversion from ALWFP to ALWOP.

28. This argument is untenable for two reasons. The first is that there is no gain-saying that a proven misconduct on the part of a staff member can lead to the disciplinary action of separation or dismissal. This fact was well known to the Respondent on 2 January 2014 when he first sent the Applicant on ALWP. In other words, from the very beginning when investigations into the Applicant's alleged conduct of 27 December 2013 were initiated and she was placed on ALWFP, and up until 2 April 2014 when the element of pay was removed from her administrative leave and until the filing of this Application when another three-month ALWOP is running against the Applicant, nothing had changed.

29. Further, the Organization's legislation has remained the same and considering the rationale for administrative leave, the Applicant has remained outside the workplace and cannot affect or influence any investigations, tamper with investigative material or constitute nuisance.

30. Again, the claim by the Respondent that upon concluding and reviewing the investigation report, on 13 March 2014, he decided that the ALWFP be extended to ALWOP until the completion of any subsequent disciplinary process, clearly amounts to pre-judging the Applicant and engaging in disciplinary action against her.

31. In essence, the Respondent has prejudged an alleged misconduct outside of the applicable rules and has defeated the purpose of the administrative leave procedure and the clear provisions of staff rule 10.4 (d) that placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

32. Staff rule 10.4(a) makes it clear that administrative leave may continue throughout an investigation and until the completion of the disciplinary process. The Respondent has told the Tribunal that he concluded investigations into this case on or about 13 March 2014. On the basis of the findings in the investigation report, and upon the recommendation by the Department of Field Services (DFS), the Under Secretary-General, Department of Management (USG/DM) approved the placement on ALWOP for an initial period of three months.

33. There is no doubt that the Respondent concluded investigations into the allegations against the Applicant within two months of placing her on ALWFP and reviewed the findings. It is therefore only reasonable, fair and humane to expect that between 13 March and 29 April 2014 when the Applicant's ALWFP ended, a clear 47 days having elapsed; the Respondent had had sufficient time to make up his mind about either pursuing disciplinary action or closing the case against the Applicant.

34. The Tribunal at this stage wishes to address the matter of the time that has elapsed since 2 April 2014 when the Applicant was advised that a review of the

investigation report had been undertaken and a decision taken to place her on ALWOP. In his submissions, the Respondent has stated that he placed the Applicant on ALWOP for three months without making up his mind as to whether he wanted to pursue disciplinary action against her. Upon the expiry of that three-month period, he has embarked on a second three-month period of ALWOP and is yet to decide whether the disciplinary process will be resorted to.

35. It is necessary to point out that the provisions of staff rule 10.4(a) are made with a view to its fair application. In other words, the said provisions do not envisage that where administrative leave continues throughout an investigative process, it must continue for any length of time while the Respondent dithers in making up his mind as to the next course of action to follow.

36. The question that arises here is whether administrative leave can continue beyond the conclusion and review of investigations reports and when there is no institution of a disciplinary process? My answer to this is No! Such is not the intendment of staff rule 10.4(a).

37. Staff rule 10.4 (b) provides that as far as practicable, administrative leave should not exceed three months. Having diligently concluded investigations into the alleged misconduct of the Applicant, produced the investigation report and reviewed the said report within two months; why has the Respondent or his agents been unable to decide, six months later, whether to close the case or to proceed with disciplinary action? The circumstances of this extension of ALWOP, without doubt, point to a veiled disciplinary action.

38. With regard to the argument that the Secretary-General has discretionary powers to decide what constitutes “exceptional circumstances”, the Tribunal must underscore the fact that, as it held in the case of *Contreras* UNDT/2010/154¹ the word “discretion” is not synonymous with the word “power” and that in public administration, discretion must be exercised judiciously. In other words, the exercise of discretionary power is not absolute and any exercise of discretion by a public officer must be exercised carefully and with a sense of accountability.

¹ At para. 74.

39. The Tribunal in view of the foregoing considerations, finds and holds that the decision to convert the Applicant's ALWFP to ALWOP cannot be attributed to any exceptional circumstances, that the same offends the provisions of staff rule 10.4 and that the requirement of prima facie unlawfulness has been satisfied in this Application.

40. With regard to urgency, each new day in the circumstances in which the Applicant is placed, the urgency and desperation of her situation are escalated. While on ALWOP, the Applicant who has an infant under one year old is denied an income, medical coverage and any opportunity to engage in any income-generating activity.

41. With regards to the hardship element, the Tribunal particularly takes judicial notice of the ongoing Ebola virus disease outbreak currently ravaging almost every county in Liberia and warranting the declaration of a countrywide state of emergency. The deprivation of a staff member and her family that includes two children, one of which is a baby, of a source of income or medical coverage for several months at such a critical time while senior managers cannot decide whether to pursue disciplinary action or not is regrettable, insensitive, inhumane and irresponsible.

42. The United Nations family at this time is in the fore-front of international actions to contain the humanitarian crisis created by the Ebola outbreak in Liberia. It bears mentioning that the head of UNMIL, Ms. Landgren, while briefing the United Nations Security Council on 9 September 2014 on the Ebola disease in Liberia stated inter alia that "the speed and scale of the loss of lives, and the economic, social, political and security reverberations of the crisis, are affecting Liberia profoundly."

43. In the same vein and even more recently, Dr. Margaret Chan, the Director-General of the World Health Organization (WHO) addressed an emergency session of the United Nations Security Council on 18 September stating in part:

But this Ebola event is different. Very different. This is likely the greatest peacetime challenge that the United Nations and its agencies have ever faced. None of us experienced in containing

outbreaks has ever seen, in our lifetimes, an emergency on this scale, with this degree of suffering, and with this magnitude of cascading consequences. This is not just an outbreak. This is not just a public health crisis. This is a social crisis, a humanitarian crisis, an economic crisis, and a threat to national security well beyond the outbreak zones².

44. It is a matter of public knowledge all over the world that the General Assembly of the United Nations only three days ago, on 19 September 2014, approved the setting up of an international emergency response mission to Liberia among other urgent actions.

45. Having carefully reviewed the parties' submissions and other relevant facts, the Tribunal is of the firm view that the elements of urgency and irreparable harm have been proven in the Motion.

Conclusion

46. The Tribunal grants the Application for suspension of action pending the completion of the proceedings in the substantive Application before it. It is accordingly ordered that the decision to deprive the Applicant of her salaries while she is on administrative leave pursuant to staff rule 10.4 be hereby suspended until the Applicant's Application on the merits has been determined.

47. The Tribunal directs that this Order be served on the USG/DFS.

(Signed)

Judge Nkemdilim Izuako

Dated this 22nd day of September 2014

² World Health Organization, Programmes,
<http://www.who.int/dg/speeches/2014/security-council-ebola/en/>.

Entered in the Register on this 22nd day of September 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi