



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/004

Order No.: 007 (NBI/2016)

Date: 15 January 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NIANZOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON THE APPLICATION FOR
SUSPENSION OF ACTION PURSUANT TO
ARTICLE 13 OF THE RULES OF
PROCEDURE

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Miryong An, ALS/OHRM

The Application and Procedural History

1. The Applicant is a Security Guard at the United Nations Operation in Côte d'Ivoire (ONUCI). He serves on a fixed term appointment, at the GS5 level.
2. On 8 January 2016, the Applicant filed for an Application for Suspension of Action (SOA) pending management evaluation against the decision to place him on Administrative Leave Without Pay (ALWOP).
3. The SOA Application was served on the Respondent on 11 January 2016.
4. The Respondent filed his Reply on 12 January 2016 and the Applicant filed his response to the Respondent's Reply on the same day.

The Facts

5. The Applicant has worked for ONUCI as a Security Guard since 2007. He has consistently received positive performance appraisals and prior to the events giving rise to the present case, has never been the subject of a disciplinary investigation.
6. On 2 October 2015, the Applicant was accused by the Officer-in-Charge of ONUCI's Special Investigations Unit (SIU) of attempting to steal concertina wires from the ONUCI compound.
7. Shortly thereafter, he was interviewed by the SIU in relation to these alleged events. The SIU produced the investigation report circa 16 October 2015.
8. The Applicant has never been provided with a report of the SIU's findings into the alleged theft of the concertina wires.

9. On 8 December 2015, the Applicant received a letter, dated 7 December 2015, from the Under-Secretary-General for Field Support (USG/DFS). This letter stated that the Under-Secretary-General for Management (USG/DM) had decided to place the Applicant on ALWOP.

10. The letter informed the Applicant that he was being so placed on ALWOP on the basis of the SIU's findings as contained in their Report that there was *prima facie* evidence implicating the Applicant in the theft of concertina wires.

11. The initial duration of the ALWOP would be for three months or until the completion of any subsequent disciplinary process, whichever came first, at which point the matter "will be revisited". Finally, the letter stated that if the Applicant wished to maintain health insurance coverage during the period of ALWOP, he could do so at his own expense.

12. On 8 January 2016, the Applicant filed a Management Evaluation Request challenging the decision to place him on administrative leave and the related decision to deprive him of his pay during this period.

Parties' Submissions

Applicant

13. The decision to place the Applicant on administrative leave and the related decision to deprive him of his pay during that period are *prima facie* unlawful.

14. The decision-maker did not have the authority to place the Applicant on ALWOP.

15. ST/AI/234/Rev.1/Amend.2, as amended by ST/AI/234/Rev.1/Amend.2, vests the Under-Secretary-General for Management (USG/DM) with authority to decide on

the placement on administrative leave pending the outcome of an investigation into misconduct.

16. In the case of the Applicant, the letter placing him on ALWOP states that the decision was made by USG/DM, but the letter is signed by USG/DFS. Nothing in the letter properly indicated that the Assistant Secretary-General for Human Resources Management (ASG/OHRM) exercised her discretion to place the Applicant on administrative leave; nor that the USG/DM exercised his discretion to place him on ALWOP. The decision is thus *ultra vires*.

17. Secondly, the reasons for placing the Applicant on administrative leave have not been properly articulated, and are not supported by the evidence.

18. The Applicant has neither been provided with the SIU's findings nor the opportunity to comment on it. The Applicant has no way of knowing whether the Administration interviewed any witnesses other than himself. Further, it is not known whether the Administration made any attempts to verify the Applicant's statements to the SIU that the wires in question were due to be discarded by the Organization. The Applicant is essentially forced to take the Administration's word that the standard for placing him on administrative leave has been met, without any way to question that determination or to hold the decision-maker accountable.

19. Thirdly, the decision to deprive the Applicant of pay while on administrative leave does not accord with the relevant rules of the Organization. The letter placing him on ALWOP does not refer to any "exceptional circumstances" that justify not paying the Applicant for the duration of the administrative leave.

20. The continued deprivation of an income makes this matter urgent, so as to satisfy the urgency limb of the test for suspension of action.

21. The Applicant's professional reputation and career prospects are jeopardised by the impugned decision, and the resulting harm of that and the effects of the deprivation of an income is irreparable.

Respondent

22. The Applicant has failed to satisfy the three limbs of the test for suspension of action.

23. The Applicant has failed to establish that the impugned decision is *prima facie* unlawful. The decision to place the Applicant on ALWOP complied with the applicable legislative instruments.

24. There was sufficient *prima facie* evidence to indicate that the Applicant was involved in the theft of United Nations property, which conduct is serious particularly given that the Applicant is employed by the Organization as a security guard. The Applicant's actions are sufficiently serious and could lead to his separation or dismissal, thereby satisfying the requirement of "exceptional circumstances."

25. The fact that the USG/DFS signed the letter placing him on ALWOP, and that it was not copied to the ASG/OHRM and the USG/DM, does not affect the legality of the decision. The letter clearly states that the decision was taken by the USG/DM. The Respondent has tendered into evidence the memorandum on file which clearly show that the ASG/OHRM and the USG/DM "were involved and kept informed of this matter, and that USG/DM had actually made the decision to place the Applicant on ALWOP".¹

26. The Applicant was interviewed during the course of the investigation and therefore had the opportunity "to provide his account of the events". The notification

¹ Annex R4.

letter placing him on ALWOP also informed of the reasons for that decision. The Organization's "legislative instruments do not provide that a staff member be given the opportunity to review and comment on the evidence against him prior to placement on ALWOP". Such evidence is shared if and when he/she is formally alleged to have engaged in misconduct.

27. During the interview, the Applicant did not dispute the fact that he removed concertina wires from a United Nations vehicle and loaded them into his personal vehicle.

28. The elements of urgency and irreparable harm have also not been met. Every decision to place a staff member on ALWOP would be met with a motion for injunction if the deprivation of salary is found to give rise to urgency and irreparable harm within the meaning of the test.

Applicant's Response

29. The Respondent has not provided any communication from the USG/DM indicating that he had considered and concurred with this recommendation, nor did he supply any other convincing material indicating that it was he who had taken the decision to place the Applicant on ALWOP.

30. The Applicant reiterates that the letter placing him on ALWOP was vague and contained no details as to the reason for the impugned decision, as it merely indicated that the Applicant was "implicated" in the theft of wires on the basis of *prima facie* evidence against him.

Deliberations

31. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Art. 13 provides as follows:

1. 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.**

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

All three elements of the test must be satisfied before the impugned decision can be stayed.

32. A suspension of action order may appear in substance and effect to be similar to an interim order of injunction in national jurisdictions. An injunction in national jurisdictions is ordinarily a temporary order made with the purpose of providing the applicant/plaintiff some temporary relief by maintaining the status quo and thereby regulating the position between the parties to an application pending adjudication.

33. Within the United Nations internal justice system however, a suspension of action order under article 2 of the UNDT Statute and article 13 of its Rules of Procedure, can only be obtained to maintain the status quo until the Management Evaluation Unit (MEU) to which a request for review of an impugned Management decision must be made, discharges it upon concluding that the impugned decision was lawful or unlawful.

34. A Tribunal's order granting suspension of action of an administrative decision cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

35. To grant an application for suspension of action, the Tribunal must be satisfied that there is a serious question to be tried on the merits and that damages would not

adequately compensate the Applicant in the event that his or her application succeeds at trial. The application would therefore normally fail where a court finds that the payment of damages would be an adequate remedy for the harm suffered.²

36. Additionally, a suspension of action application will only succeed where the Applicant is able to establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

37. This Application must be adjudicated against the stipulated cumulative test, in that the Applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

38. In this case, the Applicant contends that the impugned decision is *prima facie* unlawful because it was not made by the appropriate authority, the Applicant was not properly given the reasons for the decision nor the evidence relied upon, and that the necessary "exceptional circumstances" justifying the deprivation of salary does not exist.

39. With regard to the authority of the decision-maker, the Tribunal is satisfied on the basis on the Respondent's submission of Annex R4 that the USG/DM was party to the decision-making process. The mechanics of how the USG came to his decision could however have been demonstrated in a neater, and less roundabout, fashion.

40. In respect of the Applicant's contention that he has not been afforded the opportunity to comment on the SIU's findings, and is indeed unaware of what those

² See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanide Co v Ethicon Ltd* (1975) AC396.

findings are, the Tribunal is satisfied that the Respondent's actions accord with section 6 of ST/AI/371 as to when a staff member's right to comment on/respond to the allegations is triggered.

41. The Respondent submitted that the fact that the allegations against the Applicant, if found to be proven could lead to the separation or dismissal of the said Applicant constitutes "exceptional circumstances" for the purposes of justifying the ALWOP on which the Applicant was placed. The Tribunal does not agree with this submission.

42. It is rather the Tribunal's view that "exceptional circumstances" refer to the *particular* set of circumstances which are "exceptional" or as in this case "egregious" and which surround the facts in issue in the particular case.

43. The Tribunal however agrees that there are in this case "exceptional circumstances" warranting the placement of the Applicant on ALWOP. This is because it is not disputed that the Applicant, who is employed by the Organization to protect its premises and properties, has been found to be in unauthorized possession of property belonging to the Organization.

44. Based on the evidence before it, the Tribunal finds no impropriety in the Respondent's application of staff rule 10.4 and ST/AI/371 (as amended) (Revised Disciplinary Measures and Procedures). This Application therefore fails on the first limb of *prima facie* unlawfulness.

45. Having found that the impugned decision has not been shown to be *prima facie* unlawful, and given that the test for suspension of action applications is a cumulative one, it is unnecessary for the Tribunal to proceed to assess this Application on the ground of urgency and irreparable harm.

46. The Application for Suspension of Action is hereby REFUSED.

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Order No.: 007 (NBI/2016)

(Signed)

Judge Nkemdilim Izuako

Dated this 15th day of January 2016

Entered in the Register on this 15th day of January 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi