



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KABONGO MBAYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**DECISION ON THE APPLICANT'S
APPLICATION FOR SUSPENSION OF
ACTION**

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Jonathan Croft, ALS/OHRM

Susan Maddox, ALS/OHRM

Introduction

1. The Applicant holds a fixed-term appointment with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO/the Mission). He serves as a Logistics Assistant at the G-4 level and is based in Lubumbashi.

Facts

2. The Applicant entered into service of the United Nations in MONUSCO as a Transport Assistant in 2000. In 2005, he became a Logistics Assistant on the G-4 level.

3. Following a complaint by a MONUSCO vendor on 13 October 2015, that the Applicant had placed purchase orders and obtained supplies for hundreds of vehicle tyres and batteries in the name of MONUSCO between 1 and 12 October 2015, the Applicant's home was searched on 13 October 2015. Upon recovery of most of the tyres and batteries, the Applicant admitted placing orders for and obtaining the goods.

4. He was interviewed by the MONUSCO Special Investigations Unit (SIU) on suspicion of fraudulent purchases in the name of the Mission on 14 October 2015.

5. MONUSCO SIU produced its report on 18 December 2015 and it was then forwarded to OIOS for further investigation.

6. In or about the third week of January 2016, another vendor complained to the Field Administration Officer at MONUSCO that the Applicant, posing as a procurement officer in the Mission, had between 31 March and 22 September 2015 placed purchase orders in the name of MONUSCO from him for stationery. Although the stationery was all delivered, payments had not been made for most of it.

7. On 2 May 2016, the Applicant was placed on Administrative Leave without Pay (ALWOP) for three months by the Under-Secretary-General for the Department of Field Support (USG/DFS) in respect of the complaint and investigations concerning the vehicle tires and batteries.

8. On 31 August 2016, OIOS interviewed the Applicant in relation to the report regarding his alleged fraudulent purchase orders and the obtaining of stationery in the name of the Mission between March and September 2015. Again the Applicant admitted to investigators that he placed the orders and obtained the stationery supplies.

9. On 3 August 2016, the USG/DFS extended the ALWOP by a further three months.

10. On 4 November 2016, the Office of Human Resources Management (OHRM) received a memorandum from the Assistant Secretary-General for Field Support referring the two matters of the Applicant's conduct for consideration of disciplinary action. The correspondence included two investigation reports from the Investigations Division of OIOS, and a preliminary investigation report from the MONUSCO SIU.

11. On 9 November 2016, the ALWOP was extended for three more months.

Submissions

Applicant

12. It is the Applicant's case that the decision to place him on administrative leave, and the decision to do so without pay, violates the relevant rules as provided for in ST/AI/371.

13. The Applicant submits that there is an obligation to indicate all reasons for placement on ALWOP in a written statement, which the letter of 2 May 2016 does

not do. The Applicant submits that evidence of an attempted fraud does not resulting in a risk to the Organization and reputational threat does not meet the required level that the staff member poses a danger to the Organization.

14. The USG/DFS provides no indication as to the probable duration of the ALWOP. The second letter simply indicates that it will continue for a further three months or until completion of the investigation. The newly received extension of ALWOP clearly demonstrates that it will continue until completion of the investigation. In such circumstances, it is required under the rules that the Respondent indicate its probable duration.

15. The Applicant has now been on such leave for nine months. He was not even interviewed until four months after his placement on ALWOP. The failure of the Respondent to investigate the allegations against the Applicant with sufficient alacrity renders the extension of his ALWOP unreasonable and contrary to staff rule 10.4(b).

16. It is submitted that when considering the decision to place a staff member on ALWOP, the Secretary-General must balance the interests of the staff member and the Organization's obligations to them against whatever exceptional circumstances exist. The Respondent has entirely failed to do this. No exceptional circumstances exist to justify not paying the Applicant and there are compelling reasons to continue paying him.

17. The Applicant contends that the matter is urgent in that his serious health issues and the withdrawal of medical insurance by the Respondent, coupled with the threat of eviction by his landlord and the adverse effect the lack of pay is having on his school going children places him and his family in a dire situation.

18. These same factors also make the harm that faces the Applicant irreparable.

Respondent

19. The Respondent submits that the Applicant has not disputed that he engaged in the conduct he has been accused of. Indeed, he has expressed his “desire to generate a revenue stream to his personal benefit, utilizing the reputation and goodwill of the Organization in the process”.

20. The Applicant has engaged in the alleged fraudulent conduct at issue on multiple occasions including at least on one more occasion after he had been interviewed by the MONUSCO SIU in October 2015 and, on at least two occasions, after he had received a formal written reprimand for similar conduct. The Applicant has repeatedly engaged in deceptive conduct under the guise that he was acting under the authority of the United Nations.

21. It is the case for the Respondent that the Applicant has failed to establish that the impugned decision(s) are *prima facie* unlawful, that the matter is urgent and that the element of irreparable harm has been satisfied.

Deliberations

22. 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.

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

24. 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.

25. Within the United Nations internal justice system however, a suspension of action order under art. 2 of the UNDT Statute and art. 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.

26. 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.

27. 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.¹

¹ See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanide Co v Ethicon Ltd* (1975) AC396.

28. 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*.

29. 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 irreparable harm.

30. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue before the court.²

31. The Tribunal finds that the Applicant has not made out a case of *prima facie* unlawfulness.

32. The Applicant's submission that he was not interviewed until four months after he was placed on ALWOP is not entirely correct. The Applicant was first interviewed by the Special Investigations Unit in October 2015, following which a report was issued and forwarded to OIOS for further investigations. His interview by OIOS after he was placed on ALWOP was based on the second reported case of obtaining stationery supplies. While the Tribunal will accept that the matters could have been dealt with more expeditiously by the Respondent, that delay does not in and of itself makes the decision to place him on ALWOP *prima facie* unlawful.

² See also: *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

33. The Respondent complied with the requirements of staff rule 10.4(b) and provided the Applicant with written explanations for being placed on ALWOP on 2 May 2016, 3 August 2016 and 9 November 2016.

34. With respect to “exceptional circumstances” *per* staff rule 10.4(c), this Tribunal has previously held that:

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.³

35. On the facts of the present case, the Tribunal is satisfied that there are in this case “exceptional circumstances” warranting the placement of the Applicant on ALWOP. The record before the Tribunal suggests that the Applicant has, on several occasions, procured goods for personal use using the Organization’s good offices with vendors.

36. The Applicant has admitted to having prepared three purchase orders for batteries and tyres, which he intended to sell for for personal gain. The Applicant has also admitted to similar conduct in respect of the fraudulent purchase of stationery prior to this. The Tribunal finds the Applicant’s alleged, and repeated, conduct to be sufficiently egregious as to justify placement on ALWOP.

37. 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.

38. 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

³ *Nianzou* Order No. 007 (NBI/2016).

cumulative one, it is unnecessary for the Tribunal to proceed to assess this Application on the ground of urgency and irreparable harm.

39. The Application for Suspension of Action is **accordingly REFUSED.**

(Signed)

Judge Nkemdilim Izuako

Dated this 22nd day of November 2016

Entered in the Register on this 22nd day of November 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi