



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HARRIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a former Information Systems Assistant at the United Nations Interim Force in Lebanon (UNIFIL) in Naqoura, Lebanon. He was on a continuing appointment at the FS-5 level.

2. On 28 July 2017, he filed an application for suspension of action (SOA), pending management evaluation, challenging the Respondent's decision to separate him from service for abandonment of post.

3. The Respondent filed a reply on 1 August 2017 in which it is argued that the application is not receivable.

4. The Applicant filed a memorandum on 3 August 2017 reiterating his claim and containing copies of documents already submitted.

Facts

5. The facts below are reproduced primarily from the documents submitted by the Applicant in support of the application.

6. The Applicant joined UNIFIL on a fixed-term appointment as an Information Technology Assistant (FS-4) on 23 September 2007. His fixed-term appointments were subsequently extended on several occasions.

7. On 11 January 2016, the UNIFIL Human Resources Management Service (HRMS) sent him a notification of non-extension of appointment effective 30 June 2016, due to changes in staffing in the budget for 2016/2017. On 23 March 2016, UNIFIL's Chief of Information Technology reported to HRMS that the Applicant had not reported to work in Sector West since 17 March 2016. That same day, HRMS/UNIFIL sent an email notification to the Applicant advising him of the

provisions of ST/AI/400 (Abandonment of post). On 30 March 2016, the Applicant sent to HRMS/UNIFIL a medical report regarding his anticipated surgery scheduled for 6 April 2016. On 20 April 2016, the Medical Services Division (MSD) approved certified sick leave from 21 March 2016 through 1 July 2016. On 2 August 2016, it was extended for a second period from 4 July 2016 to 7 October 2016.

8. On 23 June 2016, during his sick leave period, the Applicant was selected for an FS-5 Information Systems Assistant post in UNIFIL thus enabling the Mission to retain him beyond 30 June 2016.

9. On 4 October 2016, the Applicant received an email from the Chief, Regional Information Communications and Technology Services (RICTS) confirming an earlier June 2016 notification of his reassignment to UNIFIL Sector East in accordance with the RICTS rotation programme. On the same day, 4 October 2016, while still on approved certified sick leave, the Applicant visited the HRMS/UNIFIL office. He was required to provide a certificate from MSD that he had been cleared to return to the Mission. On 10 October 2016, the Applicant submitted a medical clearance dated 7 October 2016 issued by his treating physician, but not MSD.

10. On 9 November 2016, the Applicant addressed emails to the Chief/RICTS requesting home leave and provided supporting documents to justify his leave request.

11. On 10 November 2016, the Applicant wrote to the Chief/RICTS and requested him to reconsider his decision to remove him as a First Reporting Officer at his new assignment in Sector East. Following an internal meeting within RICTS, the Applicant informed the Chief of his inability to work under the conditions proposed by RICTS. On the same day, the Chief RICTS requested to arrange a meeting with the Chief Human Resources Officer (CHRO) to discuss the Applicant's reassignment and his absence from work. The meeting was held on 15 November 2016 between the Applicant, the Chief RICTS, the CHRO and the Chief International Staff Unit.

12. On 28 November 2016, the Applicant received an email from the Chief RICTS enquiring as to why he had failed to report to work in Sector East and instructing him to explain his absence in accordance with conclusions of the official meeting held on 15 November 2016. The Applicant informed the Chief/RICTS that he was unable to serve in Sector East.

13. By memo dated 29 November 2016, the Applicant was given the first warning by the CHRO that the process of separation for abandonment of post would be commenced against him as he had been absent from work at the ICTS Unit in Sector East since 16 November 2016.

14. On 1 and again on 12 December 2016, the Applicant responded to the memo dated 29 November 2016 and explained why he was unable to work in Sector East. On 8 December 2016, the Applicant addressed another email to the Chief/RICTS and others requesting for a reconsideration of the decision to reassign him to Sector East.

15. The Applicant proceeded on home leave from 19 December 2016 until 3 January 2017.

16. By memo dated 16 January 2017, the Applicant received a final warning to report to work or else UNIFIL would initiate abandonment of post proceedings. He was also informed that his salary had been placed on hold effective January 2017 due to his unauthorized absence. The Applicant responded to the 16 January 2017 memo on 17 January by email to the Chief/RICTS and other UNIFIL staff managers where he stated that he considered the abandonment of post warning as part of systematic threats.

17. The proceedings for abandonment of post were ceased on 8 February 2017 upon receipt of the approved medical certificate for the period from 28 January to 17 February 2017. HRMS/UNIFIL, however, placed the Applicant on Special Leave without Pay (SLWOP) for the periods of unauthorized absence from 8 October 2016 to 8 December 2016 and 4 January 2017 to 22 January 2017.

18. On 17 March 2017, HRMS/UNIFIL was notified by MSD that a further extension of the Applicant's certified sick leave had been approved from 18 February 2017 through 31 March 2017.

19. On 27 March 2017, the Applicant sent an email to the Chief/RICTS and other UNIFIL staff managers requesting Special Leave with Full Pay (SLWFP).

20. On 31 March 2017, the CHRO informed the Applicant that his entitlement to sick leave with full pay would be exhausted as of 3 April 2017. She suggested that any further sick leave approved by the MSD could be charged against sick leave with half pay. She awaited the Applicant's instructions in this respect.

21. Between 31 March 2017 and 25 July 2017 the Applicant engaged in an exchange of emails with the CHRO copying other UNIFIL senior managers, on the subjects of the termination of his health insurance, the release of his salary and on a request he made to the Secretary-General for SLWFP. On 7 April 2017, the Applicant requested management evaluation of, *inter alia*, the decision to cancel his health insurance and to withhold his salary for the periods from 8 October 2016 to 8 December 2016 and from 4 January 2017 to 22 January 2017, to which he received a response on 21 July 2017. These requests are not the subject of the present application.

22. On 23 May 2017, in response to the Applicant's inquiry about his request for SLWFP, the CHRO informed the Applicant that as advised in their memo to him dated 7 April 2017, they had explained to him how he should make a request for SLWFP and that as her office had not been copied on his memorandum to the Secretary-General dated 19 April 2017 requesting SLWFP, they had no oversight of his request and that they had asked their colleagues in the Field Personnel Division to follow up.

23. By a memo of 24 July 2017, the Applicant was informed by the UNIFIL Officer-in-Charge of the Mission Support Division that the Secretary-General had approved the decision to separate him from service on the grounds of abandonment of post effective 12 July 2017.

24. On 25 July 2017, the Applicant filed a management evaluation request contesting the decision to separate him from service on the grounds of abandonment of post.

25. On 31 July 2017, the Applicant received notification that no approval for SLWFP had been received from the United Nations Headquarters in New York.

Submissions

Applicant

26. The alleged abandonment of post is in violation of ST/AI/400 (Abandonment of post), particularly on the basis that UNIFIL was aware that his absence from the mission was beyond his control, that he had requested special leave, he had not been advised of the status of his special leave request and UNIFIL was aware that he was suffering from severe stress disorder.

27. The alleged unauthorized absences from work from 8 October to 8 December 2016, 4 January 2017 to 22 January 2017 were wrongly recorded.

28. Following his surgery, his reassignment to the toughest part of the mission was a clear indication of prohibited conduct and amounts to harassment.

29. The urgency and irreparable harm in this case is exacerbated by his poor health and his current financial hardship as a result of increased medical bills.

Respondent

Receivability

30. The application is not receivable *ratione materiae*. The Dispute Tribunal lacks jurisdiction to review an application for suspension of action if the contested administrative decision has been implemented. An order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

31. The contested decision has been implemented. The Applicant was separated from service effective 12 July 2017 in accordance with ST/AI/400. Therefore, the Dispute Tribunal lacks jurisdiction to review the application.

Considerations

32. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. They provide, in the relevant parts:

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.

33. In reference to the Respondent's contention of the lack of receivability of the application resulting from the putative implementation of the impugned decision, the Tribunal recalls that art. 2.2 of the UNDT Statute differs from art. 10.2 specifically in that it does not preclude suspending implementation of the contested decision in cases of appointment, promotion or termination. As noted by the United Nations Appeals Tribunal (UNAT), applying art. 2.2 must not render it meaningless.¹ Accordingly, it is

¹ *Villamorán* 2011-UNAT-160 (albeit on different facts).

this Tribunal's position that the Respondent's unilateral determination of the separation date may not act so as to bar a request for suspension of action. Practices consisting in dating separation of the staff member with immediate or even retroactive effect – and leading to situations like, *e.g.*, one contemplated in *Applicant* UNDT/2012/091, where a staff member was given a notice of non-extension of appointment notice 30 minutes before the close of business on the separation day and, bordering absurdity, the dispute whether or not her filing done 1.5 hours later had been done before or after the implementation – must not be allowed to circumvent the right to seek suspension of action.

34. The Tribunal observes that the notion of “implementation” under art. 2.2 of the UNDT Statute is being interpreted in consideration of the facts of the case and practical consequences of the decision. Suspension of implementation would usually mean precluding the decision taking legal effect and the administration acting upon it. Notably, UNAT jurisprudence accepted widely that in non-selection and non-promotion disputes it means not just the execution of the dispositive part of the impugned decision, but also imminence of decisions and actions which are legally enabled by the impugned decision and which would have the effect of irreversibly frustrating the Applicant's claim. This way, the suspension of action request serves the more general purpose of securing the main claim.

35. Referring these considerations to termination of appointment or contract, suspending the legal effect of a decision is possible notwithstanding the unilaterally determined date of separation. Conversely, obstacles to such a suspension would be posed by the occurrence of further legal consequences, in the sense that the Respondent cannot reverse them without incurring liability toward third persons, bearing costs, obtaining consent of a third person; or where an applicant had accepted the consequences either expressly or, most often, implicitly by, *e.g.*, not acting during the appropriate notice period, and then tried to retract. “Implementation” does not follow from a mere issuance of the decision, or, for that matter, from the Respondent having processed the relevant data in *Umoja*.

36. In accordance with the aforesaid, the Tribunal does not accept the Respondent's argument on the lack of receivability. It notes, moreover, that the question whether the decision on termination may take legal effect retroactively at first place is conditioned upon establishing that the termination was lawfully taken in the regime under ST/AI/400 on abandonment of post. As such, the issue in the present case falls under consideration pursuant to the tripartite test under art. 2.2 of the UNDT Statute.

37. It is recalled that an application for suspension of action must be adjudicated against the stipulated cumulative test, in that an 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. 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 an applicant to show that there is a judiciable issue before the court.²

38. Regarding the lawfulness of the determination of abandonment of post, the Tribunal notes that it remains contentious between the parties and unclear upon the file, such as it is, whether the Applicant ever assumed his assignment at UNIFIL Sector East.

39. The Mission maintains that he had unauthorized absence from 8 October 2016 until 8 December 2016 and from 4 January until 22 January 2017, with a home leave period in between. The Applicant claims that this had been wrongly recorded; he nevertheless offers no proof or explanation why would it be erroneous; furthermore, at least in relation to the absence in November the Applicant confirmed himself that he had been unable to report to work at Sector East. It moreover results from the

² See *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.

correspondence cited above that the Applicant did not attend work following the expiry of his sick leave with full pay on 3 April 2017.

40. Whereas the Applicant maintains that his absence from the Mission was beyond his control, no information on the file suggests that he produced any medical certificates to this effect. Explanations about climate conditions in Sector East or “traumatic stress” as reasons preventing him from making at minimum at least a *bonae fidei* effort to discharge his duties are not plausible and indicate persistent and unfounded refusal to take up assignment. The mere fact that the Applicant subsequently requested SLWFP does not, under the circumstances, suffice to demonstrate a genuine will to remain in post. Neither did it authorize the Applicant to presume that, lacking explicit institutional response to his application, the SLWFP would be granted. Given the exceptional nature of SLWFP, granting of this request could not have been presumed, especially considering that the regular procedures for protracted absence on health basis are sick leave with full or half pay and disability, procedures of which the Applicant was informed. Considering the aforesaid, the impugned decision in establishing abandonment of post is not *prima facie* unlawful.

41. In light of this finding the Tribunal does not deem it necessary to consider the remaining elements of the tripartite test.

Conclusion

42. The application is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 4th day of August 2017

Entered in the Register on this 4th day of August 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi