



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/035

Order No.: 101 (NBI/2020)

Date: 27 May 2020

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AL-TAMIMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Marcos Zunino, OSLA

Counsel for the Respondent:

Elizabeth Brown, UNHCR

Francisco Navarro, UNHCR

Background

1. By application filed on 19 May 2020, the Applicant, Head of Field Office in Zarzis, Tunisia, at the United Nations High Commissioner for Refugees (“UNHCR”) seeks the suspension, pending management evaluation, of the decision to place him on Administrative Leave With Full Pay (“ALWFP”) from 3 October 2019 and on Administrative Leave Without Pay (“ALWOP”) from 6 May 2020 (“the contested decisions”).

2. The reply was filed on 22 May 2020 in which it was argued that in all aspects related to the decision of 3 October 2019, the application is moot and is not receivable *ratione materiae* and that the judicial review should therefore be limited to the decision of 6 May 2020 to place the Applicant on ALWOP.

Facts

3. On 2 and 9 September 2019, the Inspector General’s Office (“IGO”) received a complaint of misconduct. It was alleged that the Applicant had created a hostile working environment, made inappropriate comments to female colleagues, sent explicit media content and attempted to coerce a staff member to report to work while on sick leave.¹

4. On 3 October 2019, he was placed on ALWFP for a period of three months. The ALWFP was extended on 2 January 2020, 3 February 2020, 27 February 2020 and 1 April 2020.²

5. On 28 February 2020, the Applicant was interviewed as the subject of the investigation.³

6. By email dated 10 March 2020, the Applicant informed the IGO that he had

¹ Reply, para. 6.

² Application, annexes 3 – 7.

³ Application, annex 8 and reply, para. 11.

been hospitalized because of the stress induced by his interview and requested that the review of his record of interview be postponed. He attached a medical report from the Hayath Hospital in Baghdad to his email.⁴

7. On 26 April 2020, following verification and consultation with officials in the Iraqi Ministry of Health, a source informed the IGO that there was no Hayath Hospital in Baghdad.⁵ In addition, the IGO obtained evidence from the United Nations Staff Mutual Insurance Society against Sickness and Accident (“UNSMIS”) that, on 28 March 2019 and 1 February 2020, the Applicant had submitted two claims for the reimbursement of USD8,050 in medical expenses allegedly incurred at the Hayath Hospital. The IGO also noticed irregularities in several other medical insurance claims submitted by the Applicant since October 2018.⁶

8. On 28 April 2020, the IGO sought an explanation from the Applicant regarding a possible outside activity, namely, a dairy farm in Turkey.⁷

9. On 5 May 2020, the IGO transmitted the information regarding the Hayath Hospital and the Applicant’s medical claims to the Director of the Division of Human Resources (“DHR”).⁸

10. Based on that information, on 6 May 2020, the Applicant was notified by the Director/DHR that the ALWFP had been converted to ALWOP. The decision was warranted by the exceptional circumstances that the misconduct was of such gravity that it would, if established, warrant separation or dismissal and that the Administration had information about the misconduct that made it more likely than not that the Applicant had engaged in that conduct.⁹

11. The Applicant requested management evaluation of the contested decisions on

⁴ Reply, annex 3.

⁵ Reply, annex 5.

⁶ Reply, annex 6.

⁷ Application, annexes 10 and 11.

⁸ Reply, annex 7.

⁹ Application, annex 2.

19 May 2020.¹⁰

Considerations

12. Articles 2.2 of the UNDT Statute and 13 of its Rules of Procedure which clothe the Tribunal with jurisdiction over applications for suspension of action require that the Tribunal shall exercise this jurisdiction during the pendency of the management evaluation of the contested administrative decision. They also require an applicant to satisfy the Tribunal that the contested decision appears *prima facie* to be unlawful, that the matter appears to be of particular urgency and that its implementation would appear to cause irreparable damage.

13. The issues for determination are:

- a. Whether the application or aspects of it is receivable;
- b. Whether the decision to place the applicant on ALWOP is *prima facie* unlawful;
- c. Whether the matter appears to be of particular urgency; and
- d. Whether its implementation would appear to cause irreparable damage.

Whether the application or aspects of it is receivable

14. The Respondent maintains that the application is not receivable in all aspects regarding the placement of the Applicant on ALWFP. It is argued that the decision to place the Applicant on ALWOP replaced and superseded the decision of 3 October 2019 to place him on ALWFP and the subsequent decisions to extend the ALWFP, meaning that the Applicant is on a different administrative status since 7 May 2020. It was argued that the application is moot and is not receivable *ratione materiae* in aspects relating to the ALWFP, since the Applicant did not request management evaluation in

¹⁰ Application, annex 12.

relation to them within the statutory time limits.

15. The Tribunal notes that the decision of 3 October 2019 to place the Applicant on ALWFP and the subsequent decisions to extend the ALWFP had dates on which they lapsed, meaning that they were fully implemented at end of each given period. It is an established principle that an administrative leave is considered as fully implemented upon its completion¹¹ and that the Dispute Tribunal may not order a suspension of action with regard to fully implemented decisions. The decisions to place the Applicant on ALWFP and the extensions of ALWFP are distinct from the decision to place him on ALWOP since the ALWFP decisions were fully implemented. The Tribunal agrees with the Respondent's submission that the application is moot and is not receivable *ratione materiae* in all aspects regarding the placement of the Applicant on ALWFP.

Whether the decision to place the Applicant on ALWOP is prima facie unlawful

16. The Applicant raises two arguments in this regard. The first is that the obligation of the Administration under staff rule 10.4(b) to give a written statement of the reasons for placing him on administrative leave was not fulfilled. The Respondent maintains that those obligations were fulfilled by the 6 May 2020 letter.

17. The Tribunal notes that staff rule 10.4(b) and paragraph 10.1 of UNHCR/AI/2018/18 (Administrative Instruction on Misconduct and the Disciplinary Process) provide that staff members placed on administrative leave shall be given a written statement of the reason(s) for such leave and its probable duration. The issue is whether the information in the 6 May 2020 letter to the Applicant satisfies those requirements. The information he was given was,

... considering the nature and gravity of the alleged misconduct, and due to further evidence that has come to light during the investigation of the IGO, I have decided to convert the status of your administrative leave in accordance with staff rule 10.4 and paragraphs 10.4 and administrative leave without pay with immediate effect. The

¹¹ *Kompass*, Order No. 099 (GVA/2015), para. 18.

exceptional circumstances that warrant this decision are that the misconduct is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix) and that I have information about the misconduct that makes it more likely than not (preponderance of the evidence) that you engaged in the misconduct. I would also like to inform you that the administrative leave is extended to 31 May 2020.

18. While the Applicant argues that those general statements do not allow him to understand how the Administration came to its determination and what factual circumstances justified the decisions, the Respondent maintains that the information adequately satisfies the requirements of staff rule 10.4(b) and paragraph 10.1 of UNHCR/AI/2018/18. Also, the Respondent argues that none of those provisions require that a staff member be informed of the exact nature of the allegations of misconduct or the available evidence. Further, that the Applicant's right to respond to the evidence that the investigator intends to rely on only applies in the context of the investigation and the disciplinary process and not at the stage of placement on administrative leave. Lastly, that staff rule 10.4(a) allows for a staff member to be placed on administrative leave at any time after an allegation of misconduct, even before the opening of a formal investigation.

19. The Tribunal notes that staff rule 10.4(b) and paragraph 10.1 of UNHCR/AI/2018/18 do not specify the form the reason(s) given to the Applicant should take to fulfil the legal requirements. And, since it is possible for a staff member to be placed on administrative leave before the opening of a formal investigation (staff rule 10.4(a)), the furnishing of generic reasons to an applicant for any such decision is not out of place. The Tribunal's jurisprudence indeed supports the view that generic information such as was given to the Applicant suffices for purposes of discharging the obligation under staff rule 10.4(b) and paragraph 10.1 of UNHCR/AI/2018/18.¹² In this case, the reasons given to the Applicant included those which had been communicated to him by the 3 March 2019 letter and bore probable duration. The Tribunal finds that the Respondent fulfilled the obligations under staff rule 10.4(b) and paragraph 10.1 of

¹² See for example *Eldiasty*, Order No. 036 (NBI/2019).

UNHCR/AI/2018/18, and that the decision is not unlawful in this regard.

Whether exceptional circumstances warranting the placement of the applicant on ALWOP exist in this case

20. The Applicant argues that in order to convert his ALWFP into ALWOP, the Administration needed to establish that the misconduct is of such gravity that it would, if established warrant separation or dismissal under staff rule 10.2(a)(viii) or (ix), and that there is information before the Director/DHR about the misconduct that makes it more likely than not that the staff member engaged in the misconduct. He asserts that the information available does not make it more likely than not that he engaged in the misconduct.

21. On the other hand, the Respondent argues that exceptional circumstances indeed exist to justify placing the Applicant on ALWOP. These include evidence of entitlement fraud and forgery with a view to thwarting an ongoing investigation. Also, that the UNHCR has a policy of zero tolerance to fraud as stated in its Strategic Framework for the prevention of fraud and corruption.¹³ Considering that the Applicant could have committed entitlement fraud, ALWOP is appropriate because it allows UNHCR to use his unpaid salary to recover money that may have been embezzled, should the allegations be subsequently confirmed. Lastly, that the alleged misconduct is of such scope and gravity that, if established, it would warrant the Applicant's separation from service or dismissal.

22. Both staff rule 10.4(c) of ST/SGB/2014/1 (Staff Rules and Staff Regulations of the United Nations) and section 11.4 (b) 5 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) permit the Secretary-General to determine if the administrative leave will be without pay in exceptional circumstances. In order for the Tribunal to determine whether exceptional circumstances indeed exist there must be an objective factual basis for the reasonable belief of misconduct¹⁴ and in this

¹³ IOM-FOM 44/2013 (Strategic Framework for the prevention of fraud and corruption).

¹⁴ *Muteeganda* 2018-UNAT-869, para. 29.

regard, it has to be determined whether there is an adequate objective basis or probable cause that the Applicant engaged in the alleged misconduct. The allegations against the the Applicant included one of an attempt to thwart an investigation on two separate occasions by means of a forged medical report and that he submitted fraudulent claims for the reimbursement of medical expenses.

23. The evidence supporting that inference consists of:

- a. the Applicant's email dated 10 March 2020 to the IGO stating that he was hospitalized and requesting that the investigation be put on hold;
- b. the Applicant's email dated 31 March 2020 to the IGO stating that he could not review the record of interview and requesting that it be postponed;
- c. the medical report dated 5 March 2020 from the Hayath Hospital in Baghdad stating that the Applicant needed two months for his situation to stabilize, which the Applicant submitted with his two emails;
- d. evidence, including a statement by a reliable source that the Hayath Hospital does not exist;
- e. the Applicant's two claims for reimbursement of medical expenses allegedly incurred at the non-existing Hayath Hospital in Baghdad; and
- f. the various irregularities in the documents submitted by the Applicant with multiple claims for the reimbursement of medical expenses.

24. It has to be determined whether the above evidence constitutes probable cause that the Applicant engaged in the alleged misconduct. In this regard, the Tribunal notes that the evidence relating to the allegations of fraud is document based and the documents in issue, which originate from the Applicant, were attached to the response.¹⁵ The contents of those documents appear to support the allegation of fraud.

¹⁵ Reply, annexes R1 to R6.

The Tribunal finds that the information before it about the alleged misconduct makes it more likely than not that the Applicant engaged in the misconduct, and that there is probable cause that the Applicant engaged in the alleged misconduct.

25. On whether there are exceptional circumstances warranting the decision to place him on ALWOP, the Applicant asserts that the Respondent has not shown that the nature of the allegations is such that the Applicant could not continue to perform his functions effectively. That it is not indicated how his continued presence at the duty station could prejudice the interests and reputation of UNHCR. Also, that it has not been established that the misconduct is of such gravity that it would, if established warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix).

26. The Respondent argues that UNHCR has a policy of zero tolerance in cases of fraud as stated in its Strategic Framework for the prevention of fraud and corruption. Also, that the UNHCR/AI/2018/18 on misconduct and the disciplinary process allows the Director/DHR, in consultation with the IGO where appropriate, to place a staff member on ALWOP at any time following a report of suspected misconduct if certain factors exist, including: “Continued service by the staff member would create a risk that he/she could destroy, conceal or otherwise tamper with potential evidence, or interfere in any way with the investigation or disciplinary process, including by retaliating against individuals protected under UNHCR’s retaliation policy”.

27. It is clear that the decision to place the Applicant on ALWOP was not made in a vacuum but was made on the basis of evidence gathered in an investigation process and on the basis of an Administrative issuance which embodies UNHCR’s policy of zero tolerance to fraud. Under these circumstances, the Tribunal cannot find that the Respondent acted unlawfully by making best efforts to protect its interests during the pendency of the investigation.

28. The decision to place the Applicant on ALWOP is not an unlawful or an otherwise impermissible exercise of discretion on the part of the Respondent. The Tribunal concludes that the Applicant has not made out a case of *prima facie*

unlawfulness.

29. Since the threefold test for the grant of a suspension of action is cumulative, it is not necessary for the Tribunal to examine whether the other two limbs of the test have been met.

Conclusion

30. The application for suspension of action is accordingly refused.

(Signed)

Judge Margaret Tibulya

Dated this 27th day of May 2020

Entered in the Register on this 27th day of May 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi