



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OKWAKOL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Sétondji Roland Adjovi

Counsel for the Respondent:

Nicola Caon, AAS/ALD/OHR
Elizabeth Gall, AAS/ALD/OHR

Introduction

1. The Applicant is a Chief Resident Auditor, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Goma.¹ He serves on a fixed-term appointment at the P-5 level.²

2. On 29 June 2020, he filed an application for suspension of action pending management evaluation before the United Nations Dispute Tribunal in Nairobi. He seeks suspension of a decision dated 13 May 2020 which retroactively extended a 13 January 2020 decision which had placed him on administrative leave without pay (“ALWOP”) as from 16 April 2020 for an additional three months.

3. On 29 June 2020, the application was served on the Respondent, who filed his reply on 1 July 2020. On 3 July 2020, the Applicant filed a motion for leave to respond to the Respondent’s reply, which was granted by the Tribunal on the same day.

Facts

4. On 10 December 2019, the Applicant received an email from the Office of Internal Oversight Services (“OIOS”) informing him that he was the subject of an investigation regarding allegations that he did not report rape and that he attempted to interfere with the investigation by seeking to negotiate payment of money to the alleged victim for her to withdraw her rape complaint.³ The Applicant was further informed that the investigation is into “assisting in, or contributing to, the commission of a misconduct”.⁴

5. On 13 January 2020, the Under-Secretary General for Management, Strategy, Policy and Compliance (“USG-MSPC”), placed the Applicant on ALWOP for a

¹ Application, section I

² Ibid. 3

³ Reply, para 31

⁴ Application, annex 3.

period of three months pending completion of the investigation and any disciplinary process against the Applicant.⁵

6. On 13 May 2020, the Applicant was notified that the USG-MSPC had decided to extend his ALWOP for an additional period of three months from 16 April 2020, or until the completion of the disciplinary process, whichever comes earlier.⁶

7. On 22 June 2020, the Assistant Secretary-General for Human Resources (“ASG/OHR”) rescinded the decision to place the Applicant on ALWOP on a retroactive basis, that is, regarding the period from 16 April to 12 May 2020. The ASG/OHR advised MONUSCO to pay the Applicant his salary. On 23 June 2020, MONUSCO confirmed that the Applicant would be paid his salary from 16 April 2020 to 13 May 2020.⁷

8. On 25 June 2020, the Applicant requested management evaluation of the contested decision.⁸ The Management Evaluation Unit is yet to respond.⁹

Submissions

Receivability

Respondent’s submissions

9. The Respondent contends that the application is not receivable. The application is partly moot because the decision to place the Applicant on ALWOP on a retroactive basis has been rescinded and therefore, any unlawfulness cured. To the extent the application refers to the 13 January 2020 decision to place the Applicant on ALWOP, it is also not receivable. The administrative decision under which the Applicant continues to be placed on ALWOP is the 13 May 2020 decision. The Applicant cannot attempt to correct his failure to apply for management evaluation of

⁵ Application, annex 2.

⁶ Application, Annex 1.

⁷ Reply, R/5.

⁸ Application, annex 8.

⁹ Application, Section VI.

the 13 January 2020 decision by asserting that the two decisions constitute one decision.

Applicant's Submissions

10. The Applicant contends that the 13 May 2020 retroactive extension of the ALWOP from 16 April 2020 for an additional three months is not a standalone decision and it does not exist on its own without the original 13 January 2020 decision. As a result, and logically, one cannot challenge either decision in isolation.

Considerations

11. The subject of the application is a decision dated 13 May 2020 on the extension of ALWOP. It is clearly a discrete administrative decision, in a nexus with the decision that applied the ALWOP in the first place, but reviewable in and of itself. Only this decision may be subject to the Tribunal's order, whatever it might be. The Tribunal does not deem it necessary to indulge this matter any further.

12. The Tribunal recalls that it is established by jurisprudence of the UNDT across its seats¹⁰, that a decision having continuous legal effect, such as to place a staff member on administrative leave, is only deemed to have been implemented when it has been implemented in its entirety, that is - at the end of the administrative leave. This Tribunal holds, moreover, that a decision on withholding entitlements that are due periodically takes effect in relation to each instalment that is due. As dictated by logic, such decision cannot be deemed "implemented" in relation to instalments that are not yet due. As the other side of the coin, the decision is implemented with respect to the cycles that elapsed.

13. The record shows that the Applicant's ALWOP with effect from 16 April 2020 of which he was notified on 13 May 2020, that is, the decision was with retroactive effect but extending into the future by two months. The effect of the

¹⁰ *Calvani* UNDT/2009/092; *Gallieny* Order No. 060 (NY/2014). *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014).

decision, therefore, is has not been “fully implemented”, in the sense relevant for receivability, and may affect the Applicant’s entitlements before the management evaluation is due. On the other hand, the period encompassed by the retroactive effect of the decision had elapsed without the Applicant being paid and without, by all appearances, him returning to work. As such, the decision has been implemented as to the contested part and, regarding this part, there is nothing for the Tribunal to suspend.

14. The Tribunal agrees with the Applicant that absent an extension of the ALWOP by the 13 April 2020 expiration of the three-month period or completion of the investigation/disciplinary process, the Applicant should have immediately been restored to active service. This is because of the presumption of innocence in disciplinary proceedings, as well as because ALWOP, being an exceptional variation of the terms of employment, cannot be presumed and, thus, requires having a legal basis, both formal and substantive, throughout its duration. The Respondent demonstrates, in recognition of this irregularity, the impugned decision was retracted in this part and the Applicant will be paid for the contested period. Thus, the putatively illegal part of the decision does not exist anymore, rendering this aspect of the application moot.

15. The Applicant’s case is, however, that the entirety of the decision is unlawful and requests its suspension. The application, therefore is receivable and needs to be responded to on the merits.

Merits

Applicant’s submissions

16. On the prong of unlawfulness, the Applicant’s case is that the 13 May 2020 decision to extend his ALWOP from 16 April 2020 was unlawful because of retroactivity. Further, in his additional submission, the Applicant seems to dispute the evidentiary foundation of the case in that he claims having had no knowledge of the alleged rape and investigation at the time of his involvement; he moreover disputes

his obligation to report the alleged rape given that a complaint had already been filed. Moreover, the Applicant raises multiple objections to the conduct of the investigation.

17. The Applicant submits that the matter is urgent because he has been on ALWOP since 13 January 2020. He is currently facing dire financial circumstances. For irreparable harm, the Applicant reiterates that due to the dire financial circumstances, he is unable to support his family. He continues to suffer reputational damage each day he is left on administrative leave. The Applicant maintains that he is also unable to seek alternate work to mitigate his situation.

Respondent's submissions

18. The Respondent submits that the application has no merit. The Applicant has not discharged his burden of proving that the three statutory conditions under art. 2.2 of the Tribunal's Statute have been met. The Organization has taken steps on its own accord to correct the retroactive element of the contested decision. Otherwise, the USG-MSPC's decision to extend the Applicant's ALWOP from 13 May 2020 under section 11.4 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) is lawful, reasonable and proportionate. The Respondent argues that there was probable cause regarding the alleged conduct, that it was in connection with sexual abuse and that the Organization's reputation suffers in such instances.

19. With regard to urgency, the Respondent submits that the delay is self-created. The Applicant has not sought relief at the first available opportunity. More than a month passed between the Applicant receiving the 13 May 2020 decision and the filing of this application on 29 June 2020. The Applicant has not satisfactorily explained why he did not request relief from the Tribunal earlier.

20. For irreparable harm, the Applicant has not demonstrated how the decisions would cause him a loss that cannot be adequately compensated through a monetary award. While the Applicant's financial situation may be affected by the loss of his salary during his placement on ALWOP, he has not shown how any negative impact

could not be remedied. If the allegations against the Applicant are ultimately not sustained, any pay withheld from him, will be restored.

Considerations

***Prima facie* unlawfulness**

21. It is recalled that staff rule 10. 4 reads in the relevant part:

(a)...

(b)...

(c) Administrative leave shall be with full pay except (i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, or (ii) 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.

(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.

22. While this Tribunal does not agree with the Applicant's initial proposition that partial retroactivity invalidates the decision as a whole, it nevertheless observes that the decision might be unlawful for different reasons, namely, that it does not provide any fact-based justification for the application of ALWOP. It is observed, in this connection, that using ALWOP is not a matter of vast administrative discretion, as the Respondent wants, because it concerns fundamental contractual rights of the staff member. Regarding the invoked legal basis, ST/AI/2017/1, leaving aside the question whether an administrative issuance might validly restrict the scope of staff rule 10.4(c), as ST/AI/2017/1 purports, it is specifically worth noting that the Applicant is not investigated for having engaged in sexual exploitation and sexual abuse but, rather, for not reporting an act of rape and attempting to pervert the course of investigation through directing an alleged victim to withdraw her complaint. Facts put before the Tribunal do not show probable cause, for which it would be necessary to show that the Applicant had a sound knowledge of the commission of rape in the first

place, knowledge of the pendency of an investigation in the second place or that he had threatened the victim or persuaded her to do something illegal. Otherwise, the Applicant may have been just a mediator in a private conflict. Neither is the Applicant's input in the impugned interaction disclosed, while it appears that other persons had been involved. The Tribunal understands that details relevant for these considerations may be known to the Respondent and may make up probable cause. This, by itself, however, would not substantiate the ALWOP. The only reason invoked to justify it, is "reputation of the Organization," which, however, is not supplied with any specifics. Using the Organization's reputation as an abstract good could justify ALWOP in every case of misconduct. Moreover, the investigation has been going on since at minimum December 2019, incriminating material against the Applicant consists in a recording in the possession of the Respondent and no case was made for the need to preserve evidence. Lastly, even assuming that removing the Applicant from active service was necessary, for which there is no substantiation, no justification was given why ALWOP was preferred over an administrative leave with partial pay or with full pay.

23. In total, the impugned decision is *prima facie* unlawful.

Urgency and irreparable damage

24. On the prongs of urgency and irreparable harm, the Tribunal endorses the Respondent's arguments in their entirety. It wishes to add that financial onerousness of the impugned decision has been now alleviated by the retraction of the part of the impugned decision, i.e., the Applicant will be paid a month worth of his salary. A late filing of the present request, moreover, currently renders the ongoing damage equal to 8 days of salary only.

25. The application fails on these prongs, which in the light of art. 2 of the UNDT statute, precludes granting it.

ORDER

26. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 6th day of July 2020

Entered in the Register on this 6th day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi