



Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KETER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Shuba Naik, OSLA

Counsel for the Respondent:

Esther Shamash, UNDP

Introduction

1. The Applicant is an Administrative and Finance Specialist at the Regional Office for Southern & Eastern Africa (“ROSEA”), United Nations Office for the Coordination of Humanitarian Affairs (“UNOCHA”), based at the United Nations Offices in Nairobi (“UNON”). He serves on a fixed-term appointment from the United Nations Development Programme (“UNDP”) at the NOB/10 level.

2. On 20 September 2021, the Applicant filed an application for suspension of action (“SOA”) pending management evaluation. He seeks to suspend a decision issued on 23 August 2021, to place him on Administrative Leave Without Pay [“ALWOP”] pending conclusion of investigations into a number of allegations (“the contested decision”). The investigations commenced in November 2018, and additional allegations were made as it progressed.

3. The Respondent filed his reply on 22 September 2021. According to the Respondent, the sheer number of allegations including theft, fraud, bribery, and unauthorized outside activities, which were extensively investigated with evidence, including alleged admissions, set out in the Investigation Report justifies that there were exceptional circumstances for placement of the Applicant on ALWOP.

Background Facts

4. On 18 November 2018, the Applicant was notified that he was the subject of an investigation into allegations of theft. On 19 November 2019, the Applicant acknowledged receipt of the letter.

5. On 6 March 2019, the Applicant was further notified that he was the subject of an investigation into additional allegations of procurement fraud, abuse of authority and other failure to comply with obligations (unauthorised outside activities).

6. On 10 December 2020, OAI forwarded the draft investigation report to the Applicant for his comments. He submitted his comments on 25 December 2020.

7. On 23 August 2021, almost three years after the investigations commenced, the Applicant was informed of the decision he now seeks to have suspended. He was being placed on AWLOP pending completion of a review by the Office of Legal Services, Bureau for Management Services (“BMS/OLS”) of the completed Investigation Report submitted by the UNDP Office of Audit and Investigations (“OAI”).

8. The stated reason for the decision was that given the nature of the allegations and the evidence identified, the Applicant’s continued service may pose a reputational risk to the Organization and impact negatively on the harmonious work environment in UNOCHA. Further, the letter indicated that there is a preponderance of evidence that the Applicant engaged in the alleged conduct; and that the allegations are of sufficient gravity that it will, if established, warrant his separation or dismissal.

9. On 20 September 2021, the Applicant submitted a management evaluation request concerning the contested decision.

Considerations

10. Articles 2.2 of the Dispute Tribunal’s Statute and 13 of the Tribunal’s Rules of Procedure govern the Tribunal’s jurisdiction in deciding on applications for suspension of action. An applicant must satisfy the Tribunal that the contested decision is *prima facie* unlawful, that the case is of particular urgency and that implementation of the decision would cause irreparable damage.

Is the contested decision prima facie unlawful?

11. In establishing *prima facie* unlawfulness, the Applicant is not required to meet the standard of proof that will be applicable in a hearing on the merits. Proving a *prima facie* case of unlawfulness is less demanding. It may be established by

“demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt”.¹

12. The Applicant’s basis for contending that the decision is unlawful is that ALWOP is an exceptional measure which is inapplicable to the instant circumstances. He asserts that the legal premises based on which ALWOP can be implemented pursuant to staff rule 10.4(c) were not evident from the reasons stated in the decision letter.

13. The legal premises required for an ALWOP decision to be taken in the UNDP legal framework² are similar to those applicable in section 11.4(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which provides that there must be:

exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is **of such gravity that it would, if established, warrant separation or dismissal** under staff rule 10.2 (a) (viii) or (ix), and **there is information** before the authorized official about the unsatisfactory conduct **that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.** (Emphasis added).

14. The decision letter includes some reasons which are not specifically prescribed in the legal framework as counting as exceptional circumstances for ALWOP. Those reasons, namely reputational risk and negative impact on harmonious work relations, are more relevant to decisions to place persons on leave with pay.

15. However, the decision letter correctly follows the legal framework by stating as one of the reasons for placing the Applicant on ALWOP that there is a preponderance of evidence that he engaged in the alleged conduct, which said conduct if established will warrant his separation or dismissal.

¹ *Corna* Order No.80 (GVA/2010).

² Chapter 2, section 1.3 of the UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct. Paragraphs 40 and 42 of the UNDP Legal Framework.

Case No. UNDT/NBI/2021/082

Order No. 205 (NBI/2021)

16. In the reply filed by the Respondent, sufficient information is provided to support that the decision based on the stated reason was not *prima facie* made without rational basis. It was not *prima facie* unlawful.

Is the matter of particular urgency and would the decision cause irreparable harm?

17. As the Applicant has not satisfied the limb of *prima facie* unlawfulness, there is no need for the Tribunal to further inquire into whether the impugned decision would cause irreparable harm or if the matter is urgent.

Conclusion

18. The application is therefore DISMISSED.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 27th day of September 2021

Entered in the Register on this 27th day of September 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi