



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/051
Order No.: 208 (NY/2014)
Date: 23 July 2014
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MOISE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Sophie Parent, ALS/OHRM, UN Secretariat

Introduction

1. On 17 July 2014, the Applicant, a staff member in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), submitted an application for suspension of action, pending management evaluation, of the implied decision “to renew [his] placement on administrative leave without pay [“ALWOP”] pending outcome of an investigation into disciplinary conduct”. He was placed on ALWOP by letter dated 20 December 2013 in which he was also informed that this administrative leave “will continue for three months or until completion of any subsequent disciplinary process, whichever is earlier, at which point the matter will be revisited”. By letter dated 2 April 2014, the Applicant received a further letter indicating that he would be placed on ALWOP for an additional three months from 30 March 2014, subject to review on expiry thereof. After the expiry of the three months, the Applicant filed the current application on 17 July 2014.

2. With respect to the *prima facie* unlawfulness of the contested decision, the Applicant submits, *inter alia*, that the Under-Secretary-General for Field Support (“USG/DFS”) does not have the delegated authority to place the Applicant on ALWOP and that the conditions for placing the Applicant on ALWOP have not been met. With regard to the requirements of *particular urgency* of the matter and *irreparable harm*, the Applicant submits, *inter alia*, that both are expressed in terms of the serious financial consequences of the imposed administrative leave as he is financially responsible for providing for his own family, including his wife and three children.

3. The Registry transmitted the present application to the Respondent on 17 July April 2014. The Respondent duly filed his reply on 21 July 2014. The Respondent opposes the application and submits that the Applicant has failed to establish the

requirements for suspension of action and is mistaken as to the identity of the decision maker and the details of the disciplinary process.

4. Without seeking leave from the Tribunal, at 5:13 p.m., on 21 July 2014, the Respondent filed an additional submission, titled “Supplementary Reply”, contending that the application is not receivable as the impugned administrative decision has already been implemented, the Applicant having been informed on 21 July 2014, by letter dated 18 July 2014, that his ALWOP was extended for an additional period of three months. The Respondent states that the *lacuna* period of 30 June until 17 July 2014, “will be treated as special leave with full pay”. In response to the Respondent’s unsolicited “Supplementary Reply“, at 3:56 p.m., on 22 July 2014, the Applicant requested leave to file an additional submission in which he opposes the Respondent’s point on receivability. On an exceptional basis, the Tribunal accepts both filings.

Background

5. The following background information is based on the parties’ written submissions and the record.

6. The Applicant has worked for MINUSTAH since 2005, currently as an Engineering Assistant at the GS-4 level.

7. In December 2012, whilst posted at Jacmel, a disciplinary investigation was initiated against him for allegedly having received payments from Haitian locals in return for employment with MINUSTAH as individual contractors.

8. In March 2013, amid the misconduct allegations, the Applicant was transferred from Jacmel to the MINUSTAH compound in Port-au-Prince where he worked until he was placed on ALWOP.

9. On 20 December 2013, the Applicant received a letter from Ms. Ameerah Haq, USG/DFS, stating that (emphasis added):

Dear [the Applicant],

...

The purpose of this letter is to advise you that the Under-Secretary-General for Management [“USG/DM”], has decided, on behalf of the Secretary-General, to place you on ALWOP pursuant to staff rule 10.4. This decision is based on the information provided to the Department of Management by the Department of Field Support. Accordingly, you are placed on ALWOP effective as of the date of your receipt of the present notification. *The ALWOP will continue for three months or until completion of any subsequent disciplinary process, whichever is earlier, at which point the matter will be revisited.*

The reasons for your placement on administrative leave are that there appears to be sufficient *prima facie* evidence that you engaged in serious misconduct by soliciting and/or accepting payment of money in exchange for facilitating their employment with MINUSTAH or on the basis that they believed you facilitated their employment with MINUSTAH. The nature of the conduct you are alleged to have engaged in is sufficiently serious that it would, if proven, lead to your dismissal, and as such it meets the “exceptional circumstances” required to place you on ALWOP.

Please note that *your placement on administrative leave is an administrative measure*. It is without prejudice to your rights, *it does not constitute a disciplinary measure* and it does not prejudice the outcome of any further investigation or subsequent disciplinary process. *It will be subject to review depending on the developments of your case and may, if the circumstances so warrant, be extended. You will be informed promptly of any decisions made regarding your status.*

...

10. On 2 April 2014, the Applicant received a further letter from the USG/DFS, using similar reasons as in the 20 December 2013 letter, indicating that the USG/DM had decided “to extend [the Applicant’s ALWOP] for an additional three months

from 30 March 2014, or until the completion of the disciplinary process, if any, whichever is earlier”.

11. On 16 July 2014, the Applicant requested management evaluation of the contested decision, an evaluation which remains pending, and he filed this application for suspension of action on 17 July 2014.

12. By letter of 18 July 2014 from the USG/DFS, which he apparently received on 21 July 2014, the Applicant was informed that the USG/DM had decided to place him on ALWOP for three months from his “acknowledgment of receipt of this letter, or until the completion of the disciplinary process, if any, whichever is earlier”.

13. On 21 July 2014, the Applicant signed a confirmation in French that he had received a “white envelope” at the offices of the Conduct and Discipline Unit of MINUSTAH. According to the Respondent, the white envelope contained the 18 July 2014 letter mentioned above, but this is not clear from the signed confirmation which only refers to the white envelope.

14. After the expiry of the Applicant’s second ALWOP (29 June 2014) and until the imposition of his third ALWOP on 18 July 2014, which postdated this application, the Respondent notes that “the Applicant was not on administrative leave for the period 30 June to 17 July 2014. This period will be treated as special leave with full pay”. However, no evidence on the case record provides that the Applicant was ever informed about this decision other than retroactively in footnote 2 to para. 11 in the Respondent’s reply dated 21 July 2014, subsequent to the Applicant having filed these proceedings.

15. The Applicant submits that, thus far, he has not been interviewed in relation to the allegations of misconduct. However, the Respondent contends in the reply that the Applicant was interviewed on 25 June 2013 “on the matters pertinent to the

investigation”, and that the investigation report contains a signed interview of the Applicant (the document has not been produced to the Tribunal in evidence).

Consideration

16. An application for a suspension of action pending management evaluation is an extraordinary discretionary relief, generally not appealable, and which requires consideration by the Tribunal within five working days of the service of the application on the Respondent (art. 13.3 of the Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal and the parties’ schedules. They also divert the Tribunal’s attention from considering other cases filed under standard application procedures, some of which are long outstanding. Therefore, parties approaching the Tribunal must do so on genuine urgency basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. The Respondent’s reply, when sought, should be complete in all relevant respects, bearing in mind that a matter is not at the merits stage by this time. It is not envisaged that multiple submissions will be filed or that a hearing will be conducted. Due to the urgent nature of an application for suspension of action, the Tribunal has to rely on the veracity of the information provided by Counsel, as Officers of the Tribunal.

The contested decision and receivability

17. The Respondent submits that the application for suspension of action is not receivable as the impugned decision has already been implemented in that the Applicant has allegedly acknowledged receipt of the 18 July 2014 letter on 21 July 2014, following the filing of his application on 17 July 2014.

18. The Tribunal finds that the Applicant was first placed on administrative leave without pay on 20 December 2013. The ALWOP was extended by letter dated 2

April 2014 for “an additional three months from 30 March 2014, or until the completion of the disciplinary process”. The Applicant was informed that his ALWOP will be subject to review and, if the circumstances so warrant, be further extended and that he would be informed *promptly* of any decisions regarding his status. After the expiry of the second ALWOP on 30 June 2014, the Applicant heard nothing further and filed this application on 17 July 2014.

19. Subsequent to filing his reply at 10.50 a.m. on Monday, 21 July 2014, before the deadline of 11:00 a.m., the Respondent filed a “Supplementary Reply” at 5:15 p.m., unsupported by any motion for leave to so file. In this submission, the Respondent avers that the Applicant was informed, on 21 July 2014, of a further extension of his placement on ALWOP. Thus, the Respondent submits, the decision has already been implemented and the application for suspension of action is therefore not receivable.

20. The Respondent has not sought leave of the Tribunal to file any “Supplementary Reply”. As stated above, the equitable nature of urgent suspension of action matters is not served by the filing of multiple submissions. The Tribunal must decide preferably on the founding papers filed by both parties, otherwise this extraordinary process and the equitable relief envisaged becomes meaningless. The relief after all is only temporary in nature, pending management evaluation.

21. In the reply, the Respondent footnotes that “the Applicant was not on administrative leave for the period 30 June to 16 July 2014. This period will be treated as special leave with full pay”. The Tribunal finds this logic quite incredulous and disingenuous, particularly as in the letter dated the 18 July 2014, the Applicant is informed that his ALWOP will continue for an additional period of three months or until completion of the disciplinary process because “[t]he reason for your continuation on administrative leave is that the considerations warranting your placement on ALWOP continue to exist”. If indeed such considerations continued to

exist throughout, why is the Applicant treated as being on special leave with full pay for 18 days?

22. The Tribunal finds that contrary to the Respondent's submission, the Applicant is clearly challenging the implied decision to renew his ALWOP. As the Tribunal found in *Calvani* UNDT/2009/092, the decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effect during that period of time and is only deemed to have been implemented in its entirety at the end of the administrative leave (rather than when the decision was first notified). In any case, it is evident from the papers before the Tribunal that the decision to place the Applicant on administrative leave without pay has continued beyond the stipulated three months and it is only on 17 July 2014, after the Applicant filed his application, that the Respondent has seen it fit to address the Applicant's predicament.

23. The Tribunal cannot adjudicate cases involving decisions of a changing nature (*Adundo* UNDT/2012/118, paras. 76-77). When decisions have been neglected to be reviewed, erroneously made, reversed, or even reconsidered, the honourable and good faith measure to take is to make the appropriate acknowledgements and rectify the situation, rather than to move the goalposts whenever the ball is kicked.

24. For the reasons stated above, the Tribunal finds that the application is receivable and that the decision contested by the Applicant in this case is the decision to renew his placement on administrative leave beyond the second three-month period, which decision may be suspended by the Tribunal if the requirements of art. 2.2 of its Statute are satisfied.

25. The Tribunal now turns to the consideration of the three requirements of art. 2.2 of its Statute. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the

pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

Prima facie unlawfulness

26. For the *prima facie* unlawfulness test to be satisfied, it is enough for the Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011), *Villamorán* UNDT/2011/126).

27. Staff rule 10.4 states (emphasis added):

Administrative leave pending investigation and the disciplinary process

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time pending an investigation until the completion of the disciplinary process.

(b) *A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration, which, so far as practicable, should not exceed three months.*

(c) *Administrative leave shall be with full pay unless, in exceptional circumstances, the Secretary-General decides that [ALWOP] is warranted.*

(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, any pay withheld shall be restored without delay.*

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

28. In arguing that the decision to put him on ALWOP pay was *prima facie* unlawful, the Applicant's primary two contentions are that:

- a. The decision maker, the USG/DFS, did not have the delegated authority to place the Applicant on ALWOP; and
- b. The conditions to place the Applicant on ALWOP were not satisfied.

Did the decision maker have authority to make the impugned administrative decision?

29. It explicitly follows from each of the letters the Applicant received from the USG/DFS informing him that he was placed on ALWOP that the decision was taken by the USG/DM. Further, each letter is clearly formulated as a standalone administrative decision placing the Applicant on ALWOP in that:

- a. In each letter, the Applicant's ALWOP is strictly limited to a maximum of three months at a time; and
- b. When the Applicant's second ALWOP expired on 29 June 2014, he is said to have been placed on special leave with full pay till 17 June when his ALWOP was renewed.

30. In his reply, the Respondent contends that the Applicant is mistaken when stating that the impugned decision was taken by the USG/DFS and, instead, he argues that it was taken by the USD/DM. In this regard, the Tribunal agrees with the Respondent—this is clearly spelt out in each of the letters from the USG/DFS to the Applicant.

31. The Respondent further submits that the correct decision maker was the USG/DM. In support hereof, the Respondent appends a letter dated 17 August 2009 from the then Chef de Cabinet of the Secretary-General, Mr. Vijay Nambiar, to the then USG/DM, Ms. Angela Kane, informing her that the Secretary-General has agreed to transfer the decision making authority to make (emphasis added) “decisions to impose *disciplinary measures* to the [“USG/DM”] with effect from 1 July 2009”. However, staff rule 10.4(d) explicitly states that “[p]lacement on administrative leave ... shall not constitute a disciplinary measure”, as also highlighted in the 20 December 2014 letter to the Applicant (“your placement on administrative leave is an administrative measure ... it does not constitute a disciplinary measure”) and also stated in the 2 April and 18 July 2014 letters (“[t]he continuation of your ALWOP is an administrative measure, which is not disciplinary in nature”). The letter from the Chef de Cabinet does therefore not form a delegation of authority from the Secretary-General to the USG/DM to place the Applicant on ALWOP.

32. The Respondent also refers to ST/AI/234/Rev.1, sect. 5, Administration of the Staff Regulation and Staff Rules, to support his case that the authority to place the Applicant on ALWOP rests with the USG/DM. However, according to Annex II and IV of ST/AI/234/Rev.1, while the authority to place a staff member on administrative leave (at the time of the promulgation of the Administrative Instruction referred to as “special leave”) without pay for *more than three months* is that of the Assistant Secretary-General for Human Resources (a subordinate to the USG/DM), the power to do so for *up to three months* is with “the head of department”, which in the case of the Applicant would be the USG/DFS.

33. Accordingly, the Tribunal finds that the decision to place the Applicant on ALWOP was wrongly taken by the USG/DM in that the USG/DFS would have been the correct decision maker. The impugned decision is *prima facie* unlawful.

Were the conditions for placing the Applicant on ALWOP complied with?

34. Furthermore, the legal basis for placing a staff member on administrative leave is formulated in para. 4 of ST/AI/371 which stipulates that:

As a general principle, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or the organisation, or if there is the risk of evidence being destroyed or concealed and if redeployment is not feasible.

35. Hitherto, the only reason given to the Applicant for his placement on ALWOP is the finding of a *prima facie* case of misconduct of a serious nature (see letters dated 20 December 2013 and 2 April 2014). It is only in the reply that the Respondent formulates a proper legal basis for the Applicant's placement on ALWOP, namely that the Applicant poses a serious danger to witnesses, by allegedly issuing death threats and undertaking other serious actions.

36. In this regard, the Tribunal observes that staff rule 10.4(b) provides that, "A staff member placed on administrative leave ... shall be given a written statement of the reason(s) for such leave", and it is settled law that an administrative decision must be fully and correctly reasoned (*Islam* 2011-UNAT-112, *Obdeijn* 2012-UNAT-201).

37. No matter the seriousness of a case, the Administration is obligated to follow its own rules and procedures, and a staff member is entitled to due process. The Respondent failed to provide the Applicant with proper reasons formulating the legal basis for renewing his ALWOP, and only attempted to do so much later after the fact and after the application was filed.

38. The Tribunal further observes that, even if the ALWOP is considered to be cumulative, it may well be argued that the decision to place the Applicant on ALWOP, absent proper delegated authority and/or proper reasoning and legal basis, was void *ab initio*.

Particular urgency

39. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. The Dispute Tribunal has stated in a number of rulings that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the party seeking interim relief (see, e.g., *Villamorán* UNDT/2011/126 and *Dougherty* UNDT/2011/133).

40. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention, the Applicant having filed the present application approximately two weeks after the promised deadline for revisiting the issue of his administrative leave. Furthermore, the continuing financial consequences visited upon the Applicant as well as the Administration's failure to provide the Applicant full and correct reasons for the ALWOP have exacerbated the urgency.

41. In the circumstances, and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

42. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage.

43. In each case, the Tribunal has to look at the particular factual circumstances. The Applicant submits that the implementation of the contested decision would cause him irreparable harm as he will be unable to provide financial support to his family in particularly his children's school. Furthermore, the reputational harm incurred by placing him on lengthy administrative leave (be it with or without pay)

could adversely affect him during any downsizing exercise, particularly as he has now spent over six months away from the post he has held since 2005.

44. In the circumstances, and on the papers before it, the Tribunal finds the requirement of irreparable harm to be satisfied.

45. Finally, on the brief facts that are currently before it, and in the particular circumstances of this case, including the observations the Tribunal has made regarding the *prima facie* unlawfulness, the Tribunal finds that this matter is well-suited to amicable resolution between the parties and encourages the parties to attempt such resolution.

Conclusion

46. The Tribunal orders suspension, pending management evaluation, of the decision to renew the Applicant's placement on administrative leave with or without pay.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 23rd day of July 2014