



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 4 November 2016, the Applicant, Chief (P-5 level), Proactive Investigation Unit, Office of Internal Oversight Services (“OIOS”), filed an application seeking suspension, pending management evaluation, of the decision to deny his request to be placed on special leave with pay (“SLWP”). He has been on sick leave since March 2016.

2. The New York Registry transmitted the application to the Respondent on the date of receipt of the application. The Respondent was instructed to file his reply to the application by 1 p.m. on Tuesday, 8 November 2016. The Respondent’s reply to the application was duly filed and transmitted on the same day to the Applicant through the eFiling portal.

Relevant background

3. The following outline of the relevant background is based on the parties’ submissions as well as the documentation on file.

4. On 3 March 2016, the Applicant’s physician recommended that he not return to work until 16 May 2016. He was placed on certified sick leave and he remains on sick leave to date.

5. On 9 March 2016, the Applicant requested to be placed on SLWP. In late March 2016, his request was denied by the Under-Secretary-General, OIOS (“USG/OIOS”). The Applicant subsequently appealed that decision before the Dispute Tribunal.

6. On 7 October 2016, the Dispute Tribunal rendered *Wilson* UNDT/2016/182, finding that the USG/OIOS had no delegated authority to consider the Applicant’s request for SLWP. The Tribunal remanded

the Applicant's request for consideration by the Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM"), within 30 days.

7. On 10 October 2016, the Applicant sent an email to the ASG/OHRM, stating *inter alia*:

I am not sure if you have been apprised as yet but the [Dispute Tribunal] has issued a judgment wherein you are to exercise your authority in the consideration of a Special Leave With Pay application that the USG OIOS had previously denied me.

My email is to inform you that I will be submitting a Motion to the Tribunal to have this matter waived for a decision of Mr. [António Guterres], the Secretary-General elect (and/or whoever is appointed the next [Secretary-General] upon [Secretary-General Ban Ki-moon's] departure.)

...

As outlined above it is readily apparent that you are in a position of bias to make any determination associated [with *Wilson* UNDT/2016/182]. I just wanted to advise you accordingly as I prepare the necessary UNDT submissions.

8. On the same day, the Applicant forwarded the email above to the Officer-in-Charge of OHRM ("OiC/OHRM"), stating:

Good day ...

Thought it best that I apprise you as such in consideration of [ASG/OHRM's] absence from the office. (I received her out of office indicating that you were acting on her behalf in the meantime.)

9. On 26 October 2016, the Applicant sent an email to the ASG/OHRM, copying the OiC/OHRM, stating *inter alia*:

As you will note in my SLWP application I have referenced an abuse of authority complaint/Application that is currently before the Tribunal. Because the abuse of authority Application pertains to a decision of yours – you are in a position of bias to exercise any authority designated by the [Secretary-General] to grant SLWP.

...

As such I again collectively reiterate my request that my SLWP request be forwarded to Mr. [António Guterres] once he assumes his position as the new United Nations Secretary-General. You are in a position of bias and conflict of interest to take any further action on my request.

Thank you Ms. Wainaina [ASG/OHRM]. I also just want to ensure you that all I am seeking is a fair and non-bias decision to avoid the need for any further UNDT review of this issue. Notwithstanding my position I would request that you also abide to the UNDT direction and inform me of your decision within the prescribed 30 day timetable.

10. On 3 November 2016, the Applicant was informed by email from the OiC/OHRM of the decision not to grant the Applicant's request for SLWP. The email stated:

Thank you for your email to the Assistant Secretary-General for Human Resources Management (ASG/OHRM). I am responding on her behalf, as she is currently on extended leave.

The Dispute Tribunal has ordered the ASG/OHRM to decide your 9 March 2016 request for special leave with pay within 30 days. As Officer-in-Charge of OHRM, I have considered your request to be placed on special leave with pay and decided to deny it for the following reasons.

First, please note that I do not share your view that the ASG/OHRM is in a position of bias or conflict of interests because of her hierarchical relationship with Mr. Takasu [Under-Secretary-General for Management] and the Secretary-General. In my opinion, the same applies to me.

Secondly, staff rule 6.2 provides that a staff member, who is unable to perform his duties by reason of illness shall be granted sick leave. You have been on certified sick leave since 3 March 2016. Your sick leave entitlements have not been exhausted. Kindly note that in accordance with the Organization's rules, a staff member is granted sick leave independent of the source of his or her illness.

Thirdly, I have considered whether this was an exceptional case under staff rule 5.3(f), and found that not to be the situation. The

Organization's rules contain a comprehensive framework that addresses your absence from duty as a result of your illness. As such, I did not consider it in the interest of the Organization to grant you special leave with pay outside of that framework.

Finally, with regard to your request that the Secretary-General-Designate, Mr. António Guterres decide this matter once he assumes the position of Secretary-General on 1 January 2017, I note that this would be in violation of the 30-day deadline imposed by the Dispute Tribunal.

11. On 4 November 2016, the Applicant submitted a request for management evaluation of the "decision of the OIC OHRM to deny [him] a special leave with pay". The Applicant further stated in his request for management evaluation:

What remedy do you seek through management evaluation?

That my sick leave with pay request be forwarded to the incoming Secretary-General once he assumes office in January 2017. Based on the information on record it is the only means that I can be provided an un-bias decision in accordance with the rights afforded to me by Staff Rule 5.3.f.

12. As of the date of the Respondent's reply, the management evaluation of the Applicant's request is pending.

Applicant's submissions

13. The Applicant's principal contentions may be summarized as follows:

Scope of the application

a. The Applicant is requesting the Tribunal "to suspend the decision of the OIC/OHRM in addition to any further loss of his sick leave days until the MEU [Management Evaluation Unit] response". He submits that it is his "intention to either request the UNDT to issue an Order for the matter to be referred to the incoming Secretary-General for decision (with the suspension of the loss of any additional sick leave days as an interim

measure) and/or for the UNDT to issue an independent decision based on the information on record”;

Prima facie unlawfulness

b. In accordance with staff rule 5.3(f) the Applicant submitted a lawful request in accordance with his contractual rights. (Staff rule 5.3(f) states: “In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization”.) The decision taken by the OiC/OHRM, however, is unlawful because he is “in a position of conflict of interest” to make any decision that could undermine the previous actions, decisions or conduct of his supervisors, including the ASG/OHRM, the Under-Secretary-General for Management, or the Secretary-General;

Urgency

c. The matter is urgent because each day that passes the Applicant is forced to sacrifice another day of his limited sick leave entitlement. It is of further urgency in consideration of the fact that the Applicant has already exhausted eight months (approximately 240 days) of sick leave and in the upcoming weeks, he will be placed on half-pay. He is entitled to a fair review of his request for SLWP by an un-biased party. Based on the information on record this can only be accomplished by the incoming Secretary-General in January 2017;

Irreparable damage

d. The Applicant continues to lose his sick leave days. In addition, he is facing pending economic loss by the Organization’s failure and inability to provide him an un-biased decision free from any conflict of interest.

Respondent's submissions

14. The Respondent's principal contentions may be summarized as follows:

Scope of the application

a. The Dispute Tribunal does not have the jurisdiction to grant the order sought by the Applicant. Under art. 2.2 of its Statute, the Tribunal's jurisdiction is limited to making orders suspending the implementation of decisions, i.e. to preserve the *status quo*. The *status quo* is that the Applicant is on sick leave and that his sick leave balance decreases on a daily basis. The contested decision did not change that. The orders sought by the Applicant would go beyond preserving the *status quo*. The Dispute Tribunal does not have jurisdiction to make an order directing the Organization to place the Applicant on SLWP. Such an order would be akin to an order of *mandamus* in a common law legal system, and would go beyond suspending the implementation of the contested decision;

Prima facie unlawfulness

b. The Applicant has failed to satisfy the requirement of *prima facie* unlawfulness. The Applicant has alleged that the OiC/OHRM should not have taken the contested decision because he has a conflict of interest. This is incorrect. The OiC/OHRM took the decision in order to execute a Judgment of the Dispute Tribunal. It is not unlawful for the Organization to implement a Judgment. Furthermore, the OiC/OHRM properly considered the Applicant's request before denying it;

c. Staff Rule 5.3(f) provides that special leave with full or partial pay may be granted in exceptional cases, in the interest of the Organization. The OiC/OHRM considered whether an exception was warranted.

He found that the Organization rules contain a comprehensive framework to address the Applicant's absence from duty as a result for illness. As such, the Applicant's absence from duty as a result of an illness is not an exceptional case, nor an exceptional circumstance warranting the discretionary grant of special leave with full or partial pay;

Urgency

d. The application is not urgent. As of 5 November 2016, the Applicant has the following leave balances remaining: 52 days of sick leave with full pay, 42 days of annual leave, and 195 days of sick leave with half-pay. Through a combination of sick leave and annual leave, the Applicant may remain on certified sick leave on full pay for up to 136 days of leave before he would be moved to half-pay;

Irreparable damage

e. The requirement of irreparable harm is not satisfied in this case. The Applicant's leave balances can be re-calculated, and days of sick leave with full pay, or annual leave, can be re-credited to him.

Consideration

Legal framework

15. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

16. Article 13.1 of the Tribunal's Rules of Procedure states:

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.

17. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal 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 case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

18. Under art. 2.2 of the Statute, a suspension of action order is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of the contested decision.

19. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent 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. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, but also bearing in mind that the matter is not at the merits stage at this point of the proceedings.

Scope of the application

20. The Applicant identifies the contested decision as the decision to “deny [his] special leave with pay request”, communicated to him on 3 November 2016. He states that the decision has been implemented since “3 March 2016”, when he was first placed on sick leave.

21. It follows from art. 2.2 of the Tribunal’s Statute that where an administrative decision has been implemented, a suspension of action may not be granted (*Gandolfo* Order No. 101 (NY/2013)). However, in cases where the implementation of the decision is of an ongoing nature, the Tribunal may grant a request for a suspension of action (see, e.g., *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8 (NY/2013); *Gallieny* Order No. 60 (NY/2014)).

22. In March 2016, the Applicant asked to be placed on SLWP. The USG/OIOS denied his request. In October 2016, the Tribunal found that the USG/OIOS did not have the authority to make such determination, and remanded the matter for consideration by ASG/OHRM within 30 days. On 3 November 2016, the OiC/OHRM refused the Applicant’s request to be placed on SLWP. Thus, the Applicant continues to be on sick leave and seeks suspension of the decision of the OiC/OHRM to deny his request to be placed on SLWP.

23. He identifies the contested decision as the decision to “deny [his] special leave with pay request”, communicated to him on 3 November 2016. However, he states in the application that the decision has been implemented since 3 March 2016, when he was placed on sick leave based on his physician’s recommendation. The Applicant indicates his intention to request the Tribunal to either order that he be placed on SLWP or order that his request be considered by the new Secretary-General.

24. However, the relief sought by the Applicant is, in effect, a plea for specific performance rather than a request for a suspension of action. As explained above, the purpose of a suspension of action envisaged by art. 2.2 of the Tribunal's Statute is to preserve the *status quo* and also to restrain the Respondent from performing a specified act pending management evaluation of the contested decision (*Buff* Order No. 396 (NY/2015); *Kortes* Order No. 253 (NY/2016)). In contrast, art. 10.2 of the Tribunal's Statute and art. 14 of its Rules of Procedure envisage a broader range of specific performance measures that may be ordered by the Tribunal under a substantive application, provided that the necessary conditions are satisfied.

25. Accordingly, in view of the above, the Tribunal finds that the orders sought by the Applicant in the present application extend beyond the framework of art. 2.2 of the Tribunal's Statute.

Observation

26. The Tribunal notes that, even if it found that the Applicant's request fell under the scope of art. 2.2 of the Tribunal's Statute, the matter would not satisfy the requirement of particular urgency.

27. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

28. The Tribunal may order the suspension of action of a challenged decision only when management evaluation of that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159; *Benchebbak* 2012-UNAT-256). Furthermore, the Dispute Tribunal may under no circumstances order the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed (*Onana* 2010-UNAT-008; *Kasmani* 2010-UNAT-011; *Benchebbak* 2012-UNAT-256). In this particular case, as the Applicant is stationed in New York, the Administration has 30 calendar days to consider his management evaluation request (i.e., by 5 December 2016, as 4 December 2016 falls on a Sunday).

29. The Respondent submits that, in this particular case, through a combination of sick leave and annual leave, the Applicant may remain on certified sick leave on full pay (combined with annual leave days) for up to 136 days after 5 November 2016, before he would be moved to sick leave on half-pay. That would take the Applicant well beyond the 30-day period of the Administration's consideration of his management evaluation request.

Conclusion

30. The present application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 10th day of November 2016