



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

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

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Lucienne Pierre, ALD/OHR/, UN Secretariat

Introduction

1. On 28 September 2020, the Applicant, a team manager in the United Nations Counter-Terrorism Office (“UNOCT”), filed an application requesting, under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, suspension of action pending management evaluation of the decision to put him on administrative leave with pay (“ALWP”) pursuant to staff rule 10.4.

2. Upon the instructions of the Tribunal, the Respondent duly filed his reply on 30 September 2020 in which he contends that the application for suspension action is without merit.

Factual background

3. By letter dated 14 September 2020, the Executive Officer of UNOCT informed the Applicant that the Under-Secretary-General of UNOCT (“the USG”) had “decided to place [him] on administrative leave with pay with immediate effect, pursuant to Staff Rule 10.4”.

4. In the letter was further stated that it had been brought to the USG’s attention that the Applicant was “under investigation by the Office of Internal Oversight Services into allegations of unsatisfactory conduct, including those of a racial nature”.

5. As reasons for the Applicant’s placement on administrative leave it was indicated that:

- a. “The Applicant’s continued performance of duties is highly likely to have a negative impact on the preservation of a harmonious work environment, given [his] level as section chief and [his] management responsibilities; and

b. “[T]hat there is a risk that [he] will continue [his] conduct, on the basis that the allegations of unsatisfactory conduct have been reported on more than one occasion”.

6. Regarding the background for the allegations of “unsatisfactory conduct, including those of a racial nature”, the Applicant stated as follows in an annex to his request for management evaluation dated 23 September 2020 titled, “Factual Background” (emphasis in the original):

THE ALWP REFERENCES

In the ALWP there is mention of allegations of a “racial nature”. Upon my own recollection of events in my two years at [the United Nations], I can think of only one instance that could have been misconstrued under that term.

The context of the event

I have daily stand up meetings with my team on Microsoft Teams, which take place at 9am EST/3pm CEST. During a call on July 15th 2020, only 3 or 4 members of my team were present at the start where normally we are with 8 people, and people dropped in and out of the meeting throughout.

This had happened a few times already and we informally had joked before about how sometimes less and less of us made the meeting as we are all very busy.

As we were waiting for others to join, the situation reminded me of a very well-known book in world’s literature, the Agatha [Christie] novel from 1939 “And then there were none”, and a very old nursery rhyme the book was based on called “Ten Little Soldiers”. The story is of a mystery of a group of people, of which more and more seem to disappear until there are none. I jokingly asked those present in the call if they were familiar with this rhyme and book. When they reacted it did not directly ring a bell, I asked them if they might be more familiar with the original incredibly racist title “Ten Little N*****”. I know many around the world are more familiar with this title because most learned of it in school including how it is unrelated to the content of the story and unnecessarily offensive and racist (See for instance on Wikipedia:

https://en.wikipedia.org/wiki/And_Then_There_Were_None).

One of the female team members asked in return if I meant the book “How to kill a Mockingbird” but I said no and that I was talking about

the rhyme and book about the mystery of how less and less people remain in a group. The only reason I referred to the rhyme and the novel are because of the story and how we were in a similar situation.

As more colleagues joined and may have heard some of the beginning of the call out of context, I realized that me recalling the original racist title of the book could be misconstrued and I do not tolerate racism in any way. That is why at the end of our call I came back to the start and this reference to the rhyme and novel. I explained that I referred to this because of the story, and that they are a nursery rhyme and an Agatha Christie novel.

I also repeated the fact that they originally had a racist title and that this had been changed in the US not long after publishing but only very recently in many others. I told the team what the correct titles are, namely “And then there were none” and “Ten Little Soldiers”. And I proceeded to read the rhyme “Ten Little Soldiers” to make clear again the content of the rhyme and to make sure there could not be any misunderstanding why I thought of the story. I stated again that I believe the original title is unmistakably racist and offensive.

This was the end of the call. I had no intention other than referring to the context of these stories. I recounted the fact of the original very racist title and made sure to clarify that this was offensive, and unrelated to the story itself of the rhyme and book. This was an awkward moment perhaps, but it was necessary to make clear why I recalled the fact of the old titles and that it had nothing to do with the topic of our informal discussion and that I think that this title is racist. On many different occasions I actively fight racism in the organization and records exist of those actions.

7. In the reply, the Respondent confirms that that the allegations were based on the situation that the Applicant described in the annex as quoted above, and added that ““Ten Little N*****’ pertains to the death and killing of the eponymous characters of the nursery rhyme, until no one is left alive”.

8. The Respondent further contends that the Applicant’s statements at the 15 July 2020 meeting led several staff member to file “confidential complaints about the Applicant’s conduct being offensive”.

Consideration

9. Under art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of the Rules of Procedure, 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 have been met.

Prima facie unlawfulness

10. In considering whether to suspend an administrative decision pending management evaluation, the Dispute Tribunal’s Statute does not require the Tribunal to make a definitive finding that the decision is unlawful. The test is not particularly onerous since all the Tribunal is to do at this stage is to decide as to whether it appears that, if not rebutted, the claim will stand proven on a *prima facie* basis. Any such determination is not binding should the Applicant subsequently file an application on the merits and the matter would proceed to a full judicial review. It is merely an indication as to what appears to be the case at this preliminary stage.

Was the contested decision taken by someone with appropriate authority?

11. The Applicant submits that it appears that the contested decision “was not taken by the person with authority”, because “in the written notification, [he] was told the decision was taken by the USG/UNOCT”, but “the decision was only signed by the Executive Officer of UNOCT”.

12. In response, the Respondent, in essence, contends that whereas the letter dated 14 September 2020 was authored and signed by the Executive Officer, the contested decision was indeed taken by the USG, as also stated in the letter.

13. The Tribunal notes that under ST/SGB/2019/2 (Delegation of authority), decisions regarding “[a]dministrative leave with pay pending investigation” under staff

regulation 10.1 and staff rule 10.4 are to be taken by “[h]eads of entity” for staff at the level of “D-2 and below”.

14. It explicitly follows from the letter dated 14 September 2020 that the contested decision was taken by the USG, who is also the head of UNOCT. The fact that the decision was communicated by someone else, namely the Executive Officer, makes no difference in this regard.

15. Accordingly, the decision was taken by a competent official.

Was it *prima facie* unlawful to place the Applicant on ALWP in the given circumstances?

16. The Applicant submits that “as a staff member facing a disciplinary procedure, [he has] a right to be heard” and that “[t]his is a standard and universal right”, but that “[i]n the present case, [he has] not been heard at all”, that he does “not even know what [he is] accused of”, and that he “cannot defend [him]self”. Nevertheless, “an administrative leave is already imposed on [him] although the “rules say that an administrative leave is not a disciplinary sanction but the organization seems to use it these days as an advance disciplinary measure without any safeguards for the staff member”, namely as a “disguised disciplinary sanction”. Recent cases before the Dispute Tribunal “show the trend”.

17. The Applicant contends his “due process rights” in the “disciplinary procedure ... [have] not been respected so far” as he has “no idea who is accusing [him]”, “why [he is] being accused” and is “left with speculations to torment [his] mind”. The Applicant suspects “an abuse of process with a hidden agenda in connection to the ongoing recruitment for a position that [he] applied to, hoping to make it to a more sustainable job situation”.

18. The Applicant submits that he is “already set aside from the office”, which “is damaging for [his] sanity of mind”, and even if he has not “lost [his] revenues, this “is

not all that will fulfil [his] life on a daily basis”. In addition, his “contract is coming to an end in late December and [he is] worried that this hidden agenda might also encompass not renewing [his] contract”. This will amount to “a constructive dismissal”, and he “cannot wait until it happens before [he raises his] voice for protection and due process of the law”.

19. The Applicant contends that staff rule 10.4(b) “requires that the reasons are provided” while, in the present case, the Secretary-General “has provided elliptical reasons which do not comply with [this] requirement” as “reasons need to be specific and substantial”, and in his case, he has “no indication what incident(s) the decision is based on”.

20. The Respondent, essentially, submits that the USG lawfully exercised his discretion when placing the Applicant on ALWP in the given circumstances.

21. The Tribunal notes that in accordance with staff rule 10.4(a), “[a] staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the completion of a disciplinary process” and that such leave “may continue until the completion of the disciplinary process”. If a staff member is placed on administrative leave, then s/he shall be “given a written statement of the reason(s) for such leave and its probable duration” pursuant to staff rule 10.4(b).

22. The circumstance under which a staff member may be placed on ALWP are specified in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), which provides that “the authorized official” may do so if, among other situations, “[t]he staff member’s continued presence at the office could have a negative impact on the preservation of a harmonious work environment”, or “[t]here is a risk of repetition or continuation of the unsatisfactory conduct” (see sec. 11.3).

23. At the same time, it follows from the consistent jurisprudence of the Appeals Tribunal that discretionary authority is not unfettered. As the Appeals Tribunal stated

in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, “when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”.

24. The Appeals Tribunal, however, underlined that “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General” (see *Sanwidi*, para. 40). In this regard, “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker’s decision” (see *Sanwidi*, para. 42). Among the circumstances to consider when assessing the Administration’s exercise of its discretion, the Appeals Tribunal stated “[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

25. In the present case, the Tribunal finds that—as a matter of access to justice—the reasons provided in the letter of 14 September 2020 were inadequate in accordance with staff rule 10.4(b), because solely based thereon, it was impossible for the Applicant to understand why he was placed on ALWP and prevented him from appropriately avail himself of the different dispute resolution options that are provided for within the internal justice system of the United Nations (in line herewith, see the Appeals Tribunal in *Jafari* 2019-UNAT-927, para. 35). As the Respondent now, in the reply, has explained that the imposition of the ALWP was due to the exact circumstances that the Applicant himself described in the annex to his request for

management evaluation, the Administration has, nevertheless, managed to repair this shortcoming.

26. Considering these circumstances, the Tribunal further finds that the Applicant has not *prima facie* established that the USG overstepped his margin of appreciation when placing the Applicant on ALWP against the background that his continued presence at the office was deemed to have a negative impact on the preservation of a harmonious work environment as per sec. 11.3(d) of ST/AI/2017/1. Based on the information before it, the Tribunal, however, does not see why there should be a possible risk of repetitive behavior in accordance with sec. 11.3(e) of ST/AI/2017/1.

27. Consequently, the Applicant has not established that the contested administrative decision was *prima facie* unlawful. The Tribunal, however, recommends the Administration to solve the matter with appropriate urgency to avoid unnecessary harm to all implicated staff members and preferably before the expiry of the three-month ALWP.

Urgency and irreparable harm

28. As the Applicant has not satisfied the requirement of *prima facie* unlawfulness, it is not necessary for the Tribunal to examine the two other conditions, namely urgency and irreparable harm.

Anonymity

29. The Applicant requests that “considering the risk for [his] reputation ... [his] identity ... be kept confidential, including any information that could allow [his] identification”, because he wishes to “fight for [his] rights, without contributing [him]self to the risks [he has] identified”.

30. Article 11.6 of the Dispute Tribunal’s Statute and art. 26 of its Rules of Procedure provide that the judgments of the Dispute Tribunal shall protect personal data and shall be made available by the Registry of the Dispute Tribunal. The Appeals

Tribunal has held in this regard that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability” (*Lee* 2014-UNAT-481). The Appeals Tribunal’s practice establishes that the principle of publicity can only be departed from where the applicant shows “greater need than any other litigant for confidentiality” (*Pirnea* 2014-UNAT-456) and that it is for the party making the claim of confidentiality to establish the grounds upon which the claim is based (*Bertucci* 2011-UNAT-121).

31. In the present case, the Tribunal is persuaded by the Applicant’s contention that the publicity of the proceedings is likely to cause risk to his personal and professional reputation. The Tribunal therefore finds it reasonable to grant the motion for anonymity.

Conclusion

32. In light of the above, the Tribunal orders that:

- a. The application for suspension of action is rejected;
- b. The Applicant’s request for anonymity is granted.

(Signed)

Judge Joelle Adda

Dated this 1st day of October 2020