



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/044
Order No.: 197 (NY/2020)
Date: 16 December 2020
Original: English

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:
Marcos Zunino, OSLA

Counsel for Respondent:
Lucienne Pierre, ALD/OHR, UN Secretariat

Introduction

1. On 9 December 2020, the Applicant, a staff member with the Economic Commission for Latin America and the Caribbean (“ECLAC”), 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 filed his reply on 14 December 2020.
3. On 15 December 2020, the Applicant filed a motion for leave to file a rejoinder to the Respondent’s reply, along with a proposed rejoinder.

Factual background

4. By memorandum dated 21 November 2020, the Executive Secretary of ECLAC informed the Applicant that she “decided to place [him] on administrative leave with pay with immediate effect, pursuant to Staff Rule 10.4” as it had been brought to her attention “allegations of serious misconduct, specifically potential sexual abuse, committed by [the Applicant]”.
5. The 21 November 2020 memorandum notifying the Applicant of his placement on administrative leave states that:
 - a. “there is sufficient evidence suggesting that [the Applicant] ha[s] engaged in the alleged misconduct”;
 - b. “we have received in the past complaints of potential harassment against [the Applicant]”;

c. “the fact that [the Applicant] continue[s] to perform [his] duties as ECLAC staff member may have a negative impact on the preservation of a harmonious work environment”;

d. “the Organization’s reputation is at risk”.

6. On 9 December 2020, the Applicant filed a request for management evaluation and the present application.

Consideration

7. 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

8. 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.

9. Staff rule 10.4(a) provides that “[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).

10. The circumstances under which a staff member may be placed on ALWP are specified in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process):

11.3 The decision to place a staff member on administrative leave with pay may be made by the authorized official at any time following a report of suspected unsatisfactory conduct and following the authorized official’s determination that at least one of the following circumstances is met:

(a) The staff member is unable to continue effectively performing the staff member’s functions, given the nature of those functions;

(b) Continued service by the staff member would create a risk that the staff member could destroy, conceal or otherwise tamper with potential evidence, or interfere in any way with the investigation or disciplinary process, including by retaliating against individuals protected under ST/SGB/2017/2 or intimidating a witness;

(c) The continued presence of the staff member on the Organization’s premises or at the duty station could constitute a security or financial risk to the Organization and/or its personnel, or could otherwise prejudice the interests or reputation of the Organization;

(d) The staff member’s continued presence at the office could have a negative impact on the preservation of a harmonious work environment;

(e) There is a risk of repetition or continuation of the unsatisfactory conduct.

11. 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”. 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).

12. The Applicant submits that the decision to place him on ALWP is unlawful on the following grounds: (a) the reasons provided in the decision, i.e. “potential sexual abuse”, were insufficient, which prevents the Applicant from understanding the reasons behind an administrative decision and from being able to effectively challenge it; (b) the decision-maker took into account irrelevant matters, namely whether there was sufficient evidence supporting the allegations and the Applicant’s alleged past conduct as these are not one of the conditions set forth in sec. 11.3 of ST/AI/2017/1; and (c) his continued presence does not have a negative impact on the preservation of a harmonious work environment and that the Organization’s reputation is not at risk and thus the conditions set forth in sec. 11.3 are not satisfied in this case.

13. In the reply, the Respondent submits that on 23 September 2020, ECLAC learned that a complaint was filed with a national criminal court alleging that the Applicant committed sexual harassment and child abuse. In addition, the Respondent submits that ECLAC has received six separate claims of sexual harassment against the Applicant that allegedly took place during a period of time spanning from at least 2016 to 2020. The Respondent submits that the ECLAC’s Deputy Executive Secretary met with the Applicant in 2018 to inform him about sexual harassment complaints filed against him and since that meeting additional allegations of sexual harassment have been filed against him, including claims received this past month. The Respondent argues that based on the above circumstances the Executive Secretary of ECLAC lawfully exercised her discretion in placing the Applicant on ALWP.

14. In the present case, the Tribunal finds that—as a matter of access to justice—the reasons provided in the letter of 21 November 2020, namely “potential sexual abuse”, 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. The Tribunal is of the view that sufficient details should be provided to a staff member to allow a staff member to effectively challenge an administrative decision.

15. While the letter of 21 November 2020 provided only vague reasons for the contested decision (“potential sexual abuse”), the Respondent, albeit belatedly, provided additional details based on which the Administration decided to place the Applicant on administrative leave. Therefore, the Tribunal will consider the reasons stated on the letter of 21 November 2020, along with additionally disclosed details, to determine whether the contested decision is *prima facie* unlawful.

16. Considering all the information before the Tribunal, the Tribunal finds that the Applicant has not *prima facie* established that the Executive Secretary of ECLAC abused her discretionary authority by placing him on ALWP on the basis that “the Organization’s reputation is at risk” as per sec. 11.3(c) of ST/AI/2017/1, considering the seriousness of a criminal complaint filed with a national authority. The Applicant submits in his rejoinder that a criminal complaint filed by his former spouse for “habitual mistreatment” in May 2020 was adjudicated by a national court on 5 October 2020 in his favor. However, the Respondent referred to a criminal complaint for sexual harassment and child abuse, which is different from the one referenced by the Applicant.

17. It is not clear whether other sexual harassment complaints are filed by staff members, but considering that several separate sexual harassment complaints have been filed against the Applicant, the Tribunal further finds that the Executive Secretary’s conclusion that the Applicant’s continued presence “may have a negative impact on the preservation of a harmonious work environment” as per sec. 11.3(d) is reasonable.

18. The Applicant argues that since the Respondent has not provided any details or evidence substantiating alleged sexual harassment complaints filed against him, the Respondent has not shown that the contested decision followed an allegation of unsatisfactory conduct as required by sec. 11.1 of ST/AI/2017/1.

19. This claim is without merit. The Tribunal notes that the 21 November 2020 memorandum states that the allegations of serious misconduct were referred to the Office of Internal Oversight Services (“OIOS”). The Administration has no obligation to share details or evidence substantiating complaints filed against the Applicant to place him on ALWP. The available evidence will be disclosed to the Applicant in due course in accordance with ST/AI/2017/1.

20. The Tribunal agrees with the Applicant’s claim that two grounds mentioned for the contested decision, namely, whether there was sufficient evidence supporting the allegations and the Applicant’s alleged past conduct, are not one of the conditions set forth in sec. 11.3 of ST/AI/2017/1. Nevertheless, since sec. 11.3 only requires that one of the circumstances be met and the Tribunal found that sec. 11.3(c) and (d) were met, the Tribunal finds that the contested decision is lawful.

21. Accordingly, the Tribunal finds that the Applicant has not established that the contested administrative decision was *prima facie* unlawful.

Urgency and irreparable harm

22. 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.

The Applicant’s motion for leave to file a rejoinder to the Respondent’s reply

23. The Applicant seeks the Tribunal’s leave to file a rejoinder to respond to additional information disclosed in the reply since he has not had the opportunity to provide his views on this additional information.

24. The Tribunal agrees with the Applicant's submission and grants the motion.

Ex-parte filing of a criminal complaint

25. In accordance with art. 18.4 of the Dispute Tribunal's Rules of Procedure, the Respondent requests leave to disclose a copy of a criminal complaint on an *ex parte* basis in view of an exceptional circumstance. The Respondent submits that it is not clear whether the Applicant has formally been notified of the complaint filed against him by the national court or has been provided with a copy and thus requests the Tribunal to "impose measures to preserve the confidentiality of evidence".

26. Having reviewed a copy of a criminal complaint filed on an *ex parte* basis and considering the sensitive nature of the complaint, the Tribunal decides to allow the Respondent's *ex parte* filing. The Tribunal considers that enough details about this criminal complaint have been disclosed in the reply to give adequate information to the Applicant for the purpose of this litigation.

Anonymity

27. The Applicant requests anonymity since the application refers to a family matter involving a minor.

28. 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).

29. In the present case, considering the sensitive nature of the allegations filed against the Applicant and the fact that investigations on allegations of misconduct are confidential, the Tribunal decides to grant the motion for anonymity.

Conclusion

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

- a. The application for suspension of action is rejected;
- b. The Applicant's motion for leave to file a rejoinder to the Respondent's reply is granted;
- c. The Respondent's leave to disclose a criminal complaint on an *ex parte* basis is granted; and
- d. The Applicant's request for anonymity is granted.

(Signed)

Judge Joelle Adda

Dated this 16th day of December 2020