



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/033

Order No.: 097 (NBI/2014)

Date: 13 May 2014

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION

6. The Application was served on the Respondent on 7 May 2014 and he filed his Reply on 9 May 2014.

Applicant's submissions

7. The Applicant filed the present Application pursuant to the provisions of article 13 of the Rules of Procedure of the United Nations Dispute Tribunal and is seeking a stay of the decision to place him on ALWOP pending management evaluation.

8. As a preliminary matter, he moves the

10. He further submits that an administrative decision which has not been fully implemented is subject to a suspension of action and that if the reasoning of the Tribunal in Order No. 087 (NBI/2014) is retained, “staff members would never be allowed to request a suspension of a deci

15. Imposing administrative leave without pay is akin to the disciplinary sanction in staff rule 10.2 (a)(iv) of “suspension without pay for a specified period”. The Applicant argues that the distinction between the two is a matter of timing in that “administrative leave may be imposed during the investigation whereas the suspension without pay is a disciplinary measure imposed at the end of the process”.

16. The Applicant argues that there is no reason to refuse to pay a staff member who “remains available to work”. In the circumstances of the present case, the impugned decision is an unduly harsh measure as it deprives him not only of his wage but also of the opportunity to seek other employment for the duration of the investigation.

17. The impugned decision is “draconian” and prejudices the outcome of the disciplinary process. The Applicant argues that staff rule 10.4 makes no mention of the severity of an allegation being a factor to be considered in a decision to place a staff member on administrative leave without pay. What the rule does say is that such a measure may be warranted in “exceptional circumstances.”

18. The Applicant submits that exceptional circumstances exist when, for instance, a staff member has been arrested and detained by the authorities of the host country and is therefore not available to perform his functions. In such scenarios, administrative leave without pay may be an appropriate measure.

Urgency

19. The Applicant asserts that he was diligent in submitting his request for management evaluation and his application for suspension of action. He submits that he is already having difficulty meeting his financial obligations as a result of the Contested Decision and that this dire financial situation makes this matter urgent.

Tri-partite test

Prima facie unlawfulness

24. The Respondent submits that the Applicant has not discharged his burden of proving that the impugned decision is *prima facie* unlawful, which was made well

28. In cases of placement on ALWOP, any pay withheld is restored without delay where the allegations of misconduct are not sustained or the conduct at issue does not result in dismissal.

Urgency

29. The Respondent submits that “where there is no *prima facie* illegality in the decision to place a staff member on ALWOP, there is by definition no urgency in a request to make such placement”. Additionally, placement on ALWOP entails deprivation of income. It cannot be said therefore that placement on ALWOP inherently creates an element of urgency. The element of urgency must be determined on a case-by-case basis as supported by appropriate evidence. The Applicant has not provided evidence supporting his contention that he will not be able to support his family.

30. Furthermore, the Applicant may engage in other employment during his ALWOP provided he makes a request to the Secretary-General and is authorized, pursuant to Staff Rule 1.2(p) and the provisions of ST/AI/2000/13 (Outside activities).

Irreparable harm

31. The Respondent submits that no irreparable harm has been occasioned by the Contested Decision to the Applicant because:

- a. The power to place a staff member on ALWOP, by definition, results in the staff member losing his or her salary. Accordingly, such a loss should not, in itself, be considered as something that irreparably harms the rights of the Applicant as a staff member; and

- b. Any damage to the Applicant resulting from the decision to place him on ALWOP may be, if proven, later compensated by damages.

Considerations

Receivability

32. Before entering into a discussion on whether the Applicant has met the tripartite test for the injunctive relief that is sought, the Tribunal must *proprio motu*

temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

36. The provisions of article 10.2 of the Statute and article 13 of the Rules of Procedure of the Dispute Tribunal empower the Tribunal to grant interim relief to an individual aggrieved by an administrative action. These provisions are in the nature of injunctive relief. The basic notion of an injunction is to momentarily put on hold a proposed course of action or conduct at the request of an individual. In other words the purpose of such a relief is to let a matter remain in its *status quo* until it is determined on the merits or until the parties have satisfactorily resolved their dispute. The injunction is meant to **prevent** a course of action or conduct that would be detrimental to an individual. There is however another strand to this injunctive relief known as the *quia timet* injunction, the purpose of which is to prevent the apprehension of a wrongful act or conduct which is threatened or imminent but has not yet commenced.

37. On the face of it, the above provisions do give the Tribunal the jurisdiction to grant an injunction by way of the suspension of the contested administrative decision once the following conditions have been met namely that the administrative act is prima facie unlawful; there is urgency in the situation and irreparable damage would be caused by the refusal to grant the interim relief. Even if and when the Tribunal is satisfied that these three criteria have been satisfied the Tribunal cannot grant any suspension of action if the impugned decision has been implemented.

38. The record suggests that the Applicant was placed on ALWOP with immediate effect upon his receipt of the letter from the USG/DFS on 4 April 2014. Similar to the submission by the applicant in Order No. 087, the Applicant in the current case has framed his Application to ask for a temporary stay of the Contested Decision, even

though he is *in fact* asking that the decision either be reversed or varied so that he is at least paid for the duration of the management evaluation.

39. This submission however does not change this Tribunal's view that the decision was implemented on 4 April 2014 upon the Applicant's receipt of the USG/DFS' letter. Seeing that the Applicant is averring that he is currently out of work and is complaining of dire financial circumstances, the Tribunal is at a loss as to how it can logically conclude that the Contested Decision has not as yet been fully implemented.

40. In *Mills-Aryee* UNDT/2011/051, the Tribunal dismissed an application for suspension of action on the basis that:

[T]he selection decision was officially communicated to the selected candidate by HRMS/UNON before the Applicant filed her application for suspension of action. Thus, the Tribunal can only conclude that the contested decision in this case had already been implemented prior to the filing of the applica19aion twasiv-1.5(o twario)6.r385 d98 0 TDN6.7(

staff members of ECA, including the Applicant, were informed of decisions hours or a mere day or two before implementation so as to defeat the element of urgency.

43. The Tribunal finds it regrettable that the Respondent is brazenly using this lacuna in the rules to prevent a measure, as stringent and extreme as ALWOP, from being brought under the scrutiny of the Tribunal by way of an application for injunctive relief. It is a usurpation of the very fibre of judicial review to use a colorable legal device to ensure that ALWOP can never be the subject of a successful application for suspension of action due to the immediate implementation of the administrative decision upon the unsuspecting staff member's receipt of the decision letter.

Tri-partite test

44. Applications for suspension of action are governed by article 2 of the Statute of the United Nations Dispute Tribunal ("the Tribunal") and article 13 of the Tribunal's Rules of Procedure. The 3 statutory prerequisites contained in art. 2.2 of 43.

Decision

47. The Application is **DISMISSED**.

(Signed)

Judge Vinod Boolell