



## **Introduction**

1. The Applicant is a Facilities Management Assistant at the GS-3 level at the United Nations Mission in Liberia (UNMIL). On 18 August 2014, he filed this Application for suspension of the decision dated 23 June 2014 to extend his Administrative Leave without Pay (ALWOP) from 2 July 2014.

2. The Respondent filed a Reply to the Application on 19 August 2014 in which it was submitted, inter alia, that the Application was not receivable.

## **Facts**

3. The Applicant joined the United Nations in June 2004. His appointment was renewed on a number of occasions and is due to expire on 11 October 2014.

4. On 27 December 2013, the UNMIL National Staff Association (NASA) staged a sit-in action outside the UNMIL base. During this time, different forces were deployed to observe, including the Jordanian Police Unit, Nigerian forces and the Liberian National Police.

5. The Applicant participated in the sit-in action although the extent and nature of his participation is



decision with “ongoing legal effects” is receivable because it can only be deemed to be implemented in its entirety at the end. In support of his submission, the Applicant cited *Gallieny* Order No. 060 (NY/2014) and *Calvani* UNDT/2009/092.

13. On the issue of receivability, the Tribunal finds and holds that the latest ALWOP on which the Applicant was placed and which became effective on 2 July 2014 is without a doubt still ongoing and has not been fully implemented. Its full implementation will happen only sometime in October 2014 if it is not discontinued by the Respondent or set aside by the Tribunal.

14.

d. Staff rule 10.4(b) envisions an estimated three months as the duration of the investigative process. Several investigations were undertaken and multiple witnesses interviewed with regard to the Applicant's participation in the sit-in strike of UNMIL NASA on 27 December 2013. It was submitted on behalf of the Applicant that it is not practicable to extend his ALWOP for an additional three months after the initial period, when, in the present case, he is being kept in the dark as to the status of the investigation well into the third period of administrative leave.

e. Staff rule 10.4(c) provides that in "exceptional circumstances" the Secretary-General can take away all or part of a staff member's pay while on administrative leave. However, there is no clear articulation of what these "exceptional circumstances" may be for the purpose of placement on ALWOP.

f. The Applicant was not shown the *prima facie* evidence against him and has not been given a copy of, nor had the opportunity to respond to, the investigation report concerning his conduct.

g. The Guidelines for placement of staff members on administrative leave with pay pending investigation and the disciplinary process cannot be relied upon by the Respondent as they are not based on a properly promulgated instrument via administrative issuance.

*Urgency*

h. The decision to place the Applicant on administrative leave without pay is a decision with continuing legal effect meaning that it gives rise to the required urgency following *Calvani* UNDT/2009/092 and *Ba* UNDT/2012/025.

i. In the case of *Ba*, a decision to place a staff member on administrative leave with pay was suspended. Regarding the urgency of the decision, the learned judge found that the continuing legal effect of the unlawful decision meant that at any stage during its continuance, there was

an element of urgency. He went on to state that the urgency derives from the nature of the effect on the applicant, and is also on-going. For each day that the administrative leave continued, the applicant suffered a renewed assault on her reputation and her career prospects.

j. In this case, the Applicant had made tremendous expenditures for his medical needs as a result of the 27 December 2013 incident, and, combined with lack of income, this has created a dire situation in his ability to care for the 10 people in his family, including basic needs such as food and housing. He has had difficulty meeting rent, has received a two-month notice similar to eviction and is blocked from trying to secure any other means of income.

k. In addition, the uncertainty created by the indefinite nature of his placement on ALWOP is a source of enormous stress. Given the apparent absence of any progress in the investigation in over a year, the Applicant has no confidence that his situation could improve in the foreseeable future.

l. In *Calvani*, the learned judge considered that there were effectively two decisions to be considered, the decision to place the applicant on administrative leave and the decision to make that ALWOP. The Applicant's situation can be contrasted with that in *Calvani* where the learned judge felt that a risk of hindering the investigation meant that there was no particular urgency in relation to reinstating the applicant to the functions of his post.

m. It is the Administration which continues to extend the leave, while the Applicant has remained hopeful that there would be some completion to their actions which would warrant discontinuation. Therefore, the matter is urgent but the urgency is not self-created.

*Irreparable harm*

n. The Dispute Tribunal held in *Corna* Order No. 80 (GVA/2010), that the harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed.

o. In *Tadonki* UNDT-2009-016, it was held that a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.

p. The Dispute Tribunal found in *Calvani* 2009-UNDT-092 that damage to reputation and family distress caused by a sudden termination of salary, upon administrative leave without pay was irreparable.

q. A decision which leaves the Applicant without a salary and health care coverage indefinitely must be seen as causing irreparable harm as it negatively affects his financial, professional and personal life. The consequences of the decision described above also give rise to an irreparable harm. The realities of trying to support a family in Monrovia, during a time of heightened risk with the Ebola outbreak, with no income source for a period of over six months are daunting. The health and wellbeing of not only the Applicant but also those he supports is put in jeopardy.

**Respondent's case**

16. The Respondent's case may be summarized as follows:

*Prima facie unlawfulness*

a. 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 pending an investigation and until the completion of

the disciplinary process. In compliance with this provision, the Applicant was placed on administrative leave pending an investigation into his conduct. A disciplinary process has not been initiated, let alone completed, in respect of the Applicant. Therefore, the Applicant's placement on ALWOP continues to comply with staff rule 10.4(a).

b. 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 its probable duration which, so far as practicable, should not exceed three months. In compliance with this provision, by letters dated 2 January 2014, 2 April 2014 and 23 June 2014, the Applicant was informed of the reasons for his placement on administrative leave. While the Applicant's initial placement on administrative leave was for three months, as detailed below, it was not practicable, in this case, not to extend it beyond that period. This, too, was in compliance with staff rule 10.4(b).

c. Staff rule 10.4(c) provides that administrative leave shall be with full pay unless, in exceptional circumstances, the Secretary-General decides that ALWOP is warranted. Furthermore, section 4 of ST/AI/371 (Revised disciplinary measures)

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ii. The Applicant's conduct was serious in nature and posed a serious risk to the safety and security of United Nations personnel, as well as to the reputation of the Organization, thereby adversely affecting the effective and credible discharge of its mandate.

iii. The Applicant's redeployment would not satisfactorily alleviate the safety, security and reputational risk posed by the

security, safety and other concerns that would not be effectively addressed with a staff member's continued presence in the workplace.

g. The Applicant was interviewed in connection with the investigation into the events of 27 December 2013 and, therefore, did have the opportunity to provide his account of events. Furthermore, in the notification letters sent to him by the Department of Field Support (DFS), he was notified of the reasons for his placement on administrative leave and, subsequently, ALWOP. As the Tribunal held in *Ba* UNDT/2012/025, the investigators made it clear to the Applicant what their investigation was about and the references made thereto in the letter placing him on Administrative Leave could have left the Applicant in no doubt as to the reasons behind his placement on ALWOP.

h. Regarding the Applicant's contention that his placement on ALWOP has the *de facto* effect of serving as a disciplinary measure, the Respondent submits that, contrary to a disciplinary measure – which is final unless reviewed by the Tribunal – reviewed by the Tribunal.

investigation and until the completion of the disciplinary process, without imposing a time limit on those processes.

Staff rule 10.4(b) should be read in conjunction with staff rule 10.4(a) and should not be interpreted as imposing a time limit on those processes.

be imposed on the investigation and disciplinary processes, by noting that the three-month time limit should be adhered to only insofar as practicable. The notion of practicability in staff rule 10.4(b) must be read with reference to the investigation and disciplinary processes at issue in staff rule 10.4(a).

(namely, assisting in blocking the Star Base gate) are sufficiently serious that they could, if established, lead to his separation or dismissal. The Respondent submits that this is consistent with staff rule 10.4(d), which provides that, in cases of ALWOP, the pay withheld will only be restored to the staff member if the allegations are not sustained or, if sustained; do not result in separation or dismissal.

o. Regarding the Applicant's contention that the Respondent should not rely on the "Guidelines for placement of staff members on administrative leave with pay pending investigation and the disciplinary process", the Respondent notes that, although the Applicant's placement on ALWOP meets the criteria set forth in those Guidelines, the Guidelines were not determinative of his placement on ALWOP. Rather, the Applicant's placement on ALWOP complied with the relevant provisions of staff rule 10.4 and of ST/AI/371.

p. The Guidelines reflect the Organization's policy in the application of staff rule 10.4 and ST/AI/371 on the placement of staff members on administrative leave. Through their application, the Guidelines ensure the fair and equitable treatment of similarly situated staff members. The fact that the Guidelines may not have the force of a Staff Regulation or Staff Rule cannot mea

he contest his subsequent placement on ALWOP, dated 2 April 2014. Moreover, he has waited more than six weeks to contest the renewal of his ALWOP, which was notified to him on 30 June 2014.

s. The Respondent recalls the Tribunal's holding in *Evangelista*, UNDT/2011/212, in which the Tribunal stated that the applicant could not seek the Tribunal's assistance as a matter of urgency when she has had knowledge of the decision for more than six weeks. Any urgency in this case is, accordingly, of the Applicant's own making.

*Irreparable harm*

t. The placement of a staff member on ALWOP, by definition, results in the payment of the staff member's salary being suspended. If this were considered to irreparably harm a staff member's rights, then every placement on ALWOP would automatically meet this branch of the tripartite test.

u. The withholding of a staff member's salary is a financial measure. Any damage to the Applicant resulting from the decision to place him on

### **Consideration**

17. Applications for suspension of action are governed by arts. 2.2 and 10.2 of the Statute of the Dispute Tribunal and art

20. In the instant case, the Applicant was placed on administrative leave a few days after the commencement of investigations into certain events of 27 December 2013 instigated by UNMIL NASA in which he was alleged to have participated. The said placement on administrative leave which was for a period

place on 27 December 2013. Also that the nature of the conduct he is alleged to have engaged in is sufficiently serious that it could, if proven, lead to his dismissal.

25. During the hearing, Counsel for the Respondent submitted that whilst “exceptional circumstances” are not defined by the Staff Rules and Regulations, “where the conduct at issue is one that can lead to dismissal” should be the correct standard for justifying the conversion from ALWP to ALWOP.

26. This argument is untenable for two reasons. The first is that there is no gain-saying that a proven misconduct on the part of a staff member can lead to the disciplinary action of separation or dismissal. This fact was well known to the Respondent on 2 January 2014 when he first sent the Applicant on ALWP. In other words, from the very beginning when investigations into the Applicant’s alleged conduct of 27 December 2013 were initiated and he was placed on ALWP, and up until 2 April 2014 when the element of pay was removed from his administrative leave and until the filing of this Application when another three-month ALWOP is running against the Applicant, nothing had



29. The Tribunal at this stage wishes to address the matter of the time that has elapsed since 2 April 2014 when the Applicant was advised that a review of the investigation report had been undertaken and a decision taken to place him on ALWOP. In stating his case, the Respondent has told the Tribunal that he had placed the Applicant on ALWOP for three months without making up his mind as to whether he wanted to pursue disciplinary action against him. Upon the expiry of that three-month period, he has embarked on a second three-month period of ALWOP and is yet to decide whether the disciplinary process will be resorted to.

30. Staff rule 10.4 (b) provides that as far as practicable, administrative leave should not exceed three months. Having diligently concluded investigations into the alleged misconduct of the Applicant, produced the investigation report and reviewed the said report within three months; why has the Respondent or his agents been unable to decide nearly five months later whether to close the case or to proceed with disciplinary action? The circumstances of this extension of ALWOP, without doubt, point to a veiled disciplinary action.

31. With regard to the argument that the Secretary-General has discretionary powers to decide what constitutes “exceptional circumstances”, the Tribunal must underscore the fact that, as held in the case of *Contreras* UNDT/2010/154<sup>1</sup> the word “discretion” is not synonymous with the word “power” and that in public administration, discretion must be exercised judiciously. In other words, the exercise of discretionary power is not absolute and any exercise of discretion by a public officer must be exercised carefully and with a sense of accountability.

32. The Tribunal in view of the foregoing considerations, finds and holds that the decision to convert the Applicant’s ALWP to ALWOP cannot be attributed to any exceptional circumstances and that the requirement of *prima facie* unlawfulness has been satisfied in this Application.

33. Having carefully reviewed the parties’ submissions, the Tribunal is convinced that the elements of urgency and irreparable harm have also been met. Each new day in the circumstances in which the Applicant is placed, escalates the

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<sup>1</sup> At para. 74.

urgency and desperation of his situation. With regards to hardship, the Tribunal particularly takes judicial notice of the ongoing Ebola virus disease outbreak currently ravaging almost every county in Liberia warranting a countrywide state of emergency and finds that the UNMIL Staff Incentive Program is a source of income at such a critical time to be especially insensitive, lacking in humanitarian values, and irresponsible of the UNMIL Administration.

**Conclusion**

34. The Tribunal grants the Application for susp