



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/076
Order No.: 199 (NBI/2014)
Date: 1 September 2014
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

FAHNGON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:
Marisa MacLennan, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Cristiano Papile, ALS/OHRM

8. On 30 June 2014, the Applicant reported to the UNMIL base where he was given a one year contract to sign and a letter, dated 23 June 2014, informing him that his ALWOP was being extended for an additional three months from 2 July 2014, or until the completion of the disciplinary process, if any, whichever came earlier.

9. The Applicant requested management evaluation of the decision on 27 August 2014.

10. The Applicant also filed the present Application on 27 August 2014.

11. The Application was filed on the Respondent on 27 August 2014 with a deadline to file a Reply by 29 August 2014. On 27 August 2014, Counsel for the Respondent requested the Tribunal to determine the Application on the basis of the parties written pleadings. Counsel for the Applicant had no objection. The Tribunal is satisfied that it has sufficient evidence and submissions to make findings on the papers without the need for an oral hearing.

12. The Respondent filed a Reply on 29 August 2014.

Receivability

13. It was argued by the Respondent that the Application was not receivable for the following reasons:

- a. The decision to extend the Applicant's placement on ALWOP has already been fully implemented and, as such, it cannot legally be the subject of a suspension of action.
- b. The Respondent cited *Nwuke* UNDT/2012/002 as authority that where a contested decision has been fully implemented, suspension of action cannot be granted.
- c. Also cited in support were these three orders rendered in the matters of Applicant Order No. 087 (NBI/2014), Applicant Order No. 097 (NBI/2014) and Applicant Order No. 167 (NBI/2014) where the applicants challenged the renewal of their placement on

ALWOP were all rejected as the decisions to place the applicants on ALWOP had already been implemented.

- d. There is a distinction between the implementation of a decision and the completion of its consequences. Once the renewal of the Applicant's ALWOP was administratively implemented on 30 June 2014, there was nothing further to be done to implement the decision and, in this sense, the decision was fully implemented. The fact that the Applicant may feel the consequences of that decision for some time does not mean that the decision has not been fully implemented.

14. In response, the Applicant argued that while the UNDT has found that a suspension of action cannot be obtained to restore a situation or reverse an unlawful act which has already been implemented, it has also found that a 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.

15. 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.

16. The Respondent's argument that the decision has been fully implemented is rejected as a basis for lack of jurisdiction of this Tribunal to entertain this Application. The Application is receivable.

Applicant's case

17. The Applicant's case may be summarized as follows:

Case No. UNDT/NBI/2014/076

Order No. 199

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 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.

r. The Applicant also submits that the Tribunal granted two applications for suspension of action for staff members in virtually identical situations: Freeman

- ii. The Applicant's conduct was serious in nature and posed a serious risk to the safety and security of United Nations personnel.
- iii. The Applicant's redeployment would not satisfactorily alleviate the safety, security and reputational risk posed by the Applicant's presence in the workplace.
- iv. The Applicant's actions, if established, were sufficiently serious that they could lead to his separation or dismissal.

c. 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).

d. 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. The Respondent submits that the determination of whether "exceptional circumstances" exist in a given

investigation report concerning his conduct was finalized. After the finalization, it was evidence that the strength of the evidence against the Applicant, combined with the seriousness of his conduct, mandated the conversion of her administrative leave with pay to ALWOP.

g. The Respondent further submits that, given the seriousness of the Applicant's actions and the evidence of his patent involvement in the matter, it would have been permissible to place him on ALWOP immediately following the 27 December 2013 incidents (i.e., without waiting for the issuance of the investigation report). The fact that this was not done, and that the Respondent preserved the Applicant's salary for a further three months, cannot be held against the Respondent. The decision to wait for the investigation to be issued served both the interests of the Organization (by minimizing further disruption to mission operations during a critical time) and the interests of the Applicant (by ensuring the continuation of his salary during that period).

h. Furthermore, the fact that a disciplinary process has not yet been initiated against the Applicant does not constitute evidence that his placement on ALWOP is *prima facie* unlawful. The review involved in issuing allegations of misconduct is, of necessity, a more thorough and involved matter than the review involved in determining whether to place a staff member on ALWOP. This reflects the fact that, unlike placement on ALWOP, the issuance of allegations of misconduct is a matter that requires a full and thorough review of all of the evidence collected.

i.

is formally alleged to have engaged in misconduct. In this case, a decision has not yet been made regarding whether to pursue this matter as a disciplinary case against the Applicant and, accordingly, he is not yet entitled to receive a copy of the investigation report and supporting documentation. The Respondent respectfully submits that a requirement to seek a staff member's comments on the evidence prior to placement on ALWOP would effectively require the disciplinary process to be carried out before a staff member could be placed on ALWOP. This would defeat the purpose of administrative leave as an early intervention measure to address concerns about security, safety and other concerns that would not be effectively addressed with a staff member's continued presence in the workplace.

k. The Respondent submits that the Applicant was interviewed in connection with the investigation into the events of 27 December 2013 and, therefore, did have the opportunity to provide her account of events. Furthermore, in the notification letters sent to him by DFS, he was notified of the reasons for his

disciplinary measure would be contrary to the letter of the Organization's
legislative

leave complies with those Guidelines, it is **de facto** unlawful. It is submitted that such an outcome would be pervert the proper administration

warrant dismissal or separation, any pay withheld shall be restored without delay.

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules. (Emphasis added).

21. From the foregoing, it is apparent that the Secretary-General may place a staff member on administrative leave at any time after an allegation of misconduct is made against him or her pending the start of an investigation into the alleged misconduct and until the completion of a disciplinary process.

22. 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 of three months was made with pay.

23. One of the core issues before this Tribunal in the present c3.2 520.0BT /F1 -5(t95/t--10(b)19.04 52

had been decided that he be placed on ALWOP. On 30 June 2014, the Applicant received a letter, dated 23 June 2014, which stated that his ALWOP was being extended for an additional three months from 2 July 2014, or until the completion of the disciplinary process, if any, whichever came earlier.

26. The two reasons given for the conversion of the Applicant's ALWP to ALWOP were that the Respondent had assessed that there was sufficient *prima facie* evidence that he engaged in serious misconduct by assaulting United Nations personnel and prevented access to the UNMIL Star Base, Monrovia, in the course of events that took 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.

27. 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.

28. 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 changed.

29. Further, the Organization's legislation has remained the same and considering the rationale for administrative leave, the Applicant has remained outside the workplace and cannot affect or influence any investigations, tamper with investigative material or constitute nuisance.

30. Again, the claim by the Respondent that upon concluding and reviewing the investigation report, on 13 March 2014, he decided that the ALWP be

Case No. UNDT/NBI/2014/076

Order No.

Entered in the Register on this 1st day of September 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi