



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/077

Order No.: 200 (NBI/2014)

Date: 1 September 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COLEMAN

v.

SECRETARY-GENERAL

Introduction

1. The Applicant is a Transport Assistant at the GS-3 level in the United Nations Mission in Liberia (UNMIL). On 27 August 2014, she filed an Application for suspension of the decision dated 23 June 2014 to extend her Administrative Leave Without Pay (ALWOP) from 14 July 2014.

2. The Respondent filed a Reply to the Application on 29 August 2014 in which it was asserted, inter alia, that the Application was not receivable.

Facts

3. The Applicant joined the United Nations in June 2004. Her appointment was renewed on a number of occasions and is due to expire on 30 June 2015.

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, Nigeria forces, and Liberian National Police.

5. The Applicant participated in the sit-in action although the extent and nature of her participation is in dispute and became the subject of an investigation. The Respondent claims, inter alia, that the Applicant disarmed a Pakistani Military Officer of his firearm and restricted an UNMIL Security Officer from carrying out her official duties.

6. On 2 January 2014, the Applicant received a letter which informed her that she was the subject of an investigation into misconduct, and that she was being placed on Administrative Leave with Pay (ALWP) for three months, or until the completion of the 079981 ET Q q BT.3 thatiosL-20(a)17(f-11(j)22(e))2(a)-17(a)-24(v)958.88 T

8. On 30 June 2014, the Applicant reported to the UNMIL base where she was given a one year contract to sign and a letter, dated 23 June 2014, informing her that his ALWOP was being extended for an additional three months from 14 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 22 August 2014.

10. The Applicant 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 her submission the Applicant cited Gallieny Order No. 060 (NY/2014) and Calvani

Prima facie unlawfulness

a.

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

h. The Applicant's situation does not meet the circumstances or risks described in the Guidelines under paragraph 3, such as the staff member posing a danger, posing a security risk, or destruction of evidence. No such allegations have been made of the Applicant, but subsequent to a onetime 27 December 2014 incident involving the Applicant allegedly participating in the protest and disarming a UNMIL soldier, there is no information put forth that the Applicant continues to be a risk to do the same at this point in time, that she remains any danger to the United Nations or other staff members, or that there is any information on which to believe she would tamper or destroy related evidence. At this point, the investigation has concluded. This notion was similarly expressed in *Cabrera* (UNDT/2011/081) where the Tribunal found that there were no "live" issue

Urgency

i. 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.

j. 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 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.

k. In this case, the Applicant's lack of income, combined with the fact that her husband does not have an income either, has created a dire situation in her ability to care for the twenty people in her family, including basic needs such as food and housing. The current Ebola crisis in Liberia has also created an emergency situation for citizens of the country.

l. In addition, the uncertainty created by the indefinite nature of her 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

p. 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

Secretary-General decides that ALWOP is warranted. Furthermore, section 4 of ST/AI/371, as amended, provides that administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

b. In compliance with these provisions, the Applicant was placed on administrative leave pending an investigation into her conduct, because:

- i. there was sufficient prima facie evidence to indicate that the Applicant, in the context of a violent protest that disrupted UNMIL's operations, had disarmed a 06. g06. g06. g06. g06. g06.

during a critical time) and the interests of the Applicant (by ensuring the continuation of her 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 her 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. Regarding the Applicant's contention that she ought to have been given an opportunity to comment on the investigation report prior to her placement on ALWOP, the Respondent submits that the Organization's legislative instruments do not provide that a staff member be given the opportunity to review and comment on the evidence against him or her prior to placement on ALWOP.

j. The Organization's legislative instruments specifically mandate that such evidence be shared with the staff member if and when he or she 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, she 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 her by DFS, she was notified of the reasons for her 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 Administrative Leave Letter

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supporting documentation are voluminous. While the investigation has 9

r. 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

s. In relation to the Applicant's contention as to the harm that will result of the decision to renew her placement on ALWOP is not reversed, the Respondent submits that 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 0 152.88 6 Tf 0 0 0 rg 0 1

20. Staff rule 10.4 is the legislation relied upon by the Respondent to place the Applicant on administrative leave and provides as follows:

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 initiation of an investigation. Administrative leave may continue throughout an investigation and until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above 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.

(c) Administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a

32. 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 two and a half months; why has the Respondent or his agents been unable to decide five and a half 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.

33. 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 it held in the case of *Contreras* UNDT/2010/154¹ 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.

34. 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* unlawe

