



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/082

OrderNo.: 222(NBI/2014)

Date: 22 September 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena KwakyeBerko

WOODSON

v.

SECRETARY GENERAL
OF THE UNITED NATIONS

ORDER ON A MOTION FOR
SUSPENSION OF ACTION DURING
THE PROCEEDINGS

Counsel for the Applicant:
Miles Hastie OSLA

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

Introduction

1. The Applicant is a Team Assistant/Administrative Clerk at the GS4 level in the United Nations Mission in Liberia (UNMIL). On 11 September 2014, she filed an Application contesting the decision dated 23 June 2014 to extend her Administrative Leave Without Pay (ALWOP) for an additional three-month period.
2. Also on 11 September 2014, the Applicant filed a Motion for interim measures ("the Motion") in which she seeks the suspension of the ALWOP until a judgment is issued on her Application on the merits.
3. The Respondent filed a Reply to the Motion on 15 September 2014 in which it was asserted, inter alia, that the Application was not receivable.

Facts

4. The Applicant commenced service with the United Nations Mission in Liberia (UNMIL) in August 2004. She holds a fixed-term appointment and normally performs the function of Team Assistant/Administrative Clerk at the GS-4 level. Additionally, the Applicant is the President of UNMIL's National Staff Association (NASA).
5. On 27 December 2013, the UNMIL's 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.
6. 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
 - a. organized or chaired the NASA meeting on 27 December 2013;
 - b. instructed protesters to close the gate to the UNMIL Star Base;

- c. made threatening statements towards international staff members;
- d. instructed protesters to switch off the Star base generators and refused to turn them on; and
- e. instigated national staff members to assault a United Nations Police (UNPOL) officer.

7. On2

- 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 three orders rendered in the *interests* 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 on the basis that the decision 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.

13. 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 *Freemantle* 604(h)310 of 000 rg 0.()-197(s)27(s)27(sov0 0 rg 0.9981 0 70.9981 0 0 1 3(u)-32(2

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

Applicant's case

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

Prima facie unlawfulness

a. Staff rule 10.4(c) stipulates that a staff member shall be placed on ALWOP except when the Secretary General decides that exceptional circumstances exist warranting the placement of a staff member on administrative leave with partial pay or without pay. Staff Rule 10.4(b) provides that, in terms of duration, administrative leave so far as practicable should not exceed three months.

b. The Applicant remains in limbo, suffering significant reputational, financial and emotional harm. The length of time being taken by the Administration to conclude the investigations as to the 27 December 2013 incident is plainly unreasonable and manifestly excessive.

c. The Applicant's circumstances concerning the timing of the placement on ALWOP are similar to the circumstances of other applicants subject to Orders No. 197(NBI/2014) and 198(NBI/2014). Consistent with previous findings of the Dispute Tribunal, it is contended that the ALWOP decisions are inconsistent with the terms of staff rule 10.4(b).

d. 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. The ALWOP decisions in this case do not contain any "exceptional circumstances" that justify ALWOP. In *Galvani* UNDT/2009/092, it was found that the failure to indicate exceptional circumstances vitiated the decision to make a decision as to administrative leave without pay. This decision appears to follow the requirement under

rise to the required urgency following *Galvani* UNDT/2009/092 and *Ba* UNDT/2012/025.

i. In this case, the Applicant has incurred medical expenses arising out of the 27 December 2013 incident, she has two young children to care for, one of whom is less than one year old; and is generally responsible for the upkeep of the family. In a time where there exists a significant Ebola health outbreak in Liberia, the situation is dire, giving rise to urgency.

Irreparable harm

j. The Applicant submits that the element of irreparable harm is satisfied given the extent of financial, emotional and reputational harm she has suffered being harm that creates uncertainty and significant stress.

Respondent's case

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

Prima facie unlawfulness

a. Section 4 of ST/AI/371 (Revised Disciplinary Measures and Procedures) 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. In compliance with these provisions, the Applicant was placed on administrative leave because:

- i. There was sufficient prima facie evidence to indicate that the Applicant had engaged in misconduct.
- ii. The Applicant's conduct was serious in nature and posed a serious risk to the safety and security of United Nations personnel.

iii.

rule 10.4(d) demonstrate that placement on ALWOP is not a disciplinary measure.

k. Contrary to the imposition of a disciplinary measure, the

n. The Respondent submits that the withholding of a staff member's salary is a financial measure. Any damage to the Applicant resulting from the decision to place her on ALWOP may be directly compensated by damages.

Consideration

18. Applications for suspension of acti

pending the completion of

months from 14 July 2014, or until the completion of the disciplinary process, if any, whichever came earlier.

26. The 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 she engaged in serious misconduct by

- a. organizing or chairing the NASA meeting on 27 December 2013;
- b. instructing protesters to close the gate to the UNMIL Star Base;
- c. making threatening statements towards international staff members;
- d. instructing protesters to switch off the Star base generators and refused to turn them on; and
- e. instigating national staff members to assault a United Nations Police (UNPOL) officer.

Also that the nature of the conduct she is alleged to have engaged in is sufficiently serious that it could, if proven, lead to dismissal.

27. The Respondent submitted that whilst "exceptional circumstances" are not defined by the Staff Rules and Regulations, "where the conduct is one that can lead to dismissal" should be the correct standard for justifying the conversion from ALWFP 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 she was placed on ALWFP, and up until 2 April 2014 when the element of pay was removed from her administrative leave and until the filing of this Application when another three-month ALWOP is running against the Applicant, nothing had changed.

investigation report had been undertaken and a decision taken to place h
ALWOP. In his submissions the Respondent has stated that he placed the
Applicant on ALWOP for three months without making up his mind as to whether
he wanted to pursue disciplinary action against b 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.

35. It is necessary to point out that provisions of staffule 10.4(a) are
made with a view to its fair application. In other words, the said provisions do not
envisage that where administrative leave continues throughout an investigative
process, it must continue for any length of time while the Respondent dithers in
making up his mind as to the next course of action to follow.

36. The question that arises here is whether administrative leave can continue
beyond the conclusion and review of investigations reports and when there is no
institution of a disciplinary process? My answer to this is No. Such is not the
intendment of staffule 10.4(a).

37. Staff rule 10.4 (b) provides that as far as practicable, administrative leave
should not exceed three months. Having diligently concluded in 9112(d)-32(ii)22(ig)-11(e)-3(n)9(tl

39. The Tribunal in view of the foregoing considerations, finds and holds that the decision to convert the Applicant's ALW to ALWOP cannot be attributed to any exceptional circumstances at the same office.

outbreaks has ever seen, in our lifetimes, an emergency on this scale, with this degree of suffering, and with this magnitude of cascading consequences. This is not just an outbreak. This is not just a public health crisis. This is a social crisis, a humanitarian crisis, an economic crisis, and a threat to national security well beyond the outbreak zones.

44.

Entered in the Register ~~this~~ 22nd day of September 2014

(Signed)

Abena KwakyeBerko, Registrar, Nairobi