



the placement on administrative leave pending the outcome of an investigation into misconduct

16.

21. The Applicant's professional reputation and career prospects are jeopardised by the impugned decision, and the resultant harm of that and the effects of the deprivation of an income is irreparable.

Respondent

22.

letter placing him on ALWOP also informed of the reasons for that decision. 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 prior to placement on ALWOP. Such evidence is shared if and when he/she is formally alleged to have engaged in misconduct.

27. During the interview, the Applicant did not dispute the fact that he removed concertina wires from a United Nations vehicle and loaded them into his personal vehicle.

28. The elements of urgency and irreparable harm have also not been met. Every decision to place a staff member on ALWOP would be met with a motion for injunction if the deprivation of salary is found to give rise to urgency and irreparable harm within the meaning of the test.

Applicant's Response

29. The Respondent has not provided any communication from the USODM indicating that he had considered and concurred with this recommendation, nor did supply any other convincing material indicating that it was he who had taken the decision to place the Applicant on ALWOP

30. The Applicant reiterated that the letter placing him on ALWOP was vague and contained no details as to the reason for the impugned decision, as it merely indicated that the Applicant was "implicated" in the theft of wires on the basis of prima facie evidence against him.

Deliberations

31. Applications for suspension of action are governed by article 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides as follows

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

All three elements of the test must be satisfied before the impugned decision can be stayed.

32. A suspension of action order may appear in substance and effect to be similar to an interim order of injunction in national jurisdictions. An injunction in national jurisdictions is ordinarily a temporary order made with the purpose of providing the applicant/plaintiff some temporary relief by maintaining the status quo and thereby regulating the position between the parties to an application pending adjudication.

33. Within the United Nations internal justice system however, a suspension of action order under article 2 of the UNDT Statute and article 13 of its Rules of Procedure, can only be obtained to maintain the status quo until the Management Evaluation Unit (MEU) to which a request for review of an impugned Management decision must be made, discharges it upon concluding that the impugned decision was lawful or unlawful.

34. A Tribunal's order granting suspension of action of an administrative decision cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

35. To grant an application for suspension of action, the Tribunal must be satisfied that there is a serious question to be tried on the merits and that damages would not

adequately compensate the Applicant in the event that his or her application succeeds at trial. The application would therefore normally fail where a court finds that the payment of damages would be an adequate remedy for the harm suffered.

36. Additionally, a suspension of action application will only succeed where the Applicant is able to establish *prima facie* case on a claim of right, or where he can show that *prima facie* the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the status quo.

37. This Application must be adjudicated against the stipulated cumulative test, in that the Applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

38. In this case, the Applicant contends that the impugned decision is *prima facie* unlawful because it was not made by the appropriate authority, the Applicant was not properly given the reasons for the decision nor the evidence relied upon, and that the necessary "exceptional circumstances" justifying the deprivation of salary does not exist.

39. With regard to the authority of the decision maker, the Tribunal is satisfied on the basis on the Respondent's submission of Annex that the USG/DM was party to the decision making process. The mechanics of how the USG came to his decision could however have been demonstrated in a neater, and less roundabout fashion.

40. In respect of the Applicant's contention that he has not benefited the

findings are, the Tribunal is satisfied that the Respondent's actions accord with section 6 of ST/AI/371 as to when a staff member's right to comment on/respond to the allegations is triggered.

41. The Respondent submitted that the fact that the allegations against the Applicant, if found to be proven could lead to the separation or dismissal of the said Applicant constitutes "exceptional circumstances" for the purposes of justifying the ALWOP on which the Applicant was placed. The Tribunal does not agree with this submission.

42. It is rather the Tribunal's view that "exceptional circumstances" refer to the particular set of circumstances which are "exceptional" or as in this case "egregious" and which surround the facts in issue in the particular case.

43. The Tribunal however agrees that there are in this case exceptional circumstances warranting the placement of the Applicant on ALWOP. This is because it is not disputed that the Applicant, who is employed by the Organization to protect its premises and properties has been found to be in unauthorized possession of property belonging to the Organization.

44. Based on the evidence before it, the Tribunal finds no impropriety in the Respondent's application of staff rule 10.4 and ST/AI/371 (as amended) (Revised Disciplinary Measures and Procedures).

Case No. UNDT/NBI/2016/004

Order No.:007 (NBI/2016)

(Signed)

Judge Nkemdilim Izuako

Dated this 15th day of January 2016

Entered in the Register on this 15th day of January 2016

(Signed)

Abena Kwakye Berko, Registrar, Nairobi