



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/065
Order No.: 135 (NBI/2017)
Date: 4 August 2017
Original: English

Before: Judge Agnieszka Klonowiecka-Milart
Registry: Nairobi
Registrar: Abena Kwakye-Berko

HARRIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a former Information Systems Assistant at the United Nations Interim Force in Lebanon (UNIFIL) in Naqoura, Lebanon. He was on a continuing appointment at the FS-5 level.

2. On 28 July 2017, he filed an application for suspension of action (SOA), pending management evaluation, challenging the [redacted] to separate him from service for abandonment of post.

3. The Respondent filed a reply on 1 August 2017 in which it is argued that the application is not receivable.

4. The Applicant filed a memorandum on 3 August 2017 reiterating his claim and containing copies of documents already submitted.

Facts

5.

12. On 28 November 2016, the Applicant received an email from the Chief RICTS enquiring as to why he had failed to report to work in Sector East and instructing him to explain his absence in accordance with conclusions of the official meeting held on 15 November 2016. The Applicant informed the Chief/RICTS that he was unable to serve in Sector East.

13. By memo dated 29 November 2016, the Applicant was given the first warning by the CHRO that the process of separation for abandonment of post would be commenced against him as he had been absent from work at the ICTS Unit in Sector East since 16 November 2016.

14. On 1 and again on 12 December 2016, the Applicant responded to the memo dated 29 November 2016 and explained why he was unable to work in Sector East. On 8 December 2016, the Applicant addressed another email to the Chief/RICTS and others requesting for a reconsideration of the decision to reassign him to Sector East.

15. The Applicant proceeded on home leave from 19 December 2016 until 3 January 2017.

16. By memo dated 16 January 2017, the Applicant received a final warning to report to work or else UNIFIL would initiate abandonment of post proceedings. He was also informed that his salary had been placed on hold effective January 2017 due to his unauthorized absence. The Applicant responded to the 16 January 2017 memo on 17 January by email to the Chief/RICTS and other UNIFIL staff managers where he stated that he considered the abandonment of post warning as part of systematic threats.

17. The proceedings for abandonment of post were ceased on 8 February 2017 upon receipt of the approved medical certificate for the period from 28 January to 17 February 2017. HRMS/UNIFIL, however, placed the Applicant on Special Leave without Pay (SLWOP) for the periods of unauthorized absence from 8 October 2016 to 8 December 2016 and 4 January 2017 to 22 January 2017.

18. On 17 March 2017, HRMS/UNIFIL was notified by MSD that a further sick leave had been approved from 18 February 2017 through 31 March 2017.

19. On 27 March 2017, the Applicant sent an email to the Chief/RICTS and other UNIFIL staff managers requesting Special Leave with Full Pay (SLWFP).

20. On 31 March 2017, the CHRO informed the Applicant that his entitlement to sick leave with full pay would be exhausted as of 3 April 2017. She suggested that any further sick leave approved by the MSD could be charged against sick leave with

21. Between 31 March 2017 and 25 July 2017 the Applicant engaged in an exchange of emails with the CHRO copying other UNIFIL senior managers, on the subjects of the termination of his he1 12 Tf7pe

23. By a memo of 24 July 2017, the Applicant was informed by the UNIFIL Officer-in-Charge of the Mission Support Division that the Secretary-General had approved the decision to separate him from service on the grounds of abandonment of post effective 12 July 2017.

24. On 25 July 2017, the Applicant filed a management evaluation request contesting the decision to separate him from service on the grounds of abandonment of post.

25. On 31 July 2017, the Applicant received notification that no approval for SLWFP had been received from the United Nations Headquarters in New York.

Submissions

Applicant

26. The alleged abandonment of post is in violation of ST/AI/400 (Abandonment of post), particularly on the basis that UNIFIL was aware that his absence from the mission was beyond his control, that he had requested special leave, he had not been advised of the status of his special leave request and UNIFIL was aware that he was suffering from severe stress disorder.

27. The alleged unauthorized absences from work from 8 October to 8 December 2016, 4 January 2017 to 22 January 2017 were wrongly recorded.

28. Following his surgery, his reassignment to the toughest part of the mission was a clear indication of prohibited conduct and amounts to harassment.

29. The urgency and irreparable harm in this case is exacerbated by his poor health and his current financial hardship as a result of increased medical bills.

Case No. UNDT/NBI/2017/065

Order No.:

separation date may not act so as to bar a request for suspension of action. Practices consisting in dating separation of the staff member with immediate or even retroactive effect and leading to situations like, *e.g.*, one contemplated in *Applicant* UNDT/2012/091, where a staff member was given a notice of non-extension of appointment notice 30 minutes before the close of business on the separation day and, bordering absurdity, the dispute whether or not her filing done 1.5 hours later had been done before or after the implementation must not be allowed to circumvent the right to seek suspension of action.

34.

the UNDT Statute is being interpreted in consideration of the facts of the case and practical consequences of the decision. Suspension of implementation would usually mean precluding the decision taking legal effect and the administration acting upon it. Notably, UNAT jurisprudence accepted widely that in non-selection and non-promotion disputes it means not just the execution of the dispositive part of the impugned decision, but also imminence of decisions and actions which are legally enabled by the impugned decision and which would have the effect of irreversibly claim. This way, the suspension of action request serves the more general purpose of securing the main claim.

35. Referring these considerations to termination of appointment or contract, suspending the legal effect of a decision is possible notwithstanding the unilaterally determined date of separation. Conversely, obstacles to such a suspension would be posed by the occurrence of further legal consequences, in the sense that the Respondent cannot reverse them without incurring liability toward third persons, bearing costs, obtaining consent of a third person; or where an applicant had accepted the consequences either expressly or, most often, implicitly by, *e.g.*, not acting during the appropriate notice period, and then tried follow from a mere issuance of the decision, or, for that matter, from the Respondent having processed the relevant data in *Umoja*.

36. In accordance with the aforesaid, the Tribunal does not accept the Respondent argument on the lack of receivability. It notes, moreover, that the question whether the decision on termination may take legal effect retroactively at first place is conditioned upon establishing that the termination was lawfully taken in the regime under ST/AI/400 on abandonment of post. As such, the issue in the present case falls under consideration pursuant to the tripartite test under art. 2.2 of the UNDT Statute.

37. It is recalled that an application for suspension of action must be adjudicated against the stipulated cumulative test, in that an 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. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an applicant to show that there is a judiciable issue before the court.²

38. Regarding the lawfulness of the determination of abandonment of post, the Tribunal notes that it remains contentious between the parties and unclear upon the file, such as it is, whether the Applicant ever assumed his assignment at UNIFIL Sector East.

39. The Mission maintains that he had unauthorized absence from 8 October 2016 until 8 December 2016 and from 4 January until 22 January 2017, with a home leave period in between. The Applicant claims that this had been wrongly recorded; he nevertheless offers no proof or explanation why would it be erroneous; furthermore, at least in relation to the absence in November the Applicant confirmed himself that he had been unable to report to work at Sector East. It moreover results from the

² See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

correspondence cited above that the Applicant did not attend work following the expiry of his sick leave with full pay on 3 April 2017.

40. Whereas the Applicant maintains that his absence from the Mission was beyond his control, information on the file suggests that his absence

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 4th day of August 2017

Entered in the Register on this 4th day of August 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi