



Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MOISE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON APPLICATION FOR
SUSPENSION OF ACTION

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Sophie Parent, ALS/OHRM, UN Secretariat

Introduction

1. On 17 July 2014, the Applicant, a staff member in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), submitted an application for suspension of action, pending management evaluation, of the implied decision “to renew [his] placement on administrative leave without pay [“ALWOP”] pending outcome of an investigation into disciplinary conduct”. He was placed on ALWOP by letter dated 20 December 2013 in which he was also informed that this administrative leave “will continue for the months or until completion of any subsequent disciplinary process, whichever is earlier, at which point the matter will be revisited”. By letter dated 2 April 2014 the Applicant received a further letter indicating that he would be placed on ALWOP for an additional three months from 30 March 2014, subject to review on expiry thereof. After the expiry of the three months, the Applicant filed the present application on 17 July 2014.

2. With respect to the prima facie unlawfulness of the contested decision, the Applicant submits inter alia, that the Under-Secretary General for Field Support (“USG/DFS”) does not have the delegated authority to place the Applicant on ALWOP and that the conditions for placing the Applicant on ALWOP have not been met. With regard to the requirements of particular urgency

requirements for suspension of action and is mistaken as to the identity of the decision maker and the details of the disciplinary process.

4. Without seeking leave from the Tribunal, at 5:13 p.m., on 21 July 2014, the Respondent filed an additional submission, titled "Supplementary Reply", contending that the application is not receivable as the impugned administrative decision has already been implemented, Applicant having been informed on 21 July 2014, by letter dated 18 July 2014, that this ALWOP was extended for an additional period of three months. The Respondent states that the unexpired period of 30

9. On 20 December 2013, the Applicant received a letter from Ms. Ameerah Haq, USG/DFS, stating ~~th~~ (emphasis added):

Dear [the Applicant],

...

The purpose of this letter is to advise you that the Under-Secretary-General for Management [“USG/DM”], has decided, on behalf of the Secretary-General, to place you on ALWOP pursuant to staff rule 10.4. This decision is based on the information provided to the Department of Management by the Department of Field Support. Accordingly, you are placed on ALWOP effective as of the date of your receipt of the present notification. The ALWOP will continue for three months or until completion of any subsequent disciplinary process, whichever is earlier, at which point the matter will be revisited.

The reasons for your placement on administrative leave are that there appears to be sufficient prima facie evidence that you engaged in serious misconduct by soliciting and/or accepting payment of money in exchange for facilitating their employment with MINUSTAH or on the basis that they believed you facilitated their employment with MINUSTAH. The nature of the conduct you are alleged to have engaged in is sufficiently serious that it would, if proven, lead to your dismissal, and as such it meets the “exceptional circumstances” required to place you on ALWOP.

Please note that your placement on administrative leave is an administrative measure that is without prejudice to your rights; it does not constitute a disciplinary measure and it does not prejudice the outcome of any further investigation or subsequent disciplinary process. It will be subject to review depending on the developments of your case and may, if the circumstances so warrant, be extended. You will be informed promptly of any decisions made regarding your status.

...

10. On 2 April 2014, the Applicant received a further letter from the USG/DFS, using similar reasons as in the 20 December 2013 letter, indicating that the USG/DM had decided “to extend [the Applicant’s ALWOP] for an additional three months

investigation”, and that the investigation report contains a signed interview of the Applicant (the document has not been produced to the Tribunal in evidence).

Consideration

16. An application for a suspension of action pending management evaluation is an extraordinary discretionary relief, generally not appealable, and which requires consideration by the Tribunal within five working days of the service of the application on the Respondent (art.3.3 of the Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal and the parties’ schedules. They also divert the Tribunal’s attention from considering other cases filed under standard application procedures, some of which are long outstanding. Therefore, parties approaching the Tribunal must do so on genuine urgency basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. Application may well stand or fall on its founding papers. The Respondent’s reply, if sought, should be complete in all relevant respects, bearing in mind that a matter is not at the merits stage by this time. It is not envisaged that multiple submissions will be filed or that a hearing will be conducted. Due to the urgent nature of application for suspension of action, the Tribunal has to rely on the veracity of the information provided by Counsel, as Officers of the Tribunal.

The contested decision and receivability

17. The Respondent submits that the application for suspension of action is not receivable as the impugned decision has already been implemented in that the Applicant has allegedly acknowledged receipt of the 18 July 2014 letter on 21 July 2014, following the filing of his application on 17 July 2014.

18. The Tribunal finds that the Applicant was first placed on administrative leave without pay on 20 December 2013. The AWOP was extended by letter dated 2

April 2014 for “an additional three months from 30 March 2014, or until the completion of the disciplinary process.” The Applicant was informed that his ALWOP will be subject to review and, if the circumstances so warrant, be further extended and that he would be informed promptly of any decisions regarding his status. After the expiry of the second ALWOP on 30 June 2014, the Applicant heard nothing further and filed this application on 17 July 2014.

19. Subsequent to filing his reply at 10.50 a.m. on Monday, 21 July 2014, before the deadline of 11:00 a.m., the Respondent filed a “Supplementary Reply” at 5:15 p.m., unsupported by any motion for leave to so file. In this submission, the Respondent avers that the Applicant was informed, on 21 July 2014, of a further extension of his placement on ALWOP. Thus, the Respondent submits, the decision has already been implemented and the application for suspension of action is therefore not receivable.

20. The Respondent has not sought leave of the Tribunal to file any “Supplementary Reply”. As stated above, the equitable nature of urgent suspension of action matters is not served by the filing of multiple submissions. The Tribunal

exist throughout, why is the Applicant treated as being on special leave with full pay for 18 days?

22. The Tribunal finds that contrary to the Respondent's submission, the Applicant is clearly challenging the implied decision to renew his ALWOP. As the Tribunal found in *Calvani* UNDT/2009/092, the decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effect during that period of time and is presumed to have been implemented in its entirety at the end of the administrative leave (rather than when the decision was first

22.

pendency of management evaluation where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

Prima facie unlawfulness

26. For the prima facie unlawfulness test to be satisfied, it is enough for the Applicant to present a fairly arguable case that the contested decision was influenced by some improper consideration or was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (Order No. 29 (NY/2011), Villamorán UNDT/2011/126).

27. Staff rule 10.4 states (emphasis added):

Administrative leave pending investigation and the disciplinary process

- (a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time pending an investigation until the completion of the disciplinary process.
- (b) A staff member placed on administrative leave pursuant to

31. The Respondent further submits that the correct decision maker was the USG/DM. In support hereof, the Respondent appends a letter dated 17 August 2009 from the then Chef de Cabinet of the Secretary-General, Mr. Vijay Nambiar, to the then USG/DM, Ms. Angela Kane, informing her that the Secretary-General has agreed to transfer the decision making authority to make (emphasis added) “decisions to impose disciplinary measures to the [“USG/DM”] with effect from 1 July 2009”. However, staff rule 10.4(d) explicitly states that “[p]lacement on administrative leave ... shall not constitute a disciplinary measure”, as also highlighted in the 20 December 2014 letter to the Applicant (“your placement on administrative leave is an administrative measure ... it does not constitute a disciplinary measure”) and also stated in the 2 April and 18 July 2014 letters (“[t]he continuation of your ALWOP is an administrative measure, which is not disciplinary in nature”). The letter from the Chef de Cabinet does therefore not form a delegation of authority from the Secretary-General to the USG/DM to place the Applicant on ALWOP.

32. The Respondent also refers to ST/AI/234/Rev.1, sect. 5 Administration of the Staff Regulation and Staff Rules, to support his case that the authority to place the Applicant on ALWOP rests with the USG/DM. However, according to Annex II and IV of ST/AI/234/Rev.1, while the authority to place a staff member on administrative leave (at the time of the promulgation of the Administrative Instruction referred to as “special leave”) without pay for more than three months is that of the Assistant Secretary-General for Human Resources (a subordinate to the USG/DM), the power to do so for up to three months is with “the head of department”, which in the case of the Applicant would be the USG/DFS.

33. Accordingly, the Tribunal finds that the decision to place the Applicant on ALWOP was wrongly taken by the USG/DM that the USG/DFS would have been

