



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/018
Order No.: 039 (NY/2022)
Date: 14 April 2022
Original: English

Before: Duty Judge
Registry: New York
Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR SUSPENSION
OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:
Omar Yousef Shehabi, OSLA

Counsel for Respondent:
Bettina Gerber, LPAS/UNOG

Introduction

1. On 7 April 2022, the Applicant, filed an application requesting, under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, suspension of action pending management evaluation of the decision to put her on administrative leave with pay (“ALWP”) pursuant to staff rule 10.4.
2. Upon the instructions of the Tribunal, the Respondent filed his reply on 12 April 2022.

Factual background

3. By memorandum dated 15 March 2022, the Applicant’s Second Reporting Officer (“SRO”) informed the Applicant that she has received recent reports of possible unsatisfactory conduct about the Applicant and that the complaints had been filed with the Office of Internal Oversight Services (“OIOS”).
4. The 15 March 2022 memorandum notifying the Applicant of her placement on administrative leave states that:

“At present, OIOS is considering whether it will undertake investigations into these recent reports or whether it will be referred to me for appropriate action in accordance with the procedures set out in ST/AI/2017/1.”

“When the [Applicant’s First Reporting Officer (“FRO”)] informed you that the complaints had been received, she had also expressly instructed you to not discuss the matter with any of your staff, including in particular, staff at the D-1 level that directly report to you. I note that following those discussions, in direct contravention of that instruction, you had discussions with your direct reports on the issues associated with the complaints against you.”

“As a result, I write to convey my decision to place you on administrative leave with pay ("ALWP") with effect from receipt of this letter, pursuant to Staff Rule The administrative leave will continue for three months or until completion of the investigation process, whichever is earlier, at which point the matter will be revisited.”

“The reasons for your placement on administrative leave include that your continued presence at the office will have a negative impact on the preservation of a harmonious work environment, given your position [...] and your management responsibilities. Further, there is a high risk of repetition or continuation of the unsatisfactory conduct, given that the allegations of unsatisfactory conduct have been reported. Given your [...] position [...], your continued presence at the office could prejudice the reputation of the Organization.”

5. On 7 April 2022, the Applicant filed a request for management evaluation and the present application.

Request for Anonymity

6. The Applicant requests anonymity since the case could cause her reputational harm. The Respondent does not object to the Applicant’s request for anonymity in view of the circumstances invoked by the Applicant.

7. Article 11.6 of the Dispute Tribunal’s Statute and art. 26 of its Rules of Procedure provide that the judgments of the Dispute Tribunal shall protect personal data and shall be made available by the Registry of the Dispute Tribunal. The Appeals Tribunal has held in this regard that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability” (*Lee* 2014-UNAT-481).

8. The Appeals Tribunal’s practice establishes that the principle of publicity can only be departed from where the applicant shows “greater need than any other litigant

for confidentiality” (*Pirnea* 2014-UNAT-456) and that it is for the party making the claim of confidentiality to establish the grounds upon which the claim is based (*Bertucci* 2011- UNAT -121).

9. In the present case, considering the nature of the allegations filed against the Applicant, the nature of her functions and the fact that investigations on allegations of misconduct are confidential, the Tribunal decides to grant the motion for anonymity.

Consideration

10. In the case at hand, the Tribunal is seized of an application to suspend the decision to place the Applicant on Administrative Leave with Pay (“ALWP”) pending management evaluation.

Legal framework

11. Art. 2.2 of the Tribunal’s Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative; in other words, they must all be met in order for a suspension of action to be granted.

12. The burden of proof in relation to the fulfillment of those requirements rest on the Applicant.

Prima facie unlawfulness

13. The Tribunal recalls that the threshold required in assessing this condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076), *Kompass* Order No. 99 (GVA/2015)).

14. The Applicant argues, in this regard that the decision to place her on ALWP is *prima facie* unlawful as follows:

- i. The contested decision is not sufficiently detailed and does not allow the Applicant to respond effectively to them.
- ii. The contested decision is based entirely on considerations extrinsic to the allegations, none of these justifications meet the required standard of rationality elaborated in *Respondent 2021-UNAT-1097*.
- iii. The Applicant did not, in her conversations with two of her supervisees on 9 March 2022, contravene her FRO instruction not to mention the complaint to anyone in her office or under her supervision. In neither conversation did she disclose her knowledge of the complaint, nor did she raise the issue of the 2 March meeting from which the complaint arises.
- iv. Only after receiving the Applicant's message to her FRO regarding these conversations did the FRO give more detailed and restrictive instructions on avoiding discussions related to the complaint, even tangentially.
- v. Nothing about the Applicant's alleged unsatisfactory conduct, which concerns internal discussions, is public-facing.

15. The Tribunal finds the arguments presented by the Applicant in her defense do not meet the threshold of "serious and reasonable doubts" about the legality of the impugned administrative decision.

16. Indeed, both in her submissions as well as in her sworn statement, the Applicant presents a different version and interpretation of the events mentioned in the contested decision and provides a different context for those.

17. However, none of those arguments are sufficiently persuasive, nor do they question the fact that a complaint was made against her, and that complaint is currently being investigated by OIOS.

18. Due to the nature of her functions (and the senior role she plays) the Tribunal finds that the contested decision does not appear to be irrational nor blatantly illegal.

19. Moreover, at the current stage of the proceedings, the Tribunal is not able to fully assess the facts and to ponder the evidence as to conclude what has actually happened and whether the underlying reasons provided for by the Responded are not factually grounded.

20. From the Tribunal's point of view, the arguments raised by the Applicant are not sufficient to cast doubts on the legality of the administrative decision to place the applicant on ALWP.

21. In fact, according to the internal rules, placing a staff member on administrative leave (with or without pay) constitutes a prerogative of the organization and provided that the legal requirements are met, it does not appear as *prima facie* illegal.

22. In this regard, Staff rule 10.4(a) provides that “[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 completion of a disciplinary process” and that such leave “may continue until the completion of the disciplinary process”. If a staff member is placed on administrative leave, then s/he shall be “given a written statement of the reason(s) for such leave and its probable duration” pursuant to staff rule 10.4(b).

23. The circumstances under which a staff member may be placed on ALWP are stated in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process):

(a) The decision to place a staff member on administrative leave with pay may be made by the authorized official at any time following a report of suspected unsatisfactory conduct and following the authorized official's determination that at least one of the following circumstances is met:

(b) The staff member is unable to continue effectively performing the staff member's functions, given the nature of those functions;

(c) Continued service by the staff member would create a risk that the staff member could destroy, conceal or otherwise tamper with potential evidence, or interfere in any way with the investigation or disciplinary process, including by retaliating against individuals protected under ST/SGB/2017/2 or intimidating a witness;

(d) The continued presence of the staff member on the Organization's premises or at the duty station could constitute a security or financial risk to the Organization and/or its personnel, or could otherwise prejudice the interests or reputation of the Organization;

(e) The staff member's continued presence at the office could have a negative impact on the preservation of a harmonious work environment;

(f) There is a risk of repetition or continuation of the unsatisfactory conduct.

24. As the Appeals Tribunal stated in *Sanwidi* 2010-UNAT-084, "when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". The Appeals Tribunal underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*).

25. In this regard, the Tribunal recalls that, according to the Respondent, a report of suspected unsatisfactory conduct had been filed against the Applicant (following a

prima facie abuse of authority), she was informed in writing about her placement on administrative leave, its duration as well as the reasons for it.

26. The Respondent has also substantiated his decision to place her on ALWP, since the Applicant's continued presence at the office was considered to potentially prejudice the reputation of the Organization, have a negative impact on the preservation of a harmonious work environment and it was associated with high risk of repetition or continuation of the unsatisfactory conduct.

27. In this regard, we recall that staff rule 10.2 (b)(iii) specifically provides that administrative leave with full or partial pay or without pay pursuant to staff rule 10.4 is not a disciplinary measure and does not prejudice the outcome of a disciplinary process, if any.

28. In addition, the complaints made against the Applicant are serious as they concern *inter alia* suspected abuse of authority which, in line with ST/SGB/2019/8 is particularly serious "when a person uses their influence, power or authority to improperly influence the career or employment conditions of another (...)".

29. Considering all the information before the Tribunal, it finds that the Applicant has not *prima facie* established that the contested decision was unlawful.

30. Accordingly, the Tribunal finds that the Applicant has not established that the contested administrative decision was *prima facie* unlawful and therefore, since one of the three cumulative conditions to grant a suspension of action is not met, it is not necessary to address the two other conditions.

IT IS ORDERED THAT:

31. In light of the above, the application for suspension of action is rejected.

(Signed)

Judge Teresa Bravo

Dated this 14th day of April 2022