



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

CALVANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
François Lorient

Counsel for Respondent:
Susan Maddox, ALU/OHRM, UN Secretariat

Introduction

1. On 9 December 2009, the Applicant filed with the United Nations Dispute Tribunal (UNDT) an application requesting the Tribunal to suspend the decision to place him on administrative leave without pay pursuant to provisional staff rule 10.4.

Facts

2. Effective 1 July 2007, the Applicant was appointed by the Secretary-General as Director (L-7) of the United Nations Interregional Crime and Justice Research Institute (UNICRI) under a one-year project personnel appointment (200 series of the former Staff Rules), which was extended for another year from 1 July to 30 June 2009, then for three months effective 1 July 2009. As of 1 October 2009, the Applicant's appointment was converted to a fixed-term appointment under the new, provisional Staff Rules, at the D-2 level, and extended for nine months. His current fixed-term appointment is therefore due to expire on 30 June 2010.

3. On 2 December 2009, the United Nations Office of Internal Oversight Services (OIOS) issued an audit report entitled *Comprehensive audit of [UNICRI] – Poor governance and non-compliance with United Nations regulations and rules tainted significant areas of UNICRI's activities*. The audit report was addressed to the Under-Secretary-General for Management (USG/DM), the Chef de Cabinet of the Secretary-General, the Executive Director of the United Nations Office on Drugs and Crime and the Applicant.

4. By letter dated 7 December 2009, the USG/DM informed the Applicant that OIOS would “be initiating an investigation into the findings set out in” the above-mentioned audit report. She noted that:

“The findings of the Audit Report implicate the senior management of [UNICRI] and, in particular, you as the Director of UNICIR. These findings include that:

- a. management of UNICRI may have acted on the request of a Member State to award grants to pre-selected recipients;
- b. no evaluation or negotiation was undertaken before a contract for Euro 873,600 was awarded to a contractor pre-selected under a bilateral agreement with misleading representations being given about the contract by you and others;
- c. funding for a project to train judiciary and law enforcement authorities of \$2 million may have been secured under questionable arrangements;
- d. procurement activities were not carried out in accordance with the United Nations regulations and rules; and
- e. UNICRI's sponsorship of travel of local authorities to New York may have violated United Nations regulations and rules."

In the same letter, the USG/DM further "convey[ed] [to the Applicant] the decision of the Secretary-General that, given the nature and gravity of the findings and [the Applicant's] responsibility as the most senior official of UNICRI, [he] be placed on administrative leave without pay pursuant to provisional staff rule 10.4(a)". The Applicant's placement on administrative leave without pay was "for an initial period of three months, or until such time as the investigation is completed, and a decision is taken on whether or not to pursue the matter further, whichever is earlier".

5. By email dated 8 December 2009, the Applicant wrote to the Secretary-General to request a management evaluation of the decision to place him on administrative leave without pay.

6. By email dated 9 December 2009, Counsel for Applicant filed with the New York Registry of the UNDT an application requesting the Tribunal to suspend the decision to place the Applicant on administrative leave without pay.

7. Pursuant to article 6 of the UNDT rules of procedure, the Tribunal decided to assign the case to the Geneva Registry. Thus on 10 December 2009, the case was transferred to the Geneva Registry for registration and processing and Counsel for Respondent was notified accordingly.

8. By letter dated 11 December 2009, the Tribunal requested the Respondent to submit a reply to the application for suspension of action by Monday, 14 December 2009, and to produce the Secretary-General's decision to place the Applicant on administrative leave without pay, which was mentioned in the letter dated 7 December 2009 from the USG/DM. The parties were further informed that an oral hearing would be held in French on 16 December 2009.

9. On 14 December 2009, Counsel for Respondent submitted the Respondent's reply to the application for suspension of action.

10. In response to the Tribunal's request to produce the Secretary-General's decision to place the Applicant on administrative leave without pay, the Respondent produced, on 15 December 2009, a letter also dated 15 December 2009 from the Deputy Secretary-General to the Applicant in which she confirmed that the decision to place him on administrative leave without pay had been taken by the Secretary-General.

11. On 16 December 2009, the Tribunal held an oral hearing on the case. The Applicant and his Counsel were present at the hearing in person, whereas Counsel for Respondent attended by audio-conference. At the end of the hearing, the Tribunal ordered the Respondent to submit, by Friday, 18 December 2009, a signed confirmation from the Secretary-General that he had made the contested decision.

12. After the hearing, on the same day, Counsel for Respondent submitted a request to the Tribunal for "a further order [to] be made ... that no further evidence need be produced by the Respondent to prove the provenance of the contested decision". Counsel for Respondent argued that the evidence already produced, namely the letter dated 7 December 2009 from the USG/DM to the Applicant and the letter dated 15 December 2009 from the Deputy Secretary-General to the Applicant, was sufficient to allow the Tribunal to conclude that the Secretary-General had made the contested decision.

13. By email dated 17 December 2009, Counsel for Applicant requested the Tribunal to confirm its order.

14. By written order dated 17 December 2009, the Tribunal confirmed its order to the Respondent to submit by Friday, 18 December 2009, a signed confirmation from the Secretary-General that he made the decision to place the Applicant on administrative leave without pay pursuant to provisional staff rule 10.4.

15. On the same day, the Respondent informed the Tribunal that it would not comply with the order since it had “submitted all evidence that it intends to adduce in support of its contention that the decision was made by the Secretary-General”. The Respondent further indicated that it was “preparing a notice of appeal with respect to the [above-mentioned] order”.

Parties’ contentions

16. The Applicant’s principal contentions are:

- a. The contested decision is unlawful because:
 - i. The USG/DM’s decision was “outside her vested and/or delegated authority”. In accordance with the UNICRI Statute only the Secretary-General could have issued the contested decision. At the hearing, Counsel for Applicant further argued that despite the statements made by the USG/DM and the Deputy Secretary-General, there was no evidence that the contested decision had been made by the Secretary-General.
 - ii. No exceptional reasons as required by provisional staff rule 10.4(c) were set out in the letter from the USG/DM to justify the placement of the Applicant on administrative leave without pay.
 - iii. The requirement of provisional staff rule 10.3(a) in relation to there being an investigation that indicated misconduct may have occurred was not met.
 - iv. The decision of the USG/DM constitutes “harassment and obstruction”. Furthermore, the USG/DM should not have taken such a decision because of a conflict of interest arising from an

appeal filed by the Applicant against an earlier decision taken by the USG/DM to extend his appointment for three months only.

- b. The case is of particular urgency because:
 - i. The decision of the USG/DM prevented him from attending the UNICRI Board of Trustees meeting scheduled on 10-11 December 2009.
 - ii. The decision to place the Applicant on administrative leave without pay deprives him of the means “to sustain his regular rental and living expenditures for him and for his family, in Turin”.
- c. Irreparable damage will be caused to the Applicant if the contested decision is not suspended because:
 - i. The Applicant “will be unable to attend, report and prepare with the Board of Trustees the appropriate rebuttal to the OIOS” audit report.
 - ii. “Without salary and revenues, [the Applicant] will be unable to pay his rental and living expenditures and will have no choice but to leave Turin, placing him in a situation where he will be unable to defend himself properly, thus creating an inequality of arms situation”.
 - iii. The decision will cause irreparable damage to the Applicant’s reputation, which cannot be compensated financially.
 - iv. The decision if maintained “will mean that [the Applicant’s] presumption of innocence has been replaced by a presumption of guilt”.

17. The Respondent’s principal contentions are:

- a. The decision has been implemented. Article 2.2 of the UNDT statute and the corresponding article 13.1 of the rules of procedure provide that the Tribunal may suspend “the implementation of a

contested decision”. In the present case, the decision has already been implemented; therefore, any decision by the Tribunal to suspend the decision would in fact have the effect of reversing the decision taken by the Secretary-General – a power not conferred to the Tribunal under article 2.2 of its statute - as opposed to delaying its implementation for a period of time.

- b. The decision to place the Applicant on administrative leave without pay was a proper exercise of the Secretary-General’s discretion where findings are made of serious failings by a senior official. Provisional staff rule 10.4(d) provides that “if administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal, any pay withheld shall be restored without delay”. The Applicant failed to establish a prima facie case of illegality because:
 - i. Contrary to the Applicant’s contention, the decision to place him on administrative leave without pay was taken by the Secretary-General.
 - ii. The fact that an independent oversight bodies made findings that indicate serious failings on the part of the most senior official of an entity within the United Nations system constitutes “exceptional circumstances” within the meaning of provisional staff rule 10.4(c).
 - iii. Provisional staff rule 10.3(a) mentioned by the Applicant relates to requirements after a disciplinary process has been initiated, which has not occurred in the present case. Provisional staff rule 10.4(a) allowed the Secretary-General to place the Applicant on administrative leave without pay prior to the commencement of, and during, the OIOS investigation.
- c. “Irreparable damage” must be understood as “harm to the staff member’s rights as a staff member”. If the harm in question may

be cured by an award of damages, then this should not be considered irreparable damage as held by the UNDT in *Fradin de Bellabre*, UNDT/2009/04 (2009). The Applicant has failed to demonstrate that he would suffer irreparable harm because:

- i. Loss of salary does not irreparably harm the rights of the Applicant as a staff member.
- ii. Damage to the Applicant's reputation may be compensated by damages.
- iii. Placement on administrative leave is an administrative measure specifically excluded from being a disciplinary measure pursuant to provisional staff rule 10.2(b)(ii).

Considerations

18. The Applicant requests the Tribunal to suspend the implementation of the decision to place him on administrative leave without pay pursuant to provisional staff rule 10.4.

19. The application was filed shortly after the Applicant wrote to the Secretary-General to request a management evaluation of the contested decision. At the date of issuance of this order, the time limit for the Secretary-General's response to the request for management evaluation was still running and no such response had been made to the Applicant. Thus the application for suspension of action must be examined in the light of article 2, paragraph 2, of the Tribunal's statute, which provides that:

“The Dispute Tribunal shall be competent to hear and pass judgement 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...”

20. The contested decision, i.e. the decision to place the Applicant on administrative leave without pay, was taken pursuant to provisional staff rule 10.4, *Administrative leave pending investigation and the disciplinary process*, which provides inter alia that:

“(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.

...

(c) Administrative leave shall be with full pay unless, in exceptional circumstances, the Secretary-General decides that administrative leave without pay is warranted.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal, any pay withheld shall be restored without delay.

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.”

21. The Respondent argues that, under article 2.2 of the UNDT statute, the Tribunal does not have the authority to suspend the contested decision because it has already been implemented. The Tribunal must reject this argument since the decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effects during that period of time and can only be deemed to have been implemented in its entirety at the end of the administrative leave. Thus the Tribunal’s decision to grant a suspension of action on such a decision would not have the effect of rescinding or reversing the contested decision as claimed by the Respondent, but only that of suspending temporarily, from the date of the Tribunal’s decision and until such date as provided for in the UNDT statute, the legal consequences of the contested decision.

22. Provisional staff rules 10.2(b) and 10.4 provide that “administrative leave” can be “with pay” or “without pay”. Thus there are in fact two decisions within the contested decision, first the decision to place the Applicant on administrative leave and, second, the decision to deprive him of his salaries during such administrative leave. It is therefore appropriate to examine separately whether each “sub-decision” fulfills the requirements of article 2.2 of the UNDT statute to be the subject of a suspension of action.

23. First of all, as regards the decision to place the Applicant on administrative leave, the Tribunal will examine whether the first requirement of article 2.2 of the statute is met, i.e. whether “the decision appears prima facie to be unlawful”.

24. The Applicant maintains that only the Secretary-General, not the USG/DM, has the authority to place him on administrative leave since it was the Secretary-General who, pursuant to article V of UNICRI statute, appointed him. At the hearing, the Applicant called into question the statements made by the USG/DM and the Deputy Secretary-General in their respective letters to him that the decision to place him on administrative leave without pay had been taken by the Secretary-General.

25. Before the hearing, the Tribunal requested the Respondent to produce the Secretary-General’s decision, to no avail. During the hearing, the Respondent reiterated that the contested decision had been made by the Secretary-General. The Respondent refused, however, to comply with the Tribunal’s orders to submit a signed confirmation from the Secretary-General that he made the decision to place the Applicant on administrative leave without pay.

26. Faced with contradicting allegations from the Applicant and the Respondent, the Tribunal must strive to establish the truth. If a party refuses to comply with an order from the Tribunal to produce evidence, the Tribunal must draw consequences from such refusal. An administrative decision is unlawful if the author of the decision cannot be clearly identified. In the present case, it results from the Respondent’s ill will that the proof of the identity of the author of the contested decision has not been adduced. Thus the decision to place the Applicant on administrative leave appears prima facie to be unlawful.

27. The Tribunal will now examine whether another requirement of article 2.2 is met, i.e. whether the decision to place the Applicant on administrative leave will cause him irreparable damage.

28. The Applicant holds a fixed-term appointment that is due to expire on 30 June 2010. Although the contested decision is not a disciplinary measure and although it can only be made in the interest of the Organization, it is appropriate to take into account that the Applicant has been in the employ of the United Nations for more than 20 years and that, as Director of UNICRI, he holds a highly responsible and visible position. It can therefore be said that the contested decision causes him an irreparable moral prejudice in terms of the damage to his reputation. Thus the above-mentioned requirement is met.

29. It is a further requirement under article 2.2 of the UNDT statute that the Applicant must prove that it is of particular urgency to suspend his placement on administrative leave. The Tribunal considers that there is no particular urgency for the Applicant to be reinstated in his functions as Director, UNICRI. On the contrary, the irregularities which the Applicant is suspected of have been identified following a thorough audit, which, even if its conclusions are contested, warrants further investigation. It is clear that allowing the Applicant to continue exercising his functions while the investigation is ongoing could hinder the investigation. Thus there is no particular urgency that the Applicant be reinstated in his functions and this requirement under article 2.2 of the UNDT statute is not met. The Tribunal cannot, therefore, order a suspension of action on the decision to place the Applicant on administrative leave.

30. The Tribunal will now turn its attention to the decision to deprive the Applicant of his salaries during his administrative leave and examine whether it meets the requirements of article 2.2 of the UNDT statute.

31. For the same reasons as set out above regarding the decision to place the Applicant on administrative leave, the author of the decision to deprive the Applicant of his salaries cannot be clearly identified and therefore the decision appears *prima facie* to be unlawful.

32. Furthermore, provisional staff rule 10.4(c) clearly stipulates that a staff member placed on administrative leave may be deprived of his salaries “in exceptional circumstances” only. If the letter dated 7 December 2009 sets out the grounds for placing the Applicant on administrative leave, it does not elaborate on the exceptional circumstances which warrant depriving the Applicant of his salaries during his administrative leave. At the hearing, Counsel for Respondent was asked to elaborate on those exceptional circumstances but merely repeated what the letter dated 7 December 2009 said, i.e. that the decision was made “given the nature and gravity of the findings and [the Applicant’s] responsibility as the most senior official of UNICRI”. Thus the Respondent does not provide any reasons for depriving the Applicant of his salaries during his administrative leave and the information available in the records of the case does not reveal any exceptional circumstances warranting such an exceptional measure. For this reason, as well as for reason previously stated, the decision appears *prima facie* to be unlawful.

33. The Applicant further maintains that depriving him of his salary during several months will force him and his family to urgently relocate outside Turin, where he currently resides, which will have harsh consequences on the life and well-being of his family. The Tribunal considers that the damage, which is not merely financial, suffered by the Applicant as a result of the suddenness and unexpected nature of the contested decision cannot be repaired by the possible restoration of any pay withheld or even by the award of damages. Accordingly, the Tribunal finds that the decision to deprive the Applicant of his salaries during his administrative leave will cause him irreparable damage if it is not suspended.

34. Finally, depriving the Applicant of his salaries in such a sudden and unexpected way obviously places him and his family in a situation of particular urgency, which the respondent cannot seriously contest. Thus the three requirements of article 2.2 of the UNDT statute are met and the Tribunal must order the suspension, during the pendency of the management evaluation, of the decision to deprive the Applicant of his salaries while he is on administrative leave.

Conclusion

35. In view of the foregoing, it is ordered that the decision to deprive the Applicant of his salaries while he is on administrative leave pursuant to provisional staff rule 10.4 be suspended until the management evaluation has been completed.

36. The Applicant's request that the Tribunal order the suspension of action on the decision to place him on administrative leave is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 18th day of December 2009

Entered in the Register on this 18th day of December 2009

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva