



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/016

Order No.: 031 (NBI/2016)

Date: 24 February 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BYAKOMBE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICATION FOR
SUSPENSION OF ACTION PURSUANT
TO ARTICLE 13 OF THE RULES OF
PROCEDURE**

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Mylene Spence, ALS/OHRM

The Application and Procedural History

1. The Applicant is a Water Treatment Technician in the Engineering Section of the United Nations Organisation Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). He holds a fixed term appointment at the G3 level and is a nationally-recruited staff member.

2. On 17 February 2016, the Applicant filed an Application for Suspension of Action against the Respondent's decision to place him on Administrative Leave Without Pay (ALWOP). The Applicant also sought management evaluation of the impugned decision on the same, response to which is pending. The Applicant seeks a stay of the decision to deprive him of his salary pending the outcome of his management evaluation request.

3. The Application was served on the Respondent on 18 February 2016.

4. The Respondent filed his Reply to the Application on 22 February 2016.

Summary of the Facts and Parties' Submissions

5. On 14 January 2016, the Applicant received a letter, dated 4 January 2016, from the Under-Secretary-General for Field Support (USG/Field Support). This letter stated that the Under-Secretary-General for Management had decided to place the Applicant on ALWOP.

6. On 15 January 2016, the Applicant wrote to the USG/Field Support, contesting the administrative measure imposed upon him. The Applicant explained that there had been a physical altercation between himself and another staff member, but that it was the Applicant who was the victim in this situation. The Applicant indicated that this other staff member had yelled and thrown a rock at him and that he did everything that he could to get himself away from this assault. The Applicant

provided the names of six witnesses who could confirm his version of events. No response to this letter was forthcoming.

7. According to the Respondent, the Applicant is alleged to have physically assaulted a pregnant staff member, Ms. Ngbadulezele, on 9 April 2015, by slapping her and kneeling her in the abdomen, which led to her hospitalisation. She was five months pregnant at the time.

8. A medical report suggested that Ms Ngbadulezele suffered from “blunt trauma” to her lip and abdomen. She also presented with “false contractions” and was placed on a combination of medical, annual and maternity leave.

9. The baby was delivered in July 2015, and died shortly after his birth.

10. The incident was investigated by the Special Investigations Unit, following which three reports were prepared in April and November 2015. The pregnant staff member’s account of what transpired was also corroborated by seven witnesses.

11. The Applicant denied the physical assault but admitted to “holding her by the hand and pushing her.”

12. The Applicant was placed on ALWOP on 15 January 2016 on the basis of the *prima facie* evidence set out in the investigation and supplementary investigation reports.

Deliberations

13. Applications for suspension of action are governed by art. 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.

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

15. 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.

16. Within the United Nations internal justice system however, a suspension of action order under art. 2 of the UNDT Statute and art. 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.

17. 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.

18. 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.¹

19. Additionally, a suspension of action application will only succeed where the Applicant is able to establish a *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*.

20. 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.

21. In this case, the Applicant contends that the impugned decision is *prima facie* unlawful because the threshold for "exceptional circumstances" so as to justify the deprivation of pay has not been met. The Applicant argues that the decision to place the Applicant on ALWOP was "based solely on the nature of the (unproven and undemonstrated) allegation against him."

22. In *Nianzou*, the Tribunal held 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."²

¹ See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanamid Co. v Ethicon Ltd* (1975) AC 396.

² Order No. 007 (NBI/2016).

23. The Tribunal finds that there are in this case “exceptional circumstances” warranting the placement of the Applicant on ALWOP. Whatever is proven or unproven through further investigation, and the interviewing of the Applicant’s own witnesses, the Applicant concedes that he pushed Ms. Ngbadulezele. Based on the content of the investigation reports, the Applicant’s admission that he pushed Ms. Ngbadulezele and the medical findings of “blunt trauma” injuries, the Tribunal is satisfied that the circumstances surrounding the allegations are sufficiently “exceptional” as to justify the placement of the Applicant on ALWOP.

24. 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). This Application therefore fails on the first limb of *prima facie* unlawfulness.

25. Having found that the impugned decision has not been shown to be *prima facie* unlawful, and given that the test for suspension of action applications is a cumulative one, it is unnecessary for the Tribunal to proceed to assess this Application on the grounds of urgency and irreparable harm.

26. The Application for Suspension of Action is hereby **REFUSED**.

(Signed)

Judge Nkemdilim Izuako

Dated this 24th day of February 2016

Entered in the Register on this 24th day of February 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi