



Before: Judge Margret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LOTO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR INTERIM
MEASURES PENDING PROCEEDINGS**

Counsel for the Applicant:

Sétondji Roland Adjovi

Counsel for the Respondent:

Nicola Caon, AAS/ALD/OHR
Elizabeth Gall, AAS/ALD/OHR

Introduction

1. The Applicant serves as a Mail Assistant at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Goma.¹ On 14 June 2020, he filed an application on the merits challenging the decision to place him on administrative leave without pay “(ALWOP)”.²

2. On 17 June 2020, the Applicant filed a motion for interim measures pending proceedings seeking: (a) change of the administrative leave from ALWOP to administrative leave with pay (“ALWP”), effective 13 January 2020, with payment of his full pay and entitlements issued through off-cycle payroll; (b) credit of his leave entitlements and associated point credits for home leave, rest and recuperation (“R&R”) to be awarded if they have been withheld during the period of his ALWOP.

3. In the alternative, the Applicant seeks payment of his full pay and entitlements for the period 13 April 2020 to 13 May 2020 through an off-cycle payroll disbursement while credit for his leave entitlements and associated point credits for home leave and R&R be awarded if they have been withheld during this period.

4. On 18 June 2020, the motion was served on the Respondent, who filed his reply on 19 June 2020. On 22 June 2020, the Applicant filed a motion for leave to respond to the Respondent’s reply; which was granted by the Tribunal on the same day.

Facts

5. On 10 December 2019, the Applicant received an email from the Office of Internal Oversight Services (“OIOS”) informing him that he was the subject of an

¹ Ibid, section I.

² Application, section II.

investigation and that he was required to submit to an interview on 13 December 2019.³ The Applicant was interviewed on the appointed date.⁴

6. On 13 January 2020, the Under-Secretary General for Management, Strategy, Policy and Compliance (“USG-MSPC”), placed the Applicant on ALWOP for a period of three months pending completion of the investigation and any disciplinary process against the Applicant.⁵

7. On 13 May 2020, the Applicant was notified that the USG-MSPC had decided to extend his ALWOP for an additional period of three months from 13 April 2020, or until the completion of the disciplinary process, whichever comes earlier.

8. On 19 June 2020, the Assistant Secretary-General for Human Resources (“ASG/OHR”) rescinded the decision to place the Applicant on ALWOP on a retroactive basis, from 13 April to 12 May 2020. The ASG/OHR instructed MONUSCO to pay the Applicant his salary, including the corresponding allowances and entitlements, for this period.⁶

Submissions

Receivability

The Respondent’s submissions

9. The Respondent contends that the motion is not receivable. The 13 January 2020 decision to place the Applicant on ALWOP has been implemented. The Applicant’s continuing placement on ALWOP is as a result of the 13 May 2020 decision, not the 13 January 2020 decision. Therefore, since the 13 January 2020 decision has been implemented, the Tribunal does not have competence to order the suspension of that decision.

³ Application, annex 7.

⁴ Application, section VII, para 2.

⁵ Application, annex 1.

⁶ Reply, R/5.

10. The Respondent also submits that the Applicant is requesting the grant of final relief in a form of interim relief. The final remedies requested in the Application include rescission of the 13 January 2020 decision and the replacement of ALWOP with the Administrative Leave with Pay (“ALWP”). Accordingly, granting the Applicant’s request for suspension of action, would in effect, be granting final relief in the form of rescinding the placement of the Applicant on ALWOP and placing him on ALWP as from 13 January 2020.

11. With regard to the 13 May 2020 decision, the Respondent contends that the decision is partially moot. The ASG/OHR has rescinded this decision on a retroactive basis from 13 April to 12 May 2020. The decision has been varied to provide for placement of the Applicant on ALWOP on a prospective basis as from 13 May 2020. The ASG/OHR has also ordered for the payment of the Applicant’s salary, including the entitlements for this period. Accordingly, the motion’s request for “alternative relief” has been granted.

The Applicant’s Submissions

12. The Applicant contends that the 13 May 2020 extension of his ALWOP is not a standalone decision and it does not exist on its own without the original 13 January 2020 decision. As a result, one cannot challenge either decision in isolation.

13. The Applicant maintains that the 13 January 2020 decision has not been fully implemented because of the extension which expanded its implementation beyond the initial 12 April 2020 deadline to until 12 July 2020.

Considerations

14. All the arguments which the respondent advances for the assertion that both the 13 January 2020 and 13 May 2020 decisions are not receivable are premised on the proposition that the two decisions are separate. The facts of the case however present two contradictory scenarios. The first scenario, based on the ASG/OHR’s letter to the Applicant, is that the decision to place the Applicant on AWLOP from 13 January 2020 was time-bound and it expired on 12 April 2020. The fact that the 13

May 2020 decision came a month after the expiry of the 13 January 2020 decision would emphatically separate the two decisions, and galvanize the assertion that the 13 January decision had been fully implemented.

15. The second scenario is presented by the Respondent's email under which he communicated the 13th May 2020 decision.⁷ The communication was that the ASG/HR was extending the Applicant's ALWOP, i.e. extending the 13 January decision to a future date. The dictionary meaning of the word "extend" is to "cause to cover a wider area, to continue, to expand". The Respondent in fact uses the words "continuation of the administrative leave without pay" in that letter. Going by that email, the Respondent's clear intention was to seamlessly connect the two decisions, and indeed as argued by the Applicant, the 13 May 2020 extension of the ALWOP was not a standalone decision and it does not exist on its own without the original 13 January 2020 decision.

16. Much later, the Respondent seems to have realized the confusion created by the two letters, and in Annex R/5 he states that "... After carefully revisiting the case and the retroactivity legal implications ... it has been decided that [the Applicant] should be paid his salary for the period for which the ALWOP was extended retroactively, i.e. 13 April 2020 to 13 May 2020".

17. Crucially, it is only from this point that the Respondent started viewing the two decisions as being separate. This does not however erase the legal implications of the situation, and flowing from this, the submission that the 13 January 2020 decision to place the Applicant on ALWOP has been implemented, and that the 13 May decision was a separate decision cannot be left unchallenged. The Respondent must be held to his 13 May 2020 decision whose clear intent was to link the two decisions. A contrary position would be a travesty of justice to the Applicant who took actions based on the 13 May 2020 decision.

⁷ Application, annex 2.

18. In view of that, the Respondent's proposition that the Tribunal has no competence to order the suspension of the decision, and the 13 May 2020 decision is not properly before the Tribunal for not having been subjected to management evaluation as a separate decision are rejected.

19. The Respondent further argues that the request for suspension of action of the 13 May 2020 decision is partially moot. The Tribunal is cognizant of the jurisprudence (*Crotty* 2017-UNAT-763, paras. 15 and 16) that where a contested decision ceases to have legal effect, the application becomes moot as there is no longer a live issue upon which it is competent to pass judgment.

20. The evidence that the ASG/OHR informed MONUSCO that the decision to place the Applicant on ALWOP on a retroactive basis, from 13 April to 12 May 2020 has been rescinded with instructions to pay his salary (including corresponding allowances and entitlements) for this period is not evidence that there are no live issues upon which the Tribunal can pass judgment. That evidence only points to the fact that the 13 May 2020 decision created two separate results, one of which is the subject of these proceedings. The decision is therefore not moot.

21. The argument that the Tribunal has no competence to grant the orders because the Applicant has sought a final remedy through this motion for interim measures is without basis. The interim relief sought by the Applicant is that the current ALWOP be transformed into an ALWP (administrative leave with pay). This is different from the remedies sought under the main application, namely that the Tribunal finds the decision to put the Applicant on administrative leave is unlawful and grant him compensation with not only the full pay for the totality of the period since 13 January 2020, but for the harm suffered that can be remedied.

22. After careful consideration of facts and submissions of the parties, the Tribunal finds the application receivable.

Merits

Applicant's submissions

23. The Applicant's case is that the decision to place him on ALWOP is unlawful. Staff rule 10.4(d) and section 11.1 of the ST/AI/2017/1 ("Unsatisfactory conduct, investigations and the disciplinary process") state that placement on administrative leave "does not constitute a disciplinary measure". The Applicant submits that the 13 January 2020 placement on administrative leave was unlawful and unnecessary. Pursuant to section 11.3 of the ST/AI/2017/1, the action of imposing the ALWOP was disproportionate to the allegations. The 13 May 2020 retroactive extension of the ALWOP, one month after the original 13 January 2020 ALWOP period had expired on 13 April 2020, was illegal. He contends that the actions taken are a punitive disciplinary measure.

24. The Applicant argues the issues of urgency and irreparable harm together. He submits that he is in a dire financial situation, being responsible for the financial support of himself, his spouse, seven children and two elderly parents. He is unable to seek alternate employment to mitigate his financial situation and he is not allowed to leave his duty station, which is not his home country.

Respondent's submissions

25. The Respondent maintains that should the Tribunal find the motion receivable, with respect to the 13 January 2020 decision or the 13 May 2020 decision, the motion has no merit. The 13 January 2020 decision is lawful because both the conditions set in sections 11.4(a) and (b) of the ST/AI/2017/1 for placing the Applicant on ALWOP were met. The 13 May 2020 decision is moot as it has been rescinded.

26. With regard to urgency, the Respondent submits that the delay is self-created. Five months have elapsed since the Applicant was notified of his placement on ALWOP on 13 January 2020. Similarly, the Applicant has not sought relief at the first available opportunity for the 13 May 2020 decision. Therefore, the urgency is self-created.

27. For irreparable harm, the Applicant has not demonstrated how the decisions would cause him a loss that cannot be adequately compensated through a monetary award.

Considerations

28. The only issue for determination is whether there are any exceptional circumstances that justify the Administration's decision to place the Applicant on ALWOP.

29. Under art. 10.2 of the Statute and art. 14 of the Rules of Procedure of the Tribunal an applicant for suspension of action must establish that the impugned decision is prima facie unlawful, calls for urgent adjudication and that implementation of the 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 judicable issue before the Court (*Hepworth* UNDT/2009/003 at para. 10).

30. In conducting judicial review of decisions to place an applicant on ALWOP, the Dispute Tribunal reviews whether the decision was rational, considering the criteria stipulated in staff rule 10.4(c) and section 11.4 of ST/AI/2017/1 and the information before the Administration at the time of the decision.

31. Staff rule 10.4(c) and section 11.4 of ST/AI/2017/1 provide for the placement of staff members on ALWOP in two categories of cases, pending the investigation of the staff member for alleged unsatisfactory conduct and any subsequent disciplinary process.

32. Section 11.4 provides as follows:

A staff member may be placed on administrative leave without pay by an authorized official when at least one of the following conditions is met:

- a. There are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in

which case the placement of the staff member on administrative leave shall be without pay;

b. There are exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix), and there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

33. The Respondent's arguments are premised on exceptional circumstances within the meaning of section 11.4(b), and it is argued that the Applicant may have engaged in the following conduct:

- a. failure to report allegation of SEA (rape);
- b. organizing a meeting to pay money to V01 in exchange for withdrawal of her complaint;
- c. telling lies about his actions during his OIOS interviews; and
- d. interfering with the conduct of the OIOS investigation, as the preliminary findings indicated.

34. It is argued that the above allegations are grave and constitute serious misconduct in violation of the standards of conduct established in, inter alia, staff regulation 1.2(b), staff rules 1.2(c) and (e), and section 3.2(e) and (f) of ST/SGB/2003/13, and if established, would warrant separation or dismissal. It is therefore asserted that the impugned decision is lawful, rational and reasonable since the conditions set out in section 11.4(b) of ST/AI/2017/1 for placing the Applicant on ALWOP were met.

35. The Applicant maintains that the 13 May 2020 retroactive extension of his ALWOP from 13 April 2020 is unlawful as admitted by the Administration in the 19 June 2020 instruction. Further, that the provision for an ALWOP applies to the staff

accused of SEA, not to anyone in an ancillary role such as the Applicant who is alleged to not have reported SEA. He asserts that the Respondent's submissions do not match such circumstances.

36. The uncontested facts are that the Applicant is not under investigation for engaging in sexual exploitation and sexual abuse. The provisions of section 11.4(a) are therefore not applicable to the circumstances of the case.

37. The Tribunal however, agrees with the Respondent that the allegation that the Applicant failed to report an allegation of SEA (rape), and that he organized a meeting to pay money to V01 in exchange for withdrawal of her complaint, further that he told lies during his OIOS interview about his actions and interfered with the conduct of the OIOS investigation constitute serious misconduct in violation of the standards of conduct established in, inter alia, staff regulation 1.2(b), staff rules 1.2(c) and (e), and section 3.2(e) and (f) of ST/SGB/2003/13, and if established, it would warrant separation or dismissal.

38. Further that the evidence available, including the Applicant's admissions of some aspects of the questioned conduct and audio recordings constitute information about the unsatisfactory conduct that makes it more likely than not that the applicant engaged in the unsatisfactory conduct, within the meaning of section 11.4 (b).

39. Regardless of the above, it must be remembered that the process of decision making is as important as the decision. The Tribunal has already indicated that the Respondent must be held to his 13 May 2020 decision, which decision was irrational and illegal in so far as it sought to extend a decision which had been fully implemented a month after its implementation. The rescission of the decision under Annex R/5 did not remedy the harm it caused to the Applicant. The fact that the decision making and implementation procedure was tainted with illegality and irrationality renders the decision unlawful. The Applicant has therefore successfully proved that the decision is unlawful.

40. On the remaining two elements of urgency and irreparable damage, having carefully reviewed the entire case record, the Tribunal is convinced that those elements have also been met, since each new day in the circumstances in which the Applicant is placed, escalates the urgency and desperation of his situation. With regards to hardship for example, the Tribunal notes that the Applicant is the sole provider for his wife, seven children and two elderly parents. The deprivation of a family of eleven of a source of income is in the circumstances of this case very harsh, especially since the Applicant is in a foreign country and cannot seek alternative employment.

ORDER

41. The Tribunal grants the motion for interim measures and orders that the decision to deprive the Applicant of his salaries while he is on Administrative Leave pursuant to staff rule 10.4 be suspended until the completion of the investigations and disciplinary process.

(Signed)

Judge Margaret Tibulya

Dated this 25th day of June 2020

Entered in the Register on this 25th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi