



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GALLIENY

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
Adrien Meubus, ALS/OHRM, UN Secretariat

Introduction

1. On 3 April 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 decision “to renew [his] placement on administrative leave without pay pending outcome of an investigation into disciplinary conduct”. He was placed on administrative leave by letter dated 18 December 2013, which also informed him that his administrative leave “will continue for three months at which point the matter will be revisited”. The Applicant submits that, by not informing him of the discontinuation of the administrative leave by the end of the three-month period, i.e., by 18 March 2014, the Administration implicitly decided to continue it.

2. With respect to the *prima facie* unlawfulness of the contested decision, the Applicant states in his application that the Under-Secretary-General for Field Support does not have the delegated authority to place the Applicant on administrative leave without pay. Further, the conditions for placing the Applicant on administrative leave without pay have not been met. The failure to review the decision of 18 December 2013 as promised renders the Applicant’s continued placement on administrative leave without pay unlawful. With regard to the requirements of *particular urgency* of the matter and *irreparable harm*, the Applicant submits that both are expressed in terms of the serious financial consequences of the imposed administrative leave. He is financially responsible for providing for his own family, including seven children, as well as for his recently-deceased brother’s twelve children. The Applicant submits that he is behind on education-related payments for five of his children, two of whom have already been removed from school as a result, placing their education in jeopardy.

3. The Registry transmitted the present application to the Respondent on Thursday, 3 April 2014. Accordingly, the Tribunal has until 5 p.m. on Thursday, 10 April 2014, to consider this application.

4. The Respondent duly filed his reply by 10 a.m. on Monday, 7 April 2014. The Respondent submits that the Department of Field Support “has indicated on 4 April 2014 that it is preparing the documents” to provide for the placement of the Applicant on administrative leave *with* pay. Thus, there is no decision to extend the Applicant’s placement on administrative leave without pay. Accordingly, the application is moot and should be dismissed.

5. Later the same day, the Applicant filed a submission seeking leave to respond to the Respondent’s reply, and attaching his comments. In this submission, he states that no actual change to his status has taken place as of 7 April 2014, and, therefore, the application cannot be considered moot. He submits that the application for suspension of the implementation of the decision applies both to the decision to place him on administrative leave and the decision that such leave should be without pay. The proposed change of status addresses only one of these elements. The Applicant states, *inter alia*, that the unlawful decision to place him on administrative leave—either with or without pay—causes reputational and financial harm and could adversely affect him during any downsizing exercise.

Background

6. The following background information is based on the parties’ written submissions and the record.

7. The Applicant submits that he has worked for the United Nations since 2007 in the material post as a local staff truck driver based in Port-au-Prince. He has had

consistently positive performance appraisals throughout this period and has never been subject to any disciplinary investigation before.

8. The Applicant submits that, in July 2013, he was interviewed by a MINUSTAH staff member from Conduct and Discipline in relation to allegations of theft of 200 liters of fuel from one of MINUSTAH's trucks.

9. The Applicant submits that, around five months later he was approached by another staff member from Conduct and Discipline and requested to sign a document acknowledging receipt of a letter.

10. The letter was from the Under-Secretary-General for Field Support and addressed to the Applicant. The letter informed the Applicant that he would be placed on administrative leave without pay pending the outcome of a disciplinary investigation against him. The letter stated (emphasis added):

It has been brought to my attention by the United Nations Stabilization Mission in Haiti (MINUSTAH) that you have been the subject of an investigation in connection with an allegation that you conspired to steal United Nations property, namely fuel.

According to the information provided to me, the allegation relates to an incident on or about 26 July 2013, wherein you conspired with ... in the theft or approximately two hundred (200) litres of fuel from a UN vehicle.

The purpose of this letter is to advise you *that the Under-Secretary-General for Management has decided, on behalf of the Secretary-General, to place you on administrative leave without pay (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 administrative leave without pay effective as of the date of your receipt of this notification.

Your administrative leave without pay will continue for three months at which point the matter will be revisited.

The reason for your placement on administrative leave is that there is sufficient *prima facie* evidence that you conspired to commit the offence of theft, and as such pose a threat to the property of the Organization. The nature of the conduct you are alleged to have engaged in is sufficiently serious, that it would, if proven, lead to your dismissal.

Please note that your placement on administrative leave is an administrative measure. It 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.*

During the period of administrative leave, you are required to surrender your MINUSTAH Grounds Pass and Driver's Permit to the MINUSTAH Chief Security Advisor. You may only enter United Nations premises under escort and with prior permission from the MINUSTAH Chief of Mission Support. You are further required to obtain approval from the MINUSTAH Chief of Mission Support before leaving the duty station. Finally, you must provide current contact information during the entire duration of the administrative leave.

While on administrative leave without pay, if you wish to maintain your health insurance coverage you may do so at your own expense by contacting the MINUSTAH Human Resources Management Section and making the requisite arrangements.

In addition, during your placement on ALWOP please note that you remain a staff member of the United Nations and you are, accordingly, subject to the Staff Regulations, the Staff Rules and other administrative issuances. You are also reminded that as a staff member you are obliged, under Staff Regulation 1.2(r) and Staff Rule 1.2(c), to respond fully to requests for information from staff members and other officials of the Organization authorized to conduct an investigation, including making yourself available to investigators.

11. The letter of 18 December 2014 was in English. The Applicant states that he is a Haitian national and speaks Creole as his first language and French as a second language. He neither speaks nor reads English.

12. The Applicant states that despite the expiry of three months, his placement on administrative leave without pay has not been revisited. He submits that he has received no communication to indicate that any review of the administrative measure took place or, if it did take place, what the outcome was.

13. The Applicant submits that he was never provided with the opportunity to comment on the investigation report, nor has he seen the investigation report or the evidence against him. He denies the alleged theft and any suggestion that he was part of a conspiracy.

14. The Applicant submits that, to his knowledge, the matter has apparently been referred to OHRM for a decision as to whether allegations will be filed against him. This decision has not yet been made.

15. The Applicant requested management evaluation of the contested decision on 3 April 2014 and is still awaiting the outcome.

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. 13.3 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. An application may well stand or fall on its

founding papers. So too a Respondent's reply should be complete in all relevant respects, but also bearing in mind that a matter is not at the merits stage by this time.

17. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the 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 decisions only if all three requirements of art. 2.2 of its Statute have been met.

Contested decision

18. It is instructive that the Respondent has taken no point other than to plead that the application is moot on the grounds that the Office of the Under-Secretary-General for Management "has indicated" that there is no approval of an extension of Applicants administrative leave without pay, and that the Department of Field support "has indicated" that it is preparing documents with a view to placing the Applicant on administrative leave with pay.

19. As he has not heard to the contrary in three months, the Applicant is challenging the "decision "to renew [his] placement on administrative leave without pay pending outcome of an investigation into disciplinary conduct". He states that the contested decision in this case consists of two components, namely the decision to place him on administrative leave and the decision that such leave should be without pay. This is evident from the letter from the Under-Secretary-General for Field Support.

20. The Applicant further submits that the decision to continue his placement on administrative leave has an ongoing legal effect on his rights. 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 only deemed to have been implemented in its entirety at the end of the administrative leave (rather than when the decision was first notified). In any case it is evident from the papers before the Tribunal that the decision to place the Applicant on administrative leave without pay has continued beyond the stipulated three months and it is only on 4 April 2014, after the Applicant filed this application, that the Respondent has seen it fit to address the Applicant's predicament.

21. For the reasons stated above, the Tribunal finds that the decision contested by the Applicant in this case is the decision to continue his placement on administrative leave beyond the three-month period, which decision may be suspended by the Tribunal if the requirements of art. 2.2 of its Statute are satisfied.

22. The Tribunal will now turn to the consideration of the three requirements of art. 2.2 of its Statute. As stated above, the Tribunal notes that the Respondent did not address the Applicant's submissions on any of the three elements required for a suspension of action order. Thus, the Applicant's submissions regarding the *prima facie* unlawfulness, irreparable damage, and particular urgency stand unrebutted.

Prima facie unlawfulness

23. 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 considerations, 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 (*Jaen* Order No. 29 (NY/2011), *Villamorán* UNDT/2011/126).

24. Staff rule 10.4 states:

Rule 10.4

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 paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration, which, so far as practicable, should not exceed three months.

(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.

25. The Respondent indicates in his reply dated 7 April 2014 that there is an indication that documents are being prepared to provide for the Applicant's placement on administrative leave with pay. This means that the Applicant may or may not currently be on special leave with pay, as there is no indication whether these documents have been completed or indeed have been put into effect. Certainly the Applicant has not been notified "promptly", or even by today's date of any change in his status, if any. Furthermore, the Applicant clearly states that the decision contested by him is the implied decision to continue his placement on administrative leave beyond the three-month period, be it with or without pay. The Tribunal finds therefore the Respondent's submission that the application would

be moot in the event the Applicant is placed on administrative leave with pay is misguided.

26. The Tribunal finds that a number of issues have been raised by the Applicant in relation to the decision to continue his placement on administrative leave warranting the finding that there is a fairly arguable case that the contested decision is unlawful. In particular, the Applicant raises contravention of the provisions of ST/AI/371 (Revised disciplinary measures and procedures), as amended by ST/AI/371/Amend.1, and staff rule 10.4 on the conditions, reasons and justification regarding the basis for his continued placement on administrative leave, including beyond the three-month period ordinarily envisaged by staff rule 10.4(d), as well as various procedural aspects, including in relation to the language of the related notifications and the delegation of authority of the alleged decision-maker. Furthermore, the Applicant raised the issue that, in contravention of staff rule 10.4(c), no exceptional circumstances have been stipulated such as to warrant a determination by the Secretary-General that such administrative leave should be without pay, nor is it evident that such determination was made. None of these issues have been addressed by the Respondent in his reply. These matters will have to be fully canvassed as part of substantive proceedings on the merits, if any.

27. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Particular urgency

28. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. The Dispute Tribunal has stated in a number of rulings that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the party seeking interim relief (see, e.g., *Villamorán* UNDT/2011/126 and *Dougherty* UNDT/2011/133).

29. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention, the Applicant having filed the present application approximately two weeks after the promised deadline for revisiting the issue of his administrative leave. On the other hand, the Respondent has not advised the Applicant “promptly” of his status and of the alleged changes to his administrative leave status. Furthermore, the continuing financial consequences visited upon the Applicant have exacerbated the urgency.

30. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

31. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage.

32. In each case, the Tribunal has to look at the particular factual circumstances. The Applicant submits that the implementation of the contested decision would cause him irreparable harm as he will be unable to provide financial support to his family and the family of his recently-deceased brother. He states that his relatives rely on his standard income for support, including with regard to their education-related expenses. He explains that, even if placed on administrative leave with pay, he would be deprived of additional monetary compensation in the form of daily subsistence allowance, which he received regularly due to his regular journeying outside of Port-au-Prince, and which is instrumental to him meeting his and his family’s financial obligations. Furthermore, the reputational harm incurred by placing him on lengthy administrative leave (be it with or without pay) could adversely affect him during any downsizing exercise, particularly as he has now

spent over three months away from the post he has held since 2007. He submits that posts not occupied for significant periods are more likely to be considered redundant. The Respondent has not sought to rebut any of these submissions.

33. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable harm to be satisfied.

34. Finally, on the brief facts that are currently before it, and in the particular circumstances of this case, including the *prima facie* unlawfulness, the Tribunal finds that this matter is well-suited to amicable resolution between the parties and encourages the parties to attempt such resolution.

Conclusion

35. The Tribunal orders suspension, pending management evaluation, of the decision to continue the Applicant's placement on administrative leave with or without pay.

(Signed)

Judge Ebrahim-Carstens

Dated this 9th day of April 2014