



**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BELSITO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

George G. Irving

**Counsel for Respondent:**

Marcus Joyce, UN Women

Prue Smith, UN Women

## **Introduction**

1. The Applicant served on a fixed-term appointment at the P-5 level in the United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”).
2. On 11 March 2019, he was placed on administrative leave with full pay (“ALWFP”) pending the outcome of an investigation into allegations of abuse of authority and harassment. The Applicant submitted his resignation the next day and also on that date, in a communication erroneously dated 13 July 2017, he sought management evaluation of the decision to place him on ALWFP.
3. The instant application was filed after the Applicant received a response to his request for management evaluation in which the Director, Human Resources, UN Women, informed him that any reversal of the decision was rendered moot by his resignation.
4. For reasons explained in this Judgment, the Tribunal determines that the application is without merit.

## **Procedural history**

5. On 6 June 2019, the Applicant filed an application before the United Nations Dispute Tribunal to challenge the decision to place him on ALWFP.
6. The Respondent filed his reply on 11 July 2019. It is the Respondent’s case that the impugned decision was lawful, and that the application should be dismissed in its entirety.
7. On 4 February 2021, the Tribunal issued Order No. 23 (GVA/2021) directing the parties to attend a case management discussion (“CMD”).
8. The CMD took place, as scheduled, on 19 February 2021. Both parties appeared represented by Counsel.

9. The Tribunal then issued Order No. 56 (GVA/2021) in which the issues to be adjudicated in this matter were outlined as follows:

- a. Was the decision to place the Applicant on special leave with full pay procedurally lawful;
- b. Was it tainted by extraneous factors;
- c. Did the decision amount to constructive dismissal;
- d. Did the Applicant's resignation render the application, or parts of it, moot; and
- e. Are the Applicant's claims for the remedies he seeks warranted?

10. On 5 March 2021, the parties jointly informed the Tribunal that they intended to proceed with closing submissions, as settlement discussions had yielded no agreement.

11. The Respondent and the Applicant filed their closing submissions on 12 and 19 March 2021, respectively.

12. On 1 April 2021, the Respondent sought leave to file a rejoinder. The Applicant filed his objection to the motion on the same day. The Tribunal has considered the motion and decided to grant it. The Applicant's motion for permission to have remarks included in his 1 April 2021 filing considered by the Tribunal is also granted.

#### **Facts and Parties' submissions**

13. The Applicant joined the UN Women Jordan Country Office on 30 November 2012, as Representative at the P-5 level. In September 2016, he was assigned to the Programme Division at Headquarters, New York, as Senior Advisor to the Director, Programme Division. On 4 September 2017, the Applicant made a lateral move to the UN Women Country Office in Albania, as Representative. His fixed-term appointment was renewed for a further two years on 4 September 2018.

14. On 21 February 2019, the Office of Internal Oversight Services (“OIOS”) informed the Applicant that they were investigating him for harassment and abuse of authority following complaints by past and presently serving staff members of the country office.

15. On 11 March 2019, the Applicant was notified that he was being placed on ALWFP for a three-month period.

16. On 12 March 2019, the Applicant sought review by the Management Evaluation Unit (“MEU”) of the decision to place him on ALWFP and resigned by giving the Organization one month’s notice.

17. Two weeks after the Applicant separated from service, he received notification that MEU has upheld the impugned decision as having been made properly, and that any reversal of the decision has been rendered moot by his resignation.

18. It is the Applicant’s case that the decision to place him on ALWFP was not based on a “clear fact-based rationale” and that it was, in fact, tainted by “a number of extraneous factors.”

19. The Applicant argues that if the Respondent was acting in good faith, he would have opted to redeploy him. He contends further that the Respondent’s decision was tantamount to constructive dismissal, following a demonstrated pattern of bias and discrimination to which he was subject.

20. The Applicant is emphatic in his assertion that the investigation has in fact been abandoned for “lack of credibility.” Why else, the Applicant asks, would this investigation be still “on-going”? Indeed, a transcript of the Applicant’s own interview could only be produced in “unofficial” form, 19 months after he was interviewed and only because disclosure of it was ordered by the Tribunal.

## **Consideration**

21. The presumption of regularity has been recognised in UNAT’s jurisprudence as applicable to the Respondent’s decision making. As a result, the Respondent has a minimal burden of proof to justify a contested administrative action or decision. Once that minimal burden is discharged, the burden remains with the staff member to prove that the actions of the Respondent were unlawful or unjust. This must be done by clear and convincing evidence (*Rolland* 2011-UNAT-122).

22. Accordingly, in considering the issues arising for determination, the Tribunal examines whether the Applicant’s challenge to the contested decision is based on sufficient evidence to rebut the presumption of regularity.

*Was the decision to place the Applicant on ALWFP procedurally lawful?*

23. This issue will be examined, firstly, within the context of the applicable regulatory framework and, secondly, as to whether there has been any lack of due process, transparency or good faith in the Respondent’s part in relation to the decision.

24. The relevant regulatory framework is set out in the Respondent’s reply as including the Staff Regulations and Rules of the United Nations and UN Women’s Legal Policy for Addressing Non-compliance with UN Standards of Conduct (“the Legal Policy”). It is as follows:

a. Staff rule 10.4(a) states 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. Administrative leave may continue until the completion of the disciplinary process”;

b. Under paragraph 5.1.5(a) of the Legal Policy, staff members can be placed on administrative leave at any time from the moment allegations of wrongdoing are reported or detected, pending or during an investigation and until the completion of the disciplinary process; and

c. Staff rule 10.4(b) and paragraph 5.1.5(b), (g) and (h) of the Legal Policy set out the conditions for placement of staff members on ALWFP including that staff members must be given a written statement of the reason(s) for such leave and its probable duration.

25. The Tribunal finds that the Respondent has complied with every aspect of the regulatory framework. Specifically, regarding the complaint that the Applicant was not provided with details of the allegations that led to the investigation, there is no requirement for such disclosure when informing a staff member that they will be placed on leave with pay at the initial stage of an investigation. This differs from the circumstances where the decision being made is placement on leave without pay.

26. All that the Respondent was required to disclose was the reason for the decision. This was sufficiently explained by indicating that the Applicant was subject to allegations of harassment and abuse of authority. The Applicant was not entitled to receive information on the identity of complainants or the nature of the allegations. There is logic to the Respondent's contention that in addition to this not being a requirement under the regulatory framework, the premature provision of such information could interfere with the investigative process.

27. The Applicant further contends that he should have been given an explanation as to why his absence from the duty station was required. Paragraph 5.1.5(g) of the Legal Policy mandates that staff members be informed of the reason for being placed on administrative leave. This must be read in the context of para. 5.1.5(b), which sets out the contemplated cases where a decision can be made to place on ALWFP a staff member being investigated. Hence it should suffice, as was done in this case, to specify in the decision letter one or more of these contemplated cases as the reason for the decision.

28. The reasons stated in the decision letter in this case were that:

a. Due to the seriousness and the nature of the allegations against the Applicant, the conduct in question and/or his continued presence on UN Women premises posed or may have posed a threat to the Organization's interest; and

b. The Applicant's continued presence at the office could negatively impact the preservation of a harmonious work environment and there was a risk of a repetition or continuation of the alleged misconduct.

29. These clearly fall within the contemplated cases in para. 5.1.5 (b), which justify a decision to place an investigated subject on ALWFP. In addition to the foregoing, the Respondent explained in the decision letter that consideration was given to a re-assignment as an alternate to leave. Thus, there was compliance with para. 5.1.5 (h). However, there was no alternate position to which the Applicant could be assigned within his duty station because he was the Head of Office. No further explanation was required at that initial stage.

30. The Legal Policy provides at para. 5.2.1(a) for investigations that may follow once allegations of misconduct have been received. In the investigations, the rights of the person being investigated will be observed in compliance with provisions of the OIOS Investigations Manual and related guidance materials.

31. There was no requirement that the investigation be continued after the Applicant's resignation (para. 5.2.2(a) of the Legal Policy). Despite this, the Respondent continued in good faith with the investigation. This included interviewing the Applicant and thereby sharing with him the nature of the complaints and giving him an opportunity to respond. It is unfortunate that the investigation appears to have been unduly prolonged with no conclusion yet reached. However, that in itself does not reflect bad faith in making the contested decision.

32. Overall, there is no indication that the Respondent acted other than in full compliance with the regulatory framework and in good faith in decisions made to place the Applicant on ALWFP for the commencement of the investigation into his conduct.

*Was the decision tainted by extraneous factors?*

33. As to extraneous factors, the Applicant alleges that these included retaliatory motivation for having challenged prior non-selection decisions and an improper intention to silence him because he had looked into claims made by a person who he considered to be a whistle-blower. The contentions overall are based solely on the Applicant's belief and as such appear to be speculative. No evidence has been presented to substantiate the alleged improper motives.

34. The Respondent, on the other hand, has presented evidence, including the redacted transcript of the interview which was disclosed to the Applicant. The evidence reveals that the Respondent acted in a rational manner as it is clear, from the interview transcript, that the complaints relate to very serious allegations about the Applicant's alleged mistreatment of those under his supervision and other concerns regarding his disclosures of confidential information.

35. Although at the time of filing this application, in June 2019, the Applicant may not have had specific details about the complainants and allegations, these were made clear to him in September 2019 when he was interviewed. The redacted version of the interview was filed and disclosed to the Applicant in the instant proceedings. It is clear from the transcript of the interview that the Applicant knew the details of misconduct allegations being investigated.

36. The Applicant further contends that the decision to place him on ALWFP was a disguised disciplinary measure. This is not borne out by the terms of the decision letter. In fact, the letter specifically stated that the decision was an administrative measure and not a disciplinary one, taken without prejudice to the Applicant's rights. Additionally, the decision was expressly subject to review so the Applicant was entitled to expect there could be a possible re-consideration.



37. The fact that even the decision to investigate is not “an accusation” is expressly provided for in the Legal Policy at para. 5.2.1(c). It follows that ALWFP pending conclusion of an investigation and before any finding of misconduct has been made, is neither a punishment nor a disciplinary measure as alleged by the Applicant.

38. Another aspect of the Applicant’s allegation that there were improper motives is that he believes he was differently treated *vis-a-vis* others who were being investigated. The view is expressed that those that were closest to the decision makers were not sent on administrative leave. Without more, this contention is too speculative to amount to convincing evidence. The Applicant has not shown that the matters being investigated concerning others involved similar instances of harassment and abuse of authority.

39. The Applicant has failed to discharge his burden of proof in rebutting the presumption of regularity in the Respondent’s decision *per se* to place him on ALWFP. The question whether that decision, examined in the context of many other prior actions by the Respondent, can be considered a constructive dismissal will now be considered.

*Did the decision amount to constructive dismissal?*

40. UNAT Jurisprudence has defined the limits within which a staff member who resigns can successfully argue that he has been constructively dismissed and seek remedies on that basis (see *Balestrieri* 2010-UNAT-41, para. 24; *Koda* 2011-UNAT-130, para. 36.). In *Kalil* 2015-UNAT-580, the Appeals Tribunal addressed how a staff member can meet the burden of proving that his resignation was a dismissal by explaining as follows (emphasis added):

65. The Appeals Tribunal in *Koda* held that “in a case of alleged constructive termination, the actions of the employer must be such that **a reasonable person would believe that the employer was ‘marching them to the door’**”. In such circumstances, although there has been no actual dismissal, the treatment is sufficiently bad to the extent that it **usually creates a hostile working environment** such that **the resignation of the employee is not considered to be**

**voluntary**; it is in effect a termination and the employee is entitled to regard himself as having been dismissed.

41. In the instant case, the Applicant has described several actions by the Respondent which he contends cumulatively amount to “intentional marginalization and retaliation”. He contends that based on these actions he was constructively dismissed and as such his resignation was not voluntary. However, on an examination of these actions it is clear that none of them either individually or taken together could lead a reasonable person to the view that the employer was “marching [him] to the door.”

42. The first action that appears to have been of concern to the Applicant was the withdrawal of a request for his accreditation as UN Women Representative for Tanzania on 28 October 2016. However, if this action was viewed as irregular, the Applicant’s options for seeking redress included making a request for management evaluation. There is no indication that that was done. Instead, in July 2017, the Applicant accepted a two-year fixed-term appointment at the same level in Albania.

43. Prior to and during his assignment in Albania, the Applicant continued to apply for alternate UN Women positions. He did so because he viewed the Albania posting as less than ideal, since he heard there were plans for abolition of the post. He applied for the post of Regional Director for Europe and CIS (“Regional Director”) when it was advertised on two occasions.

44. He received information regarding possible adverse consideration of his application based on discriminatory treatment. The discrimination was said to be because a woman was preferred. He later heard that the selection process had been cancelled, and finally on 20 July 2018 that he was not selected. Instead a female candidate, was selected. She was the Applicant’s supervisor and had been acting in the position. The Applicant was, earlier on in 2017, offered an opportunity in Palestine as Special Representative, but heard nothing further of the offer.

45. All these non-selection concerns were considered by the Applicant to be irregular rejections, which he contested. There are two pending cases before the Tribunal concerning these challenges.

46. There is nothing in the non-selection decisions which can be construed as the employer marching the Applicant to the door. This is clear as in the midst of the challenges that arose, the Respondent engaged the Applicant on a fixed-term appointment at the same level for two years.

47. The Respondent was not encouraging the Applicant to leave the Organization. He rather sought to ensure that the Applicant remained as a contracted staff member. The Tribunal is not persuaded by the suggestion that the Applicant resigned because of the non-selection decisions, particularly as he had embarked on the appropriate course of contesting the decisions. He was entitled to continue working for the Organization while awaiting the Tribunal's determinations, which could have resulted in the non-selection decisions being rescinded.

48. Another action complained of by the Applicant is that his supervisor, the acting Regional Director, refused, in December 2017, to release him from the Albania posting to take up a six-month detail assignment in the same post of Regional Director. There is no indication that he contested that decision although he was entitled to do so.

49. Further, the Applicant did not report this as a case where he was subjected to harassment or abuse of authority by his supervisor. Accordingly, this too cannot be considered an action to be counted as leading towards a justified resignation on grounds of being constructively dismissed. The Applicant had options to contest this other than resigning.

50. Other than the non-selection issues, the Applicant's complaint as to a cumulative pattern of actions by the Respondent that forced him to resign relates to an investigation into the Albania duty station which was ongoing when he assumed duties in July 2017. The investigation was being conducted by the United Nations Development Programme ("UNDP"). There is no indication as to the Applicant's official role in such an investigation. In his application he notes that several persons, including his supervisor, were under investigation.

51. The Applicant took issue that his supervisor was not placed on administrative leave while being investigated. This is cited as an example of differential treatment, which was one of the reasons he felt forced to resign immediately when he was told that he was placed on ALWFP. Whilst this is an appropriate consideration in determining whether the decision to place the Applicant on leave was fair, it is difficult to see how this justifies his immediate resignation. The Applicant was entitled to continue receiving his salary and benefits while awaiting a determination as to whether the administrative leave decision was justified and or a full determination whether he had committed any misconduct.

52. Finally, the last straw for the Applicant appears to have been his view that the decision to place him on ALWFP was intended to silence him in relation to the pre-existing investigation into the duty station. He came to this conclusion because from December 2018 to February 2019, around a month before he was informed of the contested decision, there was correspondence reflecting his concerns about what he perceived to be potential retaliatory measures against a person he described as a whistle-blower.

53. The Applicant's case is that the decision to place him on ALWFP was therefore an action taken with improper motives; that is, to silence him. He viewed this as part of a cumulative history of actions which led him to resign.

54. Here too, the Applicant was entitled to make a report of harassment and abuse of authority based on his concerns and await due process in that regard. He was also entitled to appeal the decision to place him on administrative leave which he did, but there was no need to do so simultaneously with resigning.

55. The Applicant's resignation was a voluntary but hasty and reactionary decision. This was not a constructive dismissal.

*The remaining two issues of mootness and remedies*

56. Even if the Applicant had succeeded in proving either that the process applied was improper or that the contested decision was motivated by extraneous factors, there would be no practical effect in rescinding the decision.

57. The Applicant had removed himself from the Organization and as such the remedy of discontinuing the administrative leave could not be practically implemented.

58. His resignation has rendered the appeal moot. For this reason and on the merits, there is no basis for remedies to be awarded.

### **Conclusion**

59. The Applicant failed to prove that the decision to place him on ALWFP did not comply with the regulatory framework. Further, he has not rebutted the presumption of regularity by proving that any extraneous factors or improper motives led to the decision. The application, which therefore fails on the merits, had also been rendered moot by his resignation which was not a constructive dismissal.

60. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 15<sup>th</sup> day of April 2021

Entered in the Register on this 15<sup>th</sup> day of April 2021

*(Signed)*

René M. Vargas M., Registrar, Geneva