



Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION
AND
ON REQUEST FOR ANONYMITY**

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Stephen Margetts, CIRS/ALD/OHR, UN Secretariat

Introduction

1. By application filed on 25 January 2022, the Applicant, a staff member of the United Nations Interim Administration in Kosovo (“UNMIK”), requests suspension of action, pending management evaluation, of the decision to place her on administrative leave with pay (“ALWP”).
2. On 26 January 2022, the present case was assigned to the undersigned Judge.
3. On the same day, the application for suspension of action was served on the Respondent, who filed his reply on 28 January 2022.

Facts

4. The Applicant has served the United Nations for approximately 22 years and most recently as Chief of Mission Support, UNMIK.
5. On 21 October 2019, the Investigations Division of the Office of Internal Oversight Services (“OIOS”) received a report of possible prohibited conduct implicating the Applicant. Specifically, it was reported that the Applicant had:
 - a. Harassed staff members at UNMIK by making sexually suggestive and inappropriate comments;
 - b. Bullied staff members by making them do private errands for her; and
 - c. Made dishonest travel expense claims.
6. On 4 September 2020, OIOS informed the Applicant that she was the subject of an investigation concerning a report of possible unsatisfactory conduct.
7. On 18 and 22 September 2020, and 8 October 2020, the Applicant was interviewed by OIOS investigators and subsequently sent a detailed response to clarify her answers.

8. On 21 December 2020, the Applicant requested OIOS to investigate the leaks of confidential information following articles published by the *Inner City Press* on 25 January 2020 and 18 December 2020, further noting that together with an article published by the *Inner City Press* on 26 October 2019, they contain “internal information, inaccuracies, and misrepresentations” that had “caused [her] significant embarrassment and public humiliation”.

9. By memorandum dated 29 December 2021, the Assistant Secretary-General, OIOS, informed the Assistant Secretary-General, Office of Human Resources (“OHR”), that OIOS had completed its investigation of the Applicant’s case and referred the matter to OHR for appropriate action.

10. By letter dated 15 January 2022, the Officer-in-Charge, UNMIK, informed the Applicant of the decision of the Special Representative of the Secretary-General, UNMIK (“SRSG/UNMIK”), to place her on ALWP, with effect from receipt of the letter, for three months or until completion of the process, whichever is earlier. The letter outlines the underlying reasons for the Applicant’s placement on ALWP as follows:

a. The Applicant’s continued presence at the office (even if remotely, pursuant to COVID-19 protocols) is highly likely to have a negative impact on the preservation of a harmonious work environment, given her position as Chief of Mission Support and her management responsibilities;

b. There is a high risk of repetition or continuation of the unsatisfactory conduct, given that the allegations of unsatisfactory conduct have been reported on more than one occasion and by a number of UNMIK staff members;

c. There is also a concern that the Applicant’s continued service would create a risk that she could retaliate against individuals protected under ST/SGB/2017/2/Rev. 1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigation), given that OIOS’s investigation entailed interviews with current and/or former UNMIK staff members; and

d. Given the Applicant's high-level position within UNMIK, her continued presence at the office could prejudice the reputation of the Organization.

11. By Interoffice Memorandum dated 17 January 2022, the SRSG/UNMIK informed all UNMIK personnel that the Applicant would be on leave from 17 January 2022.

12. Accordingly, all the Applicant's prior professional commitments were cancelled, including a planned course of study at the Harvard Kennedy School for Executive Leadership.

13. On 24 January 2022, the Applicant requested management evaluation of the contested decision mentioned in para. 1 above.

Parties' contentions

14. The Applicant's primary contentions may be summarized as follows:

a. A decision having continuous legal effect, such as placing a staff member on administrative leave, is only deemed to have been fully implemented when it has been implemented in its entirety and can therefore be suspended;

b. The contested decision is unlawful because:

i. An examination of the reasons put forward in the decision letter reveals that they are generic in nature and unsupported;

ii. The timing of the action is unusual. The contested decision coincides with the arrival of a new SRSG who has little knowledge of the background to this case but acknowledges she is following the advice of the Department of Management Strategy, Policy and Compliance ("DMSPC");

- iii. It is not clear on what basis of delegated authority an OIC conveyed this decision or why it was not done by the SRSG herself, given the absence of urgency; and
 - iv. The Applicant has not been presented with any allegations of misconduct; she has only been notified of an investigation.
- c. The matter is urgent because the implementation of the contested decision is of an on-going nature; and
- d. The contested decision may cause irreparable harm because it appears to pre-judge and prejudice the outcome of all the pending inquiries and seems designed to damage the Applicant's professional standing and reputation.
15. The Respondent's primary contentions may be summarized as follows:
- a. The Applicant has not demonstrated that the contested decision is *prima facie* unlawful. At a minimum, there are reasonable grounds to believe that the Applicant engaged in harassment and intimidation and sexual harassment and as a result:
 - i. The Applicant's presence at the office is highly likely to have a negative impact on the preservation of a harmonious work environment;
 - ii. There is a high risk of repetition of the unsatisfactory conduct;
 - iii. There is a risk of retaliation; and
 - iv. Given the Applicant's high-level position within UNMIK, her continued presence could prejudice the reputation of the Organization.
 - b. There is no urgency in this matter; and
 - c. The Applicant has not shown that she suffers irreparable harm from her placement on ALWP.

Consideration

The Applicant's request for suspension of action

16. Suspension of action during a management evaluation is governed by art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure. The former, which contains almost the same text as the latter, provides in relevant part 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.

17. It follows that for an application for suspension of action to be successful, the following conditions must be met:

- a. The contested decision must have not yet been implemented;
- b. The contested decision appears prima facie to be unlawful;
- c. There is particular urgency in requesting the SOA; and
- d. The implementation of the contested decision would cause irreparable damage.

18. The above-mentioned four requirements are cumulative. In other words, they must all be met for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

Whether the contested decision has been implemented

19. It is well-established jurisprudence that a decision having continuous legal effect, such as one placing a staff member on administrative leave, is only deemed to have been implemented when it has been implemented in its entirety, that is, at the end of the administrative leave (see, e.g., *Erefa* Order No. 2 (NBI/2019);

Calvani UNDT/2009/092; *Gallieny* Order No. 60 (NY/2014); *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014)).

20. The record shows that the Applicant was placed on ALWP with effect from 17 January 2022 for three months or until completion of the disciplinary process, whichever is earlier. As such, the contested decision has not been “fully implemented” on the date of this Order.

21. Accordingly, the Tribunal finds that the contested decision has not been implemented in the present case.

Whether the contested decision is *prima facie* unlawful

22. The Tribunal recalls that the threshold required in assessing the condition of *prima facie* unlawfulness is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

23. The present case concerns the SRSG/UNMIK’s decision to place the Applicant on ALWP pending a disciplinary process. In this respect, the Tribunal recalls that staff rule 10.4(a) provides 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” and that such leave “may continue until the completion of the disciplinary process”. If a staff member is placed on administrative leave, then s/he shall be “given a written statement of the reason(s) for such leave and its probable duration” pursuant to staff rule 10.4(b).

24. The circumstances under which a staff member may be placed on ALWP are specified in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process):

11.3 The decision to place a staff member on administrative leave with pay may be made by the authorized official at any time following a report of suspected unsatisfactory conduct and following the authorized official's determination that at least one of the following circumstances is met:

(a) The staff member is unable to continue effectively performing the staff member's functions, given the nature of those functions;

(b) Continued service by the staff member would create a risk that the staff member could destroy, conceal or otherwise tamper with potential evidence, or interfere in any way with the investigation or disciplinary process, including by retaliating against individuals protected under ST/SGB/2017/2 or intimidating a witness;

(c) The continued presence of the staff member on the Organization's premises or at the duty station could constitute a security or financial risk to the Organization and/or its personnel, or could otherwise prejudice the interests or reputation of the Organization;

(d) The staff member's continued presence at the office could have a negative impact on the preservation of a harmonious work environment;

(e) There is a risk of repetition or continuation of the unsatisfactory conduct.

25. Having reviewed the parties' submissions, the Tribunal finds that the Applicant fails to demonstrate that the contested decision is unlawful for the reasons outlined below.

26. First, contrary to the Applicant's assertion, the reasons for her placement on ALWP put forward in the decision letter were not generic or unsupported. Indeed, the evidence on record shows that at the end of its investigation, OIOS found that there were reasonable grounds to conclude that the Applicant had engaged in unsatisfactory conduct, including harassment of and abuse of authority against staff

members in UNMIK. In light of this, and given the Applicant's high-level position within UNMIK, the Organization, as set forth in the decision letter, determined that:

- a. The Applicant's presence at office was highly likely to have a negative impact on the preservation of a harmonious work environment;
- b. There was a risk of retaliation; and
- c. The Applicant's continued presence could prejudice the reputation of the Organization.

27. Furthermore, considering that the allegations of unsatisfactory conduct have been reported on more than one occasion and by a number of UNMIK staff members, the Organization also included in its decision letter its view that there was a high risk of repetition or continuation of the unsatisfactory conduct.

28. Accordingly, the Tribunal finds that the Organization has met its obligations contained in staff rule 10.4(b) and art. 11.3 of the ST/AI/2017/1 to provide the Applicant with a written statement of the reasons for her placement of ALWP.

29. Second, in relation to the timing of the contested decision, the Tribunal recalls that staff rule 10.4(a) allows the Organization to place a staff member on ALWP "at any time after an allegation of misconduct and pending the completion of a disciplinary process".

30. In the present case, the SRSG/UNMIK, pursuant to staff rule 10.4, made the contested decision on 15 January 2022, following the conclusion of the investigation. Therefore, the Applicant's argument that the contested decision coincides with the arrival of a new SRSG/UNMIK is purely speculative and irrelevant to determining the lawfulness of the contested decision.

31. Third, regarding the authority to place staff members on ALWP, the Tribunal notes that it has been "delegated to heads of offices away from Headquarters, in respect of their staff" pursuant to art. 2 of the Office of Human Resources Management's Guidelines for placement of staff on administrative leave with pay pending investigation and the disciplinary process. There is, however, no

requirement that the decision-maker convey the decision himself/herself. In the present case, the SRSG/UNMIK, as head of UNMIK, made the contested decision and instructed the OIC to convey the decision to the Applicant. The Tribunal is not satisfied that the fact that an OIC conveyed the contested decision would have any bearing on the lawfulness of the decision itself. Therefore, the Tribunal dismisses the Applicant's arguments in this respect.

32. Finally, the Tribunal finds no merit in the Applicant's argument that she has not been presented with any allegations of misconduct. The evidence on record shows that on 4 September 2020, OIOS informed the Applicant of a summary of allegations of misconduct while notifying her of the investigation. Moreover, in deciding to place the Applicant on ALWP, the Organization had no obligation to share with her the detailed allegations or evidence substantiating complaints filed against her (see *Applicant* Order No. 197 (NY/2020), para. 19).

33. In addition, the Tribunal finds nothing on the record to suggest that the SRSG/UNMIK abused her discretion in arriving at the decision that the Applicant seeks to have suspended. In this respect, the Tribunal recalls that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi* 2010-UNAT-084, para. 40).

34. In light of the foregoing, the Tribunal finds that the contested decision is not *prima facie* unlawful, and that the Applicant's case does not meet the requirement of *prima facie* unlawfulness.

35. Consequently, given the cumulative nature of the requirements to grant an application for suspension of action, the Tribunal does not consider it necessary to examine the remaining two conditions, namely urgency and irreparable damage.

The Applicant's request for anonymity

36. The Applicant requests the Tribunal to anonymize her name with respect to the publication of its decision in this matter on grounds of the highly prejudicial nature of the prior reports in the media and the possible pejorative effects of this case on the professional reputation of the Applicant.

37. In his reply, the Respondent does not object to the Applicant's request for anonymity.

38. The Tribunal notes that art. 11.6 of its Statute states that “[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.”

39. It is well-settled law that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality” (see *Buff* 2016-UNAT-639, para. 21). Therefore, any deviation from the principles of transparency and accountability can only be granted if there are exceptional circumstances (see *Buff*).

40. Having regard to the circumstances invoked by the Applicant, considering the sensitive nature of the allegations filed against the Applicant and the fact that investigations on allegations of misconduct are confidential, the Tribunal finds it appropriate to grant the Applicant's request for anonymity.

Conclusion

41. In view of the foregoing, IT IS ORDERED THAT:

- a. The application for suspension of action pending management evaluation is rejected; and

b. The Applicant's request for anonymity is granted. Her name shall be anonymized in the Tribunal's present Order.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 2nd day of February 2022

Entered in the Register on this 2nd day of February 2022

(Signed)

René M. Vargas M., Registrar, Geneva