



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

SAMARASINHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Angela Arroyo, UNDP

Introduction

1. By application filed on 24 January 2024, the Applicant, a staff member of the United Nations Development Programme (“UNDP”), requests suspension of action, pending management evaluation, of the decision to place him on administrative leave without pay (“ALWOP”).
2. On 25 January 2024, the Applicant filed a motion for anonymity in connection with his above-mentioned application.
3. On 26 January 2024, the Respondent filed his reply to the application and responded to the Applicant’s motion.
4. For the reasons set out below, the application for suspension of action is rejected.

Facts

5. The Applicant joined UNDP on 6 March 2001 and currently holds a UNDP permanent appointment. In November 2018, UNDP seconded the Applicant to the UN Secretariat to serve as Resident Coordinator to Fiji (D-1 level), Solomon Islands, Tonga, Tuvalu and Vanuatu.
6. From 11 May 2023 to 24 November 2023, the Applicant was placed on administrative leave with pay pending an investigation into allegations of sexual harassment, harassment and abuse of authority against him.
7. On 24 November 2023, the Applicant’s secondment with the UN Secretariat ended and he returned to UNDP.
8. By letter dated 1 December 2023, the Assistant Secretary-General, Assistant Administrator and Director, Bureau for Management Services (“ASG/BMS”), informed the Applicant of the decision to place him on ALWOP from 1 December 2023 through 24 February 2024.
9. On 14 January 2024, the Applicant requested management evaluation of the 1 December 2023 decision.

Consideration

10. The Tribunal will first address the application for suspension of action and then the Applicant's motion for anonymity.

The application for suspension of action

11. Under art. 2.2 of the Dispute Tribunal's Statute and art. 13.1 of the Rules of Procedure, the Tribunal 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 case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can only suspend any contested administrative decision if all three requirements have been met, and all three prongs of the test must be demonstrated by the Applicant for an application for the suspension of action to succeed.

Whether the contested decision has been implemented

12. 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 *Applicant* Order No. 15 (GVA/2022); *Erefa* Order No. 2 (NBI/2019); *Calvani* UNDT/2009/092; *Galliery* Order No. 60 (NY/2014); *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014)).

13. In the present case, the record shows that the Applicant was placed on ALWOP from 1 December 2023 through 24 February 2024. As such, the contested decision has not yet been "fully implemented".

Whether the contested decision is *prima facie* unlawful

14. The Tribunal recalls that the threshold required in assessing this condition 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)).

15. The present case concerns the decision of the ASG/BMS to place the Applicant on ALWOP pending a disciplinary process.

16. The Applicant claims that the UNDP promulgated issuance is inconsistent with staff rule 10.4, which only permits placement on ALWOP in circumstances of sexual exploitation or abuse or when “exceptional circumstances” warrant such placement. However, in his view, this is not the case.

17. He also argues that the determination that the existence of a preponderance of evidence that the staff member’s conduct will lead to separation or dismissal cannot be an “exceptional circumstance” under staff rule 10.4(c)(ii) because according to the UNDP annual reports on disciplinary measures for the years 2016-2020, 60% of the staff disciplined were ultimately separated or dismissed.

18. The Respondent argues that contrary to the Applicant’s claim, UNDP rules regarding ALWOP are consistent with Staff Rule 10.4(c) on when ALWOP may be applied and reflect a proper use of the discretion of UNDP.

19. In this respect, staff rule 10.4 on administrative leave pending investigation and the disciplinary process provides as follows (emphasis added):

(a) A staff member may be placed on administrative leave, under conditions established 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) 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.

(c) Administrative leave shall be with full pay *except (i) in cases where there are reasonable grounds to believe that a staff member engaged in sexual exploitation and/or sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay, or (ii) when the Secretary-General decides that exceptional circumstances exist which warrant the*

placement of a staff member on administrative leave with partial pay or without pay.

20. Para. 42 of the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct provides that ALWOP may be contemplated in cases where (emphasis added):

(a) On the basis of the information before [the ASG/BMS], there is preponderance of evidence that the staff member engaged in the alleged conduct and the alleged misconduct is of such gravity that it would, if established, warrant separation or dismissal under Staff Rule 10.2 (a) (viii) or (ix);

(b) There is prima facie evidence of allegations of sexual exploitation and abuse.

21. The Tribunal recalls that ALWOP is an interim measure that may be applied while the investigation or the disciplinary process is still ongoing. As such, the placement on ALWOP is based on the facts available at the relevant time the decision is made.

22. According to the UNDP Legal Framework, a staff member may be placed on ALWOP only when it is determined by “preponderance of evidence”, even during the interim stage of the disciplinary process, that a staff member engaged in the alleged misconduct and that said misconduct is of such gravity that it would, if established, warrant separation or dismissal. A determination in that sense shall be done on a case-by-case basis and considering the exceptional circumstances of a particular case.

23. Consequently, the Tribunal finds that the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct is not inconsistent with staff rule 10.4.

24. In his application, the Applicant also alleges that the ASG/BMS did not consider either the evidence against the Applicant or the matters subject to investigation. The ASG/BMS rather indicated that her decision was taken not under her own assessment of the evidence but that it results instead from OIOS having

told her that a preponderance of evidence exists and that misconduct, if proven, would warrant separation or dismissal.

25. In this respect, the Tribunal notes that in the decision letter of 1 December 2023, the ASG/BMS referred to i) the reasons provided in her previous letter of 24 November 2023, and ii) the OIOS confirmation that there was a preponderance of evidence that the Applicant engaged in the alleged misconduct which is of such gravity that it would, if established, warrant separation or dismissal. The letter dated 24 November 2023 reads, in its relevant part, as follows:

The reason for this decision is that the OIOS investigation is ongoing, and the existence of these allegations has been reported in a number of media outlets. Given the seriousness of the allegations ... there is a significant risk that your return to active service could prejudice the interest or reputation of the Organization. Further, your seniority as a staff member means there is a risk that you will not be able to effectively perform functions commensurate with your status. In addition, in view of your seniority, the number and seriousness of the allegations could have a negative impact [in] any work environment to which you may be assigned.

26. While it is true that the record does not show that the ASG/BMS made her own assessment of the evidence, by referring to the OIOS confirmation that there was a preponderance of evidence, it is generally understood that the ASG/BMS endorsed said assessment. As such, the Applicant's argument is rejected.

27. Having said the above and considering that the burden of proof is on the Applicant, the Tribunal finds that the evidence he produced does not serve to prove, at this stage, that the decision is *prima facie* unlawful.

28. In light of the foregoing, the Tribunal deems that the contested decision is not *prima facie* unlawful.

29. 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 motion for anonymity

30. In his request for anonymity, the Applicant claims that no misconduct has yet been proven and no investigation into exculpatory evidence has taken place. He asserts that the publication of a judgment bearing his name carries a huge risk of reputational damage in circumstances where his name may yet be cleared and when no inquiry into exculpatory evidence has taken place. The Applicant indicates that while significant reporting of the allegations against him has already taken place, including in the press, the publication of his name in a decision will further prejudice him.

31. The Respondent in his reply deferred to the Tribunal's discretion on whether the Applicant's request for anonymity in the present proceedings is warranted.

32. In this respect, art. 11.6 of the Tribunal's 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".

33. It is well-settled case 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).

34. The Tribunal also recalls that in its resolutions 76/242 and 77/260, adopted on 24 December 2021 and 30 December 2022 respectively, the General Assembly reaffirmed the principle of transparency to ensure a strong culture of accountability throughout the Secretariat.

35. It follows that the internal justice system is governed by the principles of transparency and accountability. A deviation from these principles by means of anonymization requires an applicant to meet a high threshold for such a request to be granted.

36. In the instant case, the Tribunal finds that the Applicant's arguments concerning reputational damage are not sufficient reasons for it to deviate from the principles of transparency and accountability. Therefore, the Applicant's motion stands to be denied.

Conclusion

37. In view of the foregoing, the Tribunal DECIDES to reject the application for suspension of action pending management evaluation as well as the Applicant's motion on anonymity.

(Signed)

Judge Sun Xiangzhuang

Dated this 31st day of January 2024

Entered in the Register on this 31st day of January 2024.

(Signed)

René M. Vargas M., Registrar, Geneva