



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2024/041
Order No.: 134 (GVA/2024)
Date: 1 November 2024
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

SAMARASINHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION
FOR INTERIM MEASURES**

Counsel for Applicant:

Manuel Calzada

Counsel for Respondent:

Elizabeth Gall, UNDP

Introduction

1. The Applicant, a staff member of the United Nations Development Fund (“UNDP”), seeks suspension of the 20 August 2024 decision to extend his Administrative Leave Without Pay (“ALWOP”) from 25 August to 24 November 2024 through a suspension of action during the proceedings, also known as a motion for interim measures, under art. 14 of the Tribunal’s Rules of Procedure (“RoP”).

2. For the reasons set out below, the Applicant’s motion for interim measures is denied.

Facts

3. The Applicant joined UNDP on 6 March 2001. From 1 January 2019, UNDP seconded the Applicant to the UN Secretariat to serve as Resident Coordinator to Fiji, Solomon Islands, Tonga, Tuvalu and Vanuatu at the D-1 level.

4. From 11 May 2023 to 24 November 2023, the Applicant was placed on administrative leave with pay (“ALWP”) pending an investigation into allegations of sexual harassment, harassment and abuse of authority against him.

5. On 24 November 2023, the Applicant’s secondment with the UN Secretariat ended and he returned to UNDP.

6. 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 ALWP from 1 December 2023 through 24 February 2024. The reason given was said to be the same as in the 24 November 2023 letter placing the Applicant on ALWP and in addition that:

OIOS has confirmed that there is preponderance of evidence that you 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).

7. On 24 January 2024, the Applicant filed an application for suspension of action pending management evaluation against the 1 December 2023 decision to place him on ALWOP. By Order No. 9 (GVA/2024), dated 31 January 2024, the Tribunal rejected the Applicant's request based on its finding that the contested decision was not *prima facie* unlawful. The Tribunal stated the following (emphasis in bold added):

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.

8. On 9 May 2024, the Applicant filed an application on the merits contesting the 1 December 2023 decision to place him on ALWOP. The Tribunal registered it under Case No. UNDT/GVA/2024/015.

9. The Applicant's placement on ALWOP was extended twice: first, from 25 February to 24 May 2024, and then from 25 May to 24 August 2024. The Applicant did not challenge any of these extensions.

10. On 31 May 2024, OIOS provided the Applicant with a copy of its draft investigation report and requested him to provide comments and countervailing evidence. The Applicant provided his comments on the draft report in June 2024.

11. By letter dated 20 August 2024, the Applicant was informed of the decision to extend his placement on ALWOP from 25 August to 24 November 2024. The reason for the decision that the ASG/BMS stated was the following:

I consider it appropriate to extend your [ALWOP] until 24 November 2024 for the reasons already expressed in my previous letters, noting of course that the review of your case is on-going.

12. On 9 September 2024, the Applicant filed a new request for management evaluation of the decision of 20 August 2024, which the Applicant updated on 9 October 2024.

13. On 10 September 2024, the Applicant filed, as a new case, a “motion for interim measures pending management evaluation”. The filing was registered under Case No. UNDT/GVA/2024/037.

14. At the request of the Tribunal, the Applicant clarified that his intention was instead to file said motion in Case No. UNDT/GVA/2024/015, which he did on 13 September 2024. In it, the Applicant requested the Tribunal to order the suspension of the 20 August 2024 decision extending his placement on ALWOP.

15. On 16 September 2024, the Applicant filed a motion to withdraw Case No. UNDT/GVA/2024/037, which the Tribunal closed by Order No. 109 (GVA/2024).

16. By Order No. 115 (GVA/2024) of 23 September 2024, the Tribunal rejected the Applicant’s motion for interim measures seeking suspension of the 20 August 2024 decision to extend his placement on ALWOP from 25 August to 24 November 2024. The reason for the rejection was the following:

21. The Tribunal recalls that in his pending application [(Case No. UNDT/GVA/2024/015)], the Applicant contests the 1 December 2023 decision to place him on ALWOP. The Tribunal assessed the lawfulness of this decision in its consideration of the Applicant’s 24 January 2024 application for suspension of action. The Tribunal found that the contested decision was not *prima facie* unlawful.

22. Having considered the Applicant’s arguments in his motion for interim measures, the Tribunal finds no new element supporting a finding of *prima facie* unlawfulness of the 1 December 2023 decision.

17. In Order No. 115 (GVA/2024), the Tribunal indicated, however, that whether:

[T]he decision-maker failed to consider all the evidence before him (e.g., the investigation report and the Applicant's response to it) when deciding to extend his placement on ALWOP ... could be relevant, at best, in an examination of the 20 August 2024 decision extending the Applicant's placement on ALWOP.

18. On 18 October 2024, the Applicant filed an application for suspension of action pending management evaluation concerning the above-mentioned 20 August 2024 decision extending his placement on ALWOP. The Tribunal registered it under Case No. UNDT/GVA/2024/040. The Applicant withdrew this application on 23 October 2024 as the management evaluation was completed on 17 October 2024. The Tribunal consequently closed the case in question by Order No. 132 (GVA/2024).

19. On 22 October 2024, the Applicant filed an application on the merits challenging the 20 August 2024 decision extending his placement on ALWOP. The Tribunal registered it under Case No. UNDT/GVA/2024/041.

20. On 24 October 2024, the Applicant filed the motion for interim measures referred to in para. 1 above in Case No. UNDT/GVA/2024/041.

21. On 29 October 2024, the Respondent filed his response, and on 31 October 2024, the Applicant filed a rejoinder.

Consideration

Suspension of action during proceedings – Interim measures

22. Interim measures during the proceedings are governed by art. 10.2 of the Tribunal's Statute and art. 14.1 of its RoP. The latter, which replicates almost completely the former, provides that:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to

suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

23. For the Tribunal to order interim measures, several cumulative conditions set forth in the above-mentioned provisions must be met (see *Nadeau* Order No. 116 (NY/2015), *Awomeyi* Order No. 165 (GVA/2015), *Kazagic* Order No. 20 (GVA/2015), *Auda* Order No. 156 (GVA/2016) and *Harvey* Order No. 10 (GVA/2020):

- a. The motion for interim measures must have been filed in connection with a pending application on the merits before the Tribunal and at any time during the proceedings;
- b. The administrative decision contested in the application on the merits appears *prima facie* to be unlawful, relates to a case of particular urgency, and its implementation would cause irreparable damage; and
- c. The requested temporary relief must not concern appointment, promotion or termination.

24. The Applicant filed his motion for interim measures into a pending application (Case No. UNDT/GVA/2024/041). The cumulative condition referred to in para. 23.a above is met.

25. The condition referred to in para. 23.b above, requires that the decision contested in the pending application on the merits meet three other cumulative conditions, namely *prima facie* unlawfulness, urgency, and causing irreparable damage.

Prima facie unlawfulness

26. 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)).

27. The Applicant asserts that each extension of his ALWOP is a separate decision that must be justified based on all the information available when the decision is made. He argues that the ASG/BMS failed to assess the evidence on record, including the OIOS investigation report and his comments in deciding to extend his ALWOP. The Applicant therefore claims that, according to the 20 August 2024 letter, the ASG/BMS relied solely on the information in her possession on 1 December 2023 when deciding on 20 August 2024 to extend his ALWOP.

28. The Applicant also claims that a considered review of all the evidence, including documents and witnesses proposed by him, would not meet the threshold of clear and convincing evidence that would lead to his separation or dismissal.

29. The Respondent argues that the contested decision is lawful. He claims that the information before the ASG/BMS at the time of the contested decision was not the same as that before her when she took the 1 December 2023 ALWOP decision. He asserts that as indicated in the response to the Applicant's updated request for management evaluation (see para. 12 above), the contested decision was taken after considering the OIOS draft investigation report, which included relevant evidence and the Applicant's response to the allegations, including his comments.

30. The Respondent asserts that the evidence contained in the report is sufficient to demonstrate by a preponderance of evidence that the Applicant engaged in multiple forms of misconduct, including sexual harassment, harassment, misuse of office, abuse of authority, and interference with an OIOS investigation.

31. Furthermore, the Respondent argues that, contrary to the Applicant's assertion, the ASG/BMS did not apply the wrong evidentiary standard. He points out that the standard to be applied to extend the Applicant's ALWOP is "preponderance of evidence" under staff rule 10.4(c)(ii) and para. 42(a) of the Legal Framework of UNDP.

32. The Applicant's motion for interim measures under examination is made in the context of a series of applications arising from decisions taken because of allegations of misconduct against the Applicant. The Tribunal decisively concluded by Order No. 9 (GVA/2024) that the endorsement of the ASG/BMS of the assessments of OIOS duly informed the view that there was a preponderance of evidence that the Applicant engaged in misconduct of the nature alleged.

33. The alleged misconduct involved sexual harassment and sexual abuse. Such misconduct is recognized in the regulatory framework as of such gravity that it provides an exceptional basis for placing a staff member on ALWOP pending the conclusion of the investigation.

34. The Applicant now contends that based on new information available, there is no longer any basis for a finding that there is a preponderance of evidence that he engaged in the said misconduct.

35. The new information referred to by the Applicant is the OIOS investigation report dated 31 May 2024, which was in the possession of UNDP by 20 August 2024 when his placement on ALWOP was extended. He also contends that his exculpatory responses to the report were not considered.

36. As evidence of his point that the ASG/BMS was in possession of the new information and failed to consider it in deciding to extend his ALWOP on 20 August 2024, the Applicant relies on a statement in the 17 October 2024 management evaluation response (see para. 18 above) mentioning that UNDP was in possession of the report.

37. However, the Respondent's response to the Applicant's motion for interim measures makes it clear that it was only on 8 October 2024 that the UNDP Office of Audit and Investigations ("OAI") transmitted the investigation report to the decision-maker, namely the BMS Office of Legal Services (BMS/OLS). Prior to that date, OAI had custody of the OIOS report for review purposes. In those circumstances, the decision to extend the ALWOP was genuinely and reasonably based on the reasons expressed in previous letters.

38. In any event, the Applicant's point of view that the final OIOS report, together with his responses, should have been treated as exculpatory on a preponderance of the evidence is ill-founded. He expressed the view that the initial allegations against him arose from the complaints of two persons and that those complaints were not addressed in the final report. This is of no exculpatory value. On a reading of the report, it could reasonably be concluded that there is a preponderance of evidence of even more grave misconduct than was initially being investigated.

39. As summarized by the Respondent, the OIOS report considered the Applicant's responses during interviews. It contained findings that the Applicant had engaged in the following actions:

- a. With respect to six anonymous individuals, then located in two duty stations, one or more of the following acts: unwelcome actions that made the victim(s) feel belittled or uncomfortable, communications of a sexual nature, and sexual acts inflicted without consent;
- b. Instructing his driver and Executive Assistant to carry out personal errands, and asking his driver to buy marijuana and disobey traffic laws;
- c. Inappropriate behaviour at official functions;
- d. Inappropriately advocating political positions; and
- e. Instructing one victim to delete communications with him shortly after he was placed on ALWP and informed by OIOS that he was the subject of an investigation.

40. In his rejoinder, the Applicant argues that the Respondent's arguments in relation to the lawfulness of the decision are misleading. However, having considered the evidence on record, including the parties' submissions, the OIOS investigation report, and the Applicant's comments to the report, the Tribunal concludes that the ASG/BMS had sufficient grounds on a preponderance of evidence to find that the Applicant engaged in the alleged misconduct, which included pervasive instances of sexual harassment.

41. The fact that the Applicant refers to consensual messaging and attaches screenshots of messages sent from an alleged victim, seeking to prove that there was consensus as to sexual engagement, is not exculpatory on the preponderance of the evidence. There was a sufficient basis in the OIOS investigation report, which was still under review by OAI, that the alleged misconduct by “a senior official, a Resident Coordinator at the D-1 level, is of such gravity that it would, if established, warrant separation or dismissal under [s]taff [r]ule 10.2(a) (viii) or (ix)”, as stated at paragraph 43 of the Respondent’s response to the Applicant’s motion for interim measures.

42. In all the circumstances, the Applicant has failed to establish that the 20 August 2024 decision extending his placement on ALWOP is *prima facie* unlawful.

43. Given the cumulative nature of the conditions required to order interim measures (see para. 23 above), the Tribunal does not find it necessary to examine the remaining conditions, namely urgency, irreparable damage and whether the requested temporary relief concerns appointment, promotion or termination.

Conclusion

44. In view of the foregoing, it is ORDERED THAT the Applicant’s motion for interim measures is denied.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 1st day of November 2024

Entered in the Register on this 1st day of November 2024

(Signed)

René M. Vargas M., Registrar, Geneva