



Before: Judge Agnieszka Klonowiecka-Milart
Registry: Nairobi
Registrar: Abena Kwakye-Berko

ABDALLAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PURSUANT
TO ARTICLE 13 OF THE RULES OF
PROCEDURE**

Counsel for the Applicant:

Michael Brazao, OSLA

Counsel for the Respondent:

Adrien Meubus, ALS/OHRM
Susan Maddox, ALS/OHRM

Notice: This Order has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant holds a permanent appointment with the United Nations. He encumbers the post of a P-3 Finance Officer at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO/the Mission), but is at present temporarily deployed at the P-4 level to the United Nations Operation in Côte d'Ivoire (UNOCI) as the Chief Budget and Finance Officer.

2. On 13 March 2017, the Applicant was informed that he was being placed on Administrative Leave Without Pay (ALWOP) with immediate effect for an initial period of three months. The Office of Internal Oversight Services (OIOS) had, at the same time, commenced an investigation into allegations of sexual abuse.

3. On 31 March 2017, the Applicant sought management evaluation of the decision to place him on ALWOP.

Facts

4. The Applicant entered into the service of the United Nations on 5 December 2005 having successfully competed in the National Competition Recruitment Examination. He was given a Permanent Appointment in December 2007.

5. The Applicant began work in Kinshasa in September 2015. He was installed at the duty station with his wife and three sons.

6. The family hired Ms. L. as their housekeeper in November 2015. Ms. L. and the Applicant's family did not enjoy a good working relationship. On 20 February 2016, Ms. L. stopped showing up for work at the Applicant's residence. The Applicant later learnt that she had taken up a job with another family in the same residential compound.

7. On 19 January 2017, Ms. L filed a complaint against him with the national police and the United Nation's Conduct and Discipline Unit alleging sexual misconduct. According to Ms. L.'s allegations, she began having sexual relations with the Applicant in December 2015, every time his wife was away and he would pay her between USD25 and USD30 on each occasion. She fell pregnant by him as a result of one incident where the Applicant had rendered her drunk and had sex with her without protection.

8. The national authorities of the Democratic Republic of the Congo issued a *Note Verbale* to MONUSCO as formal notification of the complaint on 26 January 2017.

9. The Applicant gave his statements in response to the allegations on 23 and 24 February 2017, suggesting that this was an attempt by the housekeeper at extorting money from him and that she had filed similar allegations against another man in the compound. He was willing to submit to a paternity test once the child is born. He also told the Mission that he had been interviewed by Congolese authorities on 5 and 30 January 2017.

Submissions

Applicant

10. As the impugned decision is one of "ongoing legal effects", the application is receivable.

11. The decision to place the Applicant on Administrative Leave (AL) and on to deprive him of salary during the course of that leave is *prima facie* unlawful.

12. Staff rule 10.4 allows the administration to place a staff member on AL "subject to conditions specified by the Secretary-General". These conditions are

specified in section 4 of ST/AI/371 (Revised disciplinary measures and procedures), as amended, which authorizes ALWOP on a basis of a “danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible”. Reasons invoked by the Respondent do not comply with any of the criteria enunciated in section 4 of ST/AI/371.

13. The mere fact that the Administration is satisfied that there is sufficient *prima facie* evidence of misconduct is not a legal basis for the imposition of AL. By the logic invoked by the administration, every staff member against whom an investigation for misconduct has been initiated would be subject to the imposition of AL.

14. There is no nexus between the allegations that are currently the subject of the Applicant’s pending investigation in Kinshasa and any threat to his UNOCI colleagues. The Respondent has also failed to show how the Applicant’s continued service with UNOCI would pose to a danger to the Organization. Indeed, the Respondent has also ordered the Applicant to remain in Abidjan.

15. The Respondent has not explained how permitting the Applicant to continue his functions as the Chief of the Finance and Budget Office, while a pending investigation into his possible misconduct – for which he enjoys the presumption of innocence – unfolds, poses any risk to the reputation or credibility of the Organization.

16. As to the possibility of the allegations leading to dismissal, if proven: this reason for placing him on AL and ALWOP constitutes an egregious violation of his right to be presumed innocent during the investigative process.

17. Further to these arguments on the *prima facie* unlawfulness of the AL as such, the Applicant submits that, pursuant to staff rule 10.4, the default position when

placing a staff member on leave is that it be with full pay. Placement on AL with partial or no pay is only applicable where there are “exceptional circumstances”. The Respondent has not proven the existence of any “exceptional circumstances” to justify the depriving the Applicant of his salary.

18. The consequence of depriving the Applicant of his salary, on him and his family, makes determination of this matter urgent as it gravely affects his ability to provide for his family’s food, health and shelter.

19. On irreparable harm, the Applicant submits that leaving him without salary and health care coverage indefinitely must be seen as causing irreparable harm as it negatively affects his financial, professional and personal life.

Respondent

20. The Respondent disputes the receivability of this application and argues that, as the impugned decision was implemented on 17 March 2017, this matter is no longer suitable for injunctive relief.

21. The Respondent further contends that the decision to place the Applicant on ALWOP complied with the applicable legal framework as laid out in staff rule 10.4 and related instruments. Existing legislative instruments do not explicitly define “exceptional circumstances” or the parameters of it. A determination of exceptional circumstances therefore lay within the discretionary powers of the Respondent.¹

22. The Respondent submits that “[i]f the serious allegations of sexual exploitation and abuse are substantiated, the Applicant’s service with the Organization would constitute an unacceptable risk to the reputation of the Organization and to the population it serves in a mission setting. Having the staff member serve with the Organization during an investigation into the matter and

¹ Reply, para 27

beyond would adversely affect the effective and credible discharge of the Organization 's mandate to protect local population.”² In addition, the Respondent invokes the gravity of the alleged conduct, which, if proven, would lead to separation or dismissal.³

23. The Respondent stresses that the United Nations operates a zero-tolerance policy in respect of sexual misconduct, abuse and exploitation and that the Respondent has recommended enforcement of system-wide suspension of staff with credible allegations of sexual exploitation and abuse against them.⁴

24. As to the inappropriate standard of proof invoked by the Applicant, the Respondent submits that a plain reading of staff rule 10.4 (a) allows for administrative leave to be imposed on a staff member even where no investigation has yet taken place, which implies a low threshold.⁵

25. The Respondent also submits that the application must fail because the Applicant has not met the tests of urgency and irreparable harm.

Considerations

26. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides, in the relevant part:

1. The Dispute Tribunal shall order a suspension of action 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

² Reply, para. 21.

³ Ibid.

⁴ Ibid., para. 22.

⁵ Ibid., para. 26.

appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.**

27. All three elements of the test must be satisfied before the impugned decision can be stayed. Accordingly, an application for the suspension of action must be adjudicated against the stipulated cumulative test, in that an applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

28. A Tribunal's order granting suspension of action of an administrative decision cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

29. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an applicant to show that there is a judicable issue before the court.⁶

Receivability

30. The Respondent has taken the position that this matter is not receivable before the Tribunal because the decision has already been implemented, as of notification to the Applicant about his placement on ALOWP.

31. The Tribunal recalls that it is established by jurisprudence of the UNDT across its seats⁷, that a decision having continuous legal effect, such as to place 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. This Tribunal holds, moreover, that a decision on withholding entitlements that are

⁶ See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

⁷ *Calvani* UNDT/2009/092; *Galliery* Order No. 060 (NY/2014). *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014).

due periodically takes effect in relation to each installment that is due. As dictated by logic, such decision cannot be deemed “implemented” in relation to installments that are not yet due.

32. The record shows that the Applicant was placed on ALWOP with immediate effect from 17 March 2017 and this state is to be maintained for a period of at least three months, with a possible extension. The effect of the decision, therefore, is not consummated. In its financial dimension it will, at minimum, affect the Applicants entitlements due at the end of two payment cycles before the management evaluation is done. As such, the decision has not been “fully implemented” in the sense relevant for the issue at hand, which makes this application receivable before the Tribunal.

Tripartite Test for Suspension of Action

Lawfulness of administrative leave without pay – general considerations

33. Placing a staff member on AL is governed by staff rule 10.4. It provides as follows:

a) 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 initiation of an investigation. Administrative leave may continue throughout an investigation and 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 except 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.

(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 or separation, 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.

34. The conditions are specified in section 4 of ST/AI/371:

If the conduct appears to be of such a nature and of such gravity that administrative leave may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general rule, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

35. Further elaboration on how, according to the Respondent, these criteria are to be implemented in practice are found in the *Guidelines for Placement of Staff on Administrative Leave Pending Investigation and the Disciplinary Process*, which provide:

3. The appropriate official may place a staff member on ALWP when reassignment or redeployment in the same duty station would not be feasible, or would not adequately address the risks that have been identified, and where there is prima facie evidence that:

a. Continued service by the staff member could pose a danger to other UN personnel or to the Organization;

- b. Continued service by the staff member could pose a security risk to the Organization or a threat to the property of the Organization;
- c. The staff member is unable to continue performing his or her functions effectively, in view of (i) an ongoing investigation, or (ii) the nature of those functions; or
- d. Continued service by the staff member would create an unacceptable risk that he or she could destroy, conceal or otherwise tamper with evidence, or interfere in any way with an investigation, including by retaliating against individuals protected under ST/SGB/2005/21 (“Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations”).

36. The Tribunal wishes to first address the interpretation of “exceptional circumstances” for the application of ALWOP as per staff rule 10.4. With respect to the proposition by the Respondent that, in the absence of express statutory directions, this rule should be construed as granting him an unfettered discretion to determine whether such circumstances exist, the Tribunal disagrees. The specific provision on ALWOP must not be interpreted in a legal void. The limits within which the discretion afforded to the Respondent can be exercised are apparent upon both direct and systemic reading of the statutes.

37. At the outset, as stated by staff rule 10.4(d), AL is without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. Two normative consequences stem from this rule. First, AL cannot be applied as a punitive measure, or implemented as anticipated disciplinary punishment. Accordingly, concerns of general deterrence – such as might be expressed by policy documents – cannot *per se* constitute legitimate basis for the application of AL. Second, a staff member remains presumed innocent.⁸ As such, grounds invoked to justify his/her placement on AL must be significant enough to balance the infringement to the reputation and emoluments due to the staff member with a legally protected interest of the Organization (principle of proportionality).

⁸ *Liyanarachchige* 2010-UNAT-087; *Diabagate* 2014-UNAT-403; *Hallal* 2012-UNAT-207.

38. Consistent with the principle of proportionality, section 4 of ST/AI/371, requires for the application of AL that the alleged misconduct be of a sufficient gravity.

39. Specific grounds for the application of AL are articulated in section 4 of ST/AI/371 and the *Guidelines* cited above. These grounds express the objectives which, “as a general rule”, legitimize the application of AL or ALWOP consistent with staff rule 10.4, in both instruments they express a preventive and not punitive character of AL, including that in the case of risk of loss of evidence re-deployment is preferred over the AL. Of note is, moreover, that under the applicable legal framework placement on AL is in any event optional.

40. The applicable rules do not specify the level of proof of misconduct requisite for the application of AL. The balance implied in staff rule 10.4., however, requires that the allegations of misconduct be sufficiently substantiated. Notably, the postulate that AL be not granted lightly is also dictated by the interest of the Organization alone, considering the disruption of its operations and the expense that it entails. As such, the Respondent’s contention that since staff rule 10.4(a) allows for AL to be imposed on a staff member even where no investigation has yet taken place, implies a “low” threshold, is inaccurate. Staff rule 10.4(a) authorizes the application of a preventive measure irrespective of a formal investigative process; the gist of this provision, however, is to respond to urgency, and not to dispense with the proof of misconduct. This said, the Tribunal concedes that a reasonable suspicion may suffice for the placement on AL with full pay.

41. The last directive is expressed in staff rule 10.4(c) in that it establishes AL with full pay as a rule and ALWOP as an exception. It follows that, in addition to requirements needed for the placement on AL with full pay, the Respondent should also demonstrate that, in given circumstances, AL with full pay would be inappropriate or insufficient to guard a legitimate interest. Notably, a general seriousness of the proscribed conduct does not suffice. This Tribunal has previously

held that “exceptional circumstances” refer to the particular set of circumstances which are “exceptional” or “egregious” and which surround the facts in issue in the particular case.”⁹

42. In respect of grounds for AL determined in the applicable rules, the Tribunal notes that there appears to be no such preventive objectives that would require ALWOP and could not be satisfied by AL with pay. Placement on ALWOP must, therefore, be justified by objectives additional to those stated by staff rule 10.4. The absence of articulation of these objectives as grounds for ALWOP in the statute is unfortunate; still, the application of the general principles stipulated above: non-punitive character, presumption of innocence and proportionality, is capable of giving guidance.

43. In accordance with the general principles stipulated above, it would seem that ALWOP is legitimate mainly upon balancing the fiscal interest of the individual concerned against the interest of the Organization which is maintaining employment of a staff member who is not rendering work. Other objectives that might be consistent with these general principles: to secure the availability of the staff member for the investigation, akin to bail, and to secure execution of compensation due to the Organization or the third parties. At present, however, there seems to be no legal basis for the attendant forfeiture of the emoluments.

44. The immediate *de facto* consequences of ALWOP are the same as separation. Given this onerousness, and in accordance with the “exceptional” character of ALWOP, maintaining of the proportionality is central for the lawfulness of this measure.

45. In accordance with the principle of proportionality, the fiscal interests need to be considered in relation to the projected length of the investigation vis-à-vis the financial situation of the staff member concerned. A staff member should not be

⁹ *Nianzou* Order No. 007 (NBI/2016).

surprised by a sudden loss of income before she or he could make provisions for sustaining him/herself and family during the investigation. Neither should placement on ALWOP serve to encourage resigning of expeditiousness in investigation. It follows that ALWOP should be applied in a phased approach and that leave with partial pay should be given consideration.

46. By the same token, the Tribunal considers that placement on ALWOP requires more than a reasonable suspicion of misconduct and that the appropriate standard here is a probable cause.¹⁰ It follows that, for the measure to be applied before an investigation has yet taken place, the misconduct must be flagrant or readily probable upon available evidence.

47. Pursuant to staff rule 10.4(b), decisions on AL with or without pay must be reasoned. Accordingly, the Organization must show that there is a probable cause of a grave misconduct; that the measure to be applied serves a legitimate objective; and that it is proportional.

Whether the impugned decision is prima facie unlawful

48. With respect to the arguments that the Respondent failed to establish the nexus between the allegations that are currently the subject of the Applicant's pending investigation in Kinshasa and any of the basis for the placement on AL, the Tribunal notes that indeed the Respondent does not even attempt to demonstrate how justifications put forth by him relate to grounds expressed in section 4 of ST/AI/371 and even the *Guidelines*.

49. The Tribunal agrees with the Applicant that no preventive concerns have been shown related to the risk for the pending investigation, for the United Nations staff members or members of the local population. The Tribunal considers, nevertheless,

¹⁰ See e.g., *Nianzou* Order No. 007 (NBI/2016), staff member found in possession of stolen items; *Byakombe* 031 (NBI/2016), assault confirmed by 7 witnesses; *Kabongo* Order No. 490 (NBI/2016), material and documentary evidence of fraud.

that damage to the reputation of the Organization has been invoked by the Respondent and that the notion of “danger to the Organization” in section 4 of ST/AI/371 encompasses the damage to the reputation. This interest is at stake given the seriousness of the alleged misconduct, denigrating nature of the alleged acts and the notoriety of the complaint, involving *demarche* by the Congolese government. Having a staff member serve with the Organization while being under investigation of sexual exploitation and abuse may adversely affect the effective and credible discharge of the Organization’s mandate to protect vulnerable local populations.

50. The Respondent talks of “sufficient evidentiary basis” of the case, without either specifying the standard of proof or discussing the existing evidence. The Tribunal agrees, nevertheless, that evidence on record warrants a reasonable suspicion that the Applicant committed the alleged misconduct. Whereas the record consists only of allegations brought by Ms. L., these allegations display a reasonable level of detail and consistency. Of note is that Ms. L.’s allegations are not based in an abstract want of money but she has a lively and legitimate interest to pursue maintenance for herself and the child from the person whom she believes to be the father. The Applicant’s contention that Ms. L. has brought similar allegations against other men in the compound is unsubstantiated. The document relied upon by the Applicant in this respect demonstrates that while Ms. L. had doubts as to the full name of the Applicant, she however described him with specificity and selected him from a photo array; she did not implicate other persons.

51. The Tribunal agrees that the seriousness of the alleged conduct is of such nature that, if proven, may lead to a separation or dismissal of the staff member.

52. In the circumstances, the Tribunal does not agree with the Applicant that the Respondent is required to show more at this early stage of the inquiry into the Applicant’s conduct in order to place him on AL.

53. The next question is whether there exist exceptional circumstances which allow the Secretary-General to deprive the Applicant of his salary and entitlements pending management evaluation.

54. The Tribunal considers that such circumstances have not been made out. As basis for the application of the measure, the Respondent argues exclusively the element of seriousness of the alleged conduct, and the policy of “zero tolerance” toward sexual exploitation, which indicates that he approaches ALWOP as a punitive measure and anticipated punishment. This goes contrary to the presumption of innocence and is specifically not allowed by staff rule 10.4. The Tribunal takes due note of the Secretary-General’s report on *Special measures for protection from sexual exploitation and abuse* and proposals contained therein. It finds that even though *de lege ferenda* Member States propose to “[s]uspend payments due to alleged perpetrators in the face of credible allegations”¹¹, this proposal 1) has not been transformed into law as of yet; 2) may not be read so as to vitiate general principles of presumption of innocence and proportionality; and 3) has as its corollary a proposal to implement procedures to transfer withheld payments to the Trust Fund in substantiated cases.¹² As such, in its current shape it does not constitute basis for the application of ALWOP and does not release the Respondent from demonstrating exceptional circumstances required by staff rule 10.4.

55. The Respondent has failed to discuss the credibility of the allegations. Whereas the Tribunal finds them sufficient for a reasonable suspicion of the commission of the prohibited conduct, the record such as it is, without more, is nevertheless not sufficient to constitute a probable cause.

56. The Respondent has, moreover, entirely failed to discuss why the placement of ALWOP is more appropriate than AL with full pay or with partial pay; for example, considering that the Applicant has been required to remain in his present

¹¹ A/71/818, Annex I. B. (xv).

¹² Ibid. at (xvi).

duty station it would have been appropriate to, at minimum, consider the continuation of the payment of the cost of living portion of the emoluments. The Respondent has further entirely failed to consider the financial situation of the Applicant and whether or not the hardship on him and his family will be possible for them to bear without depriving them of access to health care, education and housing.

57. In conclusion, the decision that the AL be without pay is unlawful. The reason stated as its basis is improper and the decision lacks reasoning in the aspects which are relevant for the determination.

Urgency and irreparable harm

58. Urgency in the present case results from immediate effect of the withholding of the Applicant's emoluments. The Respondent's argument that the Applicant had waited two weeks to file the application and thus contributed to the urgency, is without merit. The two-week time is reasonable considered that the Applicant has sought legal advice, which is his right.

59. Irreparable harm is generally defined as harm that cannot be compensated for. The Tribunal has previously held that the concept is a little more nuanced than the question of money alone. In *Tadonki*, the court opined as follows

a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision making process.¹³

¹³ UNDT-2009-016.

60. In respect of ALWOP, the Tribunal found the element of irreparable harm in *Maina*¹⁴ and in *Fahngon*¹⁵. In the latter case the Tribunal found that depriving the Applicant and his family of six of the singular source of livelihood caused a “desperation of the Applicant’s situation” that was irreparable.

61. On the facts of the present case, the Applicant makes his case for both urgency and irreparable harm along the same lines. The Applicant contends that the “realities of trying to support a family of five, with absolutely no income” jeopardizes the health and well-being of the Applicant and his family and “must be seen as causing irreparable harm.” The Respondent relies on the possibility on future reimbursement without any consideration of the impact of the suspension of pay on the present situation of the Applicant. The Tribunal considers that an abrupt and complete deprivation of all income of a family of five is a case of urgency and a threat of irreparable harm to their well-being.

Conclusion

62. Based on the evidence before it, the Tribunal finds no impropriety in the Respondent’s application of staff rule 10.4 and ST/AI/371 in the application of AL. This application therefore fails on the first limb of *prima facie* unlawfulness.

63. At the same time, the Tribunal finds that the Respondent failed to demonstrate legal and factual premises for the application of ALWOP and that the Applicant demonstrated *prima facie* that the implementation of the impugned decision in this aspect may immediately cause him irreparable damage.

64. The Application for Suspension of Action is **accordingly REFUSED concerning the suspension of the AL and GRANTED IN PART in regard to the decision that the AL be without pay, in which part the decision is suspended.**

¹⁴ Order No. 275 (NBI/2014).

¹⁵ Order No. 199 (NBI/2014).

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 10th day of April 2017

Entered in the Register on this 10th day of April 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi