



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

EREFA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**

George G. Irving

**Counsel for the Respondent:**

Matthias Schuster, AAS/OHR, UN Secretariat

## **Introduction**

1. The Applicant is a staff member at serving as Procurement Assistant FS-4 at the United Nations Mission in Congo (MONUSCO) in Goma.
2. On 27 December 2018, he filed a request for suspension of action pursuant to article 2. 2 of the Statute of the United Nations Dispute Tribunal (UNDT) concerning a decision dated 21 November 2018 and served on him on 22 November 2018, whereby his Administrative Leave without Pay (ALWOP) was extended by three months from 5 December 2018, or until the completion of any disciplinary proceedings, whichever is earlier.
3. The Applicant sought management evaluation of the impugned decision on 19 December 2018.
4. The Respondent filed his reply on 31 December 2018.

## **Facts**

5. The Applicant is subject to disciplinary proceedings in relation to allegations that between December 2016 and July 2017 he sexually abused a female Congolese minor. The allegations of misconduct were issued on 19 October 2017. The Applicant responded on 19 November 2017, refuting the allegations.<sup>1</sup>The investigation was concluded with a report dated 11 June 2018.<sup>2</sup>
6. Since 1 December 2017 the Applicant has been placed on ALWOP, extended periodically every 3 months.<sup>3</sup>

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<sup>1</sup> Annex 5 to the application

<sup>2</sup> Annex 4 to the application

<sup>3</sup> Impugned decision, Annex 3 to the application and annex filed with the submission of 28 December 2018

7. The reasons for placement on ALWOP, stated identically in all the pertinent decisions, are: that there are reasonable grounds to believe (probable cause) that the Applicant sexually abused a Congolese minor, that he continued a sexual relationship with the minor after the alleged abuse, and that he tried to settle the matter through financial means.<sup>4</sup>

## **Submissions**

### ***Applicant***

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

9. The continued imposition of ALWOP is both unduly harsh and unjustified. No exceptional circumstances have been put forward to justify its continued use which might outweigh the serious repercussions on the Applicant, who cooperated with the investigation and denied allegations of misconduct. The case against him is entirely based on circumstantial evidence.

10. The matter is urgent because the Applicant's health and well-being are now being affected by the financial straits in which finds himself by such a prolonged and punitive action.

11. The measure causes irreparable damage because of severe hardship experienced from the denial of any financial support for over a year. Being placed in a pejorative status damages his reputation and career prospects while extended uncertainty causes emotional stress. These are exacerbated by the serious illness of the Applicant's parent, requiring his travel and further pressure on limited resources.

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<sup>4</sup> Ibid.

***Respondent***

12. The Respondent contends that the decision to place the Applicant on ALWOP complied with the applicable legal framework as laid out in staff rule 10.4.c as amended in 2018. He stresses that the United Nations operates a zero-tolerance policy in respect of sexual misconduct, abuse and exploitation and that automatic placement of staff with credible allegations of sexual exploitation and abuse against them has been endorsed by the Appeals Tribunal in *Muteeganda*.<sup>5</sup>

13. The Respondent further contends that evidence in this case demonstrates, at minimum at probable cause level, that the Applicant had sexual relations with a Congolese female under the age of 18. The victim has provided detailed, coherent and consistent evidence, recognized the Applicant in a photo array, was able to describe his home and point to a hotel where the Applicant had sexual relations with her. The receptionist at the hotel recognized the Applicant as having visited on a number of occasions with different Congolese women. It is also undisputed that the Applicant paid a large amount of money — USD5,000— to the victim’s family in order to settle the matter when the victim’s mother filed a complaint with the local authorities.<sup>6</sup>

14. There was no undue delay in the proceedings. The matter is highly complex, which required a full investigation and subsequent detailed review of the investigation report and supporting material, ensuring that the process is thorough and fair. To maintain the Applicant’s placement on ALWOP during this time is therefore not unreasonable or disproportionate.

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<sup>5</sup> Reply, para 6

<sup>6</sup> Reply para 5

15. The Respondent also submits that the application must fail because the Applicant has not met the tests of urgency and irreparable harm.<sup>7</sup>

### **Considerations**

16. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal, which provide that the Tribunal may 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. 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.

18. 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.

19. 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.<sup>8</sup>

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<sup>7</sup> Reply paras 10-13

<sup>8</sup> 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.

***Receivability***

20. The Tribunal recalls that it is established by jurisprudence of the UNDT across its seats<sup>9</sup>, 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 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.

21. The record shows that the Applicant was placed on ALWOP with effect from 5 December 2018 and this state is to be maintained for a period of up to three months. The effect of the decision, therefore, is not consummated and may affect the Applicant’s entitlements due for up to 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*

22. The case concerns a measure applied during the period when legislative changes took place. This renders the question of legality of the impugned decision central for the considerations.

23. Placing a staff member on ALWOP at the time when it was imposed on the Applicant was governed by staff rule 10.4, which provided as follows:

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<sup>9</sup> *Calvani* UNDT/2009/092; *Galliény* Order No. 060 (NY/2014). *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014).

- 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.

24. On 1 January 2018, an amendment to staff rule 10. 4 entered into force, which reads in the relevant part:

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 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 in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, 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.

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. [...]

25. The administrative instruction implementing the old staff rule 10.4.c, ST/AI/371, in addition to reiterating the exceptional character of the ALWOP after the staff rule 10.4, determined that any administrative leave, as a general rule, is applicable on preventive grounds:



#### Section 4

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.

26. The administrative instruction subsequent to ST/AI/371 and currently in force, ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), provides in relevant parts:

11.1 In accordance with staff rule 10.4, a staff member may be placed on administrative leave with or without pay at any time after an allegation of suspected unsatisfactory conduct and pending the completion of the disciplinary process. The period of administrative leave may continue until the completion of the disciplinary process. Such action is without prejudice to the rights of the staff member and does not constitute a disciplinary measure. A staff member placed on administrative leave shall be given a written statement of the reason(s) for such leave and shall be informed of its likely duration.

11.2 A decision to place a staff member on administrative leave without pay shall be without prejudice to the continuation of any education grant to which the staff member may be entitled, as well as without prejudice to the continuation of health, dental and life insurance coverage and participation in the United Nations Joint Staff Pension Fund. The amount of pay withheld from the staff member during the period that the staff member is on administrative leave without pay shall be net of all contributions by the staff member and the Organization for maintaining such entitlements and benefits.

[...]

#### 11.4 *Administrative leave without pay*

A staff member may be placed on administrative leave without pay by an authorized official when at least one of the following conditions is met:

(a) There are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay;

(b) There are exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix), and there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

11.5 Provided that at least one of the conditions of section 11.4 is met, the authorized official may convert the staff member's administrative leave with pay to administrative leave without pay at any time pending the conclusion of the disciplinary process.

11.6 In accordance with staff rule 10.4 (d), if a staff member is placed on administrative leave 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. The Organization may decide not to restore any pay withheld for the period during which the staff member was placed on administrative leave without pay if the staff member separates from the Organization for any reason prior to the completion of the investigation or disciplinary process, and the matter cannot be pursued as a result of lack of cooperation on the part of the staff member.

27. As can be seen here, the changes are significant. Among those brought about by the amendment to staff rule 10.4., the limitation that administrative leave be applied for a period normally not exceeding three months has been eliminated, both in relation to administrative leave with and without pay. Importantly for the matter at hand, in cases concerning sexual exploitation and sexual abuse, administrative leave with full pay has been excluded *a limine* and the obligation to show exceptional circumstances to apply the ALWOP has been lifted. Staff rule 10.4.c, however, does not explicitly exclude in these cases administrative leave with partial pay.

28. Clearly, the amendments aim at implementing the zero-tolerance policy for sexual misconduct. Whereas this is done by prioritizing the enforcement of the anticipated punishment and general deterrence at the expense of traditionally embraced tenets of the United Nations' disciplinary regime, such as presumption of innocence and individualization of liability, the Appeals Tribunal, as rightly pointed out by the Respondent, already pronounced in *Muteeganda*, that, given the inherent extraordinary nature of misconduct through sexual abuse, ALWOP legitimately and justifiably puts sexual predators at greater financial risk, with adequate safeguards in place for those subsequently found to be innocent.<sup>10</sup> The Appeals Tribunal, however, made these observations on the premise - which is not cited by the Respondent - that ALWOP remains an extraordinary measure, designed to be of short duration.<sup>11</sup>

29. In this vein, the Tribunal considers that, as a general matter, staff rule 10.4.a establishes imposing administrative leave as a prerogative, and not an obligation, on the part of the Secretary-General. Staff rule 10.4.c, as noted above, explicitly precludes administrative leave with full pay in sexual abuse cases, but it does not preclude leave with partial pay. ALWOP under staff rule 10.4.c remains an extraordinary measure. While originally designed to be of short duration, it may now extend throughout the duration of the investigation and disciplinary proceedings without limitation. Considering the complexity usually posed by an investigation into sexual misconduct, admitted by the Respondent and demonstrated by the case at hand, it may well exceed one year. During this time the affected staff member cannot undertake another occupation and, under ST/AI/2017/1 – what the Tribunal finds at the present regulation unlawful, as discussed below – risks forfeiture of the withheld pay if he quits or does not cooperate. Onerousness of the ALWOP is not mitigated by the fact that there would be no undue delays. The Respondent is therefore correct in identifying reasonableness and proportionality as relevant factors in the application of the ALWOP also in sexual abuse cases.

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<sup>10</sup> *Muteeganda* 2018-UNAT-869, para 41

<sup>11</sup> *Ibid.*

30. Everything considered, interpreting staff rule 10.4.c as a sharp alternative between either no administrative leave at all or administrative leave without pay would pose an unreasonable restriction on the Secretary-General's ability to respond to situations which require balancing the interest of the disciplinary process and humanitarian concerns. Rather, this staff rule must be interpreted to the effect that the Secretary-General has discretion as to placing staff on administrative leave with partial pay, including in cases of sexual misconduct.

31. This Tribunal recalls its holding in *Abdallah*<sup>12</sup>, in that, in accordance with the principle of proportionality, the fiscal – and other - interests need to be considered in relation to the length of the investigation vis-à-vis the financial situation of the staff member concerned. A staff member should not be 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. It is the Tribunal's considered opinion that this retains actuality under the new staff rule 10.4.

32. Turning to implementing instruments, it is noted that ST/AI/2017/1 goes beyond the language of the new staff rule 10.4.c in providing mandatory application of ALWOP to cases of sexual misconduct and, accordingly it dispenses with listing specific grounds for placement of a staff member on ALOWP. It only requires the minimum level of proof, albeit not quite in line with staff rule 10.4, which requires probable cause, this being a standard higher than "reasons to believe". Further, it introduces limitation on the restoration of the withheld pay in the event of resignation and non-cooperation, where it contradicts the new staff rule 10.4.d which provides that *any* pay shall be restored in the event the staff member be exonerated.

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<sup>12</sup>*Abdallah* 080/NBI/2017/Corr.1

There is currently no authorisation in the Staff Rules to forfeit remuneration of a staff member who resigned while presumed innocent, and the present case demonstrates that the pay withheld during the disciplinary processes may exceed year-worth of it.

33. On the other hand, ST/AI/2017/1 addressed humanitarian concerns, namely social welfare benefits (such as health and life insurance, education grant and contribution to pension fund) which now automatically continue during an ALWOP.

34. The Tribunal considers that rights granted to staff under the Staff Rules and superior legal instruments may not be autonomously restricted by subordinate legal instruments. Subordinate instruments may only implement restrictions within the scope authorised in the superior acts. It accordingly finds that these provisions of ST/AI/2017/1, which introduce greater or additional limitations on staff members' rights against the language of the controlling staff rules, are illegitimate.

35. In the aspect of temporary application, the Tribunal observes that the provisions discussed here are of a procedural nature. Absent specific regulation on temporal application, procedural rules are applicable immediately. Their legal effect in principle does not attach to the time of the alleged conduct akin to *nullum crimen sine lege* principle. If anything, transitional provisions usually tie the application of the new procedure to a stage of proceedings or to the time when a specific decision is taken. The change to art 10.4. of the Staff Rules introduced on 1 January 2018, one month into the Applicant's SLWOP, was immediately applicable.

36. In this connection, the Tribunal notes that ST/AI/2017/1 and changes introduced by it pre-date the amending staff rule 10.4.c and were in conflict also with the superior norms as they stood at the time.

37. It must be noted, moreover, that the applicability ST/AI/2017/1 is foreseen in relation to investigations and disciplinary proceedings initiated after its entry into force on 26 October 2017. Investigations and disciplinary processes initiated prior to that date, such as in the present case, are to continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1.<sup>13</sup> Notably, ST/AI/2017/1 transitional provisions are confusing in that while Section 13.2 extends the application of ST/AI/371 to proceedings pending at the date of the entry of ST/AI/2017/1 into force, Section 13.3 announces abolishment of the whole ST/AI/371. These dispositions are irreconcilable. The Tribunal, however, takes it that, in accordance with the obvious purpose of the law, Section 13.2 is meant to apply.

38. It is the Tribunal's understanding that both the relevant staff rules and the implementing administrative instruction are presently under review and thus expects that issues here identified as well as other ones<sup>14</sup> will be addressed.

***Whether the impugned decision is prima facie unlawful***

39. Considering the aforesaid, the Tribunal observes that, starting with the decision of 1 December 2017 and ever since, the Administration, in contradiction with Section 13.2 of ST/AI/2017/1, has applied ST/AI/2017/1 instead of ST/AI/371 to the Applicant, an error similar to one demonstrated in the *Muteeganda* case. The consequences of Section 13.2 of ST/AI/2017/1 for the present decision are that legality of the Applicant's ALWOP is to be evaluated under ST/AI/371 and, to the extent not regulated in it, or regulated in manner that would contradict the new staff rule 10.4.c, under this staff rule alone. Practically though, given the paucity of regulation in ST/AI/371, the controlling legal instrument for the ALWOP in question is staff rule 10.4.

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<sup>13</sup> ST/AI/2017/1, Section 13.2.

<sup>14</sup> There is no time limit on ALWOP and fines.

40. One consequence of it is that extending the benefit of continuing educational grant, health and life insurance and contribution to pension fund as per ST/AI/2017/1, Section 11.2, requires that it be given basis in an individual administrative decision, by way of a partial pay of a sort.

41. Staff rule 10.4.c does not allow placing the Applicant on administrative leave with full pay where there is a probable cause that he has engaged in sexual exploitation and sexual abuse. Upon the record before it, the Tribunal finds that a probable cause has been made out. The Tribunal weighs, specifically, that the victim has provided detailed, coherent and consistent evidence and was able to point to a hotel where the Applicant had sexual relations with her whereas the receptionist at the hotel recognized the Applicant as having visited on a number of occasions with different Congolese women. Conversely, the circumstances that the victim recognized the Applicant in a photo array and could describe his home do not add to the case, given the admitted fact that the victim knew the Applicant and visited him at his home, albeit for a different purpose. In totality, however, the Tribunal is satisfied that the allegations are substantiated at the required level and maintaining the administrative leave of the Applicant is necessary to contain reputational damage to the Organization.

42. Turning to the question whether continuing the Applicant's ALWOP is unlawful because of its disproportionate length and, as such, it should be discontinued or, possibly, replaced by a leave with partial pay, the Tribunal considers that the Applicant was initially put on leave with full pay, which is consistent with a phased approach. After 1 December 2017, he had access to entitlements described in ST/AI/2017/1, Section 11.2. As appears from the documents submitted, at some point he has been allowed to depart from the Mission. The Administration undertook to review the ALWOP every three months, which is commendable as such, albeit in practice there seems to have been no consideration of the merits, rather a mechanical extension.

43. At the same time, however, there is no indication that the Applicant has ever put the issue of his personal and financial circumstances before the Respondent. Neither is there information plausibly put before the Tribunal in the present application that would substantiate that the Applicant cannot sustain himself for the period in which the management evaluation is due.

### **Conclusion**

44. Based on the aforesaid, the Tribunal finds no impropriety in the Respondent's decision on extension of the ALWOP, notwithstanding erroneously invoking ST/AI/2017/1 as its basis. The application therefore fails on the first limb of *prima facie* unlawfulness. This relieves the Tribunal from considering the remaining prongs of the test.

### **ORDER:**

The application for suspension of action is accordingly **REFUSED**.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 7<sup>th</sup> day of January 2019

Entered in the Register on this 7<sup>th</sup> day of January 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi