



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

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**DECISION ON THE APPLICANT'S  
APPLICATION FOR SUSPENSION OF  
ACTION**

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**Counsel for the Applicant:**

Charles Adeogun-Phillips  
Sètondji Roland Adjovi

**Counsel for the Respondent:**

Yun Hwa Ko, UNFPA  
Katrina Waiters, UNFPA

## **Introduction**

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”). He holds a permanent appointment at a D1 level.
2. On 16 March 2020, the Applicant filed for a stay on the Respondent’s decision of 4 March 2020 to place him on administrative leave with pay (“ALWP”) on the basis of staff rule 10.4 and section 14 of the UNFPA Disciplinary Framework.
3. Administrative leave has been imposed following allegations of rape, sexual assault and sexual harassment against a fellow staff member of UNFPA on 2 December 2016 in Ouagadougou, Burkina Faso. This measure is imposed on the Applicant for an initial period of 90 days, during which time he is expected to remain in the duty station.
4. The Respondent filed his reply to the application on 19 March 2020.

## **Parties’ submissions**

### ***Applicant***

5. The impugned decision is *prima facie* unlawful on two grounds: i) there is no statutory basis for the ALWP; ii) there is a strong likelihood of bias on the part of the Director of Human Resources, Ms. Josephine Mbithi, and at least one witness; thus, the decision constitutes abuse of authority on the part of the Director of Human Resources.
6. In respect of the first contention, the Applicant argues that none of the situations envisaged by United Nations staff rule 10.4(d) and paragraph 14.4 of the UNFPA Disciplinary Framework are applicable in this case.

7. The Applicant argues, implicitly, insufficiency of the evidentiary basis. He submits that the UNFPA Office of Audit and Investigation Services (“OAIS”) issued its Report on 23 October 2017, where it found that misconduct on his part could not be established and recommended that the case be closed. Despite the absence of any new facts, the administration is pursuing the disciplinary process. The Applicant cooperated with the OAIS, and still performed his functions effectively during the course of the investigations in 2017. In addition, the complainant and the Applicant work from different duty stations. For all these reasons it is unnecessary that he be placed on administrative leave.

8. On bias and abuse of authority, the Applicant submits that Mr. Arturo Pagan is both a “key witness in support of the complaint.” and was a decision maker in this process as Officer-in-Charge (“OIC”) Human Resources at the material time. In turn, Ms. Mbithi is the complainant’s second reporting officer and the decision maker. Both have obvious and direct links to the complainant. The circumstances under which the UNFPA ordered the investigation to be re-opened in 2019 are linked to the circumstances under which Mr. Pagan and another staff member became witnesses for the complainant. There are several email exchanges between the complainant and the witnesses prior to the reopening of the investigation, which are indicative of a conspiracy at the highest levels of the Division for Human Resources (“DHR”) to implicate the Applicant in acts of misconduct.

9. The urgency of this application is established by the fact that the impugned decision is having a continuous and negative impact on the Applicant’s life and reputation, and these are compounded with time. The conduct of the DHR was designed to harass and cause considerable humiliation and distress to the Applicant and members of his immediate family. UNFPA has appointed a retired former staff member of UNFPA to act as OIC in his place, which sends a signal that the Applicant is being disciplined for misconduct. These factors constitute irreparable harm on his “successful, unblemished and illustrious career” with UNFPA and his long-standing

reputation across the United Nations system as well as undermines his relations with working partners. They also speak of the urgency of the matter.

***Respondent***

10. The Respondent contends that the application for suspension of action is not receivable because the impugned decision has already been implemented. A decision to place a staff member on administrative leave with pay is implemented when he receives notification of same. There are no ongoing legal consequences stemming from this decision given that the Applicant is continuing to receive the entitlements that are due to him.

11. On the merits, the Respondent submits that the Applicant has not established that the impugned decision is *prima facie* unlawful, met the element of urgency or shown that being placed on administrative leave will irreparably harm him.

12. The Respondent has complied with all the substantive and procedural requirements of staff regulation 1.2(b), staff rule 10.4 and UNFPA's Disciplinary Framework. UNFPA's Disciplinary Framework affords the Director of Human Resources the authority to "close the case where there are no or insufficient grounds warranting disciplinary action." In this case, the DHR carefully reviewed the facts gathered by OAIS and disagreed with the recommendation in their Report.

13. The Respondent exercised his discretion correctly in placing the Applicant on administrative leave with pay. The Applicant stands charged with violating staff regulation 1.2(b), ST/SGB/2003/13 (Special Measures for protection from sexual exploitation and sexual abuse), UNFPA's PPM Prohibition of Harassment, Sexual Harassment and Abuse of Authority (2013) and UNFPA's PPM Disciplinary Framework (2014) based on credible allegations of rape, sexual assault and sexual harassment of the Complainant. The nature of the allegations against the Applicant constitutes a "significant threat to the Organization's interests and personnel."

14. The Investigation Report concluded that the Applicant intentionally made false statements to the investigators. The Respondent concurred with that conclusion and charged Applicant with four instances of false statement and/or uncooperative actions accordingly.

15. None of the Applicant's arguments in respect of bias, abuse of authority and improper motive is borne out by the evidence.

16. The Respondent disputes the claim to irreparable harm, pointing out that the matter is carried out in full confidentiality. He also disputes the claim to urgency, pointing out that the Applicant does not experience any financial consequences as a result of his placement on SLWP.

### **Deliberations**

17. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Art. 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 appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.**

18. 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.

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 triable issue before the court.<sup>1</sup>

*Receivability*

20. 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 ALWP.

21. The Tribunal considers it to be a matter of basic logic that, where a decision has a continuing effect, it cannot be deemed implemented as of the notification. Generally, attaching the notion of “implementation” to the moment of notification would *de facto* disable the suspension of action as a procedural right, leaving it to the whim of the Respondent who may grant advance notice to a staff member or not. This is clearly not the legislative intention behind art. 2 of the UNDT Statute. The Tribunal further recalls that it is established by the jurisprudence of the UNDT across its seats<sup>2</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. The record shows that the Applicant was placed on ALWP with immediate effect from 4 March 2020 for a period of at least three months, with a possible extension. As such, the decision has not been implemented and the Respondent’s argument on receivability is frivolous.

22. The Tribunal finds that the application is receivable

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<sup>1</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.

<sup>2</sup> *Kompass* Order No. 99 (GVA/2015), *Calvani* UNDT/2009/092; *Galliery* Order No. 060 (NY/2014), *Maina* Order No. 275 (NBI/2014), *Abdallah* Order No. 080 (NBI/2017).

*Tripartite Test for Suspension of Action – whether the decision is prima facie unlawful*

23. On the legality question, the Tribunal assumes, based on the Respondent's submissions, that the regime applicable to the case is properly that of Staff Regulations and Staff Rules, together with the UNFPA policies, however, not administrative instructions of the Secretary-General.<sup>3</sup> In this regard, to the extent the impugned decision invokes staff rule 10.4 as its basis, the issue requiring clarification is what version of the Staff Rules has been adopted by UNFPA.

24. It is recalled that an amendment to staff rule 10.4 entered into force on 1 January 2018, which reads in 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. [...]

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<sup>3</sup> See *Weerasoriya* 2015-UNAT-571.

25. The Tribunal observes that the provisions discussed here are of a procedural nature. Absent a 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. Unless UNFPA rejected the application of amendment to staff rule 10.4, the amendment was applicable immediately and, thus, constituted applicable law when the impugned decision was taken.

26. Compared with the previous version, under the new 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. 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 has 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>4</sup>

27. This 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 decision-makers, also in sexual abuse cases. It further considers that staff rule 10.4(c) does not explicitly exclude in these cases administrative leave with partial

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<sup>4</sup> *Muteeganda* 2018-UNAT-869, para 41.



pay. This said, staff rule 10.4(c), as noted above, explicitly precludes in these cases applying administrative leave with full pay. Therefore, under staff rule 10.4 as it stands as of 2018, the impugned decision would be unlawful, albeit for reasons different than those proffered by the Applicant.

28. However, as stated by staff rule 10.4(d) in either version, administrative leave 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, administrative leave cannot be applied purely as a punitive measure or anticipated disciplinary punishment. Accordingly, concerns of general deterrence – such as might be expressed by policy documents – cannot *per se* constitute a legitimate basis for the application of administrative leave, even in sexual abuse cases. Second, a staff member remains presumed innocent.<sup>5</sup> As such, grounds invoked to justify his/her placement on administrative leave must be significant enough to balance the infringement to the reputation and, in the event of a leave with partial or without pay, emoluments due to the staff member.<sup>6</sup> As a corollary on the formal side, it is required that a staff member be given a written statement of the reason(s) for such leave.

29. With respect to the reasons given to the Applicant, the impugned decision provides none. Reasons put forth in the Respondent's reply to his application are scarce: they invoke "significant threat to the Organization's interests and personnel". The Respondent, however, does not reference facts justifying such threat as concrete and present.

30. The Tribunal recalls that the incident under investigation took place between two staff members and did not involve any recipients of the programmes run by the Organization, stakeholders and/or development partners. The Applicant and the complainant work in different duty stations. No matter whether the incident had been an instance of rape, indiscretion or frustrated romance, the passage of time since the

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<sup>5</sup> *Liyanarachhige* 2010-UNAT-087; *Diabagate* 2014-UNAT-403; *Hallal* 2012-UNAT-207.

<sup>6</sup> *Abdallah* Order No. 080 (NBI/2017).

alleged incident does not lend support to a threat that any such conduct would be repeated. To the extent the interest of the Organization may be said to lie in its reputation, the Tribunal recalls the Respondent's claim that the matter is handled in a personal and confidential manner; as such, the reputation of the Organization should not suffer. Conversely, interest of the Organization may lie in not paying twice for performing the Applicant's function, as it appears to presently be the case.

31. Regarding the Respondent's concern about evidence, the Tribunal notes that the investigation has been going on since 2017 and must have by now gathered all the relevant proof. Whereas the Tribunal declines the parties' requests to delve into the evidentiary value of the testimonies, none of the witnesses appear susceptible to pressure from the Applicant's side. Even if indeed the Applicant would have tampered with his WhatsApp messages, there is currently no physical evidence to be protected.

32. In conclusion, in the circumstances of the case, the Tribunal is not persuaded as to any rationale for the administrative leave, with or without pay. The impugned decision is, therefore, *prima facie* unlawful.

#### *Irreparable damage*

33. On the prong of irreparable damage, it is recalled that in *Corcoran*<sup>7</sup> the Tribunal held that irreparable damage "may already be at hand where serious harm to professional reputation and career prospects or on health or unemployment after a very long time of service would result from the implementation of the contested decision". In *Calvani*<sup>8</sup> the Tribunal considered the impact of the implementation of the contested decision on the applicant's reputation, taking into account that the applicant "has been in the employ of the United Nations for more than 20 years and that . . . he holds a highly responsible and visible position".

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<sup>7</sup> *Corcoran* UNDT/2009/071, para. 44.

<sup>8</sup> *Calvani* UNDT/2009/092, para. 28.

34. These elements are present in the Applicant's case. The Tribunal notes, moreover, contradiction in the Respondent's claim that the matter is handled in a personal and confidential manner with the claim that the Applicant's remaining in office would jeopardize the Organization's interest understood as its reputation.

*Particular urgency*

35. The Tribunal concurs with the Applicant that the matter is urgent because of the continuing and negative impact of the decision on the Applicant, which is compounded with time.

*Conclusion*

36. The Tribunal finds that the implementation of the impugned decision needs to be suspended pending management evaluation, which is expected to provide the Respondent an opportunity to delve into both the proper legal basis and the rationale for administrative leave in the circumstances of the present case.

**ORDER**

37. The Application is **GRANTED**. The Respondent's decision to place the Applicant on administrative leave with pay is suspended pending management evaluation.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 25<sup>th</sup> day of March 2020

Entered in the Register on this 25<sup>th</sup> day of March 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi