



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/053

Order No.: 139 (NBI/2020)

Date: 22 July 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANTOINE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

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Background

1. By application filed on 14 July 2020, the Applicant, an Administrative Officer in Jerusalem, Israel, at the United Nations Truce Supervision Organization (“UNTSO”) seeks the suspension, pending management evaluation, of two decisions (“the impugned decisions”):

a. The 1 July 2020 decision to place him on Administrative Leave Without Pay (“ALWOP”) from 1 July 2020 for a period of three months, or until the completion of an investigation and any disciplinary process, whichever is earlier;

b. The 30 June 2020 decision by the Office of Internal Oversight Services (“OIOS”) to seize his personal smartphone for the purposes of the OIOS investigation of the Applicant.

2. As part of his application, the Applicant filed two motions:

a. Motion requesting an order for the Respondent to produce evidence in his reply to the application, specifically a memorandum dated 30 June 2020 or 1 July 2020 memo from Mr. Ben Swanson, Director, Investigations Division, (“ID/OIOS”) to Ms. Catherine Pollard, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”); and

b. Motion requesting an order to instruct the Respondent to immediately return his personal phone, destroy any data/analysis taken from it and issue an injunction preventing use of it in any proceedings before the Tribunal.

3. The reply was filed on 17 July 2020 in which it is argued, *inter alia*, that with respect to the second contested decision, the application is not receivable.

Facts

4. On 25 June 2020, Mr. Swanson sent an e-mail to Mr. Alan Doyle, Chief Mission Support, UNTSO, informing him that on 24 June 2020 ID/OIOS received, from multiple sources, a report of possible unsatisfactory conduct implicating staff members at UNTSO in Jerusalem including a video clip (“the clip”).¹

5. The clip showed two male individuals and a female individual driving along a busy street in a clearly-marked United Nations vehicle. The clip captured the male individual seen in the back seat and the female engaging in an act of a sexual nature as the vehicle was driven along a heavily trafficked street.

6. On 30 June 2020, Mr. Swanson, sent a memorandum to Ms. Pollard, providing preliminary findings from inquiries undertaken by ID/OIOS in connection with the report of possible unsatisfactory conduct concerning the Applicant.² On the same day, the Applicant’s personal smartphone was seized as part of the OIOS investigation.³

7. On 1 July 2020, Ms. Martha Helena Lopez, the Assistant Secretary-General for Human Resources (“ASG/HR”) informed the Applicant that it had been brought to her attention by Mr. Swanson that ID/OIOS was investigating allegations that he was a passenger in a clearly marked United Nations vehicle in which acts of a sexual nature took place as the vehicle circulated in a heavily trafficked area of Tel-Aviv. She further informed him that the USG/MSPC had decided to place him on ALWOP pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process).⁴

8. On 14 July 2020, the Applicant requested management evaluation of the impugned decisions.

¹ Reply, para. 5.

² Ibid., para. 6 and reply annex 3.

³ Application, para. V(1)(ii), and annexes 11 and 16.

⁴ Application, annex 1.

Parties' submissions

Applicant

Unlawfulness

9. The impugned decisions are *prima facie* unlawful. The rush to place him on ALWOP was due to pressure brought about on the Secretary-General from the press publicity of the video clip, which resulted in numerous violations of his rights in the rush by the Secretary-General to be seen to be taking action.

10. He was accused of having “engaged in an act of a sexual nature” with “a woman, reported as possibly being a sex worker”. However, during the 30 June 2020 OIOS interview, he was never asked about the woman while there is no evidence or justification for pejoratively describing the person wearing the red dress in the video as a “sex-worker” or “prostitute”. Making such prejudicial assumptions when making statements based on clothes worn is shocking for the United Nations. The Applicant also submits that there is no evidence of any sexual act in the video clip, contrary to what was reported in the press which the Administration has reflected in its allegations.

11. There are no “exceptional circumstances” justifying his placement on ALWOP.

12. The conduct by the investigators before, during and after the subject interview using criminal investigation interrogation techniques violated his due process rights assured in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

13. The Spokesman for the Secretary-General and UNTSO made false and defamatory press releases against him.

14. The investigators lied to him that they had a right to seize his personal smartphone to conduct forensic analysis and unlawfully bullied him using criminal investigation interrogation techniques to give up his personal smartphone despite his continued protests.

15. He was not provided the required signed memo from Mr. Swanson indicating in writing the reasons why his personal smartphone was to be seized, nor any legal basis for doing so because none exists. He was asked to sign an evidence voucher which did not indicate that the phone belonged to him, or that he had protested its seizure. The evidence voucher does not indicate an estimated date of return. It is already two weeks since the phone was seized by OIOS and the phone has not been returned.

Urgency

16. He was unlawfully placed on ALWOP without due process and supportable justification, one day after he was interviewed by OIOS so the Organization could release press statements for the purposes of damage control. Since his name has already publicly been released, he has now been assumed to be guilty of the allegations in the court of public opinion, creating an urgent need to correct the record.

17. It is urgent to correct the Respondent's course of action in his attempt to please public opinion. Each day that passes further exacerbates the situation, while also denying him his salary to sustain himself and his family.

18. He has been unlawfully deprived of his personal property for more than two weeks with no end in sight. The Applicant resides in a foreign country at the service of the Organization and needs to remain reachable to his family and friends for his sanity of mind in this double crisis, the pandemic and his personal situation.

Irreparable harm

19. The Applicant's unlawful placement on ALWOP means that he is unable to support his family, which is exacerbated by the COVID-19 pandemic situation. In addition, the damage to his reputation grows each day. He is unable to leave the duty station, which is not his home country, with no ability to seek alternate work to mitigate his situation.

20. All of his personal data is now unlawfully in the hands of his employer. Such

an invasion of privacy will likely damage the Applicant's personal and professional reputation, as well as his future career prospects. It is well settled jurisprudence that damage to the career prospects and reputation meets the standard for irreparable damage.

Respondent

Receivability

21. The Applicant's submission of his mobile phone to the OIOS investigators does not constitute a final administrative decision for the purposes of staff rule 11.4(a) and art. 2.1(a) of the UNDT Statute.

22. An applicant may only challenge a "final decision", that is a decision taken at the conclusion of an administrative process and which has direct legal consequences. Preparatory or preliminary decisions and steps in an administrative process do not constitute administrative decisions. The Applicant's submission of his mobile phone during his interview is a preliminary/preparatory step that took place in the course of its investigation.

23. The investigative steps are preliminary in nature and can only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences, pursuant to Chapter XI of the Staff Rules.

24. The UNDT has no jurisdiction to influence or interfere with OIOS in light of its operational independence.

25. During the interview, the OIOS investigators did not take the phone forcefully from the Applicant and instead they explained to him the basis of such request. After recording his objection, the Applicant submitted his phone to the investigators. Since the phone is already in the possession of the OIOS investigators subject to analysis, the Applicant's contention that the submission of his mobile phone has not been implemented is baseless.

Merits

Unlawfulness

26. The USG/DMSPC's decision to place the Applicant on ALWOP pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 is lawful, reasonable and proportionate. The decision to place the Applicant on ALWOP is based on information provided in the OIOS memorandum providing its preliminary findings in its investigation into the Applicant's conduct.

27. The ID/OIOS investigation has produced information that the clip, which has been circulated widely, depicts a clearly-marked United Nations vehicle identified by its registration mark as UNTSO 205 (the "vehicle") filmed on the evening of 21 May 2020 on HaYarkon Street in Tel-Aviv. The clip showed a woman, reported as possibly being a sex worker, in a red dress, sitting astride a male passenger in the back seat, engaged in an act of a sexual nature.

28. The preliminary inquiry conducted by ID/OIOS has found evidence that identifies the Applicant as the passenger seated in the rear near-side passenger seat. The clip depicts the back-seat passenger as wearing a distinctive 'Levi' t-shirt, a gold chain and silver bracelet. ID/OIOS obtained photographs of the Applicant wearing an identical t-shirt and jewellery. The Applicant told ID/OIOS that he could not say whether it was him in the clip but could see why others might say it was him, and that he would need time to carefully review the clip to be able to say whether it was him. The totality of the foregoing information supports a conclusion that it was more likely than not (preponderance of the evidence) that the Applicant has engaged in unsatisfactory conduct of using a clearly-marked United Nations vehicle to engage in acts of a sexual nature, in a public and visible manner, thereby failing to use the United Nations vehicle only for the official purposes and to exercise reasonable care in the use of the UN vehicle.

29. Following his OIOS interview, in a written statement, the Applicant admitted

that he was the passenger seated in the rear near-side passenger seat captured in the clip. Although this information was not before the USG/DMSPC when the decision was made to place the Applicant on ALWOP, now it is not in dispute that the Applicant was inside the vehicle that was captured in the clip.

30. The ID/OIOS investigation, as it moves forward, may gather evidence demonstrating the extent of the Applicant's possible misconduct, including the identity of the female in the vehicle and the Applicant's relationship with her. That being noted, the OIOS memorandum still provides sufficient grounds to establish that the Applicant used a clearly-marked United Nations to engage in acts of a sexual nature, in a public and visible manner, thereby failing to use the United Nations vehicle only for the official purposes and to exercise reasonable care in the use of the United Nations vehicle. Contrary to the Applicant's contention, the unsatisfactory conduct referred to in the ALWOP letter to the Applicant is not about "having engaged in an act of a sexual nature with a woman reported as possibly being a sex worker".

31. The Applicant's conduct at issue is serious. The Applicant's conduct posed a significant harm to the reputation of the United Nations, and of UNTSO in particular within its mission area, including through the public nature of the conduct. The Applicant is in a position of command and respect within the mission. In these circumstances, relying on the information contained in the OIOS memorandum, the Applicant's behaviour is of such gravity that, if established, it would breach the trust placed in him by the UNTSO and thus would warrant separation or dismissal.

32. This is also in line with the Secretary-General's past practice. Depending on the circumstances of a specific case, a staff member's misuse of, or failure to exercise reasonable care in relation to United Nations property or assets resulted in the disciplinary measure of separation from service. Further, in certain cases, inappropriate and disruptive behaviour unbecoming of the status as a United Nations staff member, including domestic violence, and/or performing a sexual act in public view, led to the disciplinary measure of separation or dismissal. This therefore satisfies the requirement of "exceptional circumstances" as defined under section 11.4(b).

33. With respect to the second impugned decision, the submission of his mobile phone to the OIOS investigators is in accordance with the Organization's rules and regulations. In accordance with staff rule 1.2(c) and section 6.2 of ST/AI/2017/1, the Applicant has the duty to fully cooperate with all duly authorized investigations and to provide any communications technology equipment under the control of the Organization or under the Applicant's control. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct.

34. The Applicant's assertion that his mobile phone was personal is misplaced. During the interview, the OIOS investigators pointed out that the Applicant's mobile phone contained a United Nations issued SIM ("Subscriber Identity Module") card and was in effect used for official purposes. This had been explained as the basis for the OIOS's request for him to submit his mobile phone. Pursuant to section 9 of ST/SGB/2004/15 (Use of information and communication technology resources and data), OIOS, in accordance with its mandate, shall have authority to access all information and communication technology ("ICT") resources and data of United Nations staff members. Accordingly, there is no infringement of his rights as a staff member and the OIOS investigator's request for submission of the Applicant's phone containing a United Nations-provided SIM card is lawful.

Urgency

35. The Dispute Tribunal has consistently held that the onus is on the Applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The Applicant failed to do so. Contrary to the Applicant's contention, the Organization has not disclosed his name to the public in relation to the decision to place him on ALWOP. The Organization's press releases in relation to the clip contained no names, and there is no reputational harm caused to the Applicant. Therefore, there is no "urgent need to correct the record".

36. During the interview of 30 June 2020, the OIOS investigators indicated that the mobile phone would be returned to the Applicant once the forensic examination was

complete and gave him an approximate timeframe of 14 days. From this, it is clear that the deprivation of his access to the mobile phone is not permanent but temporary.

37. The Applicant did not clarify why he could not communicate with his family and friends without using the mobile phone. References to his sanity of mind during the pandemic and to his personal situation are vague and void of the minimum specificity to assist the Tribunal's determination of particular urgency of the case.

Irreparable harm

38. The Applicant has not demonstrated that he suffers irreparable harm from his placement on ALWOP. Placement on AWLOP is not a disciplinary measure, it is a temporary administrative measure without prejudice to the rights of the concerned staff member. While the Applicant's financial situation may be affected by the loss of his salary during his placement on ALWOP, he has not shown how any negative impact could not be remedied. If the allegations against the Applicant are ultimately not sustained, any pay withheld from the Applicant will be restored to him, in accordance with staff rule 10.4(d) and section 11.6 of ST/AI/2017/1.

39. Throughout the period of ALWOP the Organization makes the necessary payments and contributions to maintain the Applicant's entitlements to education grant, health, dental and life insurance coverage and his participation in the United Nations Joint Staff Pension Fund.

40. The Applicant did not clarify why he cannot leave the duty station and how this is relevant to the decision to place him on ALWOP. In the ALWOP letter, he was advised that should his United Nations grounds pass and/or other United Nations documents be required to travel from the duty station, he may make arrangements with Mission Support.

41. The Applicant has failed to demonstrate that the temporary deprivation of access to the mobile phone will cause him irreparable harm, meaning a loss that cannot be adequately compensated through a monetary award.

42. The Applicant's assertions about alleged invasion of his privacy or alleged harm to his reputation/future career prospects remains speculative and lacks specifics. During the interview, the OIOS investigators explained that private materials are not subject to the investigative review. Nothing on the record shows that his privacy was infringed by the OIOS investigators. Further, nothing on the record shows that his reputation and future career perspective were affected by OIOS's forensic analysis of his mobile phone.

43. The Respondent requests the Dispute Tribunal to reject the application. In particular, the Applicant's motion requesting an Order to instruct the Respondent to immediately return his mobile phone, destroy any data/analysis taken from it and issue an injunction preventing use of it should be rejected.

44. In addition, the Applicant's motion requesting an order for the Respondent to produce evidence in his reply is moot since the OIOS Memorandum is enclosed in this reply.

Considerations

45. Articles 2.2 of the UNDT Statute and 13 of its Rules of Procedure empower the Tribunal to hear and pass judgment on an application filed by an individual requesting the Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested 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 the implementation would cause irreparable damage.

46. In order to grant this relief, the Tribunal must find that the Applicant has satisfied all three elements by giving evidence which proves that the decision is *prima facie* unlawful, the matter is urgent and implementation would cause irreparable damage.

47. The starting point therefore is to consider whether the Applicant has discharged his burden of proof. It is only when the Tribunal is convinced on a lower standard proof

than preponderance of evidence that the Applicant has made out his case satisfying all three elements that the burden of proof shifts to the Respondent to show using the same standard that the decision is not *prima facie* unlawful, the matter is not of particular urgency and that implementation would not cause irreparable damage to the Applicant.

48. This reasoning is in tandem with the practice in the UNDT whereby it has been found that:

There is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for there to be a respondent's response before the applicant's request is decided.⁵

Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for temporary suspending, in appropriate cases, an administrative decision, which may have been wrongly made, so as to give the Management Evaluation Unit sufficient time to consider the matter and to advise management. The process itself should not become unduly complex, time-consuming and costly for the United Nations or its staff members.

49. The above views reflect the spirit behind the legislative framework governing suspension of actions and other similar interim remedies in particular art. 13.2 which obliges the Registrar to only transmit the application to the Respondent but does not compel the Respondent to submit a reply; art. 13.3 which mandates the Tribunal to consider an application for interim measures within five working days of the service of the application on the Respondent without a requirement to expect a reply and art. 13.4 providing that the decision of the Tribunal on such an application shall not be subject to appeal.

50. Consequently, this Tribunal has consistently held that it is up to the Applicant to produce sufficient evidence that would raise serious and reasonable doubts as to the lawfulness of the contested decision. Where the Applicant fails to discharge his burden of proof on any of the three elements, the Tribunal must reject the application⁶.

⁵ See for example in *Kananura* UNDT/2011/176, para. 6-7.

⁶ See generally, *Chattopadhyay* UNDT/2011/198 para. 46 and *Wang* UNDT/2012/080 para. 13(b).

Decision 1 – Placement of the Applicant on ALWOP

Whether the impugned decision is prima facie unlawful.

51. As discussed above, the onus is on the Applicant to show that the decision is *prima facie* unlawful. There must be created in the Tribunal, an appearance that the Respondent's decisions are in violation of the Applicant's terms and conditions of appointment. The Applicant has contested two decisions namely: being placed on ALWOP and secondly seizure of his personal mobile cell phone.

Legal framework

52. The burden of providing the regulatory framework forming the basis of the application falls squarely on the Applicant and it does not shift to the Respondent unless it is satisfied to the requisite standard and in this case because the law says, *prima facie* evidence, it means a standard lower than a preponderance of the evidence. All that the Applicant must do is to cite the relevant specific provisions and not general provisions, that the decision has infringed to the extent that the Tribunal is left in no doubt whatsoever that, on the face of it, the Respondent acted unlawfully.

53. This is important because the Dispute Tribunal shall assume jurisdiction on a matter where an Applicant appeals an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms contract and terms of appointment include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance, art. 2.1(a) of the UNDT Statute.

54. The Applicant has alleged that:

- a. The Respondent rushed to place him on ALWOP due to media pressure thereby violating his numerous rights. He does not specify the numerous violations that are in issue. In fact, he does not cite a single Staff Regulation, Rule or administrative issuance breached by this alleged rush.

b. He was accused of having engaged in an act of a sexual nature with a woman, reported as possibly being a sex worker and yet at the subject interview of 30 June he was not asked about this. That there is no evidence or justification for ‘pejoratively’ describing the person wearing the red dress in the video as a sex worker or prostitute. That there is no evidence of any sexual act in the video. The Tribunal is at a loss as to which term and or condition of the Applicant’s appointment was breached by this allegation. The allegations are being investigated and the Applicant has not been charged with any act of misconduct to claim that there is no evidence.

c. There are no exceptional circumstances as described in staff rule 10.4(c)(ii) and section 11.4 (b) of ST/AI/2017/1 justifying the placement of the Applicant on ALWOP. The Tribunal notes that the Applicant was sent on ALWOP after preliminary investigations found that he engaged in unsatisfactory conduct of using a clearly-marked United Nations vehicle to engage in acts of a sexual nature, in a public and visible manner, thereby failing to use the vehicle only for official purposes and to exercise reasonable care in the use of the vehicle. That if proved, such misconduct is so serious that it may attract the sanction of separation from service. The Applicant has not given any particulars to show how this reason violates his terms and conditions of appointment.

d. The Applicant avers that his due process rights assured under ST/AI/2017/1 were violated during the investigations. That the Respondent used criminal investigation interrogation techniques. The Tribunal is mindful of UNAT jurisprudence that at this stage of the process (preliminary investigations) the level of due process rights accorded to the staff member is minimal compared to when disciplinary processes commence after investigations.⁷ Therefore the Applicant’s challenge is premature.

⁷ See *Powell* 2013-UNAT-295. This was also confirmed in *Akello* 2013-UNAT-336, paras. 35-36; *Benamar* 2017-UNAT-797, paras. 55-57.

e. The press releases by the Spokesman of the Secretary-General and UNTSO were false and defamatory. The Applicant does not show the violations to his rights caused by these statements. He has not particularized the specific false and defamatory statements and how they impact on the lawfulness of the decisions complained of.

55. All in all, as can clearly be seen from the above paragraphs 54(a-e), the Applicant has not cited a single provision with specificity in his contract of employment, Staff Regulations and Staff Rules or Administrative Issuance or policy which has been violated through the decision to place him on ALWOP to render it unlawful.

56. This therefore is a matter where it is not necessary to consider the Respondent's reply because the Applicant has failed to discharge his initial burden to show that the decision to place him on ALWOP is *prima facie* unlawful.

57. The application in as far as it relates to the decision to place the Applicant on ALWOP is rejected without considering the rest of the conditions of urgency and irreparable damage as doing so would be mere academic and therefore in-expedient.

Decision 2- Decision to take phone for forensic evidence as part of the OIOS investigations

Receivability

58. The decision to seize the Applicant's cell phone was already taken at the time of filing this application, therefore, it has already been implemented and is not receivable.⁸

59. Further the SIM card in the cell phone is United Nations property used for official purposes and, in accordance with staff rule 1.2(c) and section 6.2 of ST/AI/2017/1, the Applicant has the duty to fully cooperate with all duly authorized

⁸ Article 2.2 UNDT Statute and, for example, *Mills-Aryee* UNDT/2011/051,

investigations and to provide any communications technology equipment under the control of the Organization or under the Applicant's control. The Respondent is entitled to seize for reasons of an investigation. The Applicant has not shown how his privacy rights were violated and how this decision has impacted his terms and conditions of appointment.

60. Further, there is an ongoing investigation and therefore the decision to seize the phone is in line with UNAT's jurisprudence that decisions made in the process of carrying out administrative processes are not appealable.⁹ The Dispute Tribunal, by its well settled case law, has also ruled that preparatory decisions are not subject to appeal.¹⁰

Applicant's motion requesting an order to instruct the Respondent to immediately return his personal phone, destroy any data/analysis taken from it and issue an injunction preventing use of it.

61. This motion requesting the Tribunal to issue declaratory orders against the Respondent is misplaced because the procedure under art. 2.2 of the Statute may not be used by the Tribunal to grant any interim relief other than suspension of a contested decision.¹¹

Judgment

62. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 22nd day of July 2020

⁹ Tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality. See for example *Auda* 2017-UNAT-786; *Nguyen-Kropp & Postica* 2015-UNAT-509; *Gehr* 2013-UNAT-313; *Ngokeng* 2014-UNAT-460; and *Wasserstrom* 2014-UNAT-457.

¹⁰ For instance, in *Hashimi* Order No. 93 (NY/2011); *Balakrishnan* 2012/UNDT/041.

¹¹ *Kamanou* UNDT/2011/ 050, para. 29.

Entered in the Register on this 22nd day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi