



**Before:** Judge Francis Belle  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

OKWAKOL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON THE APPLICANT'S MOTION  
FOR SUSPENSION OF ACTION  
PENDING MANAGEMENT  
EVALUATION**

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**Counsel for applicant:**

Roland Adjovi

**Counsel for respondent:**

Nicola Caon, AAS/ALD/OHR

Elizabeth Gall, AAS/ALD/OHR

## **Introduction and Procedural History**

1. The Applicant is the Chief Resident Auditor, with the Office of Internal Oversight Services (“OIOS”) at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Goma. He serves on a fixed-term appointment at the P-5 level.

2. On 15 July 2020, the Applicant sought a suspension of action pending management evaluation before the United Nations Dispute Tribunal in Nairobi. The impugned decision is the Respondent’s decision of 10 July 2020 to place him on administrative leave with pay (“ALWP”) as of 16 July 2020 pending review of the OIOS Investigation Report.

3. The Respondent filed his reply to the application on 20 July 2020. In acknowledging receipt of the Respondent’s reply and serving it on the Applicant, the Registry informed the parties pleadings in this application are now closed.

4. On 21 July 2020, the Applicant filed a motion for leave to respond to the Respondent’s reply. This Motion is refused.

## **Facts**

5. On 10 December 2019, the Applicant received an email from the OIOS informing him that he was the subject of an investigation regarding allegations that he did not report rape and that he attempted to interfere with the investigation by seeking to negotiate payment of money to the alleged victim for her to withdraw her rape complaint. The Applicant was told that he was being investigated for “assisting in, or contributing to, the commission of a misconduct”.

6. On 13 January 2020, the Under-Secretary General for Management, Strategy, Policy and Compliance (“USG-MSPC”), placed the Applicant on ALWOP for a

period of three months pending completion of the investigation and any disciplinary process against the Applicant.

7. On 13 May 2020, the Applicant was notified that the USG-MSPC had decided to extend his ALWOP for an additional period of three months from 16 April 2020, or until the completion of the disciplinary process, whichever comes earlier.

8. On 22 June 2020, the Assistant Secretary-General for Human Resources (“ASG/OHR”) rescinded the decision to place the Applicant on ALWOP on a retroactive basis, that is, regarding the period from 16 April to 12 May 2020. The ASG/OHR advised MONUSCO to pay the Applicant his salary. On 23 June 2020, MONUSCO confirmed that the Applicant would be paid his salary from 16 April 2020 to 13 May 2020.

9. On 25 June 2020, the Applicant submitted a request for management evaluation of the 13 May ALWOP decision. On 29 June 2020, the Applicant filed an application with the Dispute Tribunal seeking suspension of the implementation of the 13 May ALWOP decision, pending management evaluation.

10. On 6 July 2020, the Dispute Tribunal issued Order No. 127 (NBI/2020) dismissing the Applicant’s 29 June 2020 application for suspension of action.

11. On 10 July 2020, the USG/OIOS decided to place the Applicant on ALWP from 16 July 2020 under staff rule 10.4 and section 11.3 of ST/AI/2017/1 (Unsatisfactory Conduct, Investigations and the Disciplinary Process) for an initial period of three months, pending a review by the Department of Management Strategy, Policy and Compliance (“DMSPC”) of the OIOS investigation report into the Applicant’s conduct.

12. On 15 July 2020, the Applicant sought management evaluation of this latest decision, and filed the subject application of this order before the UNDT.

13. The Respondent informs the Tribunal that the OIOS investigation report into the Applicant's conduct has not been referred to the ASG/OHR for consideration of whether a disciplinary process should be pursued under section 7.2 of ST/AI/2017/1.

### Considerations

14. Applications for suspension of action are governed by art. 2 of the UNDT Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

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 [emphasis added]**.

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

15. Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for 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.

16. The impugned decision must be shown to be *prima facie* unlawful, the matter must be particularly urgently and it must be evident that implementation of the decision would cause the applicant irreparable harm. *All three elements* must be

satisfied for the Tribunal to grant the injunction being sought, as the test is a cumulative one.

17. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he/she has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.<sup>1</sup>

18. At this stage, the Applicant need only show *prima facie* unlawfulness. The presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process and consideration of irrelevant material or extraneous factors.<sup>2</sup>

19. Put another way, does it appear to the Tribunal that, unless it is satisfactorily rebutted by evidence, the claim of unlawfulness will succeed?<sup>3</sup>

20. On the facts before it, the Tribunal finds that the Applicant has not made out a case of *prima facie* unlawfulness.

21. The Applicant contends that the impugned decision is unlawful because it is based on evidence which has been improperly obtained. He does not dispute that a claim of unsatisfactory conduct has been made and is the subject of an ongoing investigation. The Applicant is instead challenging the sanctity of the evidence and the Respondent's "abusive investigative process".

22. For present purposes, the Tribunal is persuaded that the impugned decision is not *prima facie* unlawful. There is nothing on the record to suggest that the USG/OIOS abused her discretion in arriving at the decision that the Applicant seeks

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<sup>1</sup> See for example *Newland* Order No. 494 (NBI/2016).

<sup>2</sup> *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

<sup>3</sup> *Wilson* Order No. 327 (NY/2014).

to have suspended.

23. As the Applicant has not satisfied the limb of *prima facie* unlawfulness, there is no need for the Tribunal to further inquire into whether the impugned decision would cause irreparable harm or if the matter is urgent.

24. The Application is therefore DISMISSED.

*(Signed)*

Judge Francis Belle

Dated this 23<sup>rd</sup> day of July 2020

Entered in the Register on this 23<sup>rd</sup> day of July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, UNDT, Nairobi