



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

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:**

Self-represented

**Counsel for the Respondent:**

Romy Batrouni, AAS/ALD/OHR  
Miryoung An, AAS/ALD/OHR

## Introduction

1. The Applicant is a [REDACTED], working with the United Nations Truce Supervision Organization (“UNTSO”), in Jerusalem, Israel.<sup>1</sup> [REDACTED]  
[REDACTED].<sup>2</sup>

2. On 3 August 2020, he filed an application for suspension of action pending management evaluation before the United Nations Dispute Tribunal in Nairobi. He seeks suspension of a decision dated 24 July 2020 placing him on Administrative Leave Without Pay (“ALWOP”) for a period of three months, or until the completion of the investigation and any disciplinary process, whichever is earlier.

3. On 4 August 2020, the application was served on the Respondent, who filed his reply on the same day.

## Facts

4. On 26 June 2020, the Applicant was informed that an Office of Internal Oversight Services (“OIOS”) investigation had been triggered by an anonymous complaint supported by a video clip showing a United Nations branded vehicle in a busy street, with a male and female passenger in the rear seat engaged in a possible sexual act. The vehicle in the video belongs to UNTSO [REDACTED]  
[REDACTED].<sup>3</sup>

5. During the interview with OIOS, the Applicant denied that he was the [REDACTED] of the UNTSO vehicle in question. However, on 12 July 2020, he submitted a written statement to OIOS admitting that he was [REDACTED] of the vehicle and providing specific details about the matters covered during the interview.<sup>4</sup>

6. On 24 July 2020, the Under-Secretary-General for Management, Strategy,

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<sup>1</sup> Application, section I.

<sup>2</sup> Ibid.

<sup>3</sup> Application, annex 32.

<sup>4</sup> Application, section VIII, paras. 13 and 14; application, annex 18.

Policy and Compliance (“USG/DMSPC”), placed the Applicant on ALWOP for a period of three months pending completion of the investigation and any disciplinary process against him.<sup>5</sup> The decision was communicated to the Applicant via a letter from the Assistant Secretary-General for Human Resources (“ASG/OHR”).<sup>6</sup>

7. The reasons provided for placing the Applicant on ALWOP are as follows:

a. On 21 May 2020, the Applicant transported a non-United Nations person in an UNTSO vehicle. While the Applicant was [REDACTED], another male United Nations staff member, in the back seat, engaged in acts of a sexual nature, in a public and visible manner in the vehicle. By so doing, the Applicant failed to use the United Nations vehicle only for official purposes; his conduct could bring the United Nations’ reputation into disrepute;

b. During the interview with OIOS, the Applicant knowingly provided false information to investigators, thereby failing to cooperate with the OIOS investigation; and

c. The unsatisfactory conduct of failing to observe the standards of conduct expected of an international civil servant is of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2(a)(viii) or (ix).

8. On 3 August 2020, the Applicant requested management evaluation of the contested decision.<sup>7</sup> The Management Evaluation Unit (“MEU”) is yet to respond.<sup>8</sup>

## **Submissions**

### *Applicant’s submissions*

### *Unlawfulness*

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<sup>5</sup> Application, annex 1.

<sup>6</sup> Ibid.

<sup>7</sup> Application, annex 32.

<sup>8</sup> Application, Section VI.

9. On the first allegation of failing to use the United Nations vehicle only for official purposes and indulging in the conduct that could bring the United Nations' reputation into disrepute, the Applicant's position is that he cannot be held responsible for the conduct of others, even if those actions are embarrassing or perceived to be damaging to the reputation of the Organization. He explains that in mid-May 2020, he and other two colleagues, namely [REDACTED] and [REDACTED] went to Tel Aviv using an UNTSO vehicle. [REDACTED] was driving. While in Tel Aviv, they went to a restaurant, where [REDACTED] recognized a female Israeli friend of his. On return to Jerusalem, [REDACTED] asked if they could give his friend a ride since she did not live far away, and they collectively agreed. [REDACTED] did not feel well and started throwing up. Hence the Applicant [REDACTED], [REDACTED] sat in the front passenger seat, while [REDACTED] and his friend sat in the back seat of the vehicle.

10. While [REDACTED], at some point, the Applicant heard Caribbean music, which he assumed was coming from a cellphone of one of the persons sitting in the back. While stopped at a traffic light, the Applicant noticed in the rear-view mirror that [REDACTED] friend appeared to be dancing on his lap to the music. At that moment, the light turned green and he quickly gestured with his hand and said "hey, stop that, get off, get off" and [REDACTED] friend got off his lap and sat in her seat. The Applicant continued to focus on driving.

11. In view of the above, the Applicant contends that while it was a violation of the rules to allow a non-United Nation person to ride in a United Nations vehicle, he properly instructed the persons in the back seat to stop and they complied. Therefore, the Applicant, [REDACTED], properly exercised all reasonable care and he cannot be accused of having "failed to use the UN vehicle only for official purposes and to exercise reasonable care in the use of the UN vehicle". On the return, the carlog had been properly set for "liberty trip". Accordingly, the Applicant cannot be held responsible for the conduct of others.

12. With regard to the second allegation, failure to cooperate with the OIOS investigation, the Applicant admits that he lied to the investigators during the interview. He, however, opines that pursuant to section 6.10(f) of ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process), he has a right, within a period of two weeks, to provide further clarification, as well as additional testimony, which he did on 12 July 2020. Therefore, his statement repaired his original testimony before the investigators within the statutory time limits allowed by section 6.10(f) of ST/AI/2017/1. Accordingly, the second basis provided in the contested decision justifying his placement on ALWOP, i.e., that he failed to cooperate with the OIOS investigation is false.

13. On the third allegation of unsatisfactory conduct of failing to observe the standards of conduct expected of an international civil servant, the Applicant contends that this allegation does not apply to him. He is not accused of sexual abuse; he is only accused of being [REDACTED] of a United Nations vehicle where someone else may have engaged in conduct which may meet the said criteria by the Administration. The allegations do not prevent him from performing his duties as a [REDACTED]; he represents no security or financial risk to the Organization or anyone. He has no capability to interfere with the investigation; in any case he has been interviewed already and his presence at the office had no negative impact on the preservation of a harmonious working environment. Therefore, placing him on ALWOP is unlawful.

#### *Urgency*

14. With regard to urgency, the Applicant submits that he was unlawfully placed on ALWOP, so that the Organization could release an additional press statement for the purposes of damage control. Since his name has already been publicly released, he has now been assumed to be guilty of the allegations in the court of public opinion, creating an urgent need to correct that record.

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

*Irreparable harm*

16. The Applicant submits that by placing him on ALWOP, he has also been instructed not to leave his duty station. The additional hardship occasioned by the COVID-19 pandemic adds to the severity of the decision. The Applicant is in a foreign country, which he is prohibited from leaving and staying there implies cost, yet he has no salary. The ALWOP therefore, is exceptionally harsh in the circumstances. In addition, the damage to his reputation grows with each day that he is on ALWOP.

17. He further contends that given the publicity of the case, placing him on ALWOP will affect his professional prospects in a way that constitutes irreparable harm that cannot be remedied by a monetary award.

*Respondent's submissions*

18. The Respondent submits that the application has no merit. The Applicant has not discharged the burden of proving that the three conditions under art. 2.2 of the UNDT Statute have been met. It is well established that if any one of the prerequisites are not met, suspension of action cannot be granted.

19. 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. The 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. That being noted, the available information still provides sufficient grounds to establish that the Applicant

was [REDACTED] a clearly-marked United Nations vehicle while another staff member in the back seat engaged 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 a United Nations vehicle. Contrary to the Applicant's contention, section 3.6 of ST/AI/2017/1 declares that misconduct may also include assisting in, or contributing to, the commission of misconduct. It is also not in dispute that the Applicant lied to the investigators.

20. The Applicant's assertion that section 6.10(f) of ST/AI/2017/1 provides a "statutory time limit" to repair his failure to tell the truth during his interview is baseless. Nothing under section 6.10(f) justifies or reduces the accountability for telling a lie during an interview which violates the fundamental duties of a staff member under staff regulation 1.2(b) and staff rule 1.2(c).

21. The Applicant's conduct posed significant harm to the reputation of the Organization, and of UNTSO in particular.

22. The specific circumstances of this case indicate a behavior of such gravity that, if established, it would breach the trust placed in the Applicant by UNTSO and thus would warrant separation or dismissal.

23. 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 behavior unbecoming of the status as a United Nations staff member, including domestic violence, and or performing a sexual act in public view, led to disciplinary measure of separation or dismissal. This therefore, satisfies the requirement of "exceptional circumstances" as defined under section 11.4(b).

24. In view of the foregoing, the Respondent contends that the decision to place the Applicant on ALWOP is in accordance with the requirements set out in section 11.4(b) of ST/AI/2017/1.

*Urgency*

25. The Respondent submits that 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 his or her actions. The Applicant failed to do so.

26. The Applicant's contention that the Organization has disclosed his name to the public, including media outlets, in relation to the decision to place him on ALWOP, is baseless. The Organization's press releases in relation to the clip contained no names. The Organization cannot be held liable for publications by news media external to the Organization and outside the Organization's control. There is no evidence that the Organization created the publicity of this case.

27. It is not clear how suspending the ALWOP would help the Applicant "correct the record", including those articles already published in news media.

*Irreparable harm*

28. The Applicant has not demonstrated that he suffers irreparable harm from placement on ALWOP. Placement on ALWOP 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 the placement on ALWOP, he has not shown how any negative impact could be remedied. If the allegations against the Applicant are ultimately not sustained, any pay withheld from him will be restored.

29. During 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 coverage and his participation in the United Nations Joint Staff Pension Fund.

30. The Applicant did not clarify how the COVID-19 pandemic affected him in leaving the duty station. In the ALWOP letter, in relation to the COVID-19



pandemic, the Applicant was advised that he could seek assistance from Mission Support with respect to his travel from the duty station.

*Other matters*

31. The Respondent raises two other issues relating to the Applicant's production of the Respondent's documents and the inadmissibility of annexes 11 and 14 of the application.

32. With regard to the first issue, the Respondent submits that it appears that the Applicant obtained several confidential documents disclosed by the Respondent in other cases before UNDT involving [REDACTED] and [REDACTED]. The Applicant has not explained how he came to be in possession of these documents, which would not be available to him during the ordinary course of his functions as a [REDACTED]. These documents are confidential in nature.

33. On the second issue, the Respondent requests that annexes 11 and 14 to the application be ruled as inadmissible evidence under art. 18 of the Tribunal's Rules of Procedure. The audio clips appear to be extracts from the OIOS interviews of the Applicant, [REDACTED] and [REDACTED]. The authenticity of the extracts is not admitted and would require forensic verification. Further, the selective presentation of the extracts from interviews of three subjects is not probative or persuasive evidence.

**Considerations**

34. Articles 2 of the Statute and 13 of the Rules of Procedure of the Tribunal require that an applicant seeking suspension of action satisfies the Tribunal that:

- a. the impugned decision is *prima facie* unlawful,
- b. the matter appears to be of particular urgency, and
- c. the implementation of the decision would appear to cause irreparable damage.

35. All the three elements of the test must be satisfied before the impugned decision can be stayed.

***Prima facie unlawfulness***

36. The justification provided to the Applicant for his placement on ALWOP was “pursuant to Staff Rule 10.4 (from ST/SGB/2018/1) and Section 11.4(b) of ST/AI/2017/1.”

37. Staff rule 10.4 provides in the relevant part:

[...]

(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.

38. ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process) provides in the relevant part:

11.4 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.

39. Staff rule 10.4(c) confirms that ALWOP – which departs from the fundamentals of the employment relation - is an exceptional measure and not a matter of vast administrative discretion. Consequently, application of ALWOP requires, primarily, the Respondent to show that legal premises allowing it are fulfilled.

40. For staff rule 10.4(c)(i) to be applicable it would be necessary that a staff member's actions were, at minimum, accessory to sexual abuse or sexual exploitation. On the facts of the case, as they appear on the basis of the parties' submissions, this would require that the Applicant had knowingly accepted that the female passenger would be subject to sexual exploitation aboard the United Nations vehicle or at the destination. The probable cause standard is not too demanding. Admittedly, however, the requisite determinations have not been made as yet, and the Applicant has not been accused of sexual abuse or sexual exploitation in any form.

41. Before discussing the Administration's implementation of the staff rule 10.4(c)(ii) "exceptional circumstances" provision in reliance on ST/AI/2017/1, the Tribunal wishes to recall its holding in the *Erefa* case:

[...] 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. [...] 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. [...] 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.

[...]

[I]n 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.

[...]

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 ALWOP. 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. There is currently no authorisation in the Staff Rules to forfeit remuneration of a staff member who resigned while presumed innocent.

[...]

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.<sup>9</sup>

42. Turning back to staff rule 10.4(c)(ii), this Tribunal notes that it clearly requires the Secretary-General to make *a case-specific determination* warranting special leave with partial pay or without pay. Had it been intended to resort to abstract criteria, they would have been articulated on the level of staff rules, just as it has been done regarding sexual exploitation and sexual abuse. A reference to the gravity of the disciplinary violation and a certain threshold of proof and, as in section 11.4(b) of ST/AI/2017/1, rightly provides a limitation on the ALWOP, but does not amount to "exceptional circumstances". Thus, on the ground of staff rule 10.4(c)(ii), a requisite gravity and threshold of proof may serve as general conditions, in addition to which, however, individual circumstances of the case must speak in favour of ALWOP over leave with full pay or partial pay. Consideration, however, must always be given to the *purpose* of leave.<sup>10</sup> In other words, under staff rule 10.4(c)(ii), the Respondent is required to show why Administrative Leave is necessary in the first place, moreover, why it is necessary that it be without pay. Resignation from determining the purpose of ALWOP and replacing it with a sole reference to the gravity of a violation contradicts the presumption of innocence and denies any meaning to the assurance that ALWOP "shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure". In this respect, the Tribunal regrets to find, once again, that ST/AI/2017/1 goes against the letter of staff rule 10.4(c) and (d) that it clearly designed ALWOP to be applied akin to an anticipated measure of separation or dismissal.

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<sup>9</sup> *Erefa* Order No. 002 (NBI/2019).

<sup>10</sup> In this connection, it is worth recalling the Appeals Tribunal's holding in *Samandarov* 2018-UNAT-859 that: "[t]he proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability." This Tribunal stresses that in the case of ALWOP it is not only the general proportionality principle that requires considering less drastic measures but an express directive of staff rule 10.4(c)(ii) that ALWOP be approached as an exceptional measure.

43. Referring the above considerations to the facts of the present case, the Tribunal is satisfied that the nature of the alleged conduct and its unfortunate publicity are factors that may require that the individuals under investigation be removed from service pending investigation, notwithstanding that the circumstance of sexual exploitation, as well as individual roles are yet to be established. This may be necessary to control the damage to the trust in the Organization by showing that members of the host population will not be exposed to individuals who willfully and publicly offend mores and endanger public safety in traffic, and may have engaged in sexual exploitation. This said, not an iota of reason has been given as to why leave with partial pay, such as retaining the cost of living component of the salary, would not be sufficient to satisfy this purpose.

44. Whereas one of the purposes of administrative leave may be that it is necessary to prevent tampering with evidence, it is not to be applied as a punitive measure for not cooperating with the investigation. That the Applicant lied, it might, hypothetically, be indicative of consciousness of guilt. It, however, does not show that the administrative leave in any way serves the purpose of collection or preservation of evidence. Again, ALWOP appears to have been applied as a punitive measure.

***Urgency and irreparable harm***

45. The Applicant's arguments on irreparable harm and urgency are accepted. The Tribunal recalls its reasoning in *Tadonki* where it was held that "... 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. ... An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing".<sup>11</sup>

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<sup>11</sup> *Tadonki* UNDT/2009/016, para. 13.1.

46. The Tribunal finds that the Respondent applied ALWOP in violation of the presumption of innocence and as a punitive measure. This perception and attitude need to be urgently corrected as they cause irreparable harm to the Applicant's legal and financial interest.

*Other submissions*

47. The Tribunal has made its *prima facie* findings based on undisputed facts. It has not considered any disputed evidence. It is not necessary for the Tribunal to rule on admissibility of any piece of evidence upon which it does not need to rely.

**ORDER**

48. The application is granted and the decision to place the Applicant on administrative leave without pay is suspended.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 10<sup>th</sup> day of August 2020

Entered in the Register on this 10<sup>th</sup> day of August 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi