



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2022/092  
Order No.: 134 (NBI/2022)  
Date: 28 September 2022  
Original: English

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**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

BHAM

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:**

Manuel Calzada

**Counsel for the Respondent:**

Nicola Esti Caon, ALD/DAS/OHR

Jacob van de Velden, ALD/DAS/OHR

## **Introduction**

1. The Applicant is the Regional Administrative Officer, working with the United Nations Support Office in Somalia (“UNSOS”).<sup>1</sup> He serves on a continuing appointment at the FS-5 step VIII level.<sup>2</sup>

2. On 23 September 2022, he filed an application for suspension of action pending management evaluation before the United Nations Dispute Tribunal in Nairobi. He seeks suspension of the decision by the Under-Secretary General for Management Strategy, Policy and Compliance (“USG/DMSPC”) dated 16 September 2022 placing him on administrative leave without pay (“ALWOP”).

3. On 23 September 2022, the application was served on the Respondent, who filed his reply on 27 September 2022.

## **Facts**

4. The Office of Human Resources (“OHR”) received allegations of misconduct against the Applicant that he sexually harassed and/or harassed V01, V02, V03, V04 and V05 and that he engaged in abuse of authority towards V01.<sup>3</sup>

5. Pending the investigation of the allegations of misconduct against the Applicant, on 24 November 2021, the Assistant Secretary-General and the Head of UNSOS decided to place the Applicant on administrative leave with pay (“ALWP”).<sup>4</sup>

6. The Office of Internal Oversight Services (“OIOS”) undertook the investigations into the allegations and issued a report on 28 July 2022.<sup>5</sup>

7. Based on the investigation report, on 8 September 2022, the Assistant Secretary-General for Human Resources (“ASG/OHR”) issued formal allegations of

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

<sup>2</sup> *Ibid.*, section II.

<sup>3</sup> Application, annex 2 (contested decision).

<sup>4</sup> Application, section VII, para. 3.

<sup>5</sup> Application, annex 2.

misconduct against the Applicant.<sup>6</sup> The Applicant was provided with the investigation report and the supporting documentation. He was also requested to provide a response to the allegations by 9 October 2022.<sup>7</sup>

8. On 16 September 2022, the USG/DMSPC decided to modify the Applicant's ALWP to administrative leave without pay ("ALWOP"). The USG/DMSPC stated that the decision was based on the criteria set out in staff rule 10.4(c)(ii) and section 11.4(b) of the ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).<sup>8</sup>

9. On 19 September 2022, the Applicant requested management evaluation of the decision to place him on ALWOP.<sup>9</sup> The Management Evaluation Unit is yet to respond.<sup>10</sup>

## **Submissions**

### *Applicant's submissions*

10. On the prong of unlawfulness, the Applicant's case is that he has not been accused of sexual abuse or sexual exploitation and there are no exceptional circumstances to justify the decision to change his status from ALWP to place him on ALWOP. The investigation report does not substantiate any of the allegations against him. The report lacks objectivity, evidence and relies solely on hearsay and circumstantial evidence. Further, the ALWOP decision is punitive and clearly indicative of a state of mind of the USG/DMSPC that the Applicant is guilty as stated in the OIOS preliminary report. The contested decision has been imposed without allowing him the opportunity to provide his comments on the allegations, which are due on 9 October 2022.

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<sup>6</sup> *Ibid.*

<sup>7</sup> Application, annex 3,

<sup>8</sup> Application, annex 2.

<sup>9</sup> Application, annex 3.

<sup>10</sup> Application, section VI.

11. The Applicant submits that the matter is urgent because his entire family, including an elderly mother in Pakistan, his current wife and three children under seven years of age, installed in Nairobi, Kenya, are all fully financially dependent on him. Additionally, he has a USD4,900 per month mandated family maintenance obligation to his former wife and child residing in New York, the United States of America. Accordingly, without income, his family will suffer deprivations, including loss of accommodation and abandonment in a foreign country without extended family support.

12. Regarding the irreparable harm, the Applicant submits that the contested decision puts him in an impossible financial position to defend himself from the allegations which the Administration fully anticipates may justify his separation or dismissal. This is likely to lead to loss of his employment, income and reputation. Further, his family being isolated from the extended family support and without viable resources to survive in Nairobi, will make his very young children suffer deprivation of a dwelling and other basic needs.

*Respondent's submissions*

13. The Respondent submits that the application has no merit. The Applicant has not discharged his burden of proving that the three statutory conditions under art. 2.2 of the Tribunal's Statute have been met.

14. The Respondent contends that the contested decision was lawfully made, rational and is not tainted by irrationality, arbitrariness or any other ground of unlawfulness. He further maintains that there are "exceptional circumstances" warranting the ALWOP. The contested decision was made pursuant to staff rule 10.4(c)(ii) and section 11.4(b) of ST/AI/2017/1. Therefore, the Applicant's contentions that his conduct did not rise to the level of sexual exploitation or abuse are irrelevant. The Respondent submits that the question of what constitutes "exceptional circumstances" for the purposes of staff rule 10.4(c) is determined by

the provisions in section 11.4(b) of ST/AI/2017/1. That is, exceptional circumstances will exist when the criteria set out in section 11.4(b) are met.

15. With regard to urgency, the Respondent submits that the Applicant has failed to satisfy the requirement of this criterion. He cites loss of income and the effect on his family as a reason for the urgency of the Application. In fact, all cases of ALWOP involve loss of salary and, without more, this should not be considered a particular urgency *per se* as it would defeat the very purpose of ALWOP in all cases.

16. For irreparable harm, the Respondent seeks to rely on *Utkina*.<sup>11</sup> He submits that an applicant must demonstrate that the decision would cause them irreparable harm, meaning a loss that cannot be adequately compensated through a monetary award. The Dispute Tribunal has previously held that: “[i]t is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage.”<sup>12</sup> Indeed, if this were the case, then all instances of ALWOP would constitute “irreparable harm” *per se* and this limb of the three-part test would be obsolete.

17. The Respondent further submits that while the Applicant’s financial situation may be affected by the loss of his salary during ALWOP, he has not shown how any negative impact could not be remedied. Staff rule 10.4(d) and section 11.6 of ST/AI/2017/1 provide that, should the allegations against the Applicant not be substantiated, amounts withheld pursuant to the measure will be restored. Further, 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 and his participation in the United Nations Joint Staff Pension Fund. Consequently, the Applicant has failed to show harm that could not be remedied.

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<sup>11</sup> *Utkina* UNDT/2009/096, para. 50.

<sup>12</sup> *Moise* Order No. 208 (NY/2014), para. 42.

## Considerations

### *Prima facie* unlawfulness

18. It is recalled that staff rule 10.4 reads 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. 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.

19. The Tribunal considers that the Applicant has failed to prove the first of three factors that must be established in accordance with art. 10.2 of the UNDT Statute for success in obtaining a suspension of action order. He has not proven that there are serious and reasonable doubts about the lawfulness of the impugned decision<sup>13</sup> based on which it can be determined that the contested decision appears to be *prima facie* unlawful.

20. On the contrary, the information available before the Tribunal provides sound basis for concluding that there were exceptional circumstances warranting ALWOP, pursuant to section 11.4 (b) of ST/AI/2017/1.

21. Firstly, the alleged unsatisfactory conduct of the Applicant was of such gravity that it would, if established warrant separation or dismissal. This is so in that the allegations are of multiple instances of persistent and unwelcomed sexual harassment involving five women at his duty station. The Organization's firm policy stance against sexual harassment is well established. Such conduct is considered so

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<sup>13</sup> *Minaeva* UNDT/2020/056.

grave that once proven it may warrant separation or dismissal. This has been affirmed by the Appeals Tribunal in *Mbaigolmem* 2018-UNAT-819, para. 33:

Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. [...] The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.

22. Furthermore, the gravity of the alleged sexual harassment misconduct in the instant case falls within the category of “particularly serious” aggravated circumstances under section 1.7 and 1.8 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority), based on the Applicant’s position of authority and because it is combined with an element of abuse of authority concerning one of the complainants.

23. As the misconduct alleged is of such a grave nature that if established it would warrant separation or dismissal, consideration must be given to whether there was a preponderance of evidence before the decision maker that justified the placement of the Applicant on ALWOP. It is the Tribunal’s finding, from review of the investigation report and the decision letter, that there was credible evidence to justify the conclusion that more likely than not the Applicant engaged in the alleged misconduct. This evidence included credible and consistent testimony from the five complainants with substantial corroborating evidence.

24. The Applicant has presented no credible evidence in his application to prove his contention that the decision otherwise unlawful based on either bias against him or consideration of extraneous sources. Furthermore, there is no evidence that any due process entitlement of the Applicant has been breached by the Respondent in making this ALWOP decision.

25. In all the circumstances, there is no fairly arguable case<sup>14</sup> that the contested decision is unlawful. As the Applicant has not met the essential criteria of proving *prima facie* unlawfulness of the decision, his application must fail. There is no need to consider whether the other two essential factors of urgency and irreparable harm have been proven.

## **ORDER**

26. The application is dismissed.

*(Signed)*

Judge Eleanor Donaldson-Honeywell.

Dated this 28<sup>th</sup> day of September 2022

Entered in the Register on this 28<sup>th</sup> day of September 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>14</sup> *Minaeva* Order No. 056 (GVA/2020) para. 20; *Jaen*, Order No. 29 (NY/2011), para. 24; *Villamorán* UNDT/2011/126, para. 28.