



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Jacob van de Velden, DAS/ALD/OHR

Andrea Ernst, DAS/ALD/OHR

Introduction

1. The Applicant is a Security Officer at G-4, step 9 level, working with the United Nations Department of Safety and Security (“UNDSS”) based in Nairobi, Kenya.¹

2. On 28 April 2023, he filed an application for suspension of action regarding a decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) dated 18 April 2023 placing him on Administrative Leave Without Pay (“ALWOP”).² As a remedy, the Applicant requests the Tribunal to rescind the contested decision, or alternatively the decision be changed from “without pay to with pay”.

3. The application was served on the Respondent on 28 April 2023, who filed his reply on 2 May 2023, requesting that the application be rejected as non-receivable or dismissed.

Facts

4. On 28 December 2021, the Applicant was informed that he was a subject of an investigation regarding allegations that he had sexually assaulted (attempted to rape) a World Food Programme (“WFP”) staff member in the WFP Kakuma camp compound accommodation in March 2021.³

5. The Applicant was interviewed on 30 December 2021.⁴

6. On 18 April 2023, the USG/DMSPC placed the Applicant on ALWOP for a period of three months or until the completion of the investigation and any disciplinary process, whichever would come earlier.⁵

¹ Application, section II.

² Application, annex I.

³ Application, section VII, para. 2.

⁴ *Ibid.*, para. 4.

⁵ Application, annex 1.

7. On 27 April 2023, the Applicant requested management evaluation of the contested decision.⁶ The Management Evaluation Unit is yet to respond.⁷

Submissions

Receivability

8. The Respondent contends that the application is not receivable, because the Applicant requests the Tribunal to rescind the contested decision or change it from “without pay to with pay”, whereas the framework of art 2.2 of the UNDT Statute allows only to suspend the implementation. The Application aims at changing the status quo, not maintaining it. While this conclusion may seem harsh for the Applicant, who is self-represented, it was open to him to seek the professional assistance of the Office of Staff Legal Assistance which could have avoided this issue.

Considerations

9. The application is receivable. It is recalled that the Tribunal’s power to interpret an application⁸ serves to assist unrepresented applicants, who exhibit a difficulty in articulating their claim. In the latter case applications must be interpreted *bonae fidei* to ascribe to them a sense consistent with the presumed intention and legal interest of the Applicant⁹, as it would not be in the interests of justice to hold them formalistically and technically to what they may or may not have pleaded. Conversely, picking on particular expressions used by an unrepresented Applicant, is not *bonae fidei* interpretation, whereas expecting an Applicant to secure, within the narrow window for the suspension of action, a legal representation only for the sake of using the proper terminology, is unreasonable. The present application clearly identified the impugned decision and the legal regime in which the author wants it to be reviewed, including the title “for suspension of action pending management

⁶ Application, annex 4.

⁷ Application, section VI.

⁸ E.g., *Chaaban* 2016-UNAT-611, para. 18; *Fasanella* 2017-UNAT-765, para. 20.

⁹ *Ssewaguma et al* UNDT/2020/155, para. 18.

evaluation” and the fact that the Applicant lays out his case pursuant to the three prongs required by art. 2.2 of the UNDT Statute. While it is obvious that the impugned decision cannot be “rescinded” in this regime, but only suspended, it is also obvious what the Applicant contends, why, and that the desired outcome is to be of a temporary nature.

Merits

Applicant’s submissions

Unlawfulness

10. On the prong of unlawfulness, the Applicant’s case is that the contested decision does not meet requirements of the legal instruments governing ALWOP, namely staff rule 10.4 and section 11.4 of ST/AI/2017/1(Unsatisfactory conduct, investigations and the disciplinary process).

11. Given the hardship caused to him by being placed on ALWOP, the onus is on the Administration to prove the objective existence or factual basis of exceptional circumstances to warrant placing him on ALWOP. Section 11.4(b) of ST/AI/2017/1 requires that the unsatisfactory conduct must be of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix), and there must be information before the authorized official about the unsatisfactory conduct that makes it more likely than not (on a balance of probabilities) that he engaged in the alleged unsatisfactory conduct. The Administration has not shared any such information with him. Staff rule 10.4(c) relied upon by the Administration to justify placing him on ALWOP requires proof of probable cause which they have failed to provide.

12. He maintains that the available information has not established on a balance of probabilities or probable cause that he engaged in the alleged misconduct justifying placement on ALWOP. It has taken the Administration over two years to conduct an investigation, which, if the evidence was indeed compelling on a balance

of probabilities, would have been completed a long time ago. His case is just based on a “he said, she said” scenario.

13. In view of the foregoing, the Applicant prays for presumption of innocence to be observed. The Administration is imposing on him a premature disguised disciplinary measure.

Urgency

14. The Applicant submits that by placing him on ALWOP, the Administration has already created a perception in UNDSS that he is guilty. The other staff members in UNDSS already know about the allegations and this will further reinforce their belief that he is guilty as alleged. There is also urgency in the fact that denying him his salary impairs his ability to sustain himself and his family.

Irreparable harm

15. On irreparable harm, the Applicant states that the damage to his reputation grows with each day that he is on ALWOP. Given the nature of the allegations against him which are considered some of the most egregious in the United Nations system, placing him on ALWOP will affect his professional prospects in a way that constitutes irreparable harm that cannot be remedied by a monetary award. The Applicant avers that as a veteran previously involved in military combat operations, he has been receiving treatment for post-traumatic stress disorder. Accordingly, his sudden financial loss will affect his ability to continue to pay for his medical treatment.

Respondent’s submissions

Prima facie unlawfulness

16. The Applicant’s contention that “he said, she said” cases exclude probable cause is wrong. The United Nations Appeals Tribunal (“UNAT”) has consistently ruled that “credible oral victim testimony alone may be fully sufficient to support a

finding of serious misconduct, without further corroboration being required.”¹⁰ The contested decision specifies that the probable cause was based on the investigation report, supported by evidence, as well as a review of the interviews of the Applicant, V01, and other witnesses. The investigation report concludes that “the allegations of sexual assault are substantiated.”¹¹

17. Further, the Applicant’s reliance on the presumption of innocence fails. The UNAT ruled in *Gisage*¹² that “placement on ALWOP should not be regarded as a disciplinary measure infringing on the presumption of innocence. Staff rule 10.2(b)(iii) specifically provides that administrative leave with full or partial pay or without pay pursuant to staff rule 10.4 is not a disciplinary measure but an administrative measure.”

18. Finally, it is noted that the Organization had no discretion as regards ALWOP in this matter; under staff rule 10.4(c), the Applicant’s leave is to be *without pay*. The UNAT confirmed this in *Muteeganda*:¹³ “probable cause of sexual misconduct is a jurisdictional fact or condition precedent to a mechanical power to place a staff member on ALWOP. If there are reasonable grounds to believe sexual misconduct has occurred, the administrative leave will be without pay and, unlike in other instances of misconduct, the Secretary-General will have no discretion in that regard.”

Urgency

19. The Respondent submits that the Applicant has not substantiated that the contested decision indeed “created a perception [...] that [the Applicant] is guilty” as he alleges. The contested decision makes clear that the ALWOP is not a disciplinary measure and does not pre-empt the disciplinary process. No perception of guilt is thus

¹⁰ *Hallal* 2012-UNAT-207.

¹¹ Reply, annex 2 (investigation report), para. 68.

¹² *Gisage* 2019-UNAT-973, para. 41.

¹³ *Muteeganda* 2018-UNAT-869, para. 32.

created by it; at least, any such perception, if any, cannot be attributed to the contested decision.

20. Furthermore, the investigative (and any disciplinary) process is confidential, which further makes clear that any perception of guilt, if any, cannot be attributed to the Organization. Second, the Applicant has not substantiated any particular financial urgency in that “denying his salary impairs his ability to sustain himself and his family.” The ALWOP has lasted little more than a week. The Applicant has not explained why he is not able to rely on his savings or take a loan during the period of his ALWOP.

21. The Respondent seeks to rely on *Muteeganda*¹⁴ where UNAT emphasized that “though seemingly harsh, a decision to impose ALWOP in sexual misconduct cases is not disproportionate. It seeks to balance competing adverse and beneficial effects of the policy in order to achieve the desired end of behavior change in cases of sexual misconduct. It legitimately and justifiably puts sexual predators at greater financial risk, with adequate safeguards in place for those subsequently found to be innocent.”

Irreparable harm

22. The Respondent’s position is that, contrary to the Applicant’s assertion, reputational damage is by its nature not irreparable; if the allegation against him is not substantiated, the matter will be closed. Furthermore, the investigative and disciplinary processes are strictly confidential, meaning that reputational damage, if any, will be avoided or stay within acceptable limits. The Applicant’s assertion that “placing him on ALWOP will affect his professional prospects in a way that cannot be remedied by a monetary award,” is entirely speculative and unsubstantiated. The Applicant’s assertion that “his sudden financial loss will affect his ability to continue to pay for his medical treatment,” is without substantiation. As noted in the contested decision, the Applicant’s placement on ALWOP is without prejudice to, inter alia, the

¹⁴ *Muteeganda* 2018-UNAT-869, para. 41.

continuation of his health insurance coverage, as provided in section 11.2 of ST/AI/2017/1.

23. Based on his arguments as stated above, the Respondent requests the Tribunal to reject the application.

Considerations

24. In accordance with art. 2.2 of the UNDT Statute and art. 13 of the UNDT Rules of Procedure, for an order of suspension of action to be granted, the Applicant must satisfy three cumulative requirements:

- a. that the decision is *prima facie* unlawful;
- b. that there is particular urgency justifying a suspension of action; and
- c. that he will suffer irreparable harm if the contested decision is implemented.

25. On the prong of unlawfulness, it is recalled that staff rule 10. 4 reads in the relevant part:

(a) A staff member may be placed on administrative leave, under conditions established 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 where there are reasonable grounds to believe that a staff member engaged in sexual exploitation and/or sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay, 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 with partial pay or without pay and the staff member's conduct at issue does not lead to the imposition of the disciplinary measure of dismissal or separation from service, any pay withheld shall be restored without delay.

Section 11.4 of ST/AI/2017/1 provides:

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.

26. As shown by the above, application of administrative leave, with or without pay, is optional. The ALWOP, which departs from the fundamentals of the employment relation, is an exceptional measure and not a matter of vast administrative discretion. Pursuant to staff rule 10.4(b), decisions on administrative leave with or without pay must be reasoned. Accordingly, before considering whether the Applicant has shown the *prima facie* unlawfulness as required by art 2.2 of UNDT Statute, the Organization must show that there is a probable cause of misconduct; that the measure serves a legitimate objective; and that it is proportional.

27. The Tribunal takes note of the Respondent's arguments to support that probable cause has been made up. Further, the Tribunal notes that the amended rule 10.4c (i), which mandates ALWOP in cases of sexual abuse, purports to remove from consideration a placement on administrative leave with full or partial pay. For expediency, the Tribunal need not discuss these elements.

28. This said, as stated by staff rule 10.4(d), 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, a staff member remains presumed innocent, at minimum through the disciplinary process.¹⁵ Grounds invoked to justify his/her placement on administrative leave must be significant enough to balance the infringement to the reputation and emoluments due to the staff member with a legally protected interest of the Organization (principle of proportionality). Second, administrative leave cannot be applied as a punitive measure, or implemented as anticipated disciplinary punishment. Accordingly, concerns of general deterrence – such as might be expressed by policy documents – cannot *per se* constitute legitimate basis for the application of administrative leave. The latter may come into play only in the consideration of a disciplinary measure.

29. The Respondent argues exclusively the policy of “zero tolerance” toward sexual abuse and the authority to apply ALWOP. “Zero tolerance” policy, as confirmed by the Appeals Tribunal in *Turkey*¹⁶ and, most recently, in *Van de Graaf*¹⁷, denotes resolve as to preventing, flagging, and prosecuting certain conduct but does not justify unnecessarily or excessively onerous measures. Not an iota of justification has been attempted to show what non-punitive purpose might ALWOP, or AL at all, serve in this case. The Tribunal considers that the investigation has been concluded after two years. There has been no allegation of tampering with evidence or a threat of re-offending. The Applicant and the alleged victim do not work at the same place. A damage to the Organization’s reputation, which the Tribunals recognize as valid interest to protect, is not alleged. On this score, the Tribunal recalls that the matter concerns an encounter between two adults, in the absence of subordinate relationship or power differential, on a weekend, in private, behind closed doors, and without witnesses. The Respondent’s arguments about strict confidentiality of the investigation, which allegedly protects the reputation of the Applicant, applies *à rebours* to protecting the reputation of the Organization, the difference being that

¹⁵ *Liyanarachchige* 2010-UNAT-087; *Diabagate* 2014-UNAT-403; *Hallal* 2012-UNAT-207.

¹⁶ *Turkey* 2019-UNAT-955, para. 24.

¹⁷ *Van de Graaf* 2023-UNAT-1325.

whereas the allegations must be kept confidential, and the knowledge of the allegations contained, the placement of the Applicant on ALWOP is quite visible.

30. Clearly, the Respondent in this case approaches ALWOP as a punitive measure and anticipated punishment¹⁸. This goes contrary to the presumption of innocence and is specifically not allowed by staff rule 10.4(c). It follows that the impugned decision is unlawful.

31. Urgency in the present case results from the immediate effect of withholding of the Applicant's emoluments and indeed a reputational damage. In imposing the ALWOP, the Respondent has not analyzed the financial and family situation of the Applicant. It results from the investigative report (filed *ex parte*) that the Applicant is a young man with family. The Tribunal is satisfied that the measure is particularly harsh for him.

32. As concerns irreparable harm, UNDT has previously held that the concept is a little more nuanced than the question of money alone:

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.¹⁹

33. The Tribunal agrees that, given the arbitrariness of the impugned decision, the infringement to the financial interest and reputation of the Applicant should not be allowed to continue.

34. Considering that the Applicant is unrepresented and that the allegations against him are grave but have not been yet confirmed by any authoritative decision, the Tribunal orders *ex officio* that the Applicant's name be redacted from the published version of this Order.

¹⁸ In effect, ALWOP closely resembles the disciplinary measure of suspension without pay from Staff rule 10.2 a (iv).

¹⁹ *Tadonki* UNDT-2009-016.

ORDERS

35. The application is granted, and the impugned decision is suspended pending management evaluation.

36. The Applicant's name is to be anonymized in the published version of this Order.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 6th day of May 2023

Entered in the Register on this 6th day of May 2023

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi