
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/129

Order No.: 002 (NBI/2019)

Date: 7 January 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

EREFA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Introduction

1. The Applicant is a staff member at serving as Procurement Assistant FS-4 at the United Nations Mission in Congo (MONUSCO) in Goma.
2. On 27 December 2018, he filed a request for suspension of action pursuant to article 2. 2 of the Statute of the United Nations Dispute Tribunal (UNDT) concerning a decision dated 21 November 2018 and served on him on 22 November 2018, whereby his Administrative Leave without Pay (ALWOP) was extended by three months from 5 December 2018, or until the completion of any disciplinary proceedings, whichever is earlier.
3. The Applicant sought management evaluation of the impugned decision on 19 December 2018.
4. The Respondent filed his reply on 31 December 2018.

Facts

5. The Applicant is subject to disciplinary proceedings in relation to allegations that between December 2016 and July 2017 he sexually abused a female Congolese minor. The allegations of misconduct were issued on 19 October 2017. The Applicant responded on 19 November 2017, refuting the allegations.¹The investigation was concluded with a report dated 11 June 2018.²
6. Since 1 December 2017 the Applicant has been placed on ALWOP, extended periodically every 3 months.³

¹ Annex 5 to the application

² Annex 4 to the application

³ Impugned decision,

Respondent

12. The Respondent contends that the decision to place the Applicant on ALWOP complied with the applicable legal framework as laid out in staff rule 10.4.c as amended in 2018. He stresses that the United Nations operates a zero-tolerance policy in respect of sexual misconduct, abuse and exploitation and that automatic placement of staff with credible allegations of sexual exploitation and abuse against them has been endorsed by the Appeals Tribunal in *Muteeganda*.⁵

13. The Respondent further contends that evidence in this case demonstrates, at minimum at probable cause level, that the Applicant had sexual relations with a Congolese female under the age of 18. The victim has provided detailed, coherent and consistent evidence, recognized the Applicant in a photo array²al miso in this case d(t)-2(o)-20()29(a)23(r

15. The Respondent also submits that the application must fail because the Applicant has not met the tests of urgency and irreparable harm.⁷

Considerations

16. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal, which provide that the Tribunal may 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.

17. All three elements of the test must be satisfied before the impugned decision can be stayed. Accordingly, an application for the suspension of action must be adjudicated against the stipulated cumulative test, in that an applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

18. A Tribunal's order granting suspension of action of an administrative decision cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

19. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an applicant to show that there is a judicable issue before the court.⁸

⁷ Reply paras 10-13

⁸ See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

Receivability

20. The Tribunal recalls that it is established by jurisprudence of the UNDT across its seats⁹, that a decision having continuous legal effect, such as to place a staff member on administrative leave, is only deemed to have been implemented when it has been implemented in its entirety, that is - at the end of the administrative leave. This Tribunal holds, moreover, that a decision on withholding entitlements that are due periodically takes effect in relation to each installment that is due. As dictated by logic, such decision cannot be deemed “implemented” in relation to installments that are not yet due.

21. The record shows that the Applicant was placed on ALWOP with effect from 5 December 2018 and this state is to be maintained for a period of up to three months. The effect of the decision, therefore, is not consummated and may affect the Applicant’s entitlements due for up to two payment cycles before the management evaluation is done. As such, the decision has not been “fully implemented” in the sense relevant for the issue at hand, which makes this application receivable before the Tribunal.

Tripartite Test for Suspension of Action

Lawfulness of administrative leave without pay – general considerations

22. The case concerns a measure applied during the period when legislative changes took place. This renders the question of legality of the impugned decision central for the considerations.

23. Placing a staff member on ALWOP at the time when it was imposed on the Applicant was governed by staff rule 10.4, which provided as follows:

⁹ *Calvani* UNDT/2009/092; *Galliény* Order No. 060 (NY/2014). *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014).

- a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the initiation of an investigation. Administrative leave may continue throughout an investigation and 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, which, so far as practicable, should not exceed three months.

- c) Administrative leave shall be with full pay except 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 ary

a) A staff member may be placed on administrative leave, subject to conditions specified 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 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 the the

Section 4

If the conduct appears to be of such a nature and of such gravity that administrative leave may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general rule, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

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(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.

11.5 Provided that at least one of the conditions of section 11.4 is met, the authorized official may convert the staff member's administrative leave with pay to administrative leave without pay at any time pending the conclusion of the disciplinary process.

11.6 In accordance with staff rule 10.4 (d), if a staff member is placed on administrative leave without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct is not a disciplinary issue, the staff member shall be placed on administrative leave with pay.

28. Clearly, the amendments aim at implementing the zero-tolerance policy for sexual misconduct. Whereas this is done by prioritizing the enforcement of the anticipated punishment and general deterrence at the expense of traditionally embraced tenets of the United Nations' disciplinary regime, such as presumption of innocence and individualization of liability, the Appeals Tribunal, as rightly pointed out by the Respondent, already pronounced in *Muteeganda*, that, given the inherent extraordinary nature of misconduct through sexual abuse, ALWOP legitimately and justifiably puts sexual predators at greater financial risk, with adequate safeguards in place for those subsequently found to be innocent.¹⁰ The Appeals Tribunal, however, made these observations on the premise - which is not cited by the Respondent - that ALWOP remains an extraordinary measure, designed to be of short duration.¹¹

29. In this vein, the Tribunal considers that, 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. Considering the complexity usually posed by an investigation into sexual misconduct, admitted by the Respondent and demonstrated by the case at hand, it may well exceed one year. 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. The Respondent is therefore correct in identifying reasonableness and proportionality as relevant factors in the application of the ALWOP also in sexual abuse cases.

¹⁰ *Muteeganda* 2018-UNAT-869, para 41

¹¹ *Ibid.*

30. 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.

31. This Tribunal recalls its holding in *Abdallah*¹², in that, in 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.

32.

There is currently no authorisation in the Staff Rules to forfeit remuneration of a staff member who resigned while presumed innocent, and the present case demonstrates that the pay withheld during the disciplinary processes may exceed year-worth of it.

33. On the other hand, ST/AI/2017/1 addressed humanitarian concerns, namely social welfare benefits (such as health and life insurance, education grant and contribution to pension fund) which now automatically continue during an ALWOP.

34. 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.

35. In the aspect of temporary application, the Tribunal observes that the provisions discussed here are of a procedural nature. Absent specific regulation on temporal application, procedural rules are applicable immediately. Their legal effect in principle does not attach to the time of the alleged conduct akin to *nullum crimen sine lege* principle. If anything, transitional provisions usually tie the application of the new procedure to a stage of proceedings or to the time when a specific decision is taken. The change to art 10.4. of the Staff Rules introduced on 1 January 2018, one month into the Applicant's SLWOP, was immediately applicable.

36. In this connection, the Tribunal notes that ST/AI/2017/1 and changes introduced by it pre-date the amending staff rule 10.4.c and were in conflict also with the superior norms as they stood at the time.

37. It must be noted, moreover, that the applicability ST/AI/2017/1 is foreseen in relation to investigations and disciplinary proceedings initiated after its entry into force on 26 October 2017. Investigations and disciplinary processes initiated prior to that date, such as in the present case, are to continue to be handled in accordance with the provisions of ST/AI/371 and ST/AI/371/Amend.1.¹³ Notably, ST/AI/2017/1 transitional provisions are confusing in that while Section 13.2 extends the application

40. One consequence of it is that extending the benefit of continuing educational grant, health and life insurance and contribution to pension fund as per ST/AI/2017/1, Section 11.2, requires that it be given basis in an individual administrative decision, by way of a partial pay of a sort.

41. Staff rule 10.4.c does not allow placing the Applicant on administrative leave with full pay where there is a probable cause that he has engaged in sexual exploitation and sexual abuse. Upon the record before it, the Tribunal finds that a probable cause has been made out. The Tribunal weighs, specifically, that the victim has provided detailed, coherent and consistent evidence and was able to point to a hotel where the Applicant had sexual relations with her whereas the receptionist at the hotel recognized the Applicant as having visited on a number of occasions with different Congolese women. Conversely, the circumstances that the victim recognized the Applicant in a photo array and could describe his home do not add to the case, given the admitted fact that the victim knew the Applicant and visited him at his home, albeit for a different purpose. In totality, however, the Tribunal is satisfied that the allegations are substantiated at the required level and maintaining the administrative leave of the Applicant is necessary to contain reputational damage to the Organization.

42. Turning to the question whether continuing the Applicant's ALWOP is unlawful because of its disproportionate length and, as such, it should be discontinued or, possibly, replaced by a leave with partial pay, the Tribunal considers that the Applicant was initially put on leave with full pay, which is consistent with a phased approach. After 1 December 2017, he had access to entitlements described in ST/AI/2017/1, Section 11.2. As appears from the documents submitted, at some point he has been allowed to depart from the Mission. The Administration undertook to review the ALWOP every three months, which is commendable as such, albeit in practice there seems to have been no consideration of the merits, rather a mechanical extension.

43. At the same time, however, there is no indication that the Applicant has ever