

UNITED NATIONS DISPUTE TRIBUNAL

Facts

4. On 25 June 2020, Mr. Swanson sent an e-mail to Mr. Alan Doyle, Chief Mission Support, UNTSO, informing him that on 24 June 2020 ID/OIOS received, from multiple sources, a report of possible unsatisfactory conduct implicating staff members at UNTSO in

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5. The clip showed two male individuals and a female individual driving along a busy street in a clearly-marked United Nations vehicle. The clip captured the male individual seen in the back seat and the female engaging in an act of a sexual nature as the vehicle was driven along a heavily trafficked street.

6. On 30 June 2020, Mr. Swanson, sent a memorandum to Ms. Pollard, providing preliminary findings from inquiries undertaken by ID/OIOS in connection with the report of possible unsatisfactory conduct concerning the Applicant.² On the same day, gation.³

7. On 1 July 2020, Ms. Martha Helena Lopez, the Assistant Secretary-General for attention by Mr. Swanson that ID/OIOS was investigating allegations that he was a passenger in a clearly marked United Nations vehicle in which acts of a sexual nature took place as the vehicle circulated in a heavily trafficked area of Tel-Aviv. She further informed him that the USG/MSPC had decided to place him on ALWOP pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process).⁴

8. On 14 July 2020, the Applicant requested management evaluation of the impugned decisions.

¹ Reply, para. 5.

² Ibid., para. 6 and reply annex 3.

³ Application, para. V(1)(ii), and annexes 11 and 16.

⁴ Application, annex 1.

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reputation, as well as his future career prospects. It is well settled jurisprudence that damage to the career prospects and reputation meets the standard for irreparable damage.

Respondent

Receivability

21. T

not constitute a final administrative decision for the purposes of staff rule 11.4(a) and art. 2.1(a) of the UNDT Statute.

22. A

the conclusion of an administrative process and which has direct legal consequences. Preparatory or preliminary decisions and steps in an administrative process do not

Merits

Unlawfulness

26.

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

27. The ID/OIOS investigation has produced information that the clip, which has been circulated widely, depicts a clearly-marked United Nations vehicle identified by 2020 on HaYarkon Street in Tel-Aviv. The clip showed a woman, reported as possibly being a sex worker, in a red dress, sitting astride a male passenger in the back seat, engaged in an act of a sexual nature.

28. The preliminary inquiry conducted by ID/OIOS has found evidence that identifies the Applicant as the passenger seated in the rear near-side passenger seat. The clip depicts the back-seat t-shirt, a gold chain and silver bracelet. ID/OIOS obtained photographs of the Applicant wearing an identical t-shirt and jewellery. The Applicant told ID/OIOS that he could not say whether it was him in the clip but could see why others might say it was him, and that he would need time to carefully review the clip to be able to say whether it was him. The totality of the foregoing information supports a conclusion that it was more likely than not (preponderance of the evidence) that the Applicant has engaged in unsatisfactory conduct of using a clearly-marked United Nations vehicle to engage 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 the UN vehicle.

29. Following his OIOS interview, in a written statement, the Applicant admitted

that he was the passenger seated in the rear near-side passenger seat captured in the clip. Although this information was not before the USG/DMSPC when the decision was made to place the Applicant on ALWOP, now it is not in dispute that the Applicant was inside the vehicle that was captured in the clip.

30. The ID/OIOS investigation, as it moves forward, may gather evidence

of the female in the vehicle

That being noted,

the OIOS memorandum still provides sufficient grounds to establish that the Applicant used a clearly-marked United Nations to engage 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 the United Nations vehicle.

act of a sexual

31.

significant harm to the reputation of the United Nations, and of UNTSO in particular within its mission area, including through the public nature of the conduct. The Applicant is in a position of command and respect within the mission. In these circumstances, relying on the information contained in the OIOS memorandum, the

placed in him by the UNTSO and thus would warrant separation or dismissal.

32. This is also in line with the Secretary- past practice. Depending on

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 behaviour unbecoming of the status as a United Nations staff member, including domestic violence, and/or performing a sexual act in public view, led to the disciplinary measure of separation or dismissal. This therefore satisfies the requirement

section 11.4(b).

Decision 1 – Placement of the Applicant on ALWOP

Whether the impugned decision is prima facie unlawful.

51. As discussed above, the onus is on the Applicant to show that the decision is *prima facie* unlawful. There must be created in the Tribunal, an appearance that the appointment. The Applicant has contested two decisions namely: being placed on ALWOP and secondly seizure of his personal mobile cell phone.

Legal framework

52. The burden of providing the regulatory framework forming the basis of the application falls squarely on the Applicant and it does not shift to the Respondent unless it is satisfied to the requisite standard and in this case because the law says, *prima facie* evidence, it means a standard lower than a preponderance of the evidence. All that the Applicant must do is to cite the relevant specific provisions and not general provisions, that the decision has infringed to the extent that the Tribunal is left in no doubt whatsoever that, on the face of it, the Respondent acted unlawfully.

53. This is important because the Dispute Tribunal shall assume jurisdiction on a matter where an Applicant appeals an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms contract and terms of appointment include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance, art. 2.1(a) of the UNDT Statute.

54. The Applicant has alleged that:

- a. The Respondent rushed to place him on ALWOP due to media pressure thereby violating his numerous rights. He does not specify the numerous violations that are in issue. In fact, he does not cite a single Staf1 12 Tf90 Geslations

b. He was accused of having engaged in an act of a sexual nature with a woman, reported as possibly being a sex worker and yet at the subject interview of 30 June he was not asked about this. That there is no evidence or justification pejoratively

Entered in the Register on this 22nd day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi