

Case No.: UNDT/NBI/2020/075  
Order No.: 185 (NBI/2020)/Corr.1  
Date: 23 September 2020



7. On 26 June 2020, Mr. David Rajkumar, Chief of the UNTSO Special Investigations Unit (“SIU”)<sup>4</sup>, informed the Applicant of the OIOS investigation that had been initiated. He further informed the Applicant that he was a subject of the investigation and that OIOS wanted to interview him. Mr. Rajkumar and Ms. Margaret Gichanga-Jensen, Chief of Section, OIOS/Vienna, interviewed the Applicant on 30 June 2020.<sup>5</sup>

8. By memorandum dated 30 June 2020, Mr. Swanson provided Ms. Catherine Pollard, Under-Secretary-General, Department of Management Strategy, Policy and Compliance (“USG/DMSPC”) with OIOS’ preliminary investigation findings and identified the Applicant as the occupant of the front passenger seat.<sup>6</sup>

9. By memorandum dated 1 July 2020<sup>7</sup>, Ms. Martha Helena Lopez, Assistant Secretary-General for Human Resources (“ASG/OHR”) informed the Applicant that as a result of the OIOS investigation, the USG/DMSPC had decided to place him on ALWOP for “a period of three months or until the completion of the investigation and any disciplinary process, whichever is earlier” pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). The Applicant’s placement on ALWOP became effective when he received the ASG/OHR’s memorandum on 2 July 2020.

10. In a note dated 2 July 2020, Mr. Stéphane Dujarric, Spokesman for the Secretary-General, informed correspondents that according to information initially gathered during the OIOS investigation, two male international staff members who were in the United Nations Vehicle had been identified as having engaged in misconduct, “including conduct of a sexual nature” and that due to the seriousness of the allegations, had been placed on ALWOP pending the conclusion of the OIOS investigation.<sup>8</sup> UNTSO released a similar statement on 3 July 2020.<sup>9</sup>

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<sup>4</sup> Application, annex 28.

<sup>5</sup> Application, annex 3.

<sup>6</sup> Ibid., annex 29; see also Reply, annex 3.

<sup>7</sup> Reply, annex R/4.

<sup>8</sup> Application, annex 4.

11. The Applicant requested management evaluation of the contested decisions on 14 July 2020.<sup>10</sup> The Applicant had not received a response to this request at the time he filed the current application.<sup>11</sup>

## RECEIVABILITY

### Respondent's submissions

12. The Respondent submits that the Applicant's request for the Tribunal to alter the ALWOP to administrative leave with pay ("ALWP") effective 1 July 2020 is not receivable because he is inviting the Tribunal to dispose of the substantive case by granting full relief whereas the purpose of an interim measure is to grant only temporary relief pending the outcome of substantive proceedings.<sup>12</sup>

13. Additionally, the Applicant previously contested the same decision in relation to which the Tribunal reached its decision as to the *prima facie* lawfulness of the decision. Thus, to ask the Tribunal to determine that the same decision is *prima facie*

properly suspended by the Tribunal since the decision is only deemed to have been implemented when it has been implemented in its entirety, that is – at the end of the administrative leave.<sup>14</sup>

## Considerations

16. The Tribunal concurs with arguments cited by the Applicant that a decision of continuing effect is only deemed to have been implemented when it has been implemented in its entirety. The temporary and provisional nature of administrative leave does not remove the matter from the Tribunal's cognizance under art 10.2 of its Statute. If in doubt, such result is directly confirmed by staff rule 10.4(e). The application is receivable. The application for suspension of actions and other attendant claims for temporary reliefs that the Applicant advances under art. 10. 2 of the UNDT Statute, will be addressed in the merits.

## MERITS

### Applicant's submissions

17. The Applicant submits that the ALWOP decision is *prima facie* unlawful. The Applicant has not been accused of any sexual abuse and there are no exceptional circumstances to justify the decision. The Administration has no evidence to support the allegation that the unidentified female on the back seat is a sex worker. The video clearly shows that the Applicant, as the occupant of the front passenger seat, did not engage in any conduct at all, except appearing to be sleeping or simply resting. Even if it could be established that a sexual act was taking place in the video, this had absolutely nothing to do with the Applicant. The Applicant cannot be responsible for the conduct of others, even if those actions were embarrassing or perceived to be damaging to the reputation of the organization. Lastly while the rule requires that administrative leave shall not be punitive, the Applicant's ALWOP has been since he has been deprived of his salary, which in turn has made it impossible for him to meet his family and social obligations.

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<sup>14</sup> Erefa Order No. 002 (NBI/2019) referring to Calvani UNDT/2009/092; Gallieny Order No. 060 (NY/2014); Maina Order No. 275 (NBI/2014); Fahngon Order No. 199 (NBI/2014).



21. The Applicant's placement on ALWOP pursuant to staff rule 10.4 and section 11.4(b) of ST/AI/2017/1 is lawful, reasonable and proportionate. The USG/DMSPC's decision was based on information provided in the OIOS Memorandum of 30 June 2020.<sup>16</sup> The totality of the information gathered by the OIOS investigation supports a conclusion that it was more likely than not that the Applicant engaged in unsatisfactory conduct by using a clearly-marked United Nations vehicle while another staff member in the back seat engaged in an act of a sexual nature with a woman, 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 vehicle. The requirement of "exceptional circumstances" has been met because the Applicant's conduct posed a significant harm to the reputation of the United Nation, and of UNTSO in particular within its mission area, including through the public nature of the conduct. The Applicant's behaviour is of such gravity that, if established, would warrant separation or dismissal.

22. The engagement of Mr. Rajkumar in the OIOS investigation does not render the OIOS investigation "unlawful". Evidently, Ms. Gichanga-Jensen and Mr. Rajkumar conducted the subject interview of the Applicant together. Mr. Rajkumar was not acting as an "agent of the Administration" but acting on behalf of OIOS as one of the investigators assigned to this case

23. The Applicant has not demonstrated that he suffers irreparable harm from his placement on ALWOP. If the allegations against him are ultimately not sustained, any pay withheld from him will be restored in accordance with staff rule 10.4(d) and section 11.6 of ST/AI/2017/1. Furthermore, 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 coverage and his participation in the United Nations Joint Staff Pension Fund. Thus, the Applicant's placement on administrative leave is in effect with partial pay. The Applicant's contention that he was instructed not to leave his duty station is baseless and his submission regarding his accommodation is speculative. In the ALWOP letter, in relation to the Covid-19 pandemic, the Applicant was

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<sup>16</sup> Reply, annex 3.

advised to seek assistance from Mission Support with respect to travel from the duty station. The negative damaging information published in the press, which the Applicant himself admitted “would be difficult to remove”, is not attributable to the Organization.

24. The onus is on the Applicant to demonstrate the particular urgency of the case and the timeliness of his actions<sup>17</sup> but he has failed to do so. The Applicant’s contention that the Organization has disclosed his name to the public/media outlets is baseless because the Organization’s press releases contained no names. By refraining from disclosing any personal information in relation to the Applicant, the Organization did not violate the Applicant’s presumption of innocence. It is unclear how suspending the ALWOP would help the Applicant “correct the record”, including those articles already published and widely disseminated in news media.

### Considerations

25. 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.”

26. 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.

27. ST/AI/2017/1 provides in the relevant part:

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<sup>17</sup>Jitsamruay, UNDT/2011/206, para. 26. See also: Villamorán, UNDT/2011/126, para. 26; Dougherty UNDT/2011/133; Maloka Mpacko UNDT/2012/081; Montecillo, Order No. 54 (NY/2019), para. 36; Nsubuga, Order No. 85 (NBI/2019), para. 14; Delsol, Order No. 143 (NY/2019), para. 8.



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.

28. 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.

29. For staff rule 10.4(c)(i) primT /FAA/FAAi0 17.202c)ec

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.

[...]

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>18</sup>

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<sup>18</sup> Erefa Order No. 002 (NBI/2019).

31. Turning back to staff rule 10.4(c)(ii), this Tribunal stresses that it clearly requires the Secretary-General to make a case-specific determination warranting administrative 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 the staff rules, just as it has been done regarding sexual exploitation and sexual abuse. The requirements of gravity of the disciplinary violation and threshold of proof, as in section 11.4(b) of ST/AI/2017/1, may rightly serve as general limitation on the ALWOP, but do not amount to “exceptional circumstances”. Thus, on the basis of staff rule 10.4(c)(ii), in addition to the general conditions, individual circumstances of the case must speak in favour of ALWOP over administrative leave with full or partial pay, always, however, in consideration of the purpose of the administrative leave.<sup>19</sup> In other words, the Respondent is required to show why administrative leave is necessary, moreover, what legitimate interest necessitates that in the given case it be without pay.

32. Conversely, resignation from determining the purpose of ALWOP and replacing it with the broad permissibility criteria in ST/AI/2017/1 belies the legislative intent of staff rule 10.4(c)(ii) as to ALWOP’s individual and exceptional character. First, it makes it widely available in all cases where separation is at stake, that is, in the majority of disciplinary matters. In this regard, the Tribunal notes that documents cited by the Respondent in his reply show that over 50% of disciplinary proceedings not just contemplate, but actually result in, separation or dismissal.<sup>20</sup> Second, by absolving himself from showing why an individual case would require ALWOP and relying solely on the gravity of the allegations and sufficiency of proof, the Respondent may arbitrarily apply

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<sup>19</sup>

ALWOP turning it into implementation of an anticipated disciplinary measure of

actual application of ALWOP, as it is claimed by the Respondent<sup>23</sup>, speaks to the absence of financial obstacles to such an approach.

34. In the alternative, the Respondent should seek to amend staff rule 10.4 (c)(ii) and (d) in order to obtain a wider authorization to apply ALWOP, or leave with partial pay in all cases serious enough to warrant administrative leave; for example, by making partial pay being a rule after three months of investigation and ALWOP an option after another three months. Such solution would be justified by balancing the interests of the staff member and the Organization, the latter paying a staff member who is not rendering work, and at the same time would prevent applying ALWOP as a punitive measure. Otherwise, a normative conflict will persist, staff rule 10.4(c)(ii) and (d) will remain an unfulfilled promise, whereas ALWOP will continue to be applied in a non-transparent manner.

35. 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 is yet to be established. This is 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. Still, not an iota of reason has been given as to why leave with pay or partial pay, such as retaining the cost of living component of the salary, would not suffice to satisfy this purpose.

36. On the related prongs of urgency and irreparable harm, the Tribunal finds that the Respondent applied ALWOP as a punitive measure. This, beside the lack of justification for ALWOP that would be consistent with staff rule 10.4(c) and (d), clearly transpires from the press release made by the administration, where ALWOP was mentioned in the context of serious misconduct attributed to persons involved, as well as from the reply, where the thrust of the argument is on the

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<sup>23</sup> Reply, fn 17.

current sufficiency of evidence of misconduct, warranting separation or dismissal. Yet, the Respondent does not proceed to charge the Applicant.<sup>24</sup> This contradictory perception and attitude need to be urgently corrected as they cause irreparable harm to the Applicant's legal and financial interest. The application, therefore, is granted to the extent it seeks to suspend the "unpaid" aspect of administrative leave.

37. Regarding the claim to have the decision suspended with effect *ab initio*, from 1 July 2020, the Tribunal recalls that suspension of action under art 10.2 of its Statute serves to provisionally rectify a situation based on *prima facie* determination, AAAH[( )] TJ 1 0 0 -1 0i TJ 1 t

39. The application is granted to the extent that the impugned decision is henceforth suspended with respect to the Applicant's leave being "without pay". In the remaining part the application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 23<sup>rd</sup> day of September 2020

Entered in the Register on this 23<sup>rd</sup> day of September 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi