



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KOMAKECH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PURSUANT  
TO ARTICLE 13 OF THE RULES OF  
PROCEDURE**

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**Counsel for the Applicant:**

Marissa MacLennan, OSLA

**Counsel for the Respondent:**

Adrien Meubus, ALS/OHRM

Susan Maddox, ALS/OHRM

## **Introduction**

1. The Applicant encumbers the post of an FS-4 Security Officer at the United Nations Interim Force in Lebanon (UNIFIL) on a continuing appointment.
2. On 2 May 2017, the Applicant sought management evaluation of the decision to place him on Administrative Leave Without Pay (ALWOP) for an initial period of three months pending an ongoing disciplinary investigation. He filed this application on the same date.
3. The application was served on the Respondent on 4 May 2017 and the Respondent filed his reply on 5 May 2017.

## **Facts**

4. The Applicant entered into the service of the United Nations in 2007. He was given a continuing appointment in 2016. He is married with seven children.
5. On 20 February 2017, the Applicant began receiving text messages from an unknown number asking for money with the frequency of the text messages increasing over time. The sender identified herself as Ms. A, a Lebanese woman who had been in his employ and who was also employed by a mission contractor.
6. The Applicant reported the matter to his supervisor who advised him to report to the Special Investigations Unit.<sup>1</sup>
7. On 24 April 2017, the Applicant received an email from OIOS stating that he was the subject of an investigation. The email also stated:

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<sup>1</sup> Paragraph 7 of the application.

...it was reported to OIOS that you had, in 2014 and 2015, engaged in a sexual relationship with a worker employed by the UNIFIL contractor "PANCROP co. LTD" to provide cleaning services at the UNIFIL Naquora Headquarters (HQ) building, worker who also provided cleaning services at your private residence.

8. The Applicant was interviewed by OIOS on 25 April 2017. He admitted having consensual sexual relations in 2014 with Ms. A, but denies any payment of money in exchange for sexual relations.

9. On 26 April 2017, the Applicant received a letter from the Under-Secretary-General for Field Support dated 30 March 2017<sup>2</sup> informing him that he was being placed on ALWOP with immediate effect for an initial period of three months. The Office of Internal Oversight Services (OIOS) had, at the same time, commenced an investigation into allegations of sexual abuse.

## **Submissions**

### ***Applicant***

10. As the impugned decision is one of "ongoing legal effects", the application is receivable.

11. The decision to place him on Administrative Leave (AL) and to further deprive him of salary during the course of that leave is arbitrary and unlawful.

12. Staff rule 10.4 allows the Administration to place a staff member on AL "subject to conditions specified by the Secretary-General". These conditions are specified in section 4 of ST/AI/371 (Revised disciplinary measures and procedures), as amended, which authorizes ALWOP on a basis of "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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<sup>2</sup> Annex 3 to the application.

13. The mere fact that the Administration is satisfied that there is sufficient *prima facie* evidence of misconduct is not a legal basis for the imposition of AL.

14. The Administration appears to employ the circular logic; that if it's the kind of conduct that would lead to one getting fired, if proven, then that is sufficient. However, one is left to guess at what is "sufficiently serious" and more importantly, as to what type of evidence the Administration uses in making this determination.

15. The Administration attempts to justify the Applicant's AL because his continued service could create an unacceptable risk to the reputation and credibility of the Organization. What is not clear is how removing the salary and benefits of a 57 year old cancer survivor, who is the sole provider for a wife and seven children, five of whom are below the age of 18, is any more prudent a measure than the same AL with pay.

16. As to the possibility of the allegations leading to dismissal, if proven, this reason for placing him on AL and ALWOP constitutes an egregious violation of his right to be presumed innocent during the investigative process. This Tribunal has, repeatedly, flatly rejected the rationale that the gravity of the alleged misconduct is a legally-valid exceptional circumstance warranting ALWOP.

17. Although the letter placing him on ALWOP states that the contested decision is an administrative and not a disciplinary measure, it appears to be punitive because it came the very next day after the Applicant was interviewed and made certain admissions. Whereas the Administration had known for weeks about what the Applicant had already told them regarding Ms. A.

18. The consequence of depriving the Applicant of his salary, on him and his family, makes determination of this matter urgent as it gravely affects his ability to provide for his family's food, health and shelter.

19. In this case, the Applicant has lost his entire salary, as well as his employer-sponsored health care. These consequences of his ALWOP combined with the fact that he is the sole provider for a family of eight that includes five children under 18, has created a dire situation impairing his ability to provide the necessities of life for himself and his family.

20. Furthermore, the Applicant, with a complex medical history, has been left to pay USD850 a month out of pocket to ensure he and his dependents continue to have health insurance. The uncertainty created by the indefinite nature of his placement on ALWOP is a source of enormous stress.

21. On irreparable harm, the Applicant submits that the decision that leaves him without salary and health care coverage indefinitely must be seen as causing irreparable harm as it negatively affects his financial, professional and personal life. Moreover, the Applicant recalls that despite his placement on ALWOP, he remains a United Nations staff member subject to the prohibition against outside employment as enshrined in staff regulation 1.2(o) and staff rule 1.2(s). The health and wellbeing of not only himself but also those he supports have been put in jeopardy.

***Respondent***

22. The Respondent contends that the decision to place the Applicant on ALWOP complied with the applicable legal framework as laid out in staff rules 10.4(a) – (d) and related instruments.

23. The Applicant is the subject of serious allegations involving sexual exploitation. At this stage there is evidence readily available to show that the Applicant engaged in the sexual exploitation of a Lebanese female and it is flagrant that he engaged in the alleged misconduct.

24. The Applicant had an opportunity to provide his version of events prior to a decision being made on the matter and he offered an admission to the conduct which he further confirmed in his investigative interview.

25. Placing the Applicant on ALWOP does not constitute a violation of the presumption of the Applicant's innocence since there is sufficient evidence at this stage to reverse that presumption. That evidence was provided by the Applicant himself. A subsequent investigation may serve to uncover mitigating circumstances and provide additional detail surrounding the misconduct or provide additional information to allow the Respondent to come to a final determination of the matter. The matter is currently being investigated.

26. The Tribunal has recently opined in *Abdallah* Order No. 80 (NBI/2017) that having a staff member serve with the Organization while being under investigation of sexual exploitation and abuse may adversely affect the effective and credible discharge of the Organization's mandate to protect vulnerable local populations.

27. The Respondent has stated in his report on Special measures for protection from sexual exploitation and abuse<sup>3</sup> that the Organization has taken a firm stance on sexual exploitation. The implementation of the Secretary-General's zero tolerance policy towards all forms of sexual exploitation and abuse by United Nations and related personnel is a priority for the Organization.

28. Regarding the Applicant's contention that his placement on ALWOP is unlawful as it is contrary to the relevant rules requiring exceptional circumstances for the purposes of placement on ALWOP, the Respondent submits that the Organization's legislative instruments do not explicitly state what constitutes exceptional circumstances. However, in view of the fact that staff rule 10.4(c) provides that the Secretary-General may decide whether such exceptional circumstances are met, the Respondent submits that the determination of whether

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<sup>3</sup> A/71/818.

exceptional circumstances exist in a given case is within the discretionary power of the Respondent.

29. The Applicant's service with the Organization would constitute an unacceptable risk to the reputation of the Organization and to the population it serves in a mission setting. He engaged in a sexually exploitative relationship with Ms. A. His alleged misconduct undermines the Mission's mandate and its ability to carry out that mandate with the trust of the local populations.

30. The fact that the Applicant exercises security functions within the mission also renders the case exceptional.

31. The placement on ALWOP as opposed to ALWP is justified in the light of the fact that there is evidence readily available to show that the Applicant engaged in misconduct for which he will likely be terminated. Paying the Applicant during that time where no work is being provided by him to the Organization would shock the conscience of fund contributing countries.

32. With regard to the Applicant's contention that his placement on ALWOP the day following his interview with investigators on 25 April 2015 given that he had made certain admissions in that interview demonstrates that it was done punitively, the Respondent submits that the Applicant was on leave outside the mission area until 10 April 2016 and that the mission waited until he could be interviewed by OIOS to ensure his availability before informing him of his placement on ALWOP.

33. The placement of a staff member on ALWOP by definition results in the payment of the staff member's salary being suspended. If this were considered to be sufficient urgency to suspend the ALWOP, then every placement on ALWOP would automatically meet this branch of the tripartite test.

34. The Respondent submits that the power to place a staff member on ALWOP by definition results in the staff member losing his or her salary. Accordingly, such a loss should not be considered, in itself, something that irreparably harms the rights of the Applicant as a staff member. Any damage to the Applicant resulting from the decision to place him on ALWOP may later be compensated by damages and, pursuant to staff regulation 10.4(d), any pay withheld during his placement on ALWOP would be restored.

35. The decision to place the Applicant on ALWOP was a reasonable exercise of the Respondent's discretion and was taken in accordance with applicable legal norms.

### **Considerations**

36. Applications for suspension of action are governed by art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 provides, in the relevant part:

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to 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.

37. All three elements of the test must be satisfied before the impugned decision can be stayed. Accordingly, an application for 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.

38. 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.

39. 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.<sup>4</sup>

*Tripartite Test for Suspension of Action*

*Lawfulness of administrative leave without pay – general considerations*

40. Placing a staff member on AL is governed by staff rule 10.4. It provides as follows:

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 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.

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

41. The conditions are specified in section 4 of ST/AI/371:

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<sup>4</sup> 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.

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.

42. From the foregoing, it is apparent that the Secretary-General may place a staff member on AL at any time after an allegation of misconduct is made against him or her pending the start of an investigation into the alleged misconduct and until the completion of a disciplinary process.

*Is the Respondent justified in placing the Applicant on administrative leave?*

43. In *Abdallah* Order No. 080 (NBI/2017)/Corr. 1, the Tribunal held that a reasonable suspicion of misconduct may justify placing a staff member on AL with full pay.<sup>5</sup> It was further held in the said Order that the placement of a staff member on ALWOP must be justified by objectives additional to those stated in staff rule 10.4 including the fact that they must be of a non-punitive character, they must respect the presumption of innocence and be proportional.

44. In the instant case, the Tribunal is satisfied that the Respondent is correct in placing the Applicant on AL as there are grounds for the belief that the Applicant might have engaged in misconduct since the Applicant, by his own admission, engaged in sexual relations in 2014 with Ms. A. However, the Applicant denies any payment of money in exchange for sexual relations but insists that they were consensual. The Respondent has not provided any evidence to the contrary nor any evidence to suggest that a staff member engaging in consensual sexual relations with an adult living in a mission area is in violation of any Staff Regulation or Staff Rule or of any other administrative issuance for that matter.

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<sup>5</sup> At para. 40.

45. The key legal issue before this Tribunal is whether there are any exceptional circumstances that justify the Secretary-General's decision to place the Applicant on ALWOP as opposed to AL.

46. Staff rule 10.4(c) provides that AL shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on AL with partial pay or without pay.

47. The reason given by the Respondent to place the Applicant on ALWOP was conveyed to him in the letter dated 30 March 2017. In the said letter, the Applicant was informed:

The reason for your placement on administrative leave is that there is *prima facie* evidence that you engaged in misconduct. Your continued service, pending the conclusion of the investigation, would create an unacceptable risk to the reputation, image and credibility of the Organization and reassignment would not adequately address the identified risks. Additionally the nature of the conduct you are alleged to have engaged in is sufficiently serious that it would, if proven, lead to the termination of your appointment.

48. In his reply, the Respondent further submits that paying the Applicant during his AL "would shock the conscience of fund contributing countries" and that the fact that the Applicant exercises security functions within the mission also renders the case exceptional. The Respondent has failed to elaborate how these two factors constitute exceptional circumstances.

49. With regard to the argument that the Secretary-General has discretionary powers to decide what constitutes "exceptional circumstances", this Tribunal has held in previous decisions that the word "discretion" is not synonymous with the word "power" and that in public administration, discretion must be exercised judiciously. In other words, the exercise of discretionary power is not absolute and any exercise of

discretion by a public officer must be exercised carefully and with a sense of accountability.<sup>6</sup>

50. The Applicant in the present case has not denied having consensual sexual relations with Ms. A who is gainfully employed and is not a minor. It is the Applicant in fact who reported what he describes as threats by Ms. A to extort money from him failing which she would make allegations against him to his “chief”.<sup>7</sup> The Respondent has not provided any evidence to demonstrate that placing the Applicant on AL with full pay would be inappropriate or insufficient to protect the United Nations’ reputation. On the contrary, the Respondent asserts that “paying the Applicant during that time where no work is being provided by him to the Organization would shock the conscience of fund contributing countries”. This is a clear violation of the principle of presumption of innocence and the Tribunal is convinced that the placement of the Applicant on ALWOP is nothing more than a disguised disciplinary measure. Further, the Respondent alleges that “at this this stage there is evidence readily available to show that the Applicant engaged in the sexual exploitation of a Lebanese female” and that the “evidence was provided by the Applicant himself”. The Tribunal has reviewed the so-called evidence the Respondent refers to and is not convinced that it amounts to conclusive proof of flagrant sexual exploitation of Ms. A by the Applicant.

51. Having carefully reviewed the entire case record, the Tribunal is convinced that the elements of urgency and irreparable harm have also been met. Each new day in the circumstances in which the Applicant is placed, escalates the urgency and desperation of his situation. With regards to hardship, the Tribunal notes that the Applicant is the sole provider for his wife and seven children. The deprivation of a family of eight of a source of income and medical coverage is in the circumstances of this case too harsh taking into account that the Applicant is a recent cancer survivor.

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<sup>6</sup> See for example *Fahngon* Order No. 199 (NBI/2014), at para. 33.

<sup>7</sup> Annex 1 to the reply.

## **Conclusion**

52. The Tribunal grants the Application for suspension of action and hereby orders that the decision to deprive the Applicant of his salaries while he is on AL pursuant to staff rule 10.4 be suspended until the management evaluation filed by the Applicant has been completed.

53. The Applicant must be on notice that the grant of this interim Order may be necessarily discharged upon receipt of the response from the Management Evaluation Unit.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 11<sup>th</sup> day of May 2017

Entered in the Register on this 11<sup>th</sup> day of May 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi