



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

AND

ON A REQUEST FOR ANONYMITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Francisco Navarro, UNHCR

Louis-Philippe Lapicerella, UNHCR

Background

1. The Applicant is a staff member at the United Nations High Commissioner for Refugees (“UNHCR”). He serves on a fixed-term appointment at the P-3 level.
2. On 13 October 2021, he filed an application for suspension of action (“SOA”) seeking to suspend the decision to place him on Administrative Leave Without Pay (“ALWOP”) with effect from 20 September 2021 until 30 November 2021, or until the completion of investigation and any disciplinary process, whichever is earlier.
3. The Respondent filed his reply on 15 October 2021.

Relevant facts

4. On 11 May 2021, the Inspector General’s Office (“IGO”) received a complaint of misconduct. The complainant alleged that the Applicant had sexually abused and harassed her.
5. On 6 September 2021, the IGO opened investigation INV/2021/072 into the allegations.
6. On 14 September 2021, the IGO interviewed the complainant. She testified under oath that she had been the victim of rape, sexual abuse, and sexual harassment by the Applicant.
7. On 16 September 2021, the IGO transmitted this information to the Director of the Division of Human Resources (“DHR”).
8. On 17 September 2021, the Director of DHR placed the Applicant on ALWOP until 30 November 2021 or until the completion of an investigation and any disciplinary process, whichever is earlier. The Applicant was also required to return to his place of home leave.

9. The decision was notified to the Applicant on 20 September 2021. On the same day, the Applicant was also notified that he was the subject of an investigation into allegations that he had engaged in sexual harassment on several occasions, that he had engaged in sexual assault and that he had failed to meet the standards of conduct required of a UNHCR staff member.

10. On 1 October 2021, the Applicant requested management evaluation of the decision to place him on ALWOP.

Applicant's submissions

Unlawfulness

11. Pursuant to staff rule 10.4(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.

12. In this case, there is no evidence to support the probable cause that he engaged in sexual exploitation and sexual abuse or any sexual misconduct.

13. There are no exceptional circumstances that warrant his placement on ALWOP. UNHCR has acted in haste and based only on allegations. The mere fact that the allegations against him are so serious that if proven, they would result in separation cannot constitute exceptional circumstances. An allegation, no matter how serious, is only an assertion that is yet to be proved, and he is determined to prove his innocence when provided with an opportunity. It is therefore unjust to violate his right to the fundamental principle of presumption of innocence.

14. ALWOP decisions are inconsistent with staff rule 10.4(d). Staff rule 10.4(d) states that placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. However, in his case,

the investigations have not even been initiated and the decision of ALWOP and an exceptionally harsh order to leave the duty station amount to a punitive sanction based on a presumption of guilt.

15. In this case, UNHCR applied the ALWOP in violation of the presumption of innocence and as a punitive measure, contrary to prior rulings of this Tribunal.

16. Section 10.3 of UNHCR/AI/2018/18 (Misconduct and the Disciplinary Process) contradicts the corresponding Staff Rule which confers discretion on the Administration to impose administrative leave with partial pay (“ALWPP”) instead of ALWOP. ALWPP remains within the Administration's discretion and such an option is particularly appropriate in a case such as this where he has a young family to support and who are remaining alone at the duty station.

17. The UNHCR Administration has not provided any reason why administrative leave with pay (“ALWP”) would not suffice to satisfy the purpose of ensuring public trust in the Organization and its response to allegations of sexual misconduct.

18. The Administrative decisions on AWLOP also contradict with past practices of the Secretary-General including previous UNHCR cases of such nature.

Urgency

19. The application was filed as soon as practical following submission of his request for management evaluation. Due to the sudden and unexpected decision, he had to go under medication.

20. The decision to place him on ALWOP has prevented him from doing his daily work leaving a gap in delivering services to the beneficiaries. His presence or non-presence at the office is not a legitimate basis to claim exceptional circumstances as a basis to place him on ALWOP because the office has adopted telework and telecommuting modalities in addition to minimal physical presence in line with the host Government's directives to control COVID-19. In addition, given his diverse function,

redeployment is available, and an approved option endorsed by the Representative Guidelines on placing staff members on ALWP with pay pending investigation.

21. The decision to place him on ALWOP not only separates him from his family, it also deprives him of the means to pay cost of living for his family in an expensive foreign country and for himself in his home country. This is the first time his wife and young children have lived abroad, and it is exceptionally harsh on them. His family needs his financial and emotional support and separating him from them on such short notice, without any means to provide them this support, has caused a situation of urgency.

22. Depriving him of his salary in such a sudden and unexpected way places him and his family in a situation of particular urgency.

Irreparable harm

23. This decision is causing him reputational harm and if not corrected soon, it will continue to cause irreparable damage.

24. He is assigned in a family duty station after serving for more than 10 years mostly in non-family duty stations and it violates his rights as a staff member to be with his family.

25. He is not in a position to support himself and his family and to maintain the cost of living of his family in a foreign country will be impossible and it will have a direct effect on the continuity of his children's education.

26. He has been working with UNHCR since 2010 in 10 different duty stations maintaining impeccable performance records. The contested decision causes him an irreparable moral prejudice in terms of the damage to his reputation.

Request for anonymity

27. Considering the sensitive nature of the allegations filed against him and the fact that investigations on allegations of misconduct are confidential, he requests, due to the utmost sensitivity of this information, for names, the country of service and country of residence to be anonymised in any published court orders.

Respondent's submissions

Unlawfulness

28. There is probable cause that the Applicant engaged in sexual abuse. Staff rule 10.4(a) provides that a staff member may be placed on administrative leave at any time after an allegation of misconduct and pending the completion of a disciplinary process. Staff rule 10.4(c) further provides that administrative leave shall be with 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.

29. In UNHCR, UNHCR/AI/2018/18 develops the staff rules and regulates administrative leave in section 10.

30. The letter informing the Applicant of his placement on ALWOP stated that, the exceptional circumstances that warrant this decision are that there is probable cause that he engaged in sexual abuse. The letter further stated that the misconduct was of such gravity that it would, if established, warrant separation or dismissal under staff rule 10.2 (a) (viii) or (ix), and that there is information about the misconduct that makes it more likely than not (preponderance of evidence) that he engaged in the misconduct.

31. The legal basis for placing the Applicant on ALWOP is two-fold. First, there is probable cause that the Applicant sexually abused the complainant, which warrants his

placement on administrative leave under staff rule 10.4(c)(i) and paragraph 10.3 of UNHCR/AI/2018/18.

32. In this case, the evidence supporting the allegations of sexual abuse consists of the complainant's credible testimony during the investigation. Under oath, the complainant provided a very detailed, specific and coherent account of how the Applicant sexually assaulted her on two occasions, conduct amounting to sexual abuse under the definition provided by ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).

33. The complainant's credible testimony is sufficient to meet the standard of proof of probable cause. Since credible victim testimony may suffice to reach the standard of proof of clear and convincing, it follows that the complainant's testimony during the investigation sustains the reasonable belief of misconduct required for placing the Applicant on ALWOP. The Applicant's submission that there is no evidence to support probable cause of sexual exploitation and abuse ("SEA") is unfounded.

34. The Applicant's case is distinguishable from that in *Applicant* Order No. 150 (NBI/2020) and *Antoine* Order No. 172 (NBI/2020) where the applicants were placed on ALWOP pursuant to staff rule 10.4(c)(ii), not staff rule 10.4(c)(i). This is not the case here where the Applicant has been informed that the allegations against him include sexual abuse. Where there is probable cause of SEA, staff rule 10.4(c)(i) applies and the Administration is not under an obligation to show exceptional circumstances to implement ALWOP. The decision to place the Applicant on ALWOP is therefore consistent with staff rule 10.4(c)(i) and paragraph 10.3 of UNHCR/AI/2018/18.

35. In addition to probable cause of sexual abuse, there also exist exceptional circumstances that warrant the Applicant's placement on ALWOP under staff rule 10.4(c)(ii) and paragraph 10.4 of UNHCR/AI/2018/18. Based on the jurisprudence of the Appeals Tribunal, in order for the Tribunal to determine whether exceptional circumstances indeed exist, there must be an objective factual basis for the reasonable

belief of misconduct and in this regard, it has to be determined whether there is an adequate objective basis or probable cause that the Applicant engaged in the alleged misconduct.

36. In this case, the objective circumstances are that, in addition to the allegations of sexual abuse, there is evidence that makes it more likely than not that the Applicant sexually harassed the complainant repeatedly. The specific allegations are listed in the IGO's memorandum. The evidence supporting them consists of the complainant's credible testimony during the investigation and corroborating documentary evidence, which the Respondent is filing *ex parte* for the Tribunal's review. This evidence is sufficient to meet the required standards of proof of probable cause applicable under staff rule 10.4(c)(ii) and the balance of probabilities, applicable under paragraph 10.4 of UNHCR/AI/2018/18.

37. It is legitimate to qualify the reasonable grounds to believe that the Applicant engaged in repeated sexual misconduct against the complainant as an exceptional circumstance.

38. The Applicant's placement on AWLOP is firmly grounded in the law. There is no merit to the Applicant's assertion that ALWOP is being applied as a punitive or anticipated disciplinary measure. UNHCR is lawfully making best efforts to protect its interests and the complainant's rights during the pendency of the investigation, following an individual assessment that took into consideration all circumstances of the case.

39. Specifically, placing the Applicant on ALWOP is a reasonable measure to ensure that he does not interfere with the investigation by retaliating against or intimidating the complainant or witnesses, which may include his supervisees. Considering the nature of the allegations, the Applicant's presence in the office, even if intermittent due to COVID-related restrictions, is also incompatible with the preservation of a harmonious work environment. Furthermore, the repeated and persistent nature of the Applicant's alleged misconduct shows that there is a tangible

risk of repetition. More generally, UNHCR is funded by voluntary contributions, and it is crucial for it to maintain trust by donors, including governments and private institutions and individuals, in its ability to prevent and take robust action against sexual misconduct. Placing the Applicant on ALWOP is a legitimate measure to achieve the objective of the Organization's policy of zero tolerance for sexual misconduct and to protect its reputation.

40. The purposes of ALWOP are described in the IGO's memorandum and in the letter notifying the Applicant of the decision. They are fully coherent with the factors provided in paragraph 10.2 of UNHCR/AI/2018/18 that allow the Director of DHR, in consultation with the IGO where appropriate, to place a staff member on administrative leave at any time following a report of suspected misconduct.

41. The fact that the placement on ALWOP may create financial hardship for the concerned staff member and possibly infringes upon the presumption of innocence does not render the decision disproportionate or unlawful. In this case, ALWOP has been in place for less than a month, and the Applicant has not produced any evidence that would substantiate that he cannot sustain himself for the period in which the management evaluation is due. Furthermore, the amount of pay withheld from the Applicant is net of all contributions by the Organization and the Applicant for maintaining health and life insurance coverage, participating in the United Nations Joint Staff Pension Fund and reception of the education grant. The Applicant is in fact not entirely without pay. In addition, the investigation is proceeding swiftly. The IGO expects to conclude it by 30 November 2021, as noted in the memorandum to DHR dated 16 September 2021.

42. The requirement that the Applicant leave the duty station and return to his place of home leave is also lawful in the circumstances. UNHCR adopts a victim-centred approach in accordance with UNHCR/HCP/2020/4 (Policy on a Victim-Centred Approach to Sexual Misconduct (SEA and Sexual Harassment)).

43. In this case, the requirement that the Applicant serve the ALWOP in his place of home leave is a reasonable measure to protect the complainant against retaliation, re-victimization and re-traumatization in compliance with UNHCR's victim-centred approach. The complainant has expressed a credible fear of retaliation and repetition of the misconduct. Indeed, the Applicant has been to her house before and has persisted in his harassment. Similarly, it would be intolerable to compel the complainant to be in the same country operation as the person who allegedly sexually abused her twice and sexually harassed her repeatedly.

44. The requirement is reasonable and proportionate to safeguard the integrity of the investigation. The risk that the Applicant may interfere with the investigation, including by influencing or intimidating witnesses (who may include his supervisees), cannot be adequately addressed if the Applicant remains in the duty station. Similarly, it has been alleged that the Applicant has sexually harassed other colleagues, and UNHCR has a duty to protect its personnel.

45. The Respondent acknowledges the personal hardship created for the Applicant's family – UNHCR did offer to cover the costs of their relocation to the place of home leave. Notwithstanding, the competing rights and interests need to be weighed. Considering the nature of the allegations and the available evidence, the rights of the complainant (as the party aggrieved by the Applicant's alleged misconduct) and the Organization's interests should prevail.

46. Paragraph 10.10 of UNHCR/AI/2018/18 gives authority to the Director of DHR to require a staff member to return to his place of home leave during ALWOP at.

47. There is no merit to the Applicant's contention that the contested decision is not consistent with prior practice where ALWOP was not imposed. The case at bar is distinguishable from the cases cited by the Applicant. The Appeals Tribunal and the Dispute Tribunal have consistently upheld ALWOP where there was probable cause of SEA.

Urgency

48. The Applicant failed to act at the first available opportunity, he waited almost four weeks (20 September to 13 October 2021) to file his application. A request for interim relief shall be rejected if the urgency of the matter is caused by the applicant's own makings and is therefore self-inflicted.

49. In the instant case, the Applicant claims that his placement on ALWOP has separated him from his family. Yet, it is the Applicant who decided that his family stay at his duty station and not accompany him to their place of home leave. Even though UNHCR offered to cover the costs of travel, the Applicant declined. The Applicant's separation from his family is the result of his considered decision. The Applicant cannot rely on it to claim particular urgency.

50. The scope and urgency of financial harm is mitigated by the fact that the amount of pay withheld is net of all contributions by the Applicant and UNHCR for the continuation of health and life insurance coverage, participation in the UNJSPF and education grant.

51. For these reasons, the Applicant has failed to identify any particular urgency in his case.

Irreparable Harm

52. The Applicant is speculating and has not shown any reputational harm. Nevertheless, any eventual damage to the Applicant's reputation is not related to his ALWOP but dependent on the outcome of the investigation and any disciplinary process. Should the Applicant be cleared of wrongdoing, no adverse material will be kept in his file. Also considering that both the investigation and the disciplinary process are confidential, there will be no harm to the Applicant's reputation if the allegations are not substantiated.

53. The Applicant also asserts, without any substantiation, that he is not able to support himself and his family. However, mere financial loss is not enough to satisfy the requirement for irreparable harm.

54. Any financial harm is reparable. Should the Applicant not be separated from service or dismissed pursuant to staff rule 10.2(a), any withheld pay will be restored without delay.

55. The Respondent does not oppose the Applicant's request for anonymity at this stage and he requests that any details which could reveal the identity of the complainant be omitted from any published court orders. The Respondent also requests the Tribunal for leave to exceed the recommended 10-page limit and file a 14-page reply on the ground that his detailed analysis will facilitate the proceedings and assist the Tribunal with the fair and expeditious adjudication of the case.

Considerations

Applicant's request for anonymity

56. The Applicant requests anonymity on the grounds that investigations on allegations of misconduct are confidential and of utmost sensitivity. The Respondent does not oppose the Applicant's request for anonymity at this stage and he requests that any details which could reveal the identity of the complainant be omitted from any published court orders. The Tribunal agrees with the Respondent that at this stage of the proceedings, anonymity is warranted given the nature of the allegations against the Applicant and also to safeguard the interests of the complainant who could be easily identified if the Applicant's name, employment information, place of work and functional title was revealed before investigations are complete.

Respondent's request to exceed the 10-page limit for the reply

57. The Tribunal grants the Respondent's motion for leave to exceed the page limit with a view to adequately address all questions of fact and law posed by this

application.

58. 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.¹

59. This application must fail since the impugned decision is neither unlawful nor inconsistent with the relevant Staff Rules as it is alleged. Staff rule 10.4(a) provides that a staff member may be placed on administrative leave at any time after an allegation of misconduct and pending the completion of a disciplinary process.

60. Staff rule 10.4(c) provides that administrative leave shall be with pay “except (i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, among other forms of misconduct.”

61. Under Section 10.3 of UNHCR/AI/2018/18, the Director of DHR shall place a staff member on ALWOP in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse. “Probable cause” means that there are reasonable grounds to believe that the misconduct occurred.

62. The Applicant’s assertion that there is no evidence to support the assertion that there is probable cause that he engaged in sexual exploitation and sexual abuse, or any sexual misconduct is without basis. The evidence which formed the basis for the impugned decision includes the complainant’s interview statement², pictures of marks allegedly left on the complainant’s breast after the Applicant bit her³ and WhatsApp messages from the Applicant to the complainant.

¹ Article 2.2 of the UNDT Statute and art. 13 of the Rules of Procedure.

² Reply, annex R/5 (filed *ex parte*).

³ Ibid., annex R/6 (filed *ex parte*).

63. The above evidence does not raise “serious and reasonable doubts” about the lawfulness of the impugned decision⁴ which could form the basis for reviewing it, and therefore constitutes probable cause that the Applicant engaged in sexual abuse against the complainant.

64. The Tribunal moreover agrees with the Respondent that in line with staff rule 10.4(c)(ii) and paragraph 10.4 of UNHCR/AI/2018/18), there exists exceptional circumstances, such as the Applicants alleged repeated sexual misconduct and harassment of the complainant and the need to ensure that the Applicant does not interfere with the investigation by retaliating against or intimidating the complainant and other witnesses who may include his supervisees, warranting his placement under ALWOP.

65. In view of the above, the Tribunal finds that the contested decision is not *prima facie* unlawful.

Conclusion

66. Since one of the three statutory conditions for a suspension of action has not been met by the Applicant, **the application is rejected.**

(Signed)

Judge Margaret Tibulya

Dated this 19th day of October 2021

⁴ See *Loose* Order No.259 (GVA/2017), para. 17 citing to *Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013) and *Kompass* Order No. 99 (GVA/2015).

Entered in the Register on this 19th day of October 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi