



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/111

Order No.: 275 (NBI/2014)

Date: 22 December 2014

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MAINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Nicole Washienko, OSLA

Counsel for the Respondent:

Katya Melliush, UNON

Introduction

1. The Applicant is a Finance Assistant at the United Nations Office at Nairobi (UNON). He serves at the GS6 level on a fixed-term appointment.
2. On 13 December 2014, he filed an Application for Suspension of Action of a decision by the Assistant Secretary-General for Management to place him on Administrative Leave Without Pay (ALWOP) for three months.
3. The Respondent filed a Reply to the Application on 17 December 2014 in which it was argued, inter alia, that the Application was not receivable.

Facts

4. On 30 July 2014, the Applicant received a memorandum from the Investigations Division of the Office of Internal Oversight Services (OIOS) notifying him of an authorized investigation into possible violations of the United Nations Rules and Regulations in which the Applicant was implicated. The memorandum stated that OIOS had been authorized to conduct a physical search of the Applicant's office space and to search official documents and storage facilities used and maintained by the Applicant.
5. On 30 July 2014, OIOS personnel went to the Applicant's office and seized his official laptop, his computer's central processing unit and various documents. OIOS personnel interviewed the Applicant in relation to the investigation that same day, asking him questions about the procedures for processing payments of the Financial Services Unit (FSU) at UNON.
6. On 24 September 2014, the Applicant received an email from OIOS asking him to provide his Integrated Management Information System (IMIS) passwords for the period of 1 April 2014 - 31 July 2014. The email stated that the request was being made pursuant to the OIOS investigation in which the Applicant had been identified as a subject. The Applicant replied to this email the same day, providing OIOS with the requested information.

7. On 1 October 2014, the Deputy Director, OIOS, addressed a memorandum to the Director-General of UNON (DG) titled “Advisory on a report of possible misconduct by a United Nations staff member at the United Nations Office at Nairobi (ID Case No. 0299/14)”. The relevant parts are reproduced below:

1. The Investigations Division of the Office of Internal Oversight Services (ID/OIOS) is conducting an investigation into a reported fraud against the United Nations Office at Nairobi (UNON), Kenya.
2. Specifically, it was reported that two fraudulent payments for a total amount of US \$ 300,460.00 were transferred, respectively on 22 April and 9 June 2014, to a bank account associated to a vendor that had not operated with UNON since 2006. Enquiries determined that payments were made following vendor bank account data modifications in the Integrated Management Information System (IMIS).
3. The IMIS credentials of Mr. [X], Finance Assistant with the Accounts Service Unit (ASU) at UNON were associated to the bank account modifications. Moreover, those of [Applicant], Finance Assistant with the Financial Services Unit (FSU) at UNON were associated to the creation of the two payment requests for the total amount of US\$ 300,460.00 in favour of the vendor. The approval of both payments was associated with the credentials of Ms. [Y], Chief FSU.
4. OIOS digital forensics performed on the image of Mr. [X’s] official United Nations laptop hard drive have preliminarily revealed that he had installed network sniffing and password cracking software. Further, it was determined that Mr. [X] had been scanning the UNON network (Nmap), intercepting network communications (Wireshark) and using password cracking software (Cain). Insofar, evidence adduced shows that he had been engaging in these activities since February 2014. The preliminary analysis shows that IMIS servers and Ms. [Y]’s credentials were specifically targeted.

.....

7. OIOS notes that *prima facie* evidence may provide reasonable grounds to consider the conduct of such nature and gravity that may warrant administrative leave.

8. On 7 October 2014, the Director, Division of Administrative Services (DAS), UNON, wrote to the Acting Head, Office for Human Resources Management, attaching the 1 October memorandum and requested for Mr. X and

the Applicant to be placed on ALWOP in line with ST/AI/371/Amend 1 (Revised disciplinary measures).

9. On 3 December 2014, the Applicant received a letter, dated 2 December 2014, from the Assistant Secretary-General for the Office of Human Resources Management (OHRM), which stated that the Applicant was being placed on ALWOP for three months, effective upon his receipt of the letter. The letter also stated that if the Applicant wished to have continued health coverage, it would be at his own expense.

10. According to the letter of 3 December 2014, the decision was based on information provided by UNON in connection with the Applicant's involvement in two unauthorized payments on 22 April and 9 June 2014 by the Organization, totalling USD300 460, in favour of a third-party vendor.

11. The Applicant requested management evaluation of the decision on 13 December 2014.

Receivability

12. It was argued by the Respondent that the Application was not receivable for the following reasons:

- a. The Applicant's placement on ALWOP has already been fully implemented and, as such, it cannot legally be the subject of an interim relief.
- b. The Respondent cited *Nwuke*, UNDT/2012/002¹ as authority that where a contested decision has been fully implemented, suspension of action cannot be granted.
- c. Also cited in support were these three orders rendered in the matters of *Applicant* Order No. 087 (NBI/2014), *Applicant* Order No. 097 (NBI/2014) and *Applicant* Order No. 167 (NBI/2014) where the applicants challenged the renewal of their placement on

¹ At para. 29.

ALWOP were all rejected as the decisions to place the applicants on ALWOP had already been implemented.

- d. There is a distinction between the implementation of a decision and the completion of its consequences. Once the renewal of the Applicant's ALWOP was administratively implemented on 3 December 2014, there was nothing further to be done to implement the decision and, in this sense, the decision was fully implemented. The fact that the Applicant may feel the consequences of that decision for some time does not mean that the decision has not been fully implemented.

13. In response, the Applicant argued as follows:

- a. In determining whether a suspension of action should be granted, the Dispute Tribunal must first ascertain whether or not it is possible to order the suspension of the decision. In the present case, the decision's effect started on 3 December 2014, when the Applicant received the letter placing him on ALWOP. This decision will continue to have effects until 2 March 2015.
- b. The decision to place a staff member on ALWOP during a certain period of time has continuous legal effects during that period of time and can only be deemed to have been implemented in its entirety at the end of the administrative leave.
- c. A decision to place a staff member on administrative leave—with or without pay—is a decision with continuing effect which may be suspended by the Tribunal at any time as long as the administrative leave endures.
- d. The Applicant cited *Kashala*² where it was held that,

The right to work is a fundamental right embodied
in the International Covenant on Economic, Social

² UNDT/2014/023.

and Cultural Rights. Article 6.1 of that Covenant reads: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. To the extent that the right to work is a fundamental right, in the determination of this right, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (Article 8 of the Universal Declaration of Human Rights).

- e. The decision to deprive the Applicant of his salary during the period of administrative leave will only start having effect from 22 December 2014, the date on which salaries are due to be paid to staff members. As such, this decision cannot be said to have been implemented prior to 22 December 2014 and can be distinguished from the cases cited by the Respondent.

Applicant’s case

14. The Applicant’s case may be summarized as follows:

Prima facie unlawfulness

15. The Administration did not have the authority to place him on ALWOP at the time that it took this decision.

- a. Staff rule 10.4(a) stipulates that 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. The decision to place a staff member on administrative leave must be taken prior to the initiation of an investigation. From at least July 2014,

a preliminary inquiry was made by the Administration in relation to certain unauthorized payments.

c. On 30 July 2014, the Applicant was formally notified that he was the subject of an OIOS investigation. On 3 December 2014, the Applicant was placed on administrative leave in relation to two unauthorized payments. Thus, in the present case, the Administration did not have the authority to place him an administrative leave at the time it did.

d. The Applicant notes that ST/AI/234/Rev.1/Amend.2 (Administration of Staff Regulations-Staff Rules), which is intended to clarify the authority in respect of placement on administrative leave under staff rule 10.4 delegates to the Assistant Secretary-General for Management the authority to take a decision to place a staff member in the General Service on administrative leave at any time after an allegation of misconduct and pending the initiation of an investigation and until the completion of the disciplinary process. This instruction seemingly allows for a staff member to be placed on administrative leave until the completion of the disciplinary process, which is contrary to staff rule 10.4(a).

e. The Applicant submits that, however, it is trite law that an administrative instruction is not of itself a Staff Rule but is the means by which such rules are put into operation and is essentially subordinate legislation. As a result, the administrative instruction should be interpreted in such a way as to be consistent with the Staff Rules.

f. In the present case, OIOS's memorandum of 30 July 2014 clearly stated that an investigation had been initiated and that the Applicant was a subject of this investigation. In light of the provisions of staff rule 10.4(a), it follows that from that moment, the Administration did not have the authority to place the Applicant on administrative leave.

16. The reason for placing the Applicant on ALWOP has not been properly articulated.

- a. ST/AI/371, as amended, provides in paragraph four that if the conduct appears to be of such nature and of such gravity, administrative leave might be warranted. The Applicant submits that this standard has not been met in his case.
- b. The letter informing the Applicant of his placement on ALWOP states that the reason for this placement is due to “information” regarding the Applicant’s involvement in two unauthorized payments on 22 April and 9 June 2014, totalling USD300,460 in favour of a third party vendor. The letter further states that there is sufficient *prima facie* evidence that the Applicant engaged in the above conduct and, as such, poses a serious risk to the assets of the Organization. In addition, the nature of the conduct is sufficiently serious that it would, if proven, lead to the Applicant’s dismissal.
- c. The Applicant submits that in accordance with the principle announced by the Appeals Tribunal in *Obdeijn*³, the obligation of the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Staff Rule, but is inherent to the Tribunals’ power to review the validity of such a decision, the functioning of the system of administration of justice established by General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.
- d. By simply stating that there is sufficient *prima facie* evidence that the Applicant was involved in two unauthorized payments, the Administration has not demonstrated that administrative leave is warranted in his case. The Administration has not provided any details as to the alleged nature of the Applicant’s involvement with the payments in question, including what actions he allegedly took in relation to these payments. It is not clear whether the Administration currently considers that the Applicant acted with

³ 2012-UNAT-201.

intent in making the unauthorized payments or if it considers that his involvement with respect to these payments amounts to negligence. Further, it has not been articulated what the *prima facie* evidence is. The Applicant is essentially forced to take the Administration's word that the standard for placing him on administrative leave has been met, without any way to question that determination or to hold the decision-maker accountable.

17. There is no evidence that the Applicant poses a danger to other staff members or the Organization, or that there is a risk that evidence would be destroyed or concealed.

- a. Paragraph 4 of ST/AI/371, as amended, provides that as a general principle, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.
- b. Since OIOS had clearly commenced its investigation by 30 July 2014, the Administration had information by that date that led it to believe that the Applicant may have been involved in certain unauthorized payments. Despite this, the Administration permitted the Applicant to continue working. It can therefore only be assumed that as of 30 July 2014, the Administration was not of the opinion that the Applicant's continued work for the Organization would pose a serious risk to the assets of the Organization. It is unclear what has changed since July 2014 that caused the Administration to alter its determination in this regard and to place the Applicant on administrative leave in early December 2014. Notably, no information has been provided by the Administration in this regard.
- c. Communications between the Applicant and OIOS reveal that the Applicant has always been cooperative with investigators. For example, the Applicant provided OIOS with his IMIS passwords

within two hours of when they were requested and he made himself available for an interview with OIOS on 30 July 2014, the very same day that OIOS asked for this interview. There is no evidence that the Applicant has sought to hinder or interfere with the investigatory process or that he would destroy evidence. Rather, all of his actions point to the contrary. The Applicant's good faith participation in the on-going investigation indicates that he does not pose a serious risk for the Organization.

- a. The Applicant submits that if the Administration is concerned about him continuing in his current functions, redeployment should have been considered. In the present case, it is not clear as to whether such a consideration was given to the Applicant.

18. The decision not to pay the Applicant during the period of administrative leave is unlawful.

- a. Staff rule 10.4(c) states that "administrative leave shall be with pay unless, in exceptional circumstances, the Secretary-General decides that administrative leave without pay is warranted".
- b. The letter placing the Applicant on ALWOP does not refer to any exceptional circumstances that justify not paying the Applicant during the period of administrative leave.
- c. The Applicant submits that there has been no apparent change in circumstances as from the onset of the investigation on 30 July 2014 until his placement on ALWOP on 3 December 2014 that justifies the recent decision to remove him from work and place him on ALWOP. If he was not considered a serious risk to the assets of the Organization on 30 July 2014, why was he then deemed to be such a risk on 3 December 2014? Further, *prima facie* evidence of misconduct, which is alleged, is present in the case of all disciplinary cases to be pursued, so cannot possibly constitute exceptional circumstances so as to justify ALWOP. The

Applicant cites *Freeman* Order No. 197 (NBI/2014) in support of this submission.

- d. The Applicant also notes that in reaching the ALWOP decision, it is said that the ALWOP is warranted because of the seriousness of the acts alleged. As noted above, the Administration has only examined whether there is *prima facie* evidence of such alleged misconduct; the seriousness of unproven (and contested) allegations cannot be dispositive.
- e. The Applicant contends that the decision to place him on ALWOP is contrary to staff rule 10.4(c), and that the discretion to place him on ALWOP has not been exercised with due care, manifesting a lack of accountability.

19. The decision not to pay the Applicant is inconsistent with staff rule 10.4(d).

- a. 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.
- b. In the present case, the Organization is purporting to continue to hold the Applicant to his contract, including his responsibility not to undertake other work (outside activities) while at the same time, he is being denied salary and work. Bearing this in mind, the Applicant's unwarranted placement on ALWOP constitutes constructive dismissal.

20. The memorandum dated 1 October 2014 makes it clear that there were two staff members involved. The overwhelming part of the letter refers to Mr. X's involvement. The letter also indicates that Mr. X made vendor bank account data modifications in IMIS and that the approval of payments was associated with the credentials of Ms. Y, Chief FSU, yet Ms. Y has not been charged with any wrongdoing. The Applicant submits that the UNON Administration has treated him in a disparate manner.

Urgency

21. The decision to place the Applicant on ALWOP is a decision with continuing legal effect and following *Ba* UNDT/2012/025, this gives rise to the required urgency.

22. In the case of *Ba*, a decision to place a staff member on ALWP was suspended. Regarding the urgency of the decision, the Tribunal found that the continuing legal effect of the unlawful decision meant that at any stage during its continuance, there was an element of urgency. The Tribunal went on to hold that the urgency derives from the nature of the effect on the applicant, and is also on-going. For each day that the administrative leave continued, the applicant suffered a renewed assault on her reputation and her career prospects.

23. In the present case, each day the Applicant is prevented from resuming his duties, he suffers harm to his reputation and is unable to gain professional experience. The urgency requirement is also fulfilled as, by waiting for either the Management Evaluation Unit's response, or the complete implementation of the decision, respectively one and three months' salary would be lost to the Applicant.

24. Finally, the uncertainty created by the indefinite nature of his placement on administrative leave without pay is a source of enormous stress. The Applicant is concerned with the fact that most disciplinary cases are not resolved in less than three months and that, more often than not, administrative leave is subsequently extended.

Irreparable harm

25. The Applicant submits that this Tribunal in *Gallieny* Order 060 (NY/2014) and *Calvani* UNDT/2009/092, has recognized that irreparable damage can come in the form of harm to professional reputation and career prospects, sudden loss of employment and detrimental effects of the decision to one's family.

26. In addition, the Applicant recalls the holding in *Amar* UNDT/2011/040 in which the Dispute Tribunal found no merit in the argument that any harm

suffered by the Applicant may be cured by damages. The deprivation of continuing professional experience especially where the administrative decision on which it is based is not only unlawful but patently so cannot be adequately compensated in monetary terms.

27. By placing the Applicant on ALWOP, the Applicant's professional reputation and career prospects are suffering.

28. Further, in the present case, the Applicant is the father of two children less than five-years old. Although his wife is working, the Applicant is the primary breadwinner in his family. The Applicant is also financially supporting his aging and sick parents. If he does not receive his salary from the Organization, the Applicant's family and he would be unable to pay their expenses. In particular, he will be unable to provide the necessary support to his family with regard to basic needs such as food, rent, and tuition fees.

29. In view of the foregoing, the Applicant respectfully requests that the decision to place him on administrative leave be suspended. In the alternative, the Applicant respectfully requests that the decision to deprive him of his salary during the period of administrative leave be suspended.

Respondent's case

30. The Respondent's case may be summarized as follows:

Prima facie unlawfulness

31. Staff Rule 10.4 provides that a staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time pending an investigation and until the completion of the disciplinary process.

32. Section four of ST/AI/371, as amended, provides that 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.

33. In compliance with this provision, the Applicant was placed on administrative leave because:

- a. there was sufficient, compelling evidence to indicate that the Applicant was involved in the making of two unauthorized payments by the Organization totalling USD300,460 in favour of a third party vendor;
- b. the Applicant's alleged misconduct is serious in nature and he poses a serious risk to the assets of the Organization. Redeployment is not feasible in the circumstances; and
- c. the nature of the conduct at issue is such that it would, if proven, lead to the Applicant's dismissal.

34. Staff Rule 10.4(c) provides that administrative leave shall be with full pay unless, in exceptional circumstances, the Secretary-General decides that ALWOP is warranted. As described above, the Respondent submits that exceptional circumstances are apparent in this case due to the serious nature of the Applicant's conduct and the strength of the evidence against him. Specifically:

- a. The allegations against the Applicant involve an egregious breach of standards of conduct expected of a staff member of the Organization more so because the Applicant's job was to safeguard the financial assets and resources of the Organization. This breach of fiduciary duty alone renders the case exceptional;
- b. The gravity of this case, involving as it does, theft of more than USD300,000, more than ten times the annual salary of the Applicant, renders it exceptional;
- c. It is unlikely that, if the allegations are proven, the Organization will ever recover the stolen money from the Applicant, therefore withholding further salary payments at this stage is a reasonable precautionary measure in the exceptional circumstances of this case.

35. Staff Rule 10.4(b) provides that a staff member placed on administrative leave shall be given a written statement of the reasons for such leave. In compliance with this provision, by letter dated 2 December 2014, the Applicant was informed of the reasons for his placement on administrative leave.

36. The Respondent submits that, contrary to the Applicant's contentions, the decision to place him on administrative leave is entirely consistent with staff rule 10.4(a). The plain wording of staff rule 10.4(a) is clear. A staff member may be placed on administrative leave, at any time after an allegation of misconduct. The additional conjunctive phrase, "and pending the initiation of an investigation" does not detract from that, nor limit it. The Respondent submits that to suggest that a staff member may only be placed on administrative leave in the period between an allegation of misconduct and the commencement of an investigation is absurd and runs contrary to the principle of purposive interpretation.

37. The reason for the decision has been properly articulated. The Applicant has been given ample explanation for the reasons for the decision.

38. The Applicant poses a risk to the Organization. The Applicant argues that because administrative leave was not initiated at the date of commencement of the OIOS investigation but several months later, the Administration cannot have considered the Applicant to have been a risk to the Organization. The Applicant argues that nothing has substantially changed and that therefore there is no basis for the imposition of administrative leave. The Respondent avers there is a strong basis for the imposition of administrative leave. The Applicant's position as Finance Assistant renders the Organization particularly vulnerable should he remain in his position any longer. The fact that he was not suspended on 30 July 2014 is irrelevant. Working in FSU put the Applicant in a position of fiduciary care which he has allegedly breached in the worst possible way. In such circumstances it would be negligent of the Organization not to place him on administrative leave.

39. Furthermore, although UNON was aware of the misapplied payments dated 22 April and 6 June 2014, as well as the Applicant's failure to act when notified of these by UNEP's Programme Manager, it was not until OIOS had

commenced its investigation and written to the Director-General in October that the true nature and gravity of the case came to light. It was then necessary to refer the matter to the USG for Management for a decision as to whether or not ALWOP was warranted.

40. It would have been permissible to place the Applicant on ALWOP immediately following the initial report of misconduct in July 2014. The fact that this was not done and that the respondent preserved the Applicant's salary for a further four months cannot be held against the Respondent. Indeed, the decision to allow OIOS to conduct its investigation was to the Applicant's benefit in that it ensured the continuation of his salary during that period.

41. The Respondent avers that there are exceptional circumstances warranting ALWOP in the present case. There is no requirement that the Secretary-General detail the exceptional circumstances which he considers exist in order to warrant the imposition of ALWOP. Rather, it is for the Secretary-General or the delegated official to consider the case and determine whether or not exceptional circumstances exist which warrant the withholding of pay.

42. Furthermore, section three of ST/AI/234/Rev. 1, as amended, expressly provides, inter alia, that where a rule in itself allows an action to be taken under exceptional circumstances, the decision to take action, when the exceptional circumstances arise, is a discretionary one.

43. While the Respondent cannot exercise its powers arbitrarily, the "exceptional circumstances" requirement was met in this case because the nature and gravity of the Applicant's alleged misconduct renders the case outside the norm. The case involves the theft of a sum of almost 10 times the Applicant's annual salary and thus financial recovery is unlikely to succeed rendering the case exceptional. Also, the egregious nature of the breach of fiduciary duty in this case is exceptional.

44. Regarding the Applicant's contention that his placement on ALWOP amounted to constructive dismissal and therefore a disciplinary measure, the

Respondent submits that the words of staff rule 10.4(d) clearly demonstrate that the placement on ALWOP is not a disciplinary measure.

45. Furthermore, the Applicant's placement on ALWOP includes an internal review mechanism, in that, if the reasons for his placement on ALWOP are not ultimately found to warrant separation or dismissal, all pay withheld will be restored to him without delay.

46. Moreover, the Respondent submits that a finding that a staff member's placement on ALWOP constitutes a *de facto* disciplinary measure would be contrary to the letter of the Organization's legislative issuances because it would effectively mean that every placement on ALWOP, regardless of the reasons therefore, would be *prima facie* unlawful.

47. The 1 October letter does not spell out everything about OIOS' investigation and does not distract from the fact that the Applicant was implicated. Ms. Y, the Chief of FSU, was investigated and absolved.

Urgency

48. Placement on ALWOP entails deprivation of income and thus it cannot be said that placement on ALWOP inherently creates an element of urgency. The element of urgency must be determined on a case by case basis as supported by appropriate evidence.

49. The Applicant has not provided any evidence supporting his contention that he will not be able to support his family. Furthermore, the Applicant may engage in other employment during his ALWOP provided he makes a request to the Secretary-General and is authorized pursuant to the applicable rules.

50. Reputational harm if and of itself is not sufficient to satisfy the requirement of particular urgency in art. 2.2 of the Tribunal's Statute.

Irreparable harm

51. In relation to the Applicant's contention as to the harm that will result if the decision to place him on ALWOP is not reversed, the Respondent submits that 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 irreparably harm a staff member's rights, then every placement on ALWOP would automatically meet this branch of the tripartite test for granting interim relief.

52. The Respondent submits that the withholding of a staff member's salary is a financial measure. Any damage to the Applicant resulting from the decision to place him on ALWOP may be directly compensated by damages.

53. In view of the foregoing, the Respondent submits that the Application is not receivable as the contested decision has been implemented. Even if the Application is receivable, it fails on all three of the requisite tests and should be dismissed in its entirety.

Considerations

Receivability

54. The first issue to be determined is whether the decision to place the Applicant on ALWOP has been implemented and is therefore outside the purview of the jurisdiction of the Tribunal.

55. This issue should be viewed from two angles. First the Applicant was placed on ALWOP on 3 December 2014 and from that day he is not performing his duties within the Organization. The withholding of the pay of the Applicant can only occur on 22 December which is the official payday in UNON. Until this is done it cannot be argued that the ALWOP has been implemented in actual fact.

56. Secondly, does the placing of a staff member on ALWOP amount to an implementation that is frozen in time? In the case of *Ba* UNDT/2012/25 the argument of the Respondent was the following as recorded in the judgment:

The Respondent argues that where a staff member such as in *Calvani* UNDT/2009/092 is being deprived of their pay and other benefits, there is a continuing legal effect, but where a staff member is in receipt of pay, this does not occur⁴.

57. In *Ba*, the Tribunal rejected that distinction by holding:

There is no logic to this argument and it cannot be accepted. The continuing legal effect is carried forward by the suspension from duties, regardless of whether or not a staff member is being paid. Thus it is firmly the view of this Tribunal that a decision to place a staff member on administrative leave—with or without pay—is a decision with continuing effect which may be suspended by the Tribunal at any time as long as the administrative leave endures. As Judge Ebrahim-Carstens stated in *Hassanin* Order No. 83 (NY/2011), at paragraph 15:

To allow the Respondent's interpretation would be to render the Tribunal impotent. It cannot have been the intention of the drafters of the Statute that the Tribunal should have no power to dispense justice (in this context, by granting urgent and limited interlocutory relief) where the Respondent notifies a staff member of a decision at the time of, or at the eleventh hour before the "implementation" of a decision. This would allow even the most tainted and unlawful decision to stand, so long as it has been implemented hastily⁵.

58. With the reference to *Ba*, the Tribunal is only emphasising that the Respondent himself took the view that the placement of a staff member on ALWOP has a continuing legal effect. In *Calvani* UNDT/2009/092⁶, it was held that "the decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effects during that period of time and can only be deemed to have been implemented in its entirety at the end of the administrative leave".

59. That reasoning makes sense since the wording of staff rule 10.4(a) and ST/AI/234/Rev1/Amend.2 makes it clear that "Administrative leave may continue throughout an investigation and until the completion of the disciplinary process". Further staff rule 10.4 (b) provides: "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,

⁴ At para. 30.

⁵ At para. 31.

⁶ At para. 21.

should not exceed three months”. That provision makes it clear that if the investigation and/or the disciplinary process is not over in three months, the leave may be extended. If that be the case it cannot seriously be argued that the initial decision to place a staff member on administrative leave is implemented there and then.

60. On the issue of receivability, the Tribunal finds and holds that the ALWOP on which the Applicant was placed and which became effective on 3 December 2014 has not been fully implemented. Its full implementation will happen in 22 December and it will have an ongoing effect until March 2015 if it is not set aside by the Tribunal.

61. The facts of the present case can be, as correctly argued by the Applicant, distinguished from those in the cases cited by the Respondent. The Respondent’s argument that the decision has been fully implemented is rejected as a basis for lack of jurisdiction of this Tribunal to entertain this Application. The Application is receivable.

62. Pursuant to staff rule 10.4, the Secretary-General has a wide discretion to place an individual on administrative leave 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. The Secretary-General has also the discretion to decide whether the administrative leave shall be with or without pay. In the latter case, the Secretary-General has the burden of establishing exceptional circumstances.

The issue

63. In light of the above, the Tribunal considers that the core issue that now arises for adjudication in this case is whether there were any exceptional circumstances that justified the decision of the Secretary-General’s agents to convert the Applicant’s placement on ALWP to ALWOP.

64. Section 4 of ST/AI/371/Amend.1 provides that “as a general principle, administrative leave may be contemplated if the conduct in question may 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”.

65. The facts of this case reveal that an investigation was initiated by OIOS into possible violations of the United Nations Rules and Regulations, in which the Applicant was implicated. It is abundantly clear that the three criteria that should guide the Secretary-General in the exercise of his discretion to place an individual on administrative leave are: (a) danger to staff members; (b) a risk that evidence would be destroyed; and (c) redeployment is not feasible. The criteria are exclusive and one of them would justify the placement of an individual on administrative leave.

66. Evidence on a balance of probabilities should be adduced to establish that one or more of the three above criteria was present. If there is no direct evidence then at least circumstantial evidence should be presented from which the Tribunal may reasonably infer that one or more of the above criteria governed the exercise of the discretion. The only reason that the Respondent puts forward is the fact that the Applicant works in the FSU and therefore was in a position of “fiduciary duty care” which he has breached. The Tribunal does not consider that this is sufficient evidence, even on a balance of probabilities, to conclude that the Applicant posed a danger to other staff members and/or that there would be a risk of destruction of evidence. The Tribunal notes that the Applicant was allowed to carry on his main and/or other duties from the day the misapplied payments were discovered in April and it was not until 3 December that he was informed of his placement on administrative leave.

67. The Tribunal concludes therefore that there was no evidence to establish the requirements of one or more of the criteria. It was a wrong exercise of discretion of the Secretary-General to place the Applicant on ALWOP.

68. The placement of an individual on ALWOP must be justified by exceptional reasons. The all-important word is “exceptional”. The reasons which according to the Respondent justified the placement of the Applicant on ALWOP are stated above and are repeated here for ease of reference:

- a. The allegations against the Applicant involve an egregious breach of standards of conduct expected of a staff member of the Organization more so because the Applicant's job was to safeguard the financial assets and resources of the Organization. This breach of fiduciary duty alone renders the case exceptional;
- b. The gravity of this case, involving as it does, theft of more than USD300,000, more than ten times the annual salary of the Applicant, renders it exceptional; and
- c. It is unlikely that, if the allegations are proven, the Organization will ever recover the stolen money from the Applicant, therefore withholding further salary payments at this stage is a reasonable precautionary measure in the exceptional circumstances of this case.

69. According to the Respondent, these reasons are exceptional for the purposes of placing the Applicant on ALWOP. The Respondent's arguments are untenable for the following reasons. They ignore the fact that the Applicant was not the only person involved in the alleged theft. The OIOS letter dated 1 October 2014 is especially revealing as it implicates in large part another staff member. Whenever an allegation of misconduct is made against a staff member, guilt is not presumed. The staff member is still assumed to be innocent⁷. By depriving the Applicant of his salary on the basis of the arguments offered by the Respondent, this very basic principle of presumption of innocence is being breached. The deprivation of salary in these circumstances indicates that the Applicant will be found guilty of the alleged misconduct. This is a proposition that the Tribunal cannot subscribe to.

70. The Tribunal reiterates its holding in *Kashala*⁸ as cited by the Applicant in his submissions above. In accordance with art. 6.1 of the International Covenant on Economic, Social and Cultural Rights, everyone has a right to the opportunity to gain his living by work which he freely chooses or accepts. Article 8 of the

⁷ *Liyararachchige* 2010-UNAT-087 at para. 17.

⁸ *Supra* note 2 at para. 34.

Universal Declaration of Human Rights entitles everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law

71. The Tribunal in view of the foregoing considerations, finds and holds that the decision to place the Applicant on ALWOP cannot be attributed to any exceptional circumstances and that the requirement of *prima facie* unlawfulness has been satisfied in this Application.

72. Having carefully reviewed the parties' submissions, the Tribunal is convinced that the elements of urgency and irreparable harm have also been met.

Conclusion

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

(Signed)

Judge Vinod Boolell

Dated this 22nd day of December 2014

Entered in the Register on this 22nd day of December 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi