

Case No.: UNDT/NBI/2017

UNITED NATIONS DISPUTE TRIBUNAL

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 managm BDC9

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...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.

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

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.

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

29. The Applicant's servic

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.⁴

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,

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.⁵ 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.

⁵ At para. 40.

45. The key legal issue before this Tribunal is whether there are any exceptional

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

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”.⁷ The Respondent has not provided any evidence to demonstrate that placing the Applicant

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

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