



Introduction

1. The Applicant is a [REDACTED], working with the United Nations Truce Supervision Organization (“UNTSO”), in Jerusalem, Israel [REDACTED].²

2. On 3 August 2020, he filed an application for suspension of action pending management evaluation before the United Nations Dispute Tribunal in Nairobi. He seeks suspension of decision dated 24 July 2020 placing him on Administrative Leave Without Pay (“ALWOP”) for a period of three months, until the completion of the investigation and any disciplinary process, whichever is earlier.

3. On 4 August 2020, the application was served on the Respondent, who filed his reply on the same day.

Facts

4. On 26 June 2020 the Applicant was informed that an Office of Internal Oversight Services (“OIOS”) investigation had been triggered by an anonymous complaint supported by a video clip showing a United Nations branded vehicle in a busy street, with a male and female passenger in the rear seat engaged in a possible sexual act. The vehicle in the video belongs to UNTSO [REDACTED].³

5. During the interview with OIOS, the Applicant denied that he was the driver of the UNTSO vehicle in question. However, on 12 July 2020, he submitted a written statement to OIOS admitting that he was the driver of the vehicle and providing specific details about the matters covered during the interview.

6. On 24 July 2020, the Under-Secretary General for Management Strategy,

¹ Application, section I.

² Ibid.

³ Application, annex 32.

⁴ Application, section VIII, paragraphs 13 and 14; application, annex 18.

Policy and Compliance (“USG/MSPC”), placed the Applicant on ALWOP for a period of three months pending completion of the investigation and any disciplinary process against him.⁵ The decision was communicated to the Applicant via a letter from the Assistant Secretary General for Human Resources (“ASGHR”).⁶

7. The reasons provided for placing the Applicant on ALWOP are as follows:

a. On 21 May 2020, the Applicant transported a United Nations person in a UNTSO vehicle. While the Applicant was , another United Nations staff member in the

9. On the first allegation of failing to use the United Nations vehicle only for official purposes and indulging in the conduct that could bring the UN Nations' reputation into disrepute the Applicant's position is that he cannot be held responsible for the conduct of others, even if those actions are embarrassing or perceived to be damaging the reputation of the Organization. He explains that mid-May 2020, he and other two colleagues, namely [redacted] and [redacted] went to Tel Aviv using an UNTSO vehicle. [redacted] was driving. While in Tel Aviv, they went to a restaurant, where [redacted] recognized a female Israeli friend of his. On return to Jerusalem-50(r)-turn t6.126 4.4a80Ta8e(o)-20c s30240.588 0 Td [()-0()-10

12. With regard to the second allegation, failure to cooperate with the OIOS investigation, the Applicant admits that he lied to the investigators during interview. He however, opines that pursuant to section 6.10(f) of ST/AI/2017/1 (Unsatisfactory conduct, investigation and disciplinary process) he has a right, within a period of two weeks, to provide further clarifications as well as additional testimony, which he did on 12 July 2020. Therefore, his statement repaired his original testimony before the investigators within the statutory time limits allowed by section 6.10(f) of ST/AI/2017/1. Accordingly, the second basis provided in the contested decision justifying his placement on ALWOP, that he failed to cooperate with the OIOS investigation is false.

13. On the third allegation of unsatisfactory conduct of failing to observe the standards of conduct expected of an international civil servant, the Applicant contends that this allegation does not apply to him. He is not accused of sexual abuse; he is only accused of being [REDACTED] of a United Nations vehicle where someone else may have engaged in conduct which may meet the said criteria by the Administration. The allegations do not prevent him from performing his duties as [REDACTED]; he represents no security or financial risk to the Organization or anyone. He has no capability to interfere with the investigation in any case he has been interviewed already and his presence at the office had no negative impact on the preservation of a harmonious working environment. Therefore, placing him on ALWOP is unlawful.

Urgency

14. With regard to urgency, the Applicant submits that he was unlawfully placed on ALWOP, so that the Organization could release an additional press statement for the purposes of damage control. Since his name has already been publicly released, he has now been assumed to be guilty of the allegations in the court of public opinion, creating an urgent need to correct that record.

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pandemic, the Applicant was advised that he could seek assistance from Mission Support with respect to his travel from the duty station.

Other matters

31. The Respondent raises two other issues relating to the Applicant's production

35. All the three elements of the test must be satisfied before the impugned decision can be stayed.

Prima facie unlawfulness

36. The justification provided to the Applicant for his placement on ALWOP was “pursuant to Staff Rule 10.4 (from ST/SGB/2018/1) and Section 11.4(b) of ST/AI/2017/1”

37. Staff rule 10.4 provides in the relevant part

[...]

(c) Administrative leave shall be with full pay except

(i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse

(ii) when the Secretary General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

38. ST/AI/2017/1 (Unsatisfactory conduct, investigation and the disciplinary process) provides in the relevant part:

11.4 A staff member may be placed on administrative leave without pay by an authorized official when at least one of the following conditions is met:

(a) There are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay;

(b) There are exceptional circumstances that warrant the placement of the staff member on administrative leave without pay because the unsatisfactory conduct is of such gravity that it would, if established, warrant reparation or dismissal under staff rule 10.2 (a)

(viii) or (ix), and there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in t unsatisfactory conduct.

39. Staff rule 10.4(c) confirms that ALWOP – which departs from the fundamentals of the employment relations an exceptional measure and not a matter of vast administrative discretion. Consequently, application of ALWOP requires, primarily, the Respondent to show that legal premises allowing it are fulfilled.

40. For staff rule 10.4(c)(i) to be applicable it would be necessary that staff member's actions were, at minimum, accessory to sexual abuse or sexual exploitation. On the facts of the case as they appear on the basis of the parties' submissions, this would require that the Applicant had knowingly accepted that female passenger would be subject to sexual exploitation aboard United Nations vehicle or at the destination. The probable cause standard is not too demanding. Admittedly, however, the requisite determinations have not been made as yet, and the Applicant has not been accused of sexual abuse or sexual exploitation in any form.

41. Before discussing the Administration's implementation of the staff rule 10.4(c)(ii) "exceptional circumstances" provision in reliance on ST/AI/2017/1, the Tribunal wishes to recall its holding in the case:

[...] as a general matter, staff rule 10.4 establishes imposing administrative leave as a prerogative, and not an obligation, on the part of the Secretary General. Staff rule 10.4, as noted above, explicitly precludes administrative leave with full pay in sexual abuse cases, but it does not preclude leave with partial pay. ALWOP under staff rule 10.4.c remains an extraordinary measure. While originally designed to be of short duration, it may now extend throughout the duration of the investigation and disciplinary proceedings without limitation. [...] During this time the affected staff member cannot undertake another occupation and, under ST/AI/2017/1 what the Tribunal finds at the present 0.01r ST/AI/2017/1

staff members' rights against the language of the controlling staff rules, are illegitimate.

42. Turning back to staff rule 10.4(c)(ii), this Tribunal notes that it clearly requires the Secretary-General to make a case-specific determination warranting special leave with partial pay or without pay. Had it been intended to resort to abstract criteria, they would have been articulated on the level of staff rules, just as it has been done regarding sexual exploitation and sexual abuse. A reference to the gravity of the disciplinary violation and a certain threshold of proof, as in section 11.4(b) of ST/AI/2017/1, rightly provides a limitation on the ALWOP but does not amount to "exceptional circumstances". Thus, on the ground of staff rule 10.4(c)(ii), a requisite gravity and threshold of proof may be set as general conditions, in addition to which, however, individual circumstances of the case must speak in favour of ALWOP over leave with full pay or partial pay. Consideration, however, must always be given to the purpose of leave.¹⁰ In other words, under staff rule 10.4(c)(ii) the Respondent is required to show why Administrative Leave is necessary in the first place, moreover, why it is necessary that he be without pay. Resignation from

43.

Case No.: UNDT/NBI/2020/058

OrderNo.: