

Case No.: UNDT/NBI/2020/070  
Order No.: 172 (NBI/2020)  
Date: 9 September 2020

## **Introduction**

1. The Applicant, a staff member of the United Nations Truce Supervision Organization (“UNTSO”), filed an application on 30 August 2020 to contest: his placement on Administrative Leave Without Pay (“ALWOP”) effective 1 July 2020 for a period of three months or until the completion of the investigation and any disciplinary process (“contested decision 1”); and the 30 June 2020 decision by the Office of Internal Oversight Services (“OIOS”) to seize his personal smartphone for the purposes of an investigation (“contested decision 2”).

2. Pursuant to Order No. 162 (NBI/2020), the Applicant filed an amended application on 2 September 2020 that complies with paragraph 6 of UNDT Practice Direction No. 4. On the same day, he also filed an application for

multiple sources”, a report of possible unsatisfactory conduct implicating UNTSO staff members in Jerusalem and that an investigation had been initiated.<sup>3</sup>

7. On 26 June 2020, Mr. David Rajkumar, an OIOS Investigator, informed the Applicant of the OIOS investigation that had been initiated. He further informed the Applicant that he was a subject of the investigation and that OIOS wanted to interview him.

misconduct, “including conduct of a sexual nature” and that due to the seriousness of the allegations, had been placed on ALWOP pending the conclusion of the OIOS investigation.<sup>8</sup> UNTSO released a similar statement on 3 July 2020.<sup>9</sup>

11. The Applicant requested management evaluation of the contested decisions on 14 July 2020.<sup>10</sup> The Applicant had not received a response to this request at the time he filed the current application.<sup>11</sup>

## **CONTESTED DECISION 1**

### **Receivability**

12. The Respondent submits that the Applicant’s request for the Tribunal to alter the ALWOP to administrative leave with pay (“ALWP”) effective 1 July 2020 is not receivable because he is inviting the Tribunal to dispose of the substantive case by granting full relief whereas the purpose of an interim measure is to grant only temporary relief pending the outcome of substantive proceedings.<sup>12</sup>

13. The Applicant’s request for the Tribunal to credit his leave entitlements and associated point credits for home leave and rest and recuperation (“R&R”) fails to identify a contested administrative decision denying his leave entitlements or the point credits. The Applicant’s request for management evaluation dated 14 July 2020 does not include this request.

14. The Applicant’s request for “retraction of the 2/3 July 2020 press statements” seeks to restore a situation or reverse an allegedly unlawful act that has already been implemented. This request is beyond the scope of the interim measures.

---

<sup>8</sup> Amended application., annex 4.

<sup>9</sup> Ibid., annex 5.

<sup>10</sup> Ibid., annex 22.

<sup>11</sup> SOA application, page 4, para. 7.

<sup>12</sup> *Kisambira* Order No. 80 (NY/2014,) para. 13.

15. The Applicant's case is that his challenge against his placement on ALWOP is receivable because a decision to place a staff member on administrative leave produces continued direct legal consequences which can be properly suspended by the Tribunal since the decision is only deemed to have been implemented when it has been implemented in its entirety, that is – at the end of the administrative leave.<sup>13</sup>

16. The Tribunal concurs with arguments cited by the Applicant that a decision of continuing effect is only deemed to have been implemented when it has been implemented in its entirety. The temporary and provisional nature of

since he has been deprived of his salary, which in turn has made it impossible for him to meet his family and social obligations.

18. The urgency is not self-created because the Applicant filed his application on the merits on the first day following the statutory period for management evaluation responses defined in staff rule 11.2(d). He filed this motion for interim measures immediately thereafter. The Applicant submits that he was placed on ALWOP on 1 July 2020 so that the Organization could release the 2/3 July 2020 press statements for the purposes of damage control. The Organization was aware that Inner City Press

separation or dismissal. This is also in line with the Secretary-General's past practice.

21. The Applicant has not demonstrated that he suffers irreparable harm from his placement on ALWOP. If the allegations against him are ultimately not sustained, any pay withheld from him will be restored in accordance with staff rule 10.4(d) and section 11.6 of ST/AI/2017/1. Furthermore, throughout the period of ALWOP the Organization makes the necessary payments and contributions to maintain the Applicant's entitlements to education grant, health, dental and life insurance coverage and his participation in the United Nations Joint Staff Pension Fund. The Applicant's contention that he was instructed not to leave his duty station is baseless. In the ALWOP letter, in relation to the Covid-19 pandemic, the Applicant was advised to seek assistance from Mission Support with respect to travel from the duty station. The negative damaging information published in the press, which the Applicant himself admitted "would be difficult to remove", is not attributable to the Organization.

22. The onus is on the Applicant to demonstrate the particular urgency of the case and the timeliness of his actions<sup>15</sup> but he has failed to do so. The Applicant's contention that the Organization has disclosed his name to the public/media outlets is baseless because the Organization's press releases contained no names. By refraining from disclosing any personal information in relation to the Applicant, the Organization did not violate the Applicant's presumption of innocence. It is unclear how suspending the ALWOP would help the Applicant "correct the record", including those articles already published and widely disseminated in news media.

23. 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.*"

---

<sup>15</sup>*Jitsamruay*, UNDT/2011/206, para. 26. See also: *Villamoran*, UNDT/2011/126, para. 26; *Dougherty* UNDT/2011/133; *Maloka Mpacko* UNDT/2012/081; *Montecillo*, Order No. 54 (NY/2019), para. 36; *Nsubuga*, Order No. 85 (NBI/2019), para. 14; *Delsol*, Order No. 143 (NY/2019), para. 8.





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.

28. Before discussing the Administration's implementation of 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 *Erefa* case.

[...] as a general matter, staff rule 10.4.a establishes imposing administrative leave as a prerogative, and not an obligation, on the part of the Secretary-General. Staff rule 10.4.c, 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 regulation unlawful, as discussed below – risks forfeiture of the withheld pay if he (ifc5y)-127(3(o)(rti-127(3(es )-342((it )-126(2(coopal.te.-126(2(O-1( )-1[a0(does )-341(n6

[...]

The Tribunal considers that rights granted to staff under the Staff Rules and superior legal instruments may not be autonomously restricted by subordinate legal instruments. Subordinate instruments may only implement restrictions within the scope authorised in the superior acts. It accordingly finds that these provisions of ST/AI/2017/1, which introduce greater or additional limitations on staff members' rights against the language of the controlling staff rules, are illegitimate.<sup>16</sup>

29. 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 administrative 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 the 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 and, 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

where separation is at stake - and most cases that the Tribunal receives indeed involve separation - an onus closely similar to an ultimate sanction is inflicted before the finding of misconduct is formally made. In this respect, the Tribunal regrets to find, once again, that ST/AI/2017/1 goes against the letter of staff rule 10.4(c) and (d) in that it clearly designed ALWOP to be applied akin to an anticipated measure of separation or dismissal.

30. Assuming that the Organization does not purpose to replace presumption of innocence with presumption of liability, and noting that economy is clearly the only interest of ALWOP which is not served by ALWP, the Tribunal reiterates<sup>18</sup> that in order for ALWOP to remain in line with the presumption of innocence, fiscal and other concerns need to be related to the length of the investigation vis-à-vis the financial situation of the staff member concerned. A staff member should not be surprised by a sudden loss of income before she or he could make provisions for sustaining him/herself and family during the investigation. Neither should placement on ALWOP serve to encourage resigning of expeditiousness in investigation, which is a risk where the Organization does not bear much cost of keeping a staff member of ALWOP. It follows that the financial burden of placing a staff member on administrative leave must be shared and administrative leave should be applied in a phased approach, with consideration given to leave with partial pay before ALWOP, the latter justified in genuinely exceptional cases, where objective reasons do not allow concluding the disciplinary process within a standard time.

31. Referring the above considerations to the facts of the present case, the Tribunal is satisfied that the nature of the alleged conduct and its unfortunate publicity are factors that may require that the individuals under investigation be removed from service pending investigation, notwithstanding that the circumstance of sexual exploitation is yet to be established. This is necessary to control the damage to the trust in the Organization by showing that members of the host population will not be exposed to individuals who willfully and publicly offend mores and endanger public safety in traffic, and may have engaged in sexual exploitation. This said, not an iota of reason has been given as to why

---

<sup>18</sup> See *Abdallah* Order No 080 (NBI2017) corr.1

administrative leave with pay or partial pay, such as retaining the cost of living component of the salary, would not suffice to satisfy this purpose.

32. On the prongs of urgency and irreparable harm, the Tribunal finds that the Respondent applied ALWOP in violation of the presumption of innocence and as a punitive measure. This perception and attitude need to be urgently corrected as they cause irreparable harm to the Applicant's legal and financial interest. The application, therefore, is granted to the extent it seeks to suspend the "unpaid" aspect of administrative leave.

33. Regarding the claim to have the decision suspended with effect *ab initio*, the Tribunal recalls that suspension of action under art 10.2 of its Statute serves to provisionally rectify a situation based on *prima facie* determination, and not to pronounce the impugned decision null and void. Accordingly, the consistent jurisprudence of the Tribunal is that decisions of continuing effect are suspended only as to the non-executed part rather than reversed *ab initio*. In this respect, the Applicant's claim is refused.

34. Regarding the request to "credit the Applicant's leave entitlements and associated point credits for home leave and R&R iT57s283(thea Tm [(32.))sncred0n.g3s, 138mheld"-2.

individuals were under investigation - was unfortunate and in the future should be avoided. It finds, nevertheless, the relief claimed by the Applicant has no sufficient nexus with correcting the impugned decision, i.e., whether the administrative leave is to be with or without pay, which has been effected by this Order. This part of the claim is, therefore, refused.

## **CONTESTED DECISION 2**

36. The Applicant submits that his challenge against the seizure of his personal phone is receivable because the investigators promised to return it within two weeks of its seizure but this has not been done. The evidence voucher provided to him when his smartphone was seized shows no estimated date of return and no information has been provided as to when it will be returned. The decision to seize and hold his personal property in violation of ST/SGB/2004/15 produces continued direct legal consequences. This decision is only deemed to have been implemented when it has been implemented in its entirety, that is – when the phone is returned to the Applicant.

37. The seizure is *prima facie* unlawful because there is no rule in support of it. ST/SGB/2004/15 is limited to equipment owned by the Organization and does not extend to personal equipment of staff members. The seizure of one's personal property, such as a phone, with no legal right to get it back or no information provided as to when it is going to be returned constitutes a serious abuse of power and violation of rights.

38. The Applicant submits that this matter is urgent because he has been unlawfully deprived of his personal property already for two months with no end in sight. He resides in a foreign country at the service of the Organization and needs to remain reachable to his family and friends to maintain his sanity. His contacts have only the number of his personal phone which has been seized so they cannot contact him.

39. Irreparable harm is a prospective concept, the high level of concern and probability that a negative action will occur to the detriment of the Applicant if

the interim measures are not granted. All of the Applicant's personal data is now unlawfully in the hands of his employer, who may leak it to the media. Such an invasion of privacy will likely damage the Applicant's personal and professional reputation, as well as his future career prospects. It is well settled jurisprudence that damage to the career prospects and reputation meets the standard for irreparable damage.

40. The Applicant's phone was handed to the OIOS investigator and has been forensically examined. Any decision relating to this matter has been implemented<sup>19</sup> and is therefore not receivable. Further, an applicant may only challenge a "final decision" that is taken at the conclusion of an administrative process and which has direct legal consequences. Preparatory or preliminary decisions and steps in an administrative process do not constitute administrative decisions. The Applicant's submission of his mobile phone to OIOS during his interview is a preliminary/preparatory step that took place in the course of the OIOS investigation. This does not constitute a final administrative decision for the purposes of art. 2.1(a) of the UNDT Statute.

41. There was no "seizure" of the Applicant's phone. The OIOS investigators did not take the phone forcefully from the Applicant but instead explained to him the basis of the request. After recording his objection, the Applicant submitted his phone to the investigators. The Applicant's request for the Tribunal to instruct the Respondent to immediately return his phone, destroy any data/analysis taken from it and issue an injunction preventing use of it is not receivable. The Applicant seeks issuance of declaratory orders against the Respondent which is outside the purview of art. 10.2 of the UNDT Statute.

42. The Applicant's submission of his mobile phone to the OIOS investigators is in accordance with staff rule 1.2(c) and section 6.2 of ST/AI/2017/1. He had a duty to fully cooperate with the OIOS investigation and to provide any communications technology equipment under his control. Further, the Applicant's

---

<sup>19</sup> *Antoine* Order No. 139 (NBI/2020), para. 58.

Case No. UNDT/NBI/2020/070

Order No. 172 (NBI/2020)

Therefore, the Applicant's request for immediate return of his mobile phone is moot.

46. It is recalled that the basis for taking the Applicant's phone is indicated to be in section 6.2 of ST/AI/2017/1, which provides:

**Duty to cooperate**

6.2 Pursuant to staff regulation 1.2 (r) and staff rule 1.2 (c), staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information and communications technology equipment or other information under the control of the Organization *or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct* (emphasis added).

47. It is thus obvious that the claim to have a mobile phone (including a private one) surrendered for the purpose of processing information under ST/AI/2017/1 is derived from the staff member's duty to cooperate with an investigation, and not from the authorization to seize private assets on the part of OIOS or any other agent of the Organization.

48. By contrast, authorizations to seize, are provided for OIOS in section 9 of ST/SGB/2004/15:

**Investigations by OIOS**

[...]

9.2 The following provisions shall apply to investigations carried out by OIOS involving ICT resources or ICT data:

(a) Requests for access to ICT resources or ICT data by OIOS need not be in writing or submitted in advance, where it is not practicable to do so;

(b) OIOS shall have the authority to access all ICT resources and ICT data remotely without informing the staff member;

(c) Physical access to ICT resources located in a staff member's workspace, if practicable, shall be conducted in the presence of the staff member concerned and/or the head of the staff member's division, section or unit;



49. These authorizations are granted in relation to ICT resources as defined by section 1(b) of the same Bulletin which defines:

[...]

(b) *ICT resource*: any tangible or intangible asset capable of generating, transmitting, receiving, processing, or representing data in electronic form, where the asset is owned, licensed, operated, managed, or made available by, or otherwise used by, the United Nations.

50. It follows that, as noted by the Applicant, authority to carry out a seizure or other measures without a staff member's consent is limited to the assets



administrative leave without pay. In the remaining part, the application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 9<sup>th</sup> day of September 2020

Entered in the Register on this 9<sup>th</sup> day of September 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi