UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-869

Muteeganda

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2018-1161
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Mr. Muteeganda:	Abbe Jolles
Counsel for Secretary-General:	Patricia C. Aragonés & Stéphanie Cartier

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/009, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 22 January 2018, in the case of *Muteeganda v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 23 March 2018, and Mr. Robert Muteeganda filed his answer on 4 May 2018.

Facts and Procedure

2. Mr. Muteeganda joined the Organization in 2006. At the time of his application before the UNDT, he was employed on a fixed-term contract as P-3 Logistics Officer at the United Nations Global Service Centre (UNGSC), Brindisi, Italy. Previously, he worked as a P-2 Supply Officer at the United Nations Operation in Ivory Coast (UNOCI) in Dalao, Ivory Coast.

3. While employed with UNOCI, Mr. Muteeganda was the subject of an investigation by the Office of Internal Oversight Services (OIOS) in connection with allegations of sexual misconduct involving a minor (JB). OIOS issued its investigation report on 26 May 2017.

4. OIOS found that there were reasonable grounds to believe that sometime in 2014 Mr. Muteeganda committed sexual misconduct against JB. OIOS based its conclusion on the testimony it had taken from JB, her mother, Mr. Robert Adebiyi, the Regional Administrative Officer with UNOCI, and Mr. Muteeganda. The statements of JB and her mother alleged that Mr. Muteeganda became acquainted with the family in 2013 or 2014 and that he purchased a cell phone for JB on which he would communicate with her. JB visited Mr. Muteeganda at his home with other girls. It is alleged that Mr. Muteeganda sexually assaulted JB on one occasion in 2014 or 2105 when she visited him at his home. The investigation revealed that JB was born on 12 May 1998 and was thus 15 0r 16 when the alleged incident took place. JB's mother confronted Mr. Muteeganda about the incident. She reported the alleged sexual assault to Mr. Adebiyi on 19 February 2015 and requested to be paid compensation. Mr. Muteeganda denied the allegations to Mr. Adebiyi, but both he and Mr. Adebiyi provided financial assistance to JB and her mother after the report of the incident.

5. In reaching its findings, OIOS placed considerable reliance on Mr. Muteeganda's admissions that he had provided financial assistance to the mother of JB when she sought compensation for the alleged sexual assault of JB, and on the fact that Mr. Muteeganda had

several telephonic contacts with JB on the phone he had purchased for her. OIOS rejected as unsubstantiated Mr. Muteeganda's claim that the report of misconduct was part of a campaign against him.

6. On 30 June 2017, the Assistant Secretary-General for Field Support referred the matter to the Office of Human Resources Management for appropriate action. By letter dated 27 July 2017, the Under-Secretary-General for Field Support informed Mr. Muteeganda of the decision taken by the Under-Secretary-General for Management, pursuant to Staff Rule 10.4, to place him on administrative leave without pay (ALWOP) for three months or until completion of the disciplinary process, whichever was earlier, effective as of the date of his receipt of the notification, being 28 July 2017. Mr. Muteeganda was informed that the payment being withheld related to his entitlement to salary, and not to health and social welfare benefits such as health, pension and education. The letter stated:

> The reason for your placement on administrative leave is that there are reasonable grounds on which it may be concluded that you engaged in misconduct. Specifically, the OIOS investigation revealed that there is an audio recording of the alleged victim providing information about your alleged sexual contact, and evidence of settlement discussions that you had with the family subsequent to the alleged sexual contact. Your continued service, pending the conclusion of the disciplinary process, would create an unacceptable risk to the reputation and credibility of the Organization, and reassignment would not adequately address the identified risks. Additionally, the nature of the conduct you are alleged to have engaged in is sufficiently serious that it would, if proven, lead to the termination of your appointment.

7. On 28 July 2017, Mr. Muteeganda requested permission to leave his duty station, Brindisi, and depart to his home country during his ALWOP. He stated that under the circumstances staying in Brindisi with his family would put him and his family under unbearable financial difficulties and emotional stress. His request was approved on 31 July 2017. Mr. Muteeganda filed a request for management evaluation of the decision to place him on ALWOP on 12 September 2017. On 27 October 2017, the decision to place Mr. Muteeganda on ALWOP was extended from 28 October 2017 by an additional three months or until the completion of the disciplinary process, whichever was earlier.

8. On 6 November 2017, Mr. Muteeganda filed an application with the UNDT, contesting the Administration's 27 July 2017 decision to place him on ALWOP. After various procedural issuances aimed at expediting the matter, the UNDT handed down its judgment on 22 January 2018.

9. The UNDT found that the Administration, given the sensitive nature of the allegations and the reputational risk involved, correctly exercised its discretion when it placed Mr. Muteeganda on administrative leave. Nonetheless, the UNDT held that while the decision to place Mr. Muteeganda on administrative leave was lawful, the evidence available at the time of the contested decision was insufficient to support the Administration's conclusion that "exceptional circumstances", within the meaning of Staff Rule 10.4(c), justified placing Mr. Muteeganda on ALWOP.[1]

10. The UNDT was of the view that the standard of proof to be applied in order to justify ALWOP, for the purpose of Staff Rule 10.4(c), had "to be similar to that of clear and convincing evidence" – otherwise the presumption of innocence might be sacrificed. The UNDT was not satisfied that the available evidence at the time of the contested decision was up to that standard. It therefore concluded that the contested decision of 27 July 2017 to place Mr. Muteeganda on ALWOP was illegal. In addition, the UNDT found that the Administration had failed to give consideration to the hardship placed on Mr. Muteeganda by depriving him of a salary in a foreign country. It accordingly ordered the rescission of that decision, and declared the subsequent extension on 27 October 2017, predicated upon the 27 July 2017 decision, void *ab initio*. It further ordered the back payment of Mr. Muteeganda's net base salary from 27 July 2017 until such time as he ceased to be on administrative leave as a consequence of the allegations against him. The UNDT rejected Mr. Muteeganda's claims for moral damages.[2]

[1] Staff Rule 10.4 deals with administrative leave pending investigation and the disciplinary process. Staff Rule 10.4(c) provides that administrative leave shall be with full pay except 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.

[2] On 26 January 2018, the Organization dismissed Mr. Muteeganda from service on the grounds of misconduct. Mr. Muteeganda filed an application with the UNDT challenging that decision on 6 February 2018, which remains pending.

Submissions

The Secretary-General's appeal

11. The Secretary-General submits that the UNDT erred in law in substituting its judgment for that of the Secretary-General by concluding that the investigation report finding that Mr. Muteeganda had raped a minor did not constitute "exceptional circumstances" within the meaning of Staff Rule 10.4(c) warranting his placement on ALWOP.

12. Under the legal provisions applicable at the time, when the Administration receives an investigation report providing evidence that a staff member has sexually assaulted a minor, it is reasonable for the Organization to conclude that exceptional circumstances exist to place a staff member on ALWOP. The Secretary-General has repeatedly stressed the Organization's zero-tolerance policy towards all forms of sexual exploitation and abuse by its personnel. In turn, Member States have called upon the Secretary-General to strengthen measures to address sexual exploitation and abuse.

13. As a policy matter, the Secretary-General has the discretion, in accordance with Article 97 of the Charter of the United Nations, to determine that staff members who engage in sexual exploitation and abuse will be placed on ALWOP, which is an administrative and not a disciplinary measure, during an investigation into allegations of such misconduct. It accordingly will be a reasonable exercise of the Secretary-General's broad discretion in administrative and disciplinary measures to consider the egregiousness of sexual misconduct and the Organization's zero-tolerance policy when deciding whether exceptional circumstances exist.

14. The Secretary-General contends that the UNDT erred in law and fact in concluding that there was insufficient evidence to support the placement of Mr. Muteeganda on ALWOP. Firstly, the UNDT erred in requiring clear and convincing evidence as a basis to place Mr. Muteeganda on ALWOP. The UNDT jurisprudence interpreting Staff Rule 10.4(c) has required, at most, that there be probable cause to conclude that exceptional circumstances exist. Further, it is illogical to require the higher standard of proof of "clear and convincing" evidence (which is required for a finding of misconduct at the end of the disciplinary process, when termination is a possible outcome) for placing a staff member on ALWOP. Such requirement would mean that ALWOP would not be an available option

in cases where there has not yet been an investigation but only reasonable grounds, i.e., probable cause, to believe that the staff member engaged in misconduct.

15. Secondly, the UNDT erred on a question of fact in finding that the evidence available at the time was insufficient to establish a probable cause, that is, that there were facts of sufficient detail that would lead a reasonable person to conclude that the alleged conduct occurred for the purposes of placing Mr. Muteeganda on ALWOP. Contrary to the UNDT's finding and its view that there were "serious doubts as to what actually occurred, and when", based on the evidence, both direct and circumstantial, available at the time of the contested decision, it was reasonable to conclude that Mr. Muteeganda had engaged in a sexual relationship with a minor.

16. The Secretary-General further submits that the UNDT erred on a question of law by concluding that placement on ALWOP undermines the presumption of innocence. The UNDT's conclusion in this regard is contrary to the clear wording of Staff Rule 10.4(d), which provides that the placement on administrative leave "shall be without prejudice to the rights of a staff member and shall not constitute a disciplinary measure".

17. The UNDT erred by holding that the Secretary-General had failed to consider a relevant circumstance, namely "the fact that [Mr. Muteeganda], as an international staff member, had to pay for a living for him and his family in a foreign country". There is no requirement in Staff Rule 10.4(c) that special consideration must be given to the staff member's individual circumstances. What is required is the finding that there are exceptional circumstances warranting the placement on ALWOP.

18. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety, uphold the decision to place Mr. Muteeganda on ALWOP, and dismiss his application in its entirety.

Mr. Muteeganda's Answer

19. Mr. Muteeganda submits that the Administration's decision to place him on ALWOP was unlawful since there was no credible evidence of his misconduct. Assuming guilt and imposing consequences in the absence of credible evidence is textbook discrimination.

20. The OIOS investigation report's conclusions were based on weak evidence. The alleged victim provided no evidence of the alleged rape and it was only reported several years after the alleged date of assault.

21. Mr. Muteeganda further submits that the Secretary-General incorrectly asserts that the UNDT ruled without authority and that it substituted its judgment for that of the Secretary-General.

22. Mr. Muteeganda requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety and order the Secretary-General to comply with the UNDT's order within 10 days.

Considerations

23. The Staff Rule governing administrative leave pending investigation and the disciplinary process applicable to the facts of this case is Staff Rule 10.4 in ST/SGB/2014/1. As discussed below, Staff Rule 10.4 was amended in 2018 to address specifically the question of ALWOP in sexual misconduct cases. However, it is the old Staff Rule 10.4 which applies in this case. It reads:

> (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, should not exceed three months.
>
> (c) Administrative leave shall be with full pay except 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. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.

> (e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

24. Paragraphs 4 and 5 of Administrative Instruction ST/AI/371 (Revised disciplinary measures and procedures), which were also applicable, read:[3]

> 4. 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 principle, 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.
>
> 5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether administrative leave is warranted. Administrative leave under Staff Rule 10.4 is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant administrative leave without pay, in both cases without prejudice to the staff member's rights.

25. As indicated, the UNDT accepted that the sensitive nature of the allegations which were sustained by some evidence, justified putting Mr. Muteeganda on administrative leave. There was no risk of any evidence being destroyed, interfered with or concealed since the investigation had been completed and Mr. Muteeganda no longer worked in Ivory Coast. There was however an enduring reputational risk (or danger to the Organization) in light of the allegations relating to sexual abuse and exploitation of an under-age girl which were reasonably supported by the evidence uncovered by the investigation. The UNDT thus correctly concluded that the Administration properly exercised its discretion to place Mr. Muteeganda on administrative leave.

26. The key question before the UNDT was whether exceptional circumstances warranted the Secretary-General's decision that the administrative leave be without pay. Both Staff Rule 10.4(c) of ST/SGB/2014/1 and Paragraph 5 of ST/AI/371 permit the Secretary-General to decide the administrative leave be without pay in exceptional circumstances. The UNDT held that the evidence was insufficient to establish sexual

[3] ST/AI/371 was amended by ST/AI/371/Amend. 1, effective 11 May 2010.

misconduct with the consequence that there were no exceptional circumstances justifying the ALWOP decision.

27. The questions arising on appeal therefore are: what are exceptional circumstances and to what standard must they be proven? The Staff Rules do not provide a definition of, or any explanatory criteria for determining, "exceptional circumstances".

28. A qualification of a discretionary power, by way of a condition precedent requiring "exceptional circumstances" before it can be lawfully exercised, is intended to confer a more restricted power in order to alleviate or mitigate hardship that may otherwise arise, were the power permitted to be exercised conventionally or in the ordinary course. The constraint demands proof of surrounding circumstances that are extraordinary, thus justifying exceptional use of the power.

29. The requirement of "exceptional circumstances" is thus reviewable and the existence of the circumstances upon which the claim of exceptionality rests must be capable of objective determination, especially when the power which they qualify is drastic or burdensome, as in this case. The limitation upon the power to place a staff member on ALWOP, if it is to provide some relatively objective guarantee against arbitrary or capricious deprivation, cannot be founded exclusively on the subjective opinion of the decision-maker. The actuality of the alleged circumstances is objectively justiciable and therefore not dependent singularly on the opinion of the Secretary-General regarding their existence. Likewise, there must be a rational basis for the categorization by the Secretary-General of the circumstances as exceptional. Moreover, given the hardship caused by ALWOP, the onus is on the Administration to prove the objective existence or factual basis of the exceptional circumstances.

30. The Secretary-General contends that egregious misconduct of a sexual nature posing a reputational risk to the Organization is *per se* an exceptional circumstance justifying ALWOP; and further that it is sufficient to discharge the onus by showing that there are reasonable grounds to believe (probable cause) that the sexual misconduct occurred. He therefore takes issue with the UNDT that there must be clear and convincing evidence of serious misconduct before the power to impose ALWOP may be exercised exceptionally.

31. The approach preferred by the Secretary-General has recently been given effect in the amendment by ST/SGB/2018/1 of Staff Rule 10.4(c). The provision now reads:

> 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.

Likewise, paragraph 11.4(a) of ST/AI/2017/1 provides that a staff member may be placed on ALWOP if there are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse. The new policy advances the ethos of the Organization and its commitment to equality and non-discrimination. Sexual abuse and exploitation by United Nations staff undermines the implementation of the Organization's mandates and its credibility. The amendments aim at zero tolerance for sexual misconduct by imposing ALWOP on staff members where there is a reasonable basis for inferring sexual misconduct.

32. Under the new Staff Rule 10.4(c), probable cause of sexual misconduct is a jurisdictional fact or condition precedent to a mechanical power to place a staff member on ALWOP. If there are reasonable grounds to believe sexual misconduct has occurred, the administrative leave will be without pay and, unlike in other instances of misconduct, the Secretary-General will have no discretion in that regard. The old rule differed significantly in that it did not specifically single out the regulation of sexual misconduct and the Secretary-General was at large to approach sexual misconduct cases (on the same basis as other misconduct) within his general discretion to place a staff member on ALWOP exceptionally.

33. The new policy and amendments are not applicable to Mr. Muteeganda on account of his alleged misconduct having occurred before the amendments were enacted and promulgated. The question then is whether in this case the Secretary-General acted lawfully and reasonably, pursuant to the then applicable Staff Rule 10.4(c), in imposing ALWOP exceptionally on the basis that there were objective reasonable grounds to believe that Mr. Muteeganda had committed sexual misconduct.

34. In effect, the UNDT held that the insufficiency of the evidence meant that "exceptional circumstances" had not been established and that the exercise of power by the Secretary-General was accordingly illegal. The objective existence of exceptional circumstances, as explained, is a prelude to the valid exercise of the statutory power. In

support of its conclusion, the UNDT made several findings regarding the sufficiency of the facts unearthed by the investigation. It opined as follows:

> "[T]he Tribunal is concerned that in the case at hand, upon completion of the investigation report, the quality of the available evidence and the investigation report are questionable and allow very weak inferences to be drawn. To the Tribunal, the evidence available at the time leaves serious doubts as to what actually occurred, and when."

The UNDT pointed to the vagueness of some of the allegations, the consistent denial of Mr. Muteeganda of sexual misconduct, a lack of physical evidence corroborating sexual misconduct and the failure of JB to pick out Mr. Muteeganda in a photographic identification parade, as weaknesses in the evidence that precluded a conclusion that there was either probable cause or clear and convincing evidence that Mr. Muteeganda engaged in sexual misconduct.

35. The fact that JB failed to pick out Mr. Muteeganda from a photographic line-up is inconsequential in light of it being undisputed that Mr. Muteeganda had a relationship with JB and her family. JB's inconsistency here is possibly explained by her youth, the circumstances and possibly the shaming effects of sexual abuse. The uncertainty about the precise date of the incident is equally of no consequence. The logic and sequence of the course of events, including the involvement of Mr. Adebiyi, puts the incident at some time in late 2014 and early 2015, which adequately supports a conclusion that JB was a minor at the time. Likewise, the consistent denials of Mr. Muteeganda had to be weighed against all the other evidence, albeit circumstantial and in some instances hearsay, making up the investigative report.

36. The findings of the UNDT regarding the facts are furthermore open to criticism in that it failed to take into account or give any weight to: i) the undisputed fact that there was a personal relationship between Mr. Muteeganda and JB; ii) the admission by Mr. Muteeganda that he gave JB a phone and had communicated with her through it; iii) Mr. Muteeganda's admission that JB used to visit him at his home; iv) the undisputed fact that Mr. Muteeganda engaged in settlement negotiations with JB's family; v) the involvement of Mr. Adebiyi in the saga as confirmed by Mr. Adebiyi in his interview with OIOS; and vi) the statement of JB's mother and her attempts to obtain compensation on behalf of her child. Additionally, the UNDT made no attempt to analyse the written statements of JB and her mother and to assess them against other evidence such as the audio tape of the interview of Mr. Adebiyi.

37. When all is considered, the totality of the evidence forms an adequate objective basis to conclude that there was probable cause that Mr. Muteeganda engaged in the alleged misconduct.

38. The probable cause standard is a practical, non-technical standard asking whether the proven circumstances permit a reasonable inference, in this instance of sexual misconduct. The existence of reasonable cause, and of the belief founded upon it, is still ultimately a question of fact to be tried on evidence. There must be an objective factual basis for the reasonable belief of sexual misconduct. But the Secretary-General's classification of the objectively established circumstances as exceptional is a matter for his discretion, which nonetheless must be exercised rationally.

39. The UNDT accordingly erred in law by holding that a reasonable exercise of the discretion required a stricter standard of clear and convincing evidence. The latter standard, requiring a high level of probability, is appropriate in making the ultimate finding of misconduct. It however will normally be unfeasible to achieve that standard without a full trial of the issues and a forensic determination of the sufficiency of the evidence. To require that of the Secretary-General in imposing an administrative measure (though undeniably one with onerous impact) would undermine the Administration's role in disciplining staff. While clear and convincing evidence will give greater comfort in ensuring that the exercise of power is proper, the existence of objective grounds sustaining a reasonable belief of misconduct will normally be sufficient justification for the decision.

40. Accepting the legitimate policy of the Organization in relation to sexual misconduct cases aimed at securing its reputation and credibility, reasonable grounds to believe that sexual misconduct had occurred is a circumstance that may reasonably be considered as exceptional. The decision of the Secretary-General in a specific case, prior to the amendment of Staff Rule 10.4(c) in 2018, to regard the egregious sexual misconduct as an "exceptional circumstance" is therefore within the bounds of reasonableness.[4]

41. The contested decision advances the legitimate policy of zero tolerance in cases of sexual misconduct and is a rational means of achieving that policy. To the extent that it possibly infringes upon the presumption of innocence by applying a lesser evidentiary

[4] The factual finding of the UNDT to the contrary in *Abdallah* Order No. 080 (NBI/2017) is at least doubtful.

standard favouring zero tolerance and the ethos of the Organization, the negative impact of the decision on an individual staff member is ameliorated by Staff Rule 10.4(d) which requires withheld pay to be restored without delay where the allegations of misconduct are not sustained. The rule recognises that ALWOP is an extraordinary administrative measure designed to be of short duration. Though seemingly harsh, a decision to impose ALWOP in sexual misconduct cases is not disproportionate.[5] It seeks to balance competing adverse and beneficial effects of the policy in order to achieve the desired end of behavior change in cases of sexual misconduct. It legitimately and justifiably puts sexual predators at greater financial risk, with adequate safeguards in place for those subsequently found to be innocent. Any limitation on the right to be presumed innocent is accordingly reasonable in light of all the relevant factors.

42. In the premises, the UNDT erred in law and in fact and the appeal must be upheld.

[5] The situation might be different where the ALWOP endures for an unreasonable period, which was not the case in the present matter.

Judgment

43. The appeal is upheld and Judgment No. UNDT/2018/009 is hereby vacated.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Knierim	Judge Halfeld

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar