



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1293

**James Okwakol
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2022-1652
Date of Decision:	28 October 2022
Date of Publication:	16 December 2022
Registrar:	Juliet Johnson

Counsel for Mr. Okwakol: Sètondji Roland Adjovi

Counsel for Secretary-General: Angélique Trouche

JUDGE GRAEME COLGAN, PRESIDING

1. The Secretary-General (Appellant), as the employer of James Okwakol (Respondent), a former staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), appeals the Judgment of the United Nations Dispute Tribunal (UNDT or the Tribunal) setting aside a retroactive decision to place him on administrative leave without pay (ALWOP).¹ In the impugned Judgment, the UNDT found the contested ALWOP decision unlawful, ordered its rescission and payment of all salary and entitlements foregone by the Respondent, plus interest.

2. We should emphasise at the outset that this appeal relates only to Mr. Okwakol's placement on leave pending the conclusion of the investigation of misconduct against him. It does not determine the merits of what he was alleged to have done and nothing said by us in this Judgment should be taken as any indication of our views about such matters.

3. For reasons set out below, we grant the appeal and reverse the Judgment of the UNDT.

Facts and Procedure

4. Mr. Okwakol was the Chief Resident Auditor (at level P-5) of the Office of Internal Oversight Services (OIOS) of MONUSCO in Goma, Republic of the Congo. On 4 October 2021, Mr. Okwakol was separated from service with MONUSCO with compensation in lieu of notice but without termination indemnity as a result of the events at issue in this case.

5. In November 2019, a United Nations Volunteer (UNV or the alleged perpetrator) was accused of raping a female employee of a vendor to MONUSCO (the complainant). The complainant had filed a report against the UNV with the Conduct and Discipline Team (CDT) of MONUSCO. In the course of investigating this allegation of rape, concerns arose about Mr. Okwakol's actions after the event, and he too was investigated for misconduct including attempting to persuade the complainant to withdraw her claim in return for the payment of money to her by the alleged perpetrator. This resulted in preliminary findings that Mr. Okwakol had failed to report the rape allegation when obliged to do so and that he attempted to interfere with the administration of justice and to conceal the rape allegation by

¹ *Okwakol v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/135 (impugned Judgment).

participating in a meeting with others to negotiate the payment of compensation to the complainant in return for the withdrawal of her complaint.

6. On 13 January 2020, Mr. Okwakol was placed on ALWOP for lesser of a period of three months (i.e. until 13 April 2020), or until the conclusion of the investigation into his conduct and any disciplinary action that might be taken against him. On 13 May 2020, this period was extended retroactively from 16 April 2020 for a further period of three months. On 22 June 2020, his leave was converted to administrative leave with pay (ALWP), and he was paid on a retroactive basis for the period 16 April to 12 May 2020. His proceedings before the UNDT related to the retroactive period of ALWOP and challenged the lawfulness of the original decision.

7. Despite the Secretary-General's objection to the receivability of Mr. Okwakol's challenge to the first period of ALWOP, the UNDT concluded that his entire application was receivable and also succeeded on its merits.

8. Because the evidence establishes that the circumstances of the allegations against Mr. Okwakol did not change after 13 January 2020 when ALWOP was first imposed upon him, this case turns on the sufficiency of information available to the decision-maker (the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC)) who placed Mr. Okwakol on ALWOP at that date. The UNDT identified the information available to the USG/DMSPC as consisting of the following facts:²

- On 20 November 2019, the complainant reported to CDT, saying that she had been raped by a UNV on 29 June 2019 and that she had reported this to another United Nations staff member (Mr. L.) on 10 July 2019.
- On 25 November 2019, the complainant attended a meeting with Mr. Okwakol, Mr. L., and another MONUSCO colleague, Mr. K.
- The complainant made a recording of the conversation at that meeting during which she requested an apology from the alleged perpetrator, although the conduct to be apologised for was not discussed. The complainant also requested a payment of USD 2,000 from the alleged perpetrator. The three men at the meeting (including

² *Ibid.*, para. 9.

Mr. Okwakol) were said to have directed the complainant to withdraw her report of the rape that she had made to the CDT.

- When the complainant attempted to withdraw her report, she was advised that it had been escalated to OIOS.
- At a later interview by OIOS investigators, when Mr. Okwakol was asked whether money had been discussed at the 25 November meeting, he said that the only discussion had been that the alleged perpetrator owed money to the complainant.
- At his OIOS interview, Mr. Okwakol said that the purpose of the 25 November meeting had been to gain an understanding of the issues between the complainant, the alleged perpetrator and Mr. L. Mr. Okwakol explained that before the meeting he had not been aware of the complainant's report of rape but became aware of it during the 25 November meeting. He conceded that he erred in allowing the meeting to continue from the time that he became aware of the complaint and its nature and conceded that he should have taken steps to discontinue the meeting at that point.
- Although denied by Mr. Okwakol, the OIOS Memorandum stated that having become aware of his impending OIOS interview, on 11 December 2019, Mr. Okwakol met with Mr. L. and the alleged perpetrator at a hotel in Goma. It appears that this allegation was not pursued against Mr. Okwakol.

9. On 10 December 2019 Mr. Okwakol was advised by e-mail that he was subject to investigation for failing to report an allegation of sexual exploitation and abuse (SEA) and attempted interference in the investigation by seeking to negotiate a payment to the complainant in return for her withdrawal of her complaint. This was described as “assisting in, or contributing to, the commission of a misconduct”.

10. Mr. Okwakol was placed on ALWOP on 13 January 2020 and this status was extended on 13 May 2020, purportedly with retroactive effect from 16 April 2020. The extension was justified on the grounds that the situation which pertained when he was first placed on ALWOP had not changed.

11. The decision to place Mr. Okwakol on ALWOP retroactively from 16 April to 12 May 2020 was rescinded on 22 June 2020 and he was paid for that period from 16 April to 12 May so that, effectively, he was on ALWP for that period. His ALWOP continued from 13 May to 15 July 2020. From 16 July, Mr. Okwakol's status was again altered to ALWP.

12. With the agreement of the parties, the UNDT decided Mr. Okwakol's claims on the papers filed and without a hearing of the evidence of witnesses.

13. The UNDT's Judgment was issued on 19 November 2021. As already noted, it found Mr. Okwakol's claims were receivable.³ Because this element of the UNDT's Judgment is challenged by the Secretary-General, we will set out the Dispute Tribunal's reasoning for so concluding.

14. The receivability issue turned on whether the Secretary-General's 13 May 2020 decision to treat the period 16 April to 12 May as ALWOP following the expiry of the first period of ALWOP, was an administrative decision separate from the original ALWOP decision of 13 January 2020. Mr. Okwakol sought management evaluation of the 13 May 2020 decision to impose the 16 April-12 May ALWOP retroactively, but had not sought management evaluation of the 13 January 2020 decision. In its decision of 2 October 2020, the Management Evaluation Unit (MEU) considered that Mr. Okwakol was time-barred from challenging that 13 January decision.

15. The nub of the argument is that if the 13 May 2020 decision was a separate and distinct administrative decision from the original ALWOP decision taken in January, then Mr. Okwakol's challenge to the validity of the original January decision was not receivable because it had not been the subject of a timely management evaluation request. For Mr. Okwakol's entire application to have been receivable by the UNDT (as it concluded it was), the ALWOP decision would need to have been a single and effectively continuous decision.

16. The UNDT held that examination of the relevant correspondence between Mr. Okwakol and the Administration made it clear that the Secretary-General had taken only one decision about ALWOP, intending what subsequently transpired to be continued seamlessly until a decision on the merits was made. It was significant to the UNDT's decision that Mr. Okwakol's

³ *Ibid.*, para. 38.

administrative leave was imposed and continued on unchanged grounds.⁴ The UNDT reasoned that this conclusion accorded with Staff Rule 10.4(a) which contemplates ALWOP continuing potentially until the completion of the investigative and disciplinary processes, which, if this extends beyond the maximum three-month period, contemplates (implicitly) an extension or even extensions of that period. The absence of new factors in, or grounds for, the extension of ALWOP, was significant in the UNDT's view. Had there been such factors present, the decisions may have amounted to a new administrative decision, but there were not. The UNDT decided in these circumstances that there was one effectively continuous ALWOP decision based on unchanging grounds which had been managerially evaluated.⁵

17. Turning to the merits of Mr. Okwakol's claims about the insufficient grounds for the ALWOP, the UNDT decided these by analysing whether the ALWOP decision was rationally made on the criteria for such a temporary sanction based on the information available to the Secretary-General at the time of the decision. The UNDT set that date as 13 January on the basis that, although the retroactive extension was announced on 13 May, this was against an unchanged factual situation.

18. In evaluating the placement of Mr. Okwakol on ALWOP, the UNDT considered itself bound by Staff Rule 10.4 and Section 11.4 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) which the UNDT concluded required the establishment by the Secretary-General of the existence of "exceptional circumstances". It held that there were two pre-conditions: first, the unsatisfactory conduct of which the staff member was accused must be sufficiently grave to warrant separation from service; and, second, that the decision-maker must have information showing that the staff member engaged, more probably than not, in that unsatisfactory conduct.

19. Addressing the first of these conditions (unsatisfactory conduct of such gravity to warrant separation from service), the UNDT considered the Secretary-General's proposition that failure to report allegations of sexual abuse by another staff member (a breach of Staff Rules 1.2(c) and (e), as well as the Organisation's firm policy against SEA), was, if established, sufficiently grave to warrant separation from service. The Dispute Tribunal considered, however, that this proposition was not aligned with the Organisation's regulatory framework for reporting of sexual abuse as set forth in ST/SGB/2003/13 (Special measures for

⁴ *Ibid.*, para. 33.

⁵ *Ibid.*, para. 38.

protection from sexual exploitation and sexual abuse). The Tribunal held that this Bulletin requires that only “concerns and suspicions” be reported, not what it described as “mere allegations” coming to the attention of a staff member. The Tribunal held that it was only when a staff member receiving information about sexual abuse by another staff member becomes “subjectively, and in good faith, concerned or suspicious that misconduct took place, that a report must be made.”⁶ It concluded that this might exclude from the requirement to report, a staff member who also has “knowledge of improper motives (malice or extortion) for the dissemination of allegations” of sexual abuse against a staff member.⁷

20. The UNDT further decided that the Administration had no information that Mr. Okwakol knew various details (as required by ST/AI/2017/1), including a detailed description of the “unsatisfactory conduct”; the names of implicated staff members; where and when the unsatisfactory conduct took place; the names of potential witnesses to the unsatisfactory conduct; and available supporting documentation. The UNDT described Mr. Okwakol’s awareness of the victim’s allegation of rape as being only “fleeting” and there was no evidence that he knew the details of it.⁸

21. The UNDT also held that the OIOS Memorandum, which was the informational basis to place Mr. Okwakol on ALWOP, did not contain information that he had attempted to conceal sexual abuse during the discussions that had taken place at the 25 November meeting, and that the alleged perpetrator’s actions for which an apology was sought were not defined. It concluded that the Secretary-General had not established that each element of Mr. Okwakol’s alleged actions was, if proven, sufficiently grave to warrant his separation from service and therefore to justify his being placed on ALWOP, both from the outset and, for the extended period challenged by him.⁹

22. Turning to the second condition for the ALWOP, the UNDT determined that the only information available to the authorised decision-maker (the USG/DMSPC) came from two documents, a Code Cable and the OIOS Memorandum. The Dispute Tribunal held that the information contained in these two documents was insufficient to conclude that it was more likely than not that Mr. Okwakol had committed misconduct. The recorded discussions

⁶ *Ibid.*, para. 46.

⁷ *Ibid.*, para. 48.

⁸ *Ibid.*, paras. 49-50.

⁹ *Ibid.*, paras. 51-52.

at the 25 November meeting at which Mr. Okwakol was present were not conclusive as to whether the payment of money in exchange for not reporting a rape involved him.¹⁰ The UNDT held that the recording affirmed Mr. Okwakol's statement that it was only during that meeting that he had become aware that the complainant had reported she had been subject to sexual abuse.

23. With respect to the allegation set out in the OIOS Memorandum that Mr. Okwakol attempted to hold discussions with other witnesses before his OIOS interview, the UNDT noted that this allegation was denied by him. The information available to the ALWOP decision-maker when taking the first decision to impose that temporary sanction comprised only the Code Cable and the OIOS Memorandum, relatively brief documents. There was no transcript of the OIOS interviews that had taken place, or of the recording of the 25 November meeting that had been made by the complainant. The UNDT held that the information "was not conclusive" as to whether Mr. Okwakol's actions "were linked to concerns, suspicion or attempts to mediate concerning rape allegations."¹¹

24. As to remedies, the UNDT rescinded the decision to place Mr. Okwakol on administrative leave for six months and ordered the Secretary-General to pay him all salary and entitlements for the period 13 January to 16 July 2020, except for the period 16 April to 13 May; plus interest.

Submissions

Secretary-General's Appeal

25. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment and uphold the Administration's ALWOP Decision in all respects.

26. The Secretary-General submits that the Dispute Tribunal erred in law and in fact in its conclusion that the ALWOP decision taken on 13 January 2020 and the subsequent decision to extend the ALWOP taken on 13 May 2020, constituted one continuing decision. In the Secretary-General's submission, the 13 January 2020 ALWOP decision (which he terms "the

¹⁰ *Ibid.*, paras. 57, 58 and 64.

¹¹ *Ibid.*, para. 61.

Initial ALWOP Decision”) and the 13 May 2020 ALWOP decision (which he terms “the ALWOP Renewal Decision”), were separate decisions.

27. The Secretary-General points out that Mr. Okwakol’s 25 June 2020 request for management evaluation was timely only as to the ALWOP Renewal Decision but was 104 days too late with respect to the Initial ALWOP Decision. Because Mr. Okwakol did not pursue management evaluation of the Initial ALWOP Decision within the 60 calendar days set forth in Staff Rule 11.2(a) and 11.2(c), the Secretary-General submits that the Dispute Tribunal was without jurisdiction to review and rescind the Initial ALWOP Decision.

28. In support of the contention that there were two separate ALWOP decisions at issue in this case, the Secretary-General asserts that the Renewal ALWOP decision was a reasoned decision taken by the MONUSCO Special Representative of the Secretary-General (SRSG) after a fresh assessment of the circumstances and was not a mere confirmation of the Initial ALWOP decision.

29. The Secretary-General claims that the Dispute Tribunal failed to properly apply the UNAT’s precedent of *Gisage*, wherein this Tribunal held that “an unambiguous re-examination by the Administration of an earlier decision would give rise to a new and separate administrative decision.”¹²

30. The Secretary-General also argues that the Dispute Tribunal erroneously interpreted Staff Rule 10.4(a), which provides for continuation of administrative leave until the completion of the disciplinary process, as allowing the time limit for requesting management evaluation to run from the conclusion of the entire ALWOP period.

31. For the foregoing reasons, the Secretary-General submits that Mr. Okwakol’s application to the UNDT was not receivable as to the 13 January 2020 administrative leave decision (or Initial ALWOP decision), and that the UNDT erred in ordering its rescission and payment of wage arrears for the period 13 January to 15 April 2020.

32. As to the ALWOP Renewal decision, the Secretary-General contends that the Dispute Tribunal erred in finding that this decision was unlawful.

¹² *Gisage v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-973, paras. 29-32.

33. The Secretary-General maintains that the Dispute Tribunal improperly substituted its own judgment for that of the Administration when it concluded that the information available to the decision-maker, namely the OIOS Memorandum and the Code Cable, was “insufficient for a conclusion that it was more likely than not that some misconduct took place on the part of [Mr. Okwakol].”¹³

34. The Secretary-General submits that the Administration had determined that placement of Mr. Okwakol on ALWOP was warranted in accordance with section 11.4(b) of ST/AI/2017/1. Pursuant to that Administrative Instruction, a staff member may be placed on administrative leave without pay when “exceptional circumstances” exist including that “the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal.” The Secretary-General argues that in line with the UNAT’s decision in *Muteeganda*,¹⁴ “the Secretary-General’s classification of the objectively established circumstances as exceptional, is a matter for his discretion,” and the Dispute Tribunal erred in failing to review this decision for reasonableness and instead made its own determination.

35. The Secretary-General contends that the Dispute Tribunal compounded its error when it concluded that Mr. Okwakol’s conduct was not “grave enough, if proven, to warrant separation or termination.”¹⁵ In the Secretary-General’s view, the Administration properly concluded that Mr. Okwakol’s attempt to conceal rape allegations by pressuring the complainant to withdraw her complaint in exchange for money was serious, and failure to address such conduct would defeat the Organization’s policy aimed at eradicating SEA.

36. In addition, the Secretary-General maintains that the Dispute Tribunal erred in law and in fact with its speculation that Mr. Okwakol’s possible belief that the complainant had improper motives excused his failure to report the SEA complaint. Such finding was contrary to the mandatory obligation imposed on United Nations staff, pursuant to section 3.2(e) of ST/SGB/2003/13, to report “concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker.”

¹³ Impugned Judgment, para. 57.

¹⁴ *Muteeganda v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-869.

¹⁵ Impugned Judgment, para. 54.

37. The Secretary-General argues that, taken together, the Dispute Tribunal's interpretation of both ST/SGB/2003/13 and ST/AI/2017/1 undermines the Organization's effective implementation of Staff Rule 1.2(c), which establishes a duty to report any breach of the Organization's rules, including Staff Rule 1.2(e) that prohibits sexual exploitation and abuse.

38. For the foregoing reasons, the Secretary-General requests that this Tribunal vacate the impugned Judgment.

Mr. Okwakol's Answer

39. Mr. Okwakol urges this Tribunal to reject the appeal because the Secretary-General has failed to satisfy any grounds for appeal under Article 2(1) of the UNAT Statute. To the contrary, in Mr. Okwakol's view, the Secretary-General is merely relitigating issues and facts that were reasonably adjudicated by the Dispute Tribunal. Mr. Okwakol also asserts that the Secretary-General has made false factual claims that warrant sanction.

40. Mr. Okwakol objects to the Secretary-General's use of the term "renewal" to describe the ALWOP decision of 13 May 2020. Mr. Okwakol points out that the 13 May 2020 ALWOP decision was an "extension" of the original ALWOP decision. He points to the language in the memorandum ("Please be advised that the Under Secretary-General for Management Strategy, Policy and Compliance has decided to extend your administrative leave without pay for an additional period of three months").¹⁶

41. He further claims that the Secretary-General did not use the term "renewal" until the current appeal, and that the substitution of this term for the actual language used in various communications from the Administration ("extension") constitutes abusive behaviour by counsel for the Appellant, for which he should be sanctioned.

42. Mr. Okwakol submits that "extension" refers to the continuation of the terms and conditions of the original decision, and as such, is not a new or separate decision as the Secretary-General maintains.

¹⁶ Appeal, Annex 6 (13 May 2020 Memorandum from Assistant Secretary-General Martha Helena Lopez to Mr. Okwakol).

43. Moreover, Mr. Okwakol disputes the Secretary-General's characterization of the 13 May 2020 decision as being based on a fresh assessment of the circumstances. Unlike the situation in *Gisage*, Mr. Okwakol contends that there was no change from January to May 2020, as the investigation remained incomplete at the latter date.

44. He also submits that the Dispute Tribunal correctly found that his placement on ALWOP was unlawful based on the information available to the decision-maker at the time, and that the Secretary-General's disagreement with the UNDT's findings of fact are not legitimate grounds for appeal. Mr. Okwakol also reiterates that damage to the reputation of the Organization is insufficient grounds for ALWOP.

45. Albeit briefly, Mr. Okwakol submits that the Secretary-General is now estopped from subsequently raising the issue of the absence of a managerial review request by Mr. Okwakol until first advancing this before the UNDT. We infer that his point is that the Secretary-General's failure to raise this jurisdictional point at the time when it must have come to his notice should not now exclude him from having his claims judged on their merits.

46. Finally, Mr. Okwakol recalls the Dispute Tribunal's conclusion in multiple orders that to the extent that ST/AI/2017/1 introduces additional restrictions on staff members' rights under staff rule 10.4(c), these provisions are illegitimate.

Considerations

47. We address first whether the UNDT was correct to conclude that the periods of ALWOP between January and July to which Mr. Okwakol was subject were a single and continuing administrative decision such that Mr. Okwakol's request for management evaluation filed on 26 June 2020 was sufficient to allow him to challenge the lawfulness of the original ALWOP decision taken in January 2020.

48. We conclude that the UNDT erred in law in so deciding. Each of the three identifiable periods was the subject of consideration or reconsideration of the circumstances then pertaining. On each occasion, the Organisation took a decision about the state of the investigation and its ongoing nature, and advised Mr. Okwakol accordingly. It is not decisive, or even material as Mr. Okwakol submits, that the renewals of ALWOP were referred to as extensions of the previous leave. Indeed they were extensions or renewals in the sense that they created a continuous period of uninterrupted leave, but the significant element is that at

each decision point, the Administration reassessed the situation and the progress of the investigation. In one instance, that decision was made as the result of further information coming to hand.

49. On the estoppel argument raised by Mr. Okwakol, we are satisfied that the receivability question was addressed clearly by the MEU in its 2 October 2020 decision. It both identified that Mr. Okwakol's claim did not relate to the 13 January decision to impose ALWOP and held that, in any event, he had failed to make a timely evaluation request in respect of that decision. Mr. Okwakol was not led to believe that this was not an issue, as he appears to claim, until he was before the UNDT.

50. It follows from that conclusion that the substantive lawfulness of the 13 January decision was not properly before the UNDT which was entitled in law to evaluate the substantive lawfulness only of the 13 May decision to place the Respondent on further ALWOP and so we will deal with the merits of that aspect of the appeal.

51. While ALWOP is not a disciplinary sanction, its effects on a staff member, especially in cases involving a prolonged investigation, can be detrimental and in some ways at least as, or even more, detrimental than severance from service. That is because, while the staff member on ALWOP remains an employee of the Organisation, he or she cannot earn an income, whether from the United Nations or elsewhere. An attempt to earn remuneration for work for another employer is generally prohibited by the Organisation.¹⁷ Moreover, the staff member is restricted as to where he or she can travel while on ALWOP; thus, even though not required there for the performance of work, he or she cannot leave the relevant duty station without the consent of the Organisation. That is more than an insignificant constraint on the right of freedom of movement. The staff member may also be without accommodation if such housing is part of their role.

52. While it is also true that, if subsequently vindicated, a staff member placed on ALWOP will recover some or all of his/her lost remuneration, that often cannot save the consequences of previous impecuniosity attributable to the absence of income.

¹⁷ The Secretary-General may approve outside employment when the criteria set forth in Staff Regulation 1.2(p) are met.

53. The consequences of being on ALWOP are not only economic. The shame, stigma, humiliation, loss of dignity and other similar less tangible but nevertheless real consequences attaching to being suspected of serious misconduct are residual and oppressive. That may be so even if the staff member is eventually found to have been innocent of these serious charges.

54. While the emphasis placed by the Organisation on the identification and elimination of SEA is very important, so too are the human and due process rights of staff members who have not yet at least, been adjudged guilty of that misconduct. These factors must be carefully balanced in making decisions about administrative leave and particularly if this is to be without pay and for prolonged periods as in Mr. Okwakol's case.

55. For these reasons, the General Assembly has put in place some protections or safeguards against the improper use of ALWOP which, because of its potential effects on fundamental human rights, must be satisfied by the Organisation if it seeks to impose this administrative measure.

56. First, Staff Rule 10.4(b) requires that if a staff member is to be placed on administrative leave (irrespective of whether this is with or without pay), that staff member must be given a written statement of the reasons for such leave and its probable duration. This requirement focuses the Organisation's attention on the need to have good reasons for the interim sanction and to undertake and complete its investigation and decision-making in a timely, as well as a thorough, way.

57. Second, the presumption is that administrative leave will be on full pay (ALWP). That default position is subject to exceptions. The first is where there is "probable cause" (reasonable grounds to believe) that the staff member has engaged in sexual exploitation and sexual abuse". By the use of the word "and", the requirement for these conducts is apparently cumulative, that is that there must exist probable cause to believe that the staff member has engaged in both sexual abuse and sexual exploitation. These terms are not defined in the Staff Rules, but are addressed in Section 1 of the relevant Secretary-General's Bulletin, ST/SGB/2003/13, as follows:

The term "sexual exploitation" means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

Similarly, the term “sexual abuse” means the actual or threatened physical intrusion is of a sexual nature, whether by force or under unequal or coercive conditions.

58. Mr. Okwakol cannot have been guilty of sexual exploitation or abuse as these terms are defined and so could not have been placed on ALWOP on this basis. That conclusion does not decide the case, however.

59. The second and independent ground on which a staff member may be placed on ALWOP is where, pursuant to Staff Rule 10.4(c)(ii), the Secretary-General “decides that exceptional circumstances exist which warrant the placement of the staff member on administrative leave with partial pay or without pay.”

60. ST/AI/2017/1 (which must be read and interpreted in accordance with Staff Rule 10.4 above) expands on the criteria referred to in the preceding paragraph of this Judgment and defines further the exceptional circumstances warranting ALWOP in two cumulative circumstances. The first is that these exceptional circumstances include that the unsatisfactory conduct is of such gravity that it would, if established, warrant separation from service or dismissal. The second requirement is that there is information about the unsatisfactory conduct before the authorised official making the administrative leave decision that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

61. Relevant also is ST/SGB/2003/13 which requires a staff member who develops concerns or suspicions of SEA by a fellow worker (including effectively a UNV) having taken place, to report those concerns or suspicions via established reporting mechanisms. Although the complainant had reported her complaint to CDT several months earlier, this did not detract from Mr. Okwakol’s obligation to do so himself when he became aware of it on 25 November 2019, as he admitted he had not.

62. The question for the Appeals Tribunal is what did the Administration know of Mr. Okwakol’s involvement on 13 January 2020 when he was placed on ALWOP? On 25 November 2019, Mr. Okwakol became aware, during the course of the meeting on that date, that the complainant had allegedly been raped by the UNV. Mr. Okwakol admitted that he had become aware of this, and further that he erred by failing to end the meeting there and then. Instead, the meeting continued, including attempts at dissuasion of the complainant to withdraw her complaint, and by reference to the payment to her of a sum of money.

Mr. Okwakol was aware that the meeting participants discussed the payment of a not insignificant sum (USD 2,000) to the complainant. The OIOS investigators had evidence that the male meeting participants, including Mr. Okwakol, attempted to persuade the complainant to withdraw her complaint against the alleged perpetrator.

63. Was this sufficient to place Mr. Okwakol on ALWOP? We conclude that not only was Mr. Okwakol remiss in not ending the meeting when these matters emerged, but he was bound to, but did not, report his concerns or suspicions which he should have held following those revelations. Not only did he not do either of these things, but the Administration had evidence that Mr. Okwakol was complicit in seeking to persuade the complainant to withdraw her complaint in these circumstances. The Administration was entitled to assume that this was unsatisfactory conduct and of such gravity that, if established in the investigation, would warrant separation or dismissal of Mr. Okwakol. Finally, could it have been said at that time that it was more likely than not that Mr. Okwakol engaged in that conduct? Although, in effect, a *prima facie* test at that stage, we conclude that the Administration was entitled to so find for the purpose of determining that his administrative leave was to be without pay.

64. In these circumstances, we conclude that there was no irregularity in Mr. Okwakol's placement on ALWOP and the appeal must succeed on that substantive ground.

Judgment

65. The UNDT's Judgment was erroneous in law. The Secretary-General's appeal is granted and the Judgment of the UNDT is reversed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Colgan

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 16th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar