



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

Judgment No. 2023-UNAT-1328

Michael David Antoine

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

| | |
|----------------------|--|
| Before: | Judge John Raymond Murphy, Presiding Judge Kanwaldeep Sandhu Judge Graeme Colgan |
| Case Nos.: | 2022-1660 & 2022-1663 |
| Date of Decision: | 24 March 2023 |
| Date of Publication: | 20 April 2023 |
| Registrar: | Juliet Johnson |

Counsel for Appellant: Sètonджи Roland Adjovi

Counsel for Respondent: Angélique Trouche & Patricia C. Aragonés

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mr. Michael David Antoine contested a decision by the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC and DMSPC, respectively) to place him on administrative leave without pay (ALWOP) (ALWOP decision), a seizure of his personal smartphone by the Office of Internal Oversight Services (OIOS) for the purposes of an investigation, and a decision by the Acting Head of Mission of the United Nations Truce Supervision Organization (UNTSO) to extend his placement on administrative leave with pay (ALWP) (ALWP extension decision).

2. By Judgment No. UNDT/2021/144¹ and Judgment No. UNDT/2021/151², the United Nations Dispute Tribunal (UNDT) dismissed Mr. Antoine's applications. He filed appeals with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). For the reasons set out below, the Appeals Tribunal dismisses the appeals.

Facts and Procedure

3. Mr. Antoine joined the Organization in 1999.³ At the time of the events in question, he held a continuing appointment as an Administrative Officer, at the FS-6 level, in the office of the Deputy Chief of Mission Support, UNTSO, in Jerusalem.

4. On 24 June 2020, the Investigations Division of OIOS (ID/OIOS) received a report of possible unsatisfactory conduct implicating staff members of UNTSO in Jerusalem, which included a video clip showing two male individuals and a female individual driving through a busy street in a United Nations vehicle.⁴ The video clip showed a male individual and a female apparently engaging in an act of a sexual nature while the vehicle was driven along a heavily trafficked street. The video clip was widely circulated on social media.

¹ *Antoine v. Secretary-General of the United Nations*, Judgment dated 30 November 2021.

² *Antoine v. Secretary-General of the United Nations*, Judgment dated 7 December 2021.

³ Application dated 13 August 2021, in respect of the ALWP extension decision, para. 1, and Respondent's answer to the appeal of Judgment No. UNDT/2021/144, para. 2; Respondent's answer to the appeal of Judgment No. UNDT/2021/151, para. 2.

⁴ Impugned Judgment No. UNDT/2021/144, para. 6; impugned Judgment No. UNDT/2021/151, para. 8.

5. The UNTSO staff members implicated in the report were Mr. Antoine and another staff member.⁵ On the basis of the video clip, OIOS identified Mr. Antoine as wearing a distinctive Levi's T-shirt, a gold chain and silver bracelet.⁶ He was seated in the back seat, while the female passenger, wearing a red dress, sat astride him. His right hand was placed on the left buttock of the female passenger. Another staff member of UNTSO, a Security Officer, was in the front passenger seat.⁷ The video clip clearly shows the female passenger gyrating on Mr. Antoine in a sexual manner. The registration number of the UN vehicle was seen clearly as "205".⁸

6. On 25 June 2020, the Director of ID/OIOS, sent an e-mail to Acting Head of Mission, UNTSO, informing him or her of the report and the video clip.⁹

7. On 30 June 2020, Mr. Antoine was interviewed by OIOS and was asked to surrender his personal smartphone, operative with a SIM card issued by the United Nations, to OIOS for forensic analysis for the purposes of the investigation into his possible misconduct.¹⁰ At the interview Mr. Antoine stated that he could not say whether he was the person depicted in the video clip but could see why others might say it was he, and that he would need time to carefully review the video clip to be able to say whether it was he. OIOS found that Mr. Antoine's answers were evasive. On the same day, OIOS sent a memorandum to USG/DMSPC, providing a report on the matter.¹¹ Mr. Antoine later admitted that it was he in the back seat of the vehicle.¹²

8. By letter dated 1 July 2020, the Assistant Secretary-General for Human Resources (ASG/OHR) informed Mr. Antoine of the ALWOP decision.¹³

⁵ *Ibid.*; 23 June 2020 complaint to OIOS (Annex R/2 to Respondent's reply to the application in respect of the ALWP extension decision).

⁶ ALWOP decision dated 1 July 2020 (Annex R/4 to Respondent's reply to the application in respect of the ALWP extension decision).

⁷ In addition to the three passengers, there was a fourth individual in the vehicle—the driver—who was later identified as one more staff member of UNTSO, a Procurement Assistant.

⁸ OIOS report/memorandum dated 30 June 2020 (Annex 4 to Respondent's answer to the appeal of Judgment No. UNDT/2021/151).

⁹ Impugned Judgment No. UNDT/2021/144, para. 6.

¹⁰ Transcript of the OIOS interview of 30 June 2020 (Annex 4 to the appeal of Judgement No. UNDT/2021/144).

¹¹ Impugned Judgment No. UNDT/2021/151, para. 9.

¹² Appeal of Judgment No. UNDT/2021/151, para. 25.

¹³ ASG/OHR letter dated 1 July 2020 (Annex 5 to Respondent's answer to the appeal of Judgment No. UNDT/2021/151).

9. On 2 September 2020, after submitting a request for management evaluation, Mr. Antoine filed an application with the UNDT contesting the ALWOP decision and the purported decision to seize his personal smartphone.¹⁴ On the same day, he filed a motion for interim measures. On 9 September 2020, the UNDT partially granted the motion for interim measures and ordered the suspension of the implementation of the decision to place Mr. Antoine on ALWOP.

10. By letter dated 11 September 2020, the Officer-in-Charge, UNTSO, informed Mr. Antoine that he had been placed on ALWP effective 9 September 2020 for an initial period of three months pending the outcome of the disciplinary process on the grounds that, firstly, the seriousness and nature of the allegations against him rendered him unable to continue to effectively perform his functions and, secondly, his continued presence in UNTSO could prejudice the interests or the reputation of the Organization.¹⁵

11. Mr. Antoine's placement on ALWP was later extended by letters dated 8 December 2020, 9 March 2021, and 9 June 2021, each time for three months or pending completion of the process by DMSPC, in accordance with Sections 11.3(a) and 11.3(c) of ST/AI/2017/1¹⁶.¹⁷ The letter of 9 June 2020 communicating the contested ALWP extension decision stated that the factors forming the basis for the initial placement on ALWP continued to exist.

12. On 13 August 2021, after management evaluation, Mr. Antoine filed an application to the UNDT challenging the ALWP extension decision.¹⁸

13. On 30 November 2021, the UNDT issued its Judgment in which it held that the ALWP extension decision was "lawful and rational". In addition, the UNDT ruled Annex 18 to the application¹⁹ inadmissible. The UNDT found that the document comprised a publicly released commentary and analysis of the case, which had no value, evidential or otherwise, because the compiler of it was not subject to the UNDT's jurisdiction, the veracity of its contents could not be tested and it essentially constituted inadmissible hearsay. The UNDT accepted that

¹⁴ Impugned Judgment No. UNDT/2021/151, paras. 13–14.

¹⁵ Annex 6 to Respondent's answer to the appeal of Judgment No. UNDT/2021/144.

¹⁶ Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). Sections 11.3(a) and 11.3(c) are set out below.

¹⁷ Annexes 7, 8 and 9 to Respondent's answer to the appeal of Judgment No. UNDT/2021/144.

¹⁸ Impugned Judgment No. UNDT/2021/144, para. 1.

¹⁹ Annex 18 to the application consisted of comments titled "The UNTSO 'Sex Video' Investigation".

Mr. Antoine had contributed significantly to the delay in the process to charge him and that there had accordingly been no violation of his due process rights or an abuse of discretion. The UNDT also found that the ALWP extension decision was adequately motivated in terms of the requirements of Staff Rule 10.4(b) governing ALWP decisions and thus lawful, and accordingly dismissed the application.

14. On 2 November 2021, the UNDT held a hearing on the merits of the application in respect of the ALWOP decision and on 7 December 2021 issued its Judgment. The UNDT upheld the ALWOP decision and dismissed the application. It also found that Mr. Antoine's challenge to the OIOS' request that he surrender his smartphone was not a reviewable administrative decision. In addition, the UNDT ruled that nine other annexes to Mr. Antoine's application were inadmissible as evidence.

15. On 31 January 2022, Mr. Antoine filed an appeal against Judgment No. UNDT/2021/144 regarding the ALWP extension decision and on 7 February 2022, he filed an appeal against Judgment No. UNDT/2021/151 regarding the ALWOP decision. The Secretary-General filed answers to the appeals on 4 April 2022 and 11 April 2022, respectively. On 26 October 2022, the Appeals Tribunal consolidated the appeals.

Submissions

Mr. Antoine's Appeals

16. Mr. Antoine argues that the UNDT erred in law in its conclusion that the ALWOP and ALWP extension decisions were reasonable and lawful.

17. He submits that the UNDT erred by ruling some of the documentary evidence inadmissible as these documents were "authentic".

18. Despite admitting at a later stage of the investigation (as confirmed in paragraph 25 of his appeal of Judgement No. UNDT/2021/151) that he was indeed in the backseat of the car, Mr. Antoine submits that the UNDT erred in admitting the video evidence without hearing the evidence of the person who took the video to see if it had been "doctored" in any way.

19. Mr. Antoine argues further that the circumstances were not "exceptional" in terms of Section 11.4 of ST/AI/2017/1 to justify his placement on ALWOP.

20. In relation to the ALWP extension decision, Mr. Antoine essentially argues that the investigation process was unreasonably delayed and that his conduct did not contribute to the delay. He also contends that the UNDT erred in ruling Annex 18 as inadmissible, as its author was available to testify and this evidence was relevant.

21. Mr. Antoine requests both UNDT Judgments to be reversed and to be substituted by orders rescinding the ALWOP decision and the ALWP extension decision, his reinstatement to duty, compensation for damage to his reputation and career prospects caused by the extended period of the investigation, and for the Director ID/OIOS to be referred for accountability.

The Secretary-General's Answers

22. The Secretary-General submits that the ALWOP decision and the ALWP extension decision were both reasonable and lawful and the UNDT did not err in any respect.

23. The Secretary-General maintains that the decisions were entirely consonant with the requirements of the applicable legal framework in Staff Rule 10.4 and Section 11.4(b) of ST/AI/2017/1 which justify both ALWOP and ALWP for the misconduct committed in this case. The decisions were without improper motive and were rationally based on the available evidence of misconduct.

24. The Secretary-General argues that Mr. Antoine's submissions about the evidence ruled inadmissible are of no consequence. The documents have no relevance and do not alter or impact on the material evidence establishing that the misconduct was committed.

25. The Secretary-General requests the appeals to be dismissed and the UNDT Judgments to be affirmed.

Considerations

Motion to strike the Secretary-General's response to Order No. 507 (2023)

26. After the Secretary-General submitted his response to Order No. 507 (2023), Mr. Antoine filed a motion to strike it from the record. Mr. Antoine argues that it includes irrelevant and inadmissible evidence and is an abuse of process. The Secretary-General comments that the submissions were made in good faith and the Appeals Tribunal is

well-placed to give the appropriate weight to the information and evidence provided or to ignore any information which it considers to be of no assistance.

27. Accordingly, there is no merit to Mr. Antoine's motion. It is "not up to a party to request that the Appeals Tribunal strike out each and every argument she or he does not agree with, since it is natural that the parties may dispute certain issues or matters at stake". In view of the foregoing, the motion is denied.

Merits of the appeals

28. The first issue for determination is whether the UNDT erred in finding that the ALWOP decision was lawful.

29. Staff Rule 10.4 provides:

(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 completion of a disciplinary process. Administrative leave may continue 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.

(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, 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.

30. Section 11.4 of ST/AI/2017/1 provides:

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 separation 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 the unsatisfactory conduct.

31. In *Muteeganda*²⁰, this Tribunal held that the qualification of a discretionary power, by way of a condition precedent requiring “exceptional circumstances”, is reviewable. 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”.²¹ Additionally, pursuant to Section 11.4(b) of ST/AI/2017/1, the unsatisfactory conduct must be of such gravity that it would, if established, warrant separation or dismissal under Staff Rule 10.2 (a) (viii) or (ix), and there must be information before the authorized official about the unsatisfactory conduct that makes it more likely than not (on a balance of probabilities) that the staff member engaged in the unsatisfactory conduct.

32. The UNDT did not err in its determination that the available information established on a balance of probabilities that Mr. Antoine had engaged in the alleged misconduct justifying his placement on ALWOP. The decision to place Mr. Antoine on ALWOP was based on the memorandum of the Director ID/OIOS, dated 30 June 2020, and the report received by OIOS on 24 June 2020, from multiple sources, of possible misconduct implicating UNTSO staff members captured on the video clip circulated on social media and elsewhere. The video clip alone was sufficient, cogent and compelling evidence that Mr. Antoine was the man engaged in sexual activity in the UN vehicle (“205”) as it circulated in a heavily trafficked area. The vehicle’s GPS system indicated that the vehicle had been in HaYarkon Street in Tel Aviv, in the vicinity of an area where sex workers solicit clients.²²

33. In any event, and most importantly, in his interview with the OIOS, Mr. Antoine effectively conceded that it was he in that back of the vehicle, when he said he could see why others might say it was he. In addition, there was photographic evidence of Mr. Antoine on a different occasion wearing a Levi’s T-shirt identical to that worn by the male person in the back seat of the vehicle during the incident in question. After the contested decisions were taken, Mr. Antoine admitted that he was the person in the back seat of the car, thus confirming

²⁰ *Muteeganda v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-869, paras. 28-29.

²¹ *Ibid.*

²² OIOS report/memorandum dated 30 June 2020 (Annex 4 to Respondent’s answer to the appeal of Judgment No. UNDT/2021/151).

his somewhat equivocating concession during the investigation, upon which the UNDT justifiably relied.²³

34. In these circumstances, there was undoubtedly a preponderance of evidence that Mr. Antoine had committed serious misconduct not befitting an international civil servant. Such being the case, the exclusion of the documentary evidence ruled inadmissible by the UNDT is of no consequence. The video clip, the equivocal concession (later to become an unequivocal admission) and the identification evidence alone were sufficient to establish the misconduct and the documents excluded were unlikely to alter that fact or to impact meaningfully on the evidence establishing the misconduct.

35. Moreover, considering the serious nature of the misconduct captured on the widely circulated video clip, and its potential to cause significant harm to the reputation and credibility of the Organization, constituted an exceptional circumstance, as contemplated in Section 11.4(b) of ST/AI/2017/1. The misconduct was grave enough for the Administration to contemplate separation or dismissal, as it was irremediably damaging to the trust relationship between the staff member and the Organization. The evidence justified Mr. Antoine's removal from service pending the investigation in the interest of mitigating potential reputational harm to the Organization. The ALWOP decision affirmed the Organization's policy that members of the host country's population should not be exposed to individuals who offend the ethos of the Organization by engaging publicly in transactional sex in a UN vehicle or, worse, engage in sexual exploitation with vulnerable persons (which may or may not have been the case here). Hence, there were exceptional circumstances warranting the placement of Mr. Antoine on ALWOP. Accordingly, the ALWOP decision was a reasonable and lawful exercise of the Administration's discretion. The legality of the decision is not impacted by the fact that the UNDT issued an interim measure suspending the action pending final determination of the application on the merits.

36. The appeal against the ALWOP decision must fail.

37. As for the alleged seizure of Mr. Antoine's smartphone, the UNDT found that the seizure did not involve or constitute an administrative decision and thus the application in relation to it was not receivable, and that the issue had in any event been rendered moot by the return of the smartphone. The UNDT rejected as unsustainable Mr. Antoine's contention that

²³ He confirms the admission in paragraph 25 of his appeal of Judgment No. UNDT/2021/151.

the investigators had lied to him when they relied on certain administrative issuances as a basis for the seizure. The mere fact that they differed about the legal basis for the seizure, in the opinion of the UNDT, was not evidence of deceit. In his appeal, Mr. Antoine failed to challenge the UNDT's findings on receivability and mootness, but simply reiterated his belief that he was lied to which is a matter going to the merits of his claim. Consequently, as there is no appeal against the jurisdictional issues of receivability and mootness, the jurisdictional findings of the UNDT must stand. The appeal on this issue must thus be dismissed.

38. Turning to the challenge to the UNDT's finding in relation to the ALWP extension decision, the motivation for the initial ALWP decision was evidently the same as the ALWOP decision. The only difference was that Mr. Antoine would continue to receive remuneration during his leave.

39. After the initial ALWP decision on 11 September 2020, the ALWP was extended three times on the basis that the circumstances which warranted the initial placement on ALWP continued to exist, and, as the UNDT found, because Mr. Antoine refused to cooperate with the OIOS investigation. His refusal was contrary to his obligations under Staff Regulation 1.2(r) and Staff Rule 1.2(c).

40. Staff Rule 10.4 and Section 11.3 of ST/AI/2017/1 provide *inter alia* that a staff member may be placed on administrative leave at any time after an allegation of misconduct and pending the completion of a disciplinary process and may continue until the completion of the disciplinary process. Staff Rule 10.4(d) makes clear that administrative leave is not a disciplinary sanction.

41. The investigation into the alleged misconduct commenced in June 2020. OIOS interviewed multiple witnesses and subjects. The ALWP extension decision was issued on 9 June 2021. At the time of the ALWP extension decision, therefore, Mr. Antoine had under investigation for almost a year. On the face of it, that seems like a long period of time to investigate a relatively straightforward matter, where the video evidence was clear and convincing. On the other hand, in the face of Mr. Antoine's ambivalent stance and initial equivocating denial, it was not unreasonable for the OIOS to require time to conduct a thorough investigation into the allegations in the context of a sensitive peacekeeping mission. It was necessary to build a case and to ensure that the requisite high standard of procedural fairness was met. The delay was partly justified by the fact that the investigative and

disciplinary process took place during the COVID-19 pandemic and was significantly mitigated by it, not causing Mr. Antoine any financial prejudice.

42. The length of time an investigation should take will depend on the circumstances, including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need to follow due process. The length of this investigation preceding the ALWP extension decision (almost a year) was not inordinately out of line, considering that it involved several subjects, instances of non-cooperation, sensitive allegations and the imperative to ensure due process. Mr. Antoine has challenged the UNDT's finding that his own behaviour contributed to the length of the investigative process. His arguments are largely spurious. His refusal to unequivocally concede his presence in the vehicle, which he was entitled to do, naturally obliged the OIOS to conduct a fuller investigation which delayed the process, already slowed down by the pandemic. In addition, as just intimated, considering that he was on leave with full pay for most of the duration of the investigation and disciplinary processes, he suffered no financial prejudice. Indeed, he possibly benefited from the delay in that it postponed the date of his ultimate dismissal²⁴. In the circumstances, the failure to prioritize his case, while admittedly not ideal, was not so unreasonable as to justify the rescission of the ALWP extension decision.

43. In the premises, the UNDT did not err in rejecting the claim that the ALWP extension decision was unreasonable and the appeal on this ground must accordingly also be dismissed. There is likewise no basis for referring the ID/OIOS for accountability as he quite evidently carried out his responsibilities to proper effect.

²⁴ Appellant's response to Order No. 507 (2023); Respondent's response to Order No. 507 (2023).

Judgment

44. The appeals are dismissed and Judgment No. UNDT/2021/144 and Judgment No. UNDT/2021/151 are hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Colgan

Judgment published and entered in the Register on this 20th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar