



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/86
Judgment No.: UNDT/2021/135
Date: 19 November 2021
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OKWAKOL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sètondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:

Jacob B. van de Velden, AAS/ALD/OHR, UN Secretariat

Andrea Ernst, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant was the Chief Resident Auditor, with the Office of Internal Oversight Services (“OIOS”) at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Goma. He served on a fixed-term appointment at the P-5 level.

2. This Judgment determines his application filed on 21 October 2020 contesting the 13 May 2020 retroactive extension of a 13 January 2020 decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) to place him on administrative leave without pay (“ALWOP”).

3. The contested decision was made based on information provided to the USG/DMSPC in two documents. Firstly, a four-page Code Cable dated 22 November 2019 from the Special Representative of the Secretary-General (“SRSG”) of the Mission. It set out the allegations of rape against a United Nations Volunteer (“UNV”). The allegations were by a woman who works for a vendor in MONUSCO (“the complainant/victim”). The Code Cable indicated that MONUSCO considered that there were grounds to warrant a full investigation into the conduct of the UNV.

4. Secondly, the decision was based on a two-page Memorandum dated 23 December 2019 with preliminary findings by OIOS that the Applicant had:

- a. Failed to report an allegation of sexual abuse (rape) made against a UNV (“the alleged perpetrator”) and
- b. Attempted to interfere with the United Nations administration of justice and to conceal the said allegation by participating in a meeting with others to negotiate a payment with the complainant/victim for withdrawal of the complaint.

5. The duration of the ALWOP was initially for a period of three months, or until the completion of an investigation into his conduct and any disciplinary process, whichever was earlier. It was extended on 13 May 2020 with retroactive

effect for three months from 13 April 2020. From 16 July 2021 the Applicant's ALWOP was converted to administrative leave with pay ("ALWP"). His position in this application is that the prior decisions to place him on ALWOP were unlawful.

6. The Respondent contends that the application is partly not receivable because the first three months of the ALWOP elapsed without the Applicant taking any steps in the Organization's internal justice system. According to the Respondent, the application is also partly moot as the retroactive part of it was voluntarily rescinded and it is entirely without merit.

7. The Applicant was paid for the period 16 April to 13 May 2020. There is no dispute as to this partial mootness of the challenge.

8. For reasons further explained in this Judgment, the Tribunal finds the application receivable in its entirety and the Applicant also succeeds on the merits of his challenge to the decision.

Background Facts and Procedural History

9. The background information available to the Respondent at the time when the decision was made, as summarised from the OIOS Memorandum, was as follows:

a. On 20 November 2019, the complainant/victim reported to the Conduct and Discipline Team ("CDT") in MONUSCO, that she was raped on 29 June 2019 by the alleged perpetrator. She said she had previously reported this to another United Nations staff member, Mr. Loto, on 10 July 2019.

b. On 25 November 2019, the complainant/victim attended a meeting with the Applicant, the alleged perpetrator, Mr Loto, and another colleague, Mr. Kuya who works with the Applicant as an OIOS, Resident Auditor.

c. The complainant/victim recorded the meeting conversation, wherein she requested an apology from the alleged perpetrator. The actions he was to apologise for were not defined in the discussions. The complainant/victim also requested that the alleged perpetrator pay her USD2,000.00. The

Applicant, Mr. Loto and Mr. Kuya directed her to withdraw her report to the CDT.

d. When the complainant/victim attempted to withdraw the report from the CDT, she was told that her complaint had been referred to the OIOS.

e. At a later interview with the OIOS, OIOS asked the Applicant whether money was discussed at the 25 November 2019 meeting. He said that all that was discussed was that the alleged perpetrator owed money to the complainant/victim.

f. As to the purpose of the 25 November 2019 meeting, the Applicant said that it was ‘to gain an understanding of the issue between’ the complainant/victim, Mr. Loto and the alleged perpetrator. He said he was not aware that a complaint of sexual abuse had been made by the complainant/victim prior to the meeting. He only became aware of it during the meeting. He admitted that it was an error for him to have proceeded with the meeting after he became aware of this and the meeting should have been discontinued.

g. On 11 December 2019, the OIOS says it is aware that the Applicant, having been previously notified of his OIOS interview date, met with Mr. Loto and the alleged perpetrator at a hotel in Goma. The Applicant denies that he attended that meeting.

10. On 10 December 2019, the Applicant received an email from the OIOS informing him that he was the subject of an investigation regarding allegations that he did not report an allegation of sexual abuse and that he attempted to interfere with the investigation by seeking to negotiate payment to the complainant/victim for her to withdraw her rape complaint. The Applicant was told that he was being investigated for “assisting in, or contributing to, the commission of a misconduct”.

11. On 13 January 2020, the USG/DMSPC placed the Applicant on ALWOP for a period of three months pending completion of the investigation and any disciplinary process against him.

12. On 13 May 2020, the Applicant was notified that the USG/DMSPC had decided to extend his ALWOP for an additional period of three months retroactively from 16 April 2020, or until the completion of the disciplinary process, whichever comes earlier. The reason for the extension was expressed as “the considerations...warranting your placement on ALWOP continue to exist.” This rationale was based on a Code Cable received on 4 May 2020 which did not provide new information or assessments. It stated that “the reasons for the initial placement of the subjects on ALWOP have not changed.”

13. On 22 June 2020, the Assistant Secretary-General for Human Resources (“ASG/OHR”) rescinded the decision to place the Applicant on ALWOP on a retroactive basis, that is, regarding the period from 16 April to 12 May 2020. The ASG/OHR advised MONUSCO to pay the Applicant his salary. On 23 June 2020, MONUSCO confirmed that the Applicant would be paid his salary from 16 April 2020 to 13 May 2020.

14. On 25 June 2020, the Applicant submitted a request for management evaluation of the 13 May ALWOP decision. On 29 June 2020, the Applicant filed an application with the Dispute Tribunal seeking suspension of the implementation of the 13 May ALWOP decision, pending management evaluation.

15. On 6 July 2020, the Dispute Tribunal issued Order No. 127 (NBI/2020) dismissing the Applicant’s 29 June 2020 application for suspension of action. However, in Order No. 127 (NBI/2020), the Tribunal held that the element of *prima facie* unlawfulness had been established. The reason for not granting suspension of action was that urgency and irreparable harm were not established.

16. On 10 July 2020, the USG/OIOS decided to place the Applicant on ALWP from 16 July 2020, under staff rule 10.4 and section 11.3 of ST/AI/2017/1 (Unsatisfactory Conduct, Investigations and the Disciplinary Process) for an initial period of three months, pending a review by the Department of Management Strategy, Policy and Compliance (“DMSPC”) of the OIOS investigation report into the Applicant’s conduct.

17. On 13 July 2020, the Applicant sought management evaluation of the decision to place him on ALWP. He failed in a subsequent application to the Tribunal for suspension of action of the ALWP decision as it was dismissed by Order No.141 (NBI/2020). At paragraph 13 of the Order, it was noted that the Respondent informed the Tribunal that the OIOS investigation report into the Applicant's conduct had not been referred to the ASG/OHR for consideration of whether a disciplinary process should be pursued under section 7.2 of ST/AI/2017/1.

18. After the determinations in the motions, the application was docketed to the instant Judge on 1 September 2021 for determination on the merits. The Tribunal held a case management discussion ("CMD") with the parties on 15 September 2021.

19. The parties agreed that the matter could be determined on the papers. They duly filed written closing submissions in accordance with the Tribunal's CMD directions.

Submissions

20. The Applicant contends that the application is receivable because there was one seamless ALWOP decision. This argument was accepted by the Tribunal in the related case of *Loto* Order No. 119 (NBI/2020).

21. The Respondent refutes this, contending that the Applicant failed to request management evaluation of the original ALWOP decision of 13 January 2020. Hence, his application is not receivable in so far as it challenges the first three months of his ALWOP.

22. The Respondent points out that the Tribunal had observed at paragraph 11 of Order No.127 that the ALWOP decision made on 13 January 2020 was not the subject of the suspension of action application then before the Tribunal. It was separate from the 13 May 2020 decision, which the Applicant sought to have suspended. The Tribunal opined that the 13 May 2020 which was before it for suspension was 'clearly a discrete administrative decision, in a nexus with the decision that applied the ALWOP in the first place, but reviewable in and of itself'.

The Respondent cites this statement as authority that the Applicant's challenge to the first three months of his ALWOP is not receivable.

23. As to the merits of the case, the Applicant highlights that there was a lack of due process in the investigation, that gave rise to the memorandum, acted on to place him on ALWOP. He reported this to the USG/DMSPC in August 2020 and thereafter, the interview process restarted with new investigators.

24. The Applicant further submits that the unlawfulness of the Respondent's ALWOP decision is borne out by the Respondent's own actions, in converting the Applicant's leave to ALWP. This was done both as it relates to the retroactive aspect of the ALWOP from April to May 2020 and for the months from July 2020, immediately after the period that the instant application addresses.

25. Counsel for the Applicant also relies on the finding made in *Loto* Order No. 119 (NBI/2020), that the retroactive aspect of the decision-making process tainted the decision as a whole and rendered it unlawful.

26. In response Counsel for the Respondent submits that in the process of judicial review, the Tribunal is limited to considering information available to the decision maker when the decision was made.

27. The Respondent emphasized the firm policy stance taken by the Organization prohibiting sexual abuse and exploitation ("SEA"). It was highlighted that success of the policy depends on staff members reporting suspicions and concerns of possible SEA. It also depends on staff members refraining from actions that discourage the making of complaints or encourage reconciliation with perpetrators and the withdrawal of complaints in exchange for payment.

28. Additionally, the Respondent contends that such actions by the Applicant, as an OIOS staff member, damages the credibility and reputation of the Organization's commitment to the policy. Accordingly, the alleged misconduct is grave enough to merit separation from service.

29. The Respondent contends that the information available when the ALWOP decision was made was sufficient to conclude that it was more likely than not (a preponderance of evidence) that the Applicant committed the misconduct.

30. In closing submissions, the Respondent brought to the Tribunal's attention new information. It was that on 4 October 2021, the USG/DMSPC decided to impose on the Applicant the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity.

Consideration

Receivability

31. Staff rule 11.2(a) provides as follows:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

32. The Respondent contends that the 13 May 2020 retroactive extension was a separate administrative decision. The initial three-month period had elapsed, despite the attempt of the Respondent to link the two periods retroactively and seamlessly. In these circumstances, the Respondent's case is that consideration by the Tribunal of the period of ALWOP before the second three months is not receivable.

33. At the interim measures stage of proceedings in a related application filed by Mr. Loto, the Tribunal made findings in *Loto* Order No. 119 (NBI/2020) that, on an examination of the wording of the Respondent's correspondence, there was one ALWOP decision.¹ The ALWOP was expressly intended to be retroactively extended and continued seamlessly, based on no new information, by correspondence dated 13 May 2020.

¹ Paragraphs 15-17.

34. In *Gisage* 2019-UNAT-973, the Appeals Tribunal explained the reason for finding an extension of the ALWOP, in that case, to be a separate administrative decision at paragraph 30, as follows:

The **facts** taken into consideration at that stage **were different**. As such, the decision to extend the ALWOP was based on **a fresh assessment** and constituted **a separate decision**. [Emphasis added]

35. Unlike the circumstances in *Gisage*, this case did not involve a situation of new decisions being made with each extension.

36. In this case, the Order No. 119 interpretation of the impugned ALWOP as one continuing decision fits squarely within the regulatory framework. Staff rule 10.4(a) contemplates ALWOP as potentially continuing until completion of the disciplinary process. Implicitly, extensions can be anticipated once an ALWOP decision is made.

37. Unless there are new facts and assessments giving rise to the extensions, the extensions *per se* may not fit within the characteristics clearly elucidated in *Gisage* to amount to new decisions. In such cases, staff members cannot be expected to submit repeated management evaluation requests and applications to the Tribunal.

38. In all the circumstances, the Tribunal finds that there was one continuing ALWOP decision, expressly based on the initial, 13 January 2020, considerations and reasons. No aspect of the challenge fails on grounds of non-receivability.

Merits

39. The Tribunal's review of the merits of this application focusses on determining whether the impugned decision was rationally based on criteria for ALWOP, applied to information available when the decision was made. That date was 13 January 2020, as on the express wording of the 13 May 2020 extension there were no new facts or assessments considered.

40. In this process of review, the Tribunal is mindful of the presumption of regularity of the Respondent's decisions.² However, while the Respondent's "classification of the objectively established circumstances as exceptional is a matter for his discretion," it "nonetheless must be exercised rationally."³

41. The regulatory framework governing the placement of a staff member on ALWOP is as follows:

Staff Rule 10.4

(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.

ST/AI/2017/1

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

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

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

² *Niedermayr* 2015-UNAT-603; *Survo*, 2015-UNAT-595 (both quoting *Rolland*, 2011-UNAT-122). See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

³ *Muteeganda*, 2018-UNAT-869, para. 38.

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.

42. These provisions easily lend themselves to a literal interpretation. In other words: its plain English meaning. It is clear from the provisions, that when deciding whether to place a staff member on ALWOP, the authorized official, who in this case was the USG/DMSPC, must have reason to view the circumstances as exceptional.

43. In determining that circumstances are “exceptional”, two elements must be present. Firstly the ‘unsatisfactory conduct’ the staff member is alleged to have engaged in must be grave enough to warrant separation from service (with or without notice and/or indemnity) or dismissal. Secondly, the authorized official deciding on whether to place a staff member on ALWOP must have before them, information which ‘more likely than not’ proves the staff member engaged in the unsatisfactory conduct.

The Unsatisfactory Conduct

44. Based on the above-mentioned provisions, the Tribunal must consider whether there is precedent, or any other reason based upon which the Respondent considered that separation from service or dismissal would be warranted for the applicants alleged unsatisfactory conduct

45. Counsel for the Respondent appears to place significant reliance on the Organization’s firm policy against sexual abuse. Using this policy basis, the Respondent submits that failure to report sexual abuse allegations arising between other colleagues is a breach of staff rules 1.2(c) and (e).

46. The Respondent’s submissions are however not supported by, or aligned with, the regulatory framework for reporting on sexual abuse matters. ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) makes clear that it is ‘concerns and suspicions’ that a staff member is duty bound to report. The Bulletin does not require a staff member to report mere allegations that come

to their attention. The provision is as follows:

3.2 In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:

...

(e) Where a United Nations staff member develops **concerns or suspicions** regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, **he or she must report such concerns** via established reporting mechanisms;

47. The regulatory framework also guides the staff member on the elements he/she should consider when deciding whether to report on private interactions between colleagues, that have led to sexual abuse allegations. There is no indication that as soon as any staff member alleges to another, that a mutual colleague engaged in unwelcomed sexual conduct, the staff member receiving the information must report it to the Organization's investigators.

48. It is only when the staff member receiving the information is subjectively, and in good faith, concerned or suspicious that misconduct took place, that a report must be made. This may reasonably exclude a situation where the staff member has knowledge of improper motives, such as malice or extortion, for the allegation against another person being disseminated. Making a report in such circumstances may put the staff member at risk of disciplinary action for malicious reporting. It may also deprive the staff member of protection against retaliation for making the report.⁴

49. Additionally, it is implicit in ST/AI/2017/1 that the staff member thinking of reporting such a matter ought to have details as follows:

4.5 Information received from either a staff member or a non-staff member alleging unsatisfactory conduct should contain sufficient details for it to be assessed under the present instruction, such as:

⁴ Sections 2.1(a) and 2.3 of ST/SGB/2017/2 (Rev.1) (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

- (a) A detailed description of the unsatisfactory conduct;
- (b) The names of the implicated staff member(s);
- (c) Where and when the unsatisfactory conduct occurred;
- (d) The names of potential witnesses to the unsatisfactory conduct; and
- (e) All available supporting documentation.

50. In the instant case there was no available information, when the decision was made, that the Applicant could have anything but a fleeting awareness of the alleged victim's prior report of a rape. There was no indication that he knew any of the details of the allegation.

51. There was also no information in the OIOS Memorandum to support that the Applicant attempted to conceal sexual abuse by way of the discussions at the 25 November 2019 meeting. The Memorandum admits that the actions of the alleged perpetrator in relation to which the alleged victim sought an apology were not defined.

52. The Respondent has not established that each element of the Applicant's alleged actions herein is *per se* grave enough to warrant ALWOP. This case must be examined on its own facts.

53. On the facts of this case, as determined in Order No. 127 (NBI/2020), it was *prima facie* unlawful at the outset for the Applicant to have been placed on ALWOP. The Tribunal reiterates the statement made at paragraph 22 of Order No 127 (NBI/2020) as follows:

It is specifically worth noting that the Applicant is not investigated for having engaged in sexual exploitation and sexual abuse but, rather, for not reporting an act of rape and attempting to pervert the course of investigation through directing an alleged victim to withdraw her complaint. Facts put before the Tribunal do not show probable cause, for which it would be necessary to show that the Applicant had a sound knowledge of the commission of rape in the first place, knowledge of the pendency of an investigation in the second place or that he had threatened the victim or persuaded her to do something illegal. Otherwise, the Applicant may have been just a mediator in a private conflict. Neither is the Applicant's input in

the impugned interaction disclosed, while it appears that other persons had been involved. The Tribunal understands that details relevant for these considerations may be known to the Respondent and may make up probable cause. This, by itself, however, would not substantiate the ALWOP.

54. There was *prima facie* no basis at the time when the ALWOP decision was made to conclude that the alleged misconduct was grave enough, if proven, to warrant separation or termination. This is so whether based on the offences charged *per se* or on an examination of the record of information that was available to the decision maker.

55. In considering whether the Respondent's ALWOP decision was justified, there must be further consideration whether, on the information available at the time the decision was made, it was more likely than not that the alleged misconduct was in fact committed.

The Information before the Authorized Official

56. The Respondent has confirmed, in disclosures filed pursuant to CMD directions, that transcripts of interviews and the recorded meeting were not part of the information the USG/DMSPC had when deciding on the ALWOP. The only information before the USG/DMSPC was from the Code Cable and the OIOS Memorandum.

57. The information available from these two documents, in support of the charge arising from the 25 November 2019 meeting was insufficient for a conclusion, that it was more likely than not, that some misconduct took place on the part of the Applicant. The OIOS Memorandum indicated that there was a recording of a meeting which included demands by the alleged victim for payments from the alleged perpetrator and directions, by the Applicant and others, that she should withdraw her complaint.

58. However, the recorded discussions described in the OIOS Memorandum were not conclusive as to whether the Applicant and others were discussing payment in exchange for not reporting a rape. The OIOS report of the recording did not provide a preponderance of evidence as to the misconduct of attempting to conceal a rape.

59. The information on record was that the Applicant was saying it was only during the meeting that he came to be aware that there had been a sexual abuse report by the alleged victim.

60. Finally, the information available from the OIOS Memorandum was that the Applicant attempted to have discussions with other witnesses before his OIOS interview. However, the information on record, at the time the decision was made, is that the Applicant denied participating in that meeting.

61. The information available to the USG/DMSPC did not include transcripts of the OIOS interviews or the recorded meeting. It comprised two brief documents, the code cable and the OIOS Memorandum, of less than five pages each. The information therein was not conclusive as to whether the actions of the Applicant were linked to concerns, suspicion or attempts to mediate concerning rape allegations.

62. In Order No. 127 (NBI/2020), the importance of fact-based justification for ALWOP was highlighted. At paragraph 22, the Tribunal observed that ‘[u]sing ALWOP is not a matter of vast administrative discretion, as the Respondent wants, because it concerns fundamental contractual rights of the staff member.’

63. The impact of ALWOP on a staff member may be as onerous as summary dismissal, but without the fundamental contractual procedural fairness protections. It is a draconian measure to be used only in exceptional cases.⁵

64. In the instant case, the information available when the decision was made remained the same over an extended ALWOP period. The information was not sufficient for a determination that it was more likely than not that the Applicant committed misconduct grave enough to warrant dismissal. There is no indication

⁵ *Antoine* Order No. 172 (NBI/2020) ‘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’

that any consideration was given to a phased approach of administrative leave with partial pay as least from January 2020, at the start of the investigations. He ought not to have been summarily deprived of his contractual entitlements, based on the information available.

65. In all the circumstances, the Applicant has succeeded in establishing on the merits that the decision to place him on ALWOP was not justified.

Conclusion

66. The application succeeds on the merits.

67. The Tribunal makes the following consequential orders:

a. The decision to place the Applicant on ALWOP for six months is hereby rescinded.

b. The Respondent is to pay to the Applicant all salary and entitlements for the period 13 January 2020 to 16 July 2020, save for the period 16 April 2020 to 13 May 2020.

c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

Case No. UNDT/NBI/2020/086

Judgment No. UNDT/2021/135

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 19th day of November 2021

Entered in the Register on this 19th day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi