



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

Judgment No. 2022-UNAT-1292

**Richard Loto
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case No.:	2022-1651
Date of Decision:	28 October 2022
Date of Publication:	16 December 2022
Registrar:	Juliet Johnson

Counsel for Mr. Loto: Sètondji Roland Adjovi

Counsel for Secretary-General: Angélique Trouche

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal against Judgment No. UNDT/2021/133 (impugned Judgment), rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) on 19 November 2021, which granted the application of Mr. Richard Loto, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).¹ Mr. Loto contested the decision to place him on Administrative Leave Without Pay (ALWOP).
2. For the reasons set out below, we reverse the UNDT Judgment.

Facts and Procedure

3. Mr. Loto served as a Mail and Pouch Assistant (FS-4) at MONUSCO.
4. On 28 June 2019, Mr. Loto, a female who worked for a vendor in MONUSCO (the complainant), and a United Nations Volunteer (UNV) attended a happy hour event at a bar with others and then went to Mr. Loto's house where they continued drinking. Later, the UNV (the alleged perpetrator) drove the complainant to his house where he allegedly engaged in non-consensual sex with her.
5. A few weeks later, on 10 July 2019, the complainant told Mr. Loto that she had been raped by the UNV. Mr. Loto did not report this information to the Administration.
6. On 20 November 2019, the complainant reported the allegations of rape to the Conduct and Discipline Team (CDT) in MONUSCO. She also reported that she told Mr. Loto about the alleged rape, and that he had promised to facilitate a mediation between the interested parties but had not done so. On the following day, CDT questioned Mr. Loto about his failure to report this incident.
7. On 22 November 2019, the Special Representative of the Secretary-General (SRSG) of MONUSCO sent a code cable to the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC), reporting the allegations of rape and the alleged failure by an international staff member (Mr. Loto) to report this allegation (Code Cable).

¹ *Loto v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/133.

8. On 25 November 2019, the complainant attended a meeting with Mr. Loto, two other staff members of MONUSCO (Mr. O. and Mr. K.), and the UNV. The complainant recorded this meeting. During the meeting, Mr. Loto, Mr. O. and Mr. K. directed the complainant to withdraw her report to the CDT. Following this meeting, the complainant attempted to withdraw her report but was informed that her complaint had been already referred to the Office of Internal Oversight Services (OIOS).

9. On 23 December 2019, the Director of the Investigation Division of OIOS (ID/OIOS) addressed a memorandum to the USG/DMSPC (OIOS memorandum) concerning Mr. Loto's failure to report a sexual exploitation and abuse (SEA) matter. OIOS also described a recording of the 25 November 2019 meeting, during which the complainant requested that the UNV apologise for his actions (which were not defined) and pay her money, and the complainant was directed by Mr. Loto and others to withdraw the report she made to CDT. OIOS investigators interviewed Mr. Loto who said that: i) on 10 July 2019, the complainant approached him and said that she was raped by the UNV; ii) Mr. Loto later spoke to the UNV who denied the allegation; iii) he did not report the incident as soon as the complainant told him about the incident; iv) the UNV said that the complainant later informed him that she had lied about the rape and wanted to punish the UNV because he had owed money to her and had not answered her phone calls since 29 June 2019; v) he believed that it was a misunderstanding about money between the complainant and the UNV; vi) when asked if money or compensation was mentioned in the meeting, he said no; and vii) he admitted requesting a meeting with the UNV and Mr. O. on 11 December 2019 after he was notified by OIOS to attend a subject interview as he wanted to discuss an upcoming interview. OIOS considered that, on a preliminary basis, Mr. Loto's failure to report the SEA and his involvement in the meeting on 25 November 2019 had breached the United Nations Staff Regulations and Rules. OIOS also noted that the USG/DMSPC could satisfy herself that the requisite threshold to place Mr. Loto on ALWOP had been met.

10. On 13 January 2020, the USG/DMSPC placed Mr. Loto on ALWOP for a period of three months, pending completion of the investigation and any disciplinary process against him. The USG/DMSPC's decision was based on the fact that "there are reasonable grounds to believe (probable cause) that [Mr. Loto] violated section 3.2(e) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) by failing to report and attempting to conceal an alleged act of sexual abuse by another", the conduct of which "is of such gravity that it would, if established, warrant separation or dismissal". It was stated that

this is supported by “relevant information obtained by ID/OIOS during the investigation, including an interview with [Mr. Loto]”.

11. On 13 May 2020, Mr. Loto was notified that the USG/DMSPC was extending his ALWOP for an additional period of three months retroactively from 13 April 2020, or until the completion of the disciplinary process, whichever came earlier. It was stated that “[t]he reason for the extension is that the considerations under ST/AI/2017/1 warranting [his] placement on ALWOP continue to exist”.

12. On 14 June 2020, Mr. Loto filed an application before the UNDT, challenging the decision to place him on ALWOP.

13. On 17 June 2020, Mr. Loto filed a motion for interim measures pending determination of the application before the UNDT. He sought to change his administrative leave from ALWOP to Administrative Leave With Pay (ALWP).

14. On 19 June 2020, the Assistant Secretary-General for Human Resources (ASG/OHR) rescinded the decision to place Mr. Loto on ALWOP on a retroactive basis, from 13 April to 13 May 2020.

15. On 25 June 2020, the UNDT granted Mr. Loto’s motion for interim relief and ordered that “the decision to deprive [Mr. Loto] of his salaries while he is on Administrative Leave pursuant to staff rule 10.4 be suspended until the completion of the investigations and disciplinary process”.

The UNDT Judgment

16. On 19 November 2021, the UNDT rendered the impugned Judgment, granting Mr. Loto’s application and rescinding the decision to place Mr. Loto on ALWOP for six months.

17. On the receivability issue, the Secretary-General had argued that the 13 May 2020 extension of ALWOP was a separate administrative decision and Mr. Loto’s challenge to it was not receivable since the time to consider Mr. Loto’s request for management evaluation of this extension had not yet elapsed when he filed his UNDT application. The UNDT disagreed and held that there was one ALWOP decision, dating from the initial decision on 13 January 2020, and the 13 May 2020 extension “was based on the same information (nothing new) and continued

seamlessly”.² The UNDT distinguished this case from *Gisage*³ in which the UNAT stated that “the decision to extend the ALWOP was based on a fresh assessment and constituted a separate decision”. The UNDT found that unless there are new facts and assessments giving rise to the extension, the extension of ALWOP is not a separate administrative decision. The UNDT held that its interpretation fits squarely within the regulatory framework, as Staff Rule 10.4(a) contemplates ALWOP as potentially continuing until completion of the disciplinary process and thus implicitly, extensions can be anticipated once an ALWOP decision is made. Accordingly, the UNDT held that the application was receivable in its entirety.⁴

18. On the merits, the UNDT held that the impugned ALWOP decision was not rationally based on the criteria for ALWOP, given the information available when the decision was made on 13 January 2020.

19. Regarding the nature of Mr. Loto’s alleged misconduct, the UNDT held that “[t]here is no absurdity in the [Secretary-General]’s finding that the alleged misconduct, considered globally, is grave enough, if proven, to warrant separation or termination”. However, on the question of whether the authorized official had information which “more likely than not” proved Mr. Loto engaged in the unsatisfactory conduct, the UNDT held that this condition was not met.⁵

20. With regard to Mr. Loto’s failure to report the alleged rape, the UNDT noted that the USG/DMSPC, the authorized official in this case, made the decision based on the Code Cable and the memorandum from OIOS only, and “transcripts of interviews and the recorded meeting were not part of the information the USG/DMSPC had when deciding on the ALWOP”.⁶ The UNDT held that information available from these two documents was equivocal. On the one hand, there was the complainant’s report that she informed Mr. Loto that she was raped by their mutual colleague, the UNV. On the other hand, there was a version of events that the complainant told Mr. Loto the true problem she had with the UNV was that he owed her money. On the latter version of events, there may have been neither evidentiary basis nor a regulatory obligation for Mr. Loto to have reported the matter to the Organization. The UNDT held that “[t]o do so without genuine concern, suspicion or factual details, could be

² Impugned Judgment, para. 35.

³ *Gisage v. Secretary General of the United Nations*, 2019-UNAT-973.

⁴ Impugned Judgment, paras. 39-41.

⁵ *Ibid.*, para. 57.

⁶ *Ibid.*, para. 59.

deemed an ill-motivated act, to damage the reputation and career of a colleague. There was no rational basis, from the information available, to conclude that it was more likely than not that [Mr. Loto] committed misconduct worthy of dismissal, by not reporting [the] complainant/victim's allegations".⁷

21. As to the misconduct charges arising from the 25 November 2019 meeting, the UNDT held that the information available in the OIOS memorandum was not conclusive as to whether Mr. Loto and others were discussing payment in exchange for not reporting a rape. The OIOS memorandum indicated that there was a recording of the meeting, which included demands by the complainant for payment from the UNV and directions by Mr. Loto that she should withdraw her complaint. There were alternate versions of events on the record, whether rape or money owed was the true problem faced by the complainant. The UNDT however held that there was cogent available information that Mr. Loto lied during his OIOS interview by denying that money was discussed at the 25 November 2019 meeting. Information available from the OIOS memorandum indicated that Mr. Loto attempted to have discussions with other witnesses before his OIOS interview, but the UNDT held that no information was available to clearly link this conduct to concealment of a rape allegation. The UNDT concluded that the available information was equivocal as to whether the actions of Mr. Loto were linked to concerns, suspicion, or concealment of rape allegations.⁸

22. In sum, the UNDT concluded that the available information was not sufficient for a determination that it was more likely than not that Mr. Loto committed misconduct grave enough to warrant dismissal, and the UNDT rescinded the decision to place Mr. Loto on ALWOP for six months.⁹

Procedure before the Appeals Tribunal

23. On 18 January 2022, the Secretary-General filed an appeal which was registered as UNAT Case No. 2022-1651.

24. On 21 March 2022, Mr. Loto, represented by counsel, filed an answer.

⁷ *Ibid.*, para. 61.

⁸ *Ibid.*, paras. 62-65.

⁹ *Ibid.*, para. 70.

Submissions

The Secretary-General's Appeal

25. On the issue of receivability, the Secretary-General submits that the UNDT erred in law and fact by finding that the initial ALWOP decision and the ALWOP renewal decision constituted one continuing decision and further erred in finding Mr. Loto's challenge to the ALWOP renewal decision receivable. The ALWOP renewal decision is a separate administrative decision that was based on the re-examination of the circumstances by the Administration and therefore should be distinguished from the initial ALWOP decision. While separate administrative decisions may be based on similar or the same evidence, this does not convert them into one decision.

26. The Secretary-General argues that the UNDT erroneously distinguished the instant case from *Gisage* when it concluded that "[u]nless there are new facts and assessments giving rise to the extensions", there is no new administrative decision. However, in *Gisage*, the UNAT did not require new facts, but only a new assessment for a new decision to exist. A new assessment of the circumstances took place in this case and therefore the instant case is similar to *Gisage*. Therefore, the Secretary-General maintains that the UNDT erred by finding that the instant "case did not involve a situation of new decisions being made with each extension".

27. The Secretary-General also submits that the UNDT's reliance on Staff Rule 10.4(a) to support its findings that the ALWOP was "potentially continuing" is misplaced and an error of fact and law. This rule provides that "[a]dministrative leave may continue until the completion of the disciplinary process". It provides for the maximum length of the administrative leave, not that successive decisions regarding ALWOP are to be considered as one "continuing decision".

28. Further, the Secretary-General claims that the UNDT erred in law by finding that Mr. Loto's challenge to the ALWOP renewal decision is receivable on the basis that "staff members cannot be expected to submit repeated management evaluation requests and applications to the Tribunal". The UNDT exceeded its jurisdiction by rendering the judgment on the ALWOP renewal decision, which had not been contested by an application and by ordering the rescission of the ALWOP renewal decision.

29. On the merits, the Secretary-General submits that the UNDT erred in finding that the initial ALWOP decision was unlawful. Pursuant to Staff Rule 10.4(c), the Administration had determined that Mr. Loto's placement on ALWOP was warranted by "exceptional circumstances". In line with Section 11.4(b) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), exceptional circumstances to place a staff member on ALWOP exist if "the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal [...] and there is information [...] that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct". However, the UNDT erroneously found that the available information did not establish by a preponderance of evidence that Mr. Loto had engaged in misconduct.

30. First, the Secretary-General argues, the initial ALWOP decision stated that there was a preponderance of evidence that Mr. Loto failed to report SEA allegations. It is undisputed that the complainant informed Mr. Loto of the alleged rape by the UNV and Mr. Loto did not report it. Mr. Loto says that the UNV denied the allegations, but this is irrelevant as it is not Mr. Loto's role to assess whether it occurred or not. Mr. Loto also asserts that the complainant later said that she had lied about the alleged rape, but his credibility is weak as he had lied to the OIOS investigators. The UNDT erred in law by finding that Mr. Loto's knowledge of an allegation that the complainant had improper motives in reporting the alleged rape excluded that he had a duty to report misconduct. The standard of conduct applicable to an international staff member cannot allow a staff member to forego their obligation to report misconduct by simply arguing that there were improper motives on the side of the complainant. This would effectively render meaningless the duty to report misconduct.

31. Second, the Secretary-General points out that the initial ALWOP decision stated that there was a preponderance of evidence that Mr. Loto had attempted to interfere with the administration of justice and to conceal SEA allegations by negotiating the UNV's payment of compensation to the complainant in exchange for withdrawal of her report to the CDT. Based on the OIOS memorandum, Mr. Loto had set up and actively participated in the 25 November 2019 meeting where he directed the complainant to withdraw her report to the CDT; a compensation of USD 2,000 to the complainant was discussed, which was denied by him until he was confronted by the audio recording; he lied to the OIOS investigators; and he organized a meeting with his colleagues to discuss his upcoming interview with OIOS. The UNDT erred in law by failing to consider the above examples as constituting an interference with the administration of justice.

32. The Secretary-General also states that the UNDT committed another error of law when it appears to regret that the decision-maker was not in possession of transcripts of interviews of the 25 November 2019 meeting. However, such transcripts are not a legal requirement for placement on ALWOP. The Code Cable and the OIOS memorandum set out the preliminary findings of the investigation, and the Administration can and should at that stage be able to rely on the information put forward by OIOS, the independent and impartial investigative entity of the Organization.

33. The two acts of misconduct on the part of Mr. Loto, that is, failure to report SEA as well as interference with the administration of justice and his attempts to conceal an alleged rape, are grave. The Secretary-General maintains that the UNDT erred in law by finding that such acts of misconduct did not separately warrant separation or dismissal.

34. The UNDT also erred in law in finding that a “phased approach,” involving administrative leave with partial pay, should have been considered from January 2020. A phased approach is not required by the legal framework. The statutory requirements for ALWOP were met.

35. In sum, the Secretary-General concludes that the UNDT erred in law and in fact, resulting in a manifestly unreasonable decision, when it found that there was no preponderance of evidence that Mr. Loto engaged in serious acts of misconduct warranting separation or dismissal. The statutory criteria were met for the Administration to consider that exceptional circumstances existed to place and maintain Mr. Loto on ALWOP pursuant to Staff Rule 10.4. Therefore, the Secretary-General submits that the impugned Judgment must be vacated.

Mr. Loto’s Answer

36. Mr. Loto submits that the Secretary-General has not properly established any of the five grounds for appeal under Article 2(1) of the Appeals Tribunal Statute to support his appeal. The Secretary-General has merely proceeded to relitigate the same issues and facts that were adjudicated in the impugned Judgment and introduced new arguments not submitted at the first trial level in a perverse attempt to convince the UNAT to vacate the Judgment. He has also made demonstrably false factual claims which should warrant sanction.

37. Throughout his appeal brief, Mr. Loto argues that the Secretary-General refers to “renewal” of ALWOP in a misguided attempt to mislead the UNAT and obfuscate the fact that it was an “extension” of ALWOP, not renewal. Such language is not interchangeable; the use of “extension” refers to continuation of a previous decision under the same terms and conditions as the original decision. The Secretary-General tries to introduce this radically different legal argument and use different terminology in his appeal brief.

38. Mr. Loto submits that the Secretary-General’s argument that the 13 May 2020 extension represents a separate decision based on a “fresh assessment of the circumstances” is disingenuous. Unlike in *Gisage*, where at the various stages of the process there was a change warranting a fresh assessment, in the instant case, absolutely nothing had changed in the process; the investigation report was not complete at the time of the extension, and there was no change that would warrant any reassessment of the circumstances. Therefore, the extension was not a separate decision.

39. Mr. Loto had, in fact, submitted a separate request for management evaluation of the ALWOP extension decision but did not have the opportunity to file a separate UNDT application since the MEU relied on the UNDT’s Order No. 119¹⁰ to close the management evaluation.

40. The Secretary-General’s argument that the ALWOP decision was unlawful was rejected by the UNDT and he attempts to relitigate the same arguments. The consistent jurisprudence of the UNAT is that disagreement with the UNDT’s judgment is not legal grounds for appeal. Mr. Loto should not be expected to rebut every argument put forth by the Secretary-General again.

Considerations

41. The main issues for determination in this appeal are whether: (i) the UNDT erred in law and fact by finding that both the initial ALWOP decision and the ALWOP decision which extended the initial decision were receivable *ratione materiae*; and (ii) the UNDT erred in law and fact in finding that the initial ALWOP decision was unlawful because there was not a preponderance of evidence that Mr. Loto had engaged in misconduct.

¹⁰ *Loto v. Secretary-General of the United Nations*, Order No. 119 (NBI/2020).

42. The Appeals Tribunal will examine these matters in turn.

Whether the UNDT erred in law and fact by finding that both the initial ALWOP decision and the ALWOP decision which extended the initial decision were receivable ratione materiae

43. Article 2(1)(a) of the UNDT Statute confers jurisdiction upon the UNDT to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with the staff member's terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent Staff Regulations and Rules and all relevant administrative issuances in force at the time of the alleged non-compliance.¹¹

44. Under Article 8(1)(c) of the UNDT Statute, an application shall be receivable if the applicant has previously submitted a contested decision for management evaluation where required. This obligation upon the applicant is also prescribed in Staff Rule 11.2(a), which provides that a staff member wishing to formally contest an administrative decision shall, as a first step, submit to the Secretary-General in writing a request for management evaluation. Pursuant to Staff Rule 11.2(c), a request for management evaluation is to be submitted to the Secretary-General within 60 calendar days from the date on which the staff member received notification of the contested administrative decision.

45. Moreover, the Appeals Tribunal has held that it is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the Dispute Tribunal's judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to define the administrative decision challenged by a party and to identify the subject(s) of judicial review.¹²

46. Further, we recall that, per our jurisprudence, an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. Further, the date of an

¹¹ *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 35.

¹² *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 26; *Cardwell v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-876, para. 23; *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20.

administrative decision is based on objective elements that both parties (the Administration and the staff member) can accurately determine.¹³

47. Deciding what is and what is not a decision of an administrative nature may be difficult. This determination must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.¹⁴ What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

48. In the present case, the UNDT, upon addressing the Secretary-General's claim that the Dispute Tribunal's consideration of the extension period of ALWOP was not receivable, found that "there was a request by the Applicant for management evaluation, made out of an abundance of caution, but the time to consider it had not elapsed when he filed this application".¹⁵ It is, however, undisputed that Mr. Loto timely filed an application contesting the initial ALWOP decision of 13 January 2020.

49. Then, the UNDT proceeded to observe that it had previously found in Order No. 119 that, on an examination of the wording of the Respondent's correspondence, there was one ALWOP decision. The UNDT concluded that "[t]he [initial] ALWOP was expressly intended to be retroactively extended; it was based on the same information (nothing new) and continued seamlessly by correspondence dated 13 May 2020".¹⁶

50. The UNDT Judge also made a reference to our Judgment in *Gisage*¹⁷, by finding that unlike *Gisage* the case at bar "did not involve a situation of new decisions being made with each extension" and that "[u]nless there are new facts and assessments giving rise to the

¹³ *Larriera v. United Nations Joint Staff Pension Board*, Judgment No. 2020-UNAT-1004, para. 29; *Olowo-Okello* Judgment, *op. cit.*, para. 31; *Farzin* Judgment, *op. cit.*, para. 36.

¹⁴ *Olowo-Okello* Judgment, *op. cit.*, para. 32; *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 62; *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, paras. 49-50.

¹⁵ Impugned Judgment, para. 35.

¹⁶ *Ibid.*, para. 36.

¹⁷ *Gisage* Judgment, *op. cit.*

extensions, the extensions *per se* may not fit within the characteristics clearly elucidated in *Gisage* to amount to new decisions”.¹⁸

51. Finally, based on these findings, the UNDT concluded that “there was one continuing ALWOP decision expressly based on the initial assessment [on 13 January 2020]. The application is receivable in its entirety”.¹⁹

52. In his appeal, the Secretary-General submits that the UNDT erred in fact and law by finding that Mr. Loto’s application was receivable against one “continuing decision” in force since 13 January 2020, seemingly composed of the initial ALWOP decision, dated 13 January 2020, and the ALWOP decision, dated 13 May 2020, which extended Mr. Loto’s ALWOP for three more months retroactively from 13 April 2020. The Secretary-General contends that the 13 May 2020 ALWOP decision is a separate administrative decision, which was based on the re-examination by the Administration of the circumstances and concerns a separate and distinct period of time; specifically, the initial ALWOP decision was valid for the period 13 January 2020 to 12 April 2020, while the subsequent ALWOP decision covered the period 13 April 2020 to 12 July 2020.

53. The Secretary-General argues that the existence of two separate decisions is further shown by the Code Cable addressed by the MONUSCO SRSG to the USG/MSPC on 4 May 2020, which prompted the 13 May 2020 ALWOP decision, wherein the SRSG had stated: “I am of the *considered* opinion that the reasons for the initial placement of the [Appellee] on ALWOP have not changed.”²⁰ Therefore, in the Secretary-General’s view, the 13 May 2020 decision had been taken after a fresh assessment of the circumstances at the time it was issued, and that assessment led to the conclusion that the basis for the ALWOP had not changed.

54. In urging the Appeals Tribunal to find that the UNDT erred on a question of law and fact in receiving Mr. Loto’s case concerning the 13 May 2020 administrative decision extending the ALWOP period, the Secretary-General cites Staff Regulation 11.1, which provides that: “The United Nations Dispute Tribunal shall, under conditions prescribed in its statute and rules, hear and render judgment on an application from a staff member alleging non-compliance with his or her terms of appointment or the contract of employment, including all pertinent

¹⁸ Impugned Judgment, paras. 37-38, 40.

¹⁹ *Ibid.*, para. 41.

²⁰ Emphasis added.

regulations and rules”. Based on this rule, the Secretary-General asserts that, by framing Mr. Loto’s challenge as one against a continuing ALWOP decision, the UNDT exceeded its jurisdiction in the impugned Judgment, because Mr. Loto had not even filed an application with the Dispute Tribunal of the decision to extend his ALWOP on 13 May 2020.

55. In response, Mr. Loto claims that in Order No. 119, the UNDT had already rejected the Secretary-General’s arguments that the 13 May 2020 retroactive extension of the 13 January 2020 ALWOP decision was a separate act,²¹ and in so doing, rejected his claims on receivability of the 13 May 2020 ALWOP decision.

56. Mr. Loto goes on to argue that:²²

Following the 1 September 2020 assignment of the instant case to the UNDT, the issue of receivability was not raised during the 15 September 2021 CMD [Case Management Discussion] and no further orders were issued ordering the Applicant to respond to the Respondent’s arguments on receivability. Therefore, [Mr. Loto] submits that the issue of receivability ha[d] already been disposed of as a preliminary matter in these proceedings as per paras. 14-18 of *Loto*, Order No. 119 (NBI/2020).

57. Mr. Loto also claims that “judicial proceedings overtook the 15 June 2020 management evaluation request [of the 13 May 2020 ALWOP decision] which had been submitted [by him] solely to guarantee the protection of [his] rights”. Following the issuance of Order No. 119, which suspended the ALWOP decision, and the issuance of *Loto*, Order No. 132,²³ which instructed the Administration to change [Mr. Loto’s] placement on ALWOP to ALWP, the MEU issued a closing letter on 24 July 2020 stating that his request for management evaluation of the 13 May 2020 ALWOP decision “was moot as a result”. Accordingly, Mr. Loto asserts that he did not have the opportunity to submit a separate UNDT application since the MEU relied on Order No. 119 to dispose of his 15 June 2020 management evaluation request.

58. The arguments advanced by Mr. Loto on this score are akin to a claim founded on the principle of estoppel. Though not expressly pleaded as such, it is the Tribunal that characterizes and applies the legal basis for the doctrine of estoppel on the facts and pleadings set forth by Mr. Loto. In this regard, Mr. Loto essentially argues that, under the aforementioned circumstances, the Administration is precluded or estopped from raising the

²¹ *Loto*, Order No. 119, *op. cit.*, paras. 14-18.

²² Respondent’s Answer Brief, para. 11.

²³ *Loto v. Secretary-General of the United Nations*, Order No. 132 (NBI/2020), para. 57.

defense that his challenge to the 13 May 2020 ALWOP decision was not receivable *ratione materiae* before the UNDT.

59. While this Tribunal unequivocally endorses the principle that, pursuant to Article 2(1)(a) of the UNDT Statute, the UNDT assumes jurisdiction only following an application for judicial review by an allegedly aggrieved staff member and is competent to order remedies of any specific kind provided that a previous claim for such remedy had been requested (principle of disposition)²⁴, the procedural sequence and developments in this case raise the question whether the Secretary-General is entitled, at this juncture, to argue that the UNDT erred in law and fact in determining that the 13 May 2020 ALWOP decision was justiciable.

60. As already set out, the Dispute Tribunal's Order No. 119 granted Mr. Loto's motion for interim measures and ordered that the decision to deprive him of his salary while he was on administrative leave pursuant to Staff Rule 10.4 be suspended until the completion of the investigation and the disciplinary process. There is no dispute that in said Order (paras. 14-18) the UNDT rejected the Secretary-General's arguments on the receivability of the 13 May 2020 ALWOP decision, and that the issue of receivability was not raised during the 15 September 2021 CMD and no further orders were issued instructing Mr. Loto to respond to the Administration's arguments on receivability.

61. Moreover, it is common cause that, in response to an e-mail on 27 June 2020 from the Human Resources Officer (HRO) of MONUSCO, which informed Mr. Loto that the USG/MSPC's decision of 13 May 2020 placing him on ALWOP would expire on 12 July 2020, Mr. Loto clarified that Order No. 119 required him to be on ALWP from 13 January 2020. Subsequently, on 29 June 2020, Mr. Loto received another e-mail from the Chief Human Resources Officer (CHRO) of MONUSCO, informing him that Order No. 119 took effect from 25 June 2020, the very day it was published, and accordingly, Mr. Loto would soon receive a new Personnel Action placing him on ALWP effective 25 June 2020. Finally, by Order No. 132, the UNDT ordered the execution of the Order No. 119 and specifically ordered the Administration to change Mr. Loto's administrative leave from ALWOP to ALWP, effective

²⁴ *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 20; *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 19.

13 January 2020, and to pay him his full pay and entitlements issued through off-cycle payroll, without further delay.

62. It is also not in dispute that, on the heels of Order No. 132, the MEU sent Mr. Loto an e-mail on 24 July 2020, in reference to Mr. Loto's request for management evaluation concerning the decision of 13 May 2020 to extend his ALWOP from 13 April 2020 for an additional three months, which reads, in its closing considerations, as follows:

Closing considerations

The MEU noted that the retroactive aspect of the contested decision had been corrected by the Administration as you were provided your salary and entitlements for the period from 13 April 2020 until 13 May 2020. Furthermore, UNDT Orders Nos. 119 and 132 granted you interim relief by ordering your placement on ALWP from 13 January 2020, which includes the period in question under the current contested decision. Given that the MEU has already provided its recommendation on the original decision of 13 January 2020 to place you on ALWOP which are reflected in the management evaluation letter of 11 May 2020, the MEU noted that its recommendation with respect to the decision to extend your ALWOP, prior to its modifications by the UNDT Orders, would have remained the same.

63. The MEU went on to note that "one of the possible remedies requested in the current management evaluation request was to place you on ALWP rather than ALWOP. Given that the UNDT Orders have granted you this remedy, *the MEU considers that your present request for a management evaluation has been rendered moot. Accordingly, we are proceeding to close your file*".²⁵

64. In these circumstances, and applying the principles of good faith and of the regularity of judicial proceedings, it is our considered view that, by virtue mainly of Mr. Loto's reliance, to his prejudice, on (i) the development of the judicial proceedings before the UNDT at the stage of the interim measures, as well as (ii) on the MEU's advice that his pending request for management evaluation of the 13 May 2020 ALWOP decision had been rendered moot and the MEU was closing his file, the Secretary-General is now estopped from raising such issue on appeal before this Tribunal. Given the particular circumstances of this case, the Appeals Tribunal is not inclined to entertain the Secretary-General's defense on receivability of the 13 May 2020 ALWOP decision and it is accordingly dismissed.

²⁵ Emphasis added.

65. In the premises, while there may be misgivings about the reasoning of the UNDT that the initial ALWOP decision, dated 13 January 2020, and the ALWOP decision, dated 13 May 2020, which extended Mr. Loto's ALWOP for three more months, constituted one single ("continuing") administrative decision and not two separate ones (despite the fact that they were taken by the Administration at different stages of the process, their regulatory ambit covers distinct periods of time and the latter was issued following a fresh evaluation of the material facts as they existed at that time) the Dispute Tribunal's conclusion that the 13 May 2020 ALWOP decision was receivable is correct, with the result that there is no error in law.

Whether the UNDT erred in finding that the initial ALWOP administrative decision was unlawful

66. On the issue of the lawfulness of the administrative decision to place Mr. Loto on ALWOP, the key question before the UNDT was whether exceptional circumstances warranted the Secretary-General's decision that the administrative leave be without pay.

67. The relevant legal framework for resolving this question 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 (Unsatisfactory conduct, investigations and the disciplinary process)

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 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.

Further, 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;*²⁶

68. In *Muteeganda*²⁷, the Appeals Tribunal found in terms of the “exceptional circumstances”, as follows:

... 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.

... 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

²⁶ Emphasis added.

²⁷ *Muteeganda* Judgment, *op. cit.*, paras. 28-29.

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.

69. Under the applicable legal framework, in cases of misconduct the Secretary-General is not at complete liberty to place a staff member on ALWOP, as his discretion to do so is conditioned upon the existence of exceptional circumstances which, in instances of misconduct other than those concerning SEA²⁸, requires that: (1) 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 (2) 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.

70. To decide whether there were exceptional circumstances justifying Mr. Loto's placement on ALWOP, the UNDT first established that "[t]here [was] no absurdity in the [Administration]'s finding that the alleged misconduct, considered globally, is grave enough, if proven, to warrant separation or termination."²⁹ However, the UNDT considered that the information available on Mr. Loto's failure to report the UNV's alleged misconduct was equivocal, and that there was no rational basis to find that it was more likely than not that Mr. Loto had committed misconduct. The UNDT found that the audio-recording of the 25 November 2019 meeting, as reported by OIOS, did not provide a preponderance of evidence that Mr. Loto attempted to conceal an allegation of rape. The UNDT noted however that Mr. Loto had lied at his OIOS interview on whether money or compensation to the complainant was discussed at that meeting. Nonetheless, the UNDT considered that the information contained in the OIOS Memorandum and the Code Cable were insufficient to establish that it was more likely than not that Mr. Loto had committed misconduct and therefore concluded that Mr. Loto's placement on ALWOP was unlawful.

²⁸ The applicable standard of proof for placement of staff members on ALWOP in SEA cases is "reasonable grounds to believe" or probable cause. See *Gisage* Judgment, *op. cit.*, para. 35, citing *Muteeganda*, Judgment, *op. cit.*

²⁹ Impugned Judgment, para. 57.

71. In his appeal, the Secretary-General submits that the UNDT erred in law and in fact by finding that the available information did not establish by a preponderance of evidence that Mr. Loto had engaged in misconduct. In this regard, the Secretary-General cites our Judgment in *Muteeganda*,³⁰ which, he (incorrectly) says defined the notion of preponderance of evidence (probable cause)³¹ as follows:

The probable cause standard is a practical, non-technical standard asking whether the proven circumstances permit a reasonable inference. 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 [...] 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.

72. The Secretary-General also points to our holding in the same Judgment that³²:

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.

73. At first, the Appeals Tribunal takes note that, whist our generic finding in *Muteeganda* about the impracticability of a requirement for a stricter standard of clear and convincing evidence in cases of ALWOP still stands, our cited holdings in *Muteeganda* were rendered on the basis of quite different not only factual but also legal circumstances. The facts in that case related to allegations of perpetration of SEA against an under-age girl which were reasonably supported by the evidence uncovered by the investigation, and it was sufficient for the Administration to discharge its onus of the objective existence or factual basis of the exceptional circumstances by showing that there were reasonable grounds to believe (probable cause) that the sexual misconduct had occurred.

³⁰ *Muteeganda* Judgment, *op. cit.*, para. 38.

³¹ In fact, our Judgment in *Muteeganda* did not address the preponderance of evidence standard, nor did it find that the preponderance of evidence standard was equivalent to probable cause. The latter Judgment concerned the difference between probable cause and the requirement of clear and convincing evidence.

³² *Muteeganda* Judgment, *op. cit.*, para. 39.

74. By contrast, the present case concerns misconduct other than SEA, and as the UNDT held, consistent with the plain reading of the applicable law³³:

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.

75. Hence, per the plain language of the law, the applicable standard of proof to determine whether exceptional circumstances warranting the placement of a staff member on ALWOP in the present case existed is that of the preponderance of evidence and not that of a probable cause.

76. The Secretary-General argues further that, “in addition, administrative leave is automatically without pay pursuant to section 11.4(a) of ST/AI/2017/1, in case of ‘reasonable grounds’ that a staff member had engaged in SEA. Even though [Mr. Loto] was not himself accused of perpetrating SEA, the allegations against him were directly related to the perpetration of SEA, because he was alleged to have concealed SEA allegations. Given the circumstances of the instant case, it was reasonable for the Administration to place [Mr. Loto] on ALWOP”.

77. Here again, we see no merit in the Secretary-General’s assertion who improperly adopts such a broad interpretative approach of the applicable provisions. Per the plain reading of the existing law, for a “staff member engaged in sexual exploitation and sexual abuse”, probable cause (i.e. reasonable grounds to believe), is the standard of proof for the Administration to put the staff member on ALWOP. This applies only when sexual misconduct has allegedly occurred, unlike in other instances of misconduct, as is the case at hand. For the present case, the Administrative Instruction expressly and unequivocally conditions the Secretary-General’s discretion to place a staff member on ALWOP on meeting a higher standard of evidence, namely that of the preponderance of evidence. This burden of proof demands the objective existence of the aforementioned exceptional circumstances be more likely than not, and not just a reasonable belief that the alleged misconduct has occurred. Mr. Loto was not charged with perpetration of SEA and therefore his case cannot be drawn into the purview of

³³ Impugned Judgment, para. 49 (emphasis added).

Section 11.4 (a) of ST/AI/2017/1 by analogy or broad reading. These provisions must be interpreted restrictively.

78. That said, however, the Appeals Tribunal will now examine whether the UNDT erred in law and in fact by finding that the available information did not establish by a preponderance of evidence that Mr. Loto had engaged in misconduct.

79. We begin by underscoring that, as stated in the impugned ALWOP administrative decisions, given the available information, there was a preponderance of evidence that Mr. Loto had failed to immediately report an allegation of SEA by the UNV, and had attempted to interfere with the administration of justice by, among other things, concealing SEA allegations by negotiating the UNV's payment to the complainant in exchange for the withdrawal of her SEA complaint to the Administration.

80. Notably, the Administration based its decision to put Mr. Loto on ALWOP on the OIOS Memorandum and the Code Cable, dated 29 December 2019 and 22 December 2019 respectively, which provided a detailed description of the unsatisfactory conduct, the names of the implicated staff member(s), and specifics as to where and when the unsatisfactory conduct occurred. As set out in these documents, the complainant, the alleged perpetrator (the UNV), Mr. Loto and other MONUSCO staff attended a happy hour event at a bar in Goma, on 28 June 2019. They all then went to Mr. Loto's home and continued to drink into the early hours of the next morning. The complainant was intoxicated when she left Mr. Loto's home. The alleged perpetrator drove the complainant from Mr. Loto's home to his house, where he allegedly engaged in non-consensual sex with her. He then drove her home and promised to pay for emergency contraceptive medication. A few weeks later, on 10 July 2019, the complainant told Mr. Loto that she had been raped by the alleged perpetrator. On 20 November 2019, the complainant reported the incident to the CDT.

81. Further, as set forth in the same documents, on 25 November 2019, the complainant attended a meeting with Mr. Loto, the alleged perpetrator (the UNV), Mr. O. and another MONUSCO colleague, Mr. K. She recorded their conversation, wherein she requested an apology from the alleged perpetrator. The actions for which the UNV owed an apology were not defined in the discussions. The complainant also requested that the alleged perpetrator pay her USD 2,000. Mr. Loto, Mr. O. and Mr. K. directed her to withdraw her report to the CDT. These documents, supported by the information obtained by OIOS during the

investigation including Mr. Loto's interview with OIOS, led the Administration to conclude that it was more likely than not (preponderance of evidence) that Mr. Loto had engaged in the above-described misconduct.

82. In these circumstances, there was thus undoubtedly a preponderance of evidence, i.e., more likely than not, that Mr. Loto had committed the alleged misconduct. It is a matter of record and it was not refuted by Mr. Loto that, on 10 July 2019, the complainant informed him of her alleged rape by the UNV, and that Mr. Loto did not report this SEA allegation to the competent United Nations authorities. Against this background, which objectively should have raised concerns and suspicions that sexual abuse has occurred, Mr. Loto was duty-bound to meet his obligation and report the alleged misconduct. The Appeals Tribunal does not accept Mr. Loto's defense that his failure to abide by said obligation is excused due to the alleged perpetrator's denial of the rape or other factors, such as the purported "real" motive of the complainant. At any rate, Mr. Loto's initiative to set up and actively participate in the following meeting on 25 November 2019, where he directed the complainant to withdraw her report to the Administration (CDT), and also offered compensation in the amount of USD 2,000 for the complainant was also discussed, corroborates that Mr. Loto was at the very least suspicious that sexual abuse might have taken place. As the Secretary-General rightly argues, whether rape had really been committed was a fact an investigation should determine, and it was not for Mr. Loto to assess.

83. Similarly, given the information available to the Administration, it was more likely than not, that Mr. Loto had attempted to interfere with the administration of justice and to conceal SEA allegations by negotiating the alleged perpetrator's payment of compensation to the complainant in exchange for the withdrawal of her report to the CDT. Indisputably, it was Mr. Loto who set up and actively participated in said meeting on 25 November 2019, where he directed the complainant to withdraw her report to the CDT. In this respect, we agree with the Secretary-General that it was a reasonable inference that a promise for USD 2,000 to be paid to the complainant would, at least, incentivize the complainant to withdraw her claim and, as such, Mr. Loto actively participated in the scheme of interfering with the administration of justice and concealing the SEA allegation. The fact that, following this meeting, the complainant attempted to withdraw her report also corroborated the Administration's conclusion that both acts of misconduct on the part of Mr. Loto, to wit, his failure to report SEA and his attempts to conceal SEA, were grave enough for the Administration to

contemplate separation or dismissal, as they irremediably damaged the trust relationship between the staff member, Mr. Loto, and the Organization.

84. Much more importantly, Mr. Loto's conduct constituted an exceptional circumstance, especially considering the risk such conduct was likely to undermine the Organization's "zero tolerance" policy against SEA. As such, both acts of misconduct, separately and collectively, amounted to serious interference with the administration of justice by preventing the Administration from effectively investigating alleged serious sexual misconduct, such as rape, and were the antithesis of conduct befitting an international civil servant. Hence, there were exceptional circumstances warranting Mr. Loto's placement on ALWOP.

85. Consequently, the UNDT erred in concluding that the impugned administrative decision, namely Mr. Loto's placement on ALWOP, was unlawful because there was no preponderance of evidence that he had engaged in serious acts of misconduct warranting separation or dismissal.

86. For these reasons, the appeal must be granted and the decision of the UNDT reversed.

Judgment

87. The Secretary-General's appeal is granted, and Judgment No. UNDT/2021/133 is hereby reversed.

Original and Authoritative Version: English

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

(Signed)

Judge Raikos

(Signed)

Judge Sandhu

(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