



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

MUTEEGANDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Abbe Jolles

Counsel for Respondent:

Matthias Schuster, ALS/OHRM, UN Secretariat

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 6 November 2017, the Applicant contests the decision to place him on administrative leave without pay (“ALWOP”), notified to him on 27 July 2017 by the Under-Secretary-General for Field Support.
2. The application was served on the Respondent, who filed his reply on 22 November 2017.

Facts

3. The Applicant is currently employed on a fixed-term contract as P-3 Logistics Officer at the United Nations Global Service Centre (“UNGSC”), Brindisi, Italy. Previously, he worked as a P-2 Supply Officer at the United Nations Operation in Ivory Coast (“UNOCI”) in Dalao, Ivory Coast.
4. While employed with UNOCI, the Applicant was the subject of an investigation in connection with allegations of misconduct. On 30 June 2017, the Assistant Secretary-General for Field Support referred the Applicant’s case to the Office of Human Resources Management for appropriate action. The referral was based on an investigation report by the Office of Internal Oversight Services (“OIOS”), dated 26 May 2017, together with supporting documentation.
5. By letter dated 27 July 2017, received by the Applicant on 28 July 2017, the Under-Secretary-General for Field Support informed the Applicant of the decision taken by the Under-Secretary-General for Management, on behalf of the Secretary-General, to place him on ALWOP, pursuant to staff rule 10.4., effective as of the date of his receipt of the notification.
6. The Applicant was informed that the payment being withheld “relate to [his] entitlement to salary, and not to health and social welfare benefits such as health, pension and education”. The letter further stated the following:

The reason for your placement on administrative leave is that there are reasonable grounds on which it may be concluded that you engaged in misconduct. Specifically, the OIOS investigation

revealed that there is an audio recording of the alleged victim providing information about your alleged sexual contact, and evidence of settlement discussions that you had with the family subsequent to the alleged sexual contact. Your continued service, pending the conclusion of the disciplinary process, would create an unacceptable risk to the reputation and credibility of the Organization, and reassignment would not adequately address the identified risks. Additionally, the nature of the conduct you are alleged to have engaged in is sufficiently serious that it would, if proven, lead to the termination of your appointment.

7. On 28 July 2017, the Applicant requested permission to leave his duty station, Brindisi, and depart to his home country during his administrative leave without pay. He stated that under the circumstances, staying in Brindisi with his family would put him and his family under unbearable financial difficulties and emotional stress. His request was approved on 31 July 2017.

8. The Applicant filed a request for management evaluation of the decision of 27 July 2017 on 12 September 2017.

9. On 27 October 2017, the decision to place the Applicant on ALWOP was extended from 28 October 2017 by an additional three months or until the completion of the disciplinary process, whichever is earlier.

10. On 20 November 2017, the Assistant Secretary-General for Human Resources Management decided to issue allegations of misconduct against the Applicant; the memorandum of allegations including supporting documents was sent to the Applicant on 21 November 2017.

Proceedings before the Tribunal

11. On 8 November 2017, the application was served on the Respondent. Pursuant to arts. 19 and 36 of the Tribunal's Rules of Procedure and given the urgency of the matter, the undersigned Judge instructed the Respondent to file a reply by 23 November 2017. The Respondent did so on 22 November 2017.

12. By Order No. 218 (GVA/2017) of 23 November 2017, the Tribunal ordered the Applicant to file comments on the Respondent's reply, if any, by 1 December 2017, which he did.

13. On 2 December 2017, the Respondent filed a motion requesting leave to file further submissions, which were already attached to the motion, arguing that the Applicant had, *inter alia*, impermissibly expanded the scope of the application and misstated the applicable legal standards and mischaracterized the evidence on record. Furthermore, both parties informed the Tribunal about their availability for a hearing on the merits in December 2017.

14. By Order No. 241 (GVA/2017) of 5 December 2017, the Tribunal ordered the Respondent to file contemporaneous written evidence showing that, and how, the Secretary-General made a decision that exceptional circumstances existed warranting the placement of the staff member on administrative leave without pay. The Order further convoked the parties to a hearing, which took place on 21 December 2017. The Respondent filed additional documents pursuant to Order No. 241 (GVA/2017) on 11 December 2017, placing them *ex parte*. The Tribunal decided that the documents be shared with the Applicant on an under seal status.

15. At the hearing, the Tribunal ordered the Respondent to file evidence of the Applicant's request and the Administration's approval for him to leave Brindisi, on 31 July 2017. The Respondent filed the relevant documents on the same day.

Parties' submissions

16. The Applicant's principal contentions are:

a. The decision to place him on ALWOP is without foundation; the charges are based upon rumour and speculation and the Respondent was not able to produce any concrete evidence; there is no clear and convincing evidence that the alleged misconduct occurred; he has steadfastly denied the allegations;

b. The allegations became vaguer and the memorandum of 20 November 2017 (Allegations of misconduct) refers to the alleged misconduct having taken place "one day in 2014 or 2015"; the medical documentation concludes there was no sexual assault; the purported victim was examined for sexually

transmittable diseases and none were found; the diagnosis after the medical examination was that she had Malaria;

c. In light of the evidence, OIOS finding that there was a “reasonable inference that sometime in 2014 [the Applicant] sexually abused a minor” is shocking; the OIOS report is replete with speculation, rumour and conjecture;

d. He requests “[a]ll back pay and reinstatement”;

e. In his comments to the Respondent’s reply, the Applicant requests the rescission of the contested decision, and moral damages in the amount of seven months’ net base salary for the serious harm caused to his reputation;

f. He also requests reinstatement with all back salary paid;

17. The Respondent’s principal contentions are:

a. In his comments to the Respondent’s reply, the Applicant impermissibly expands the scope of the application to request moral damages; in any event, his claim for alleged reputational harm and abuse of authority by the Respondent are unsubstantiated and he has not adduced any evidence that would support an award of compensation;

b. The Applicant seems to suggest that the applicable legal standard to begin an investigation into potential misconduct is the existence of clear and convincing evidence of the misconduct; this fails to consider that the purpose of an investigation is to establish whether such evidence exists in the first place;

c. A decision to place a staff member on ALWOP requires the existence of reasonable grounds to believe (probable cause) that the misconduct occurred; clear and convincing evidence is required for finding the facts underpinning the misconduct are established at the end of a disciplinary process, when dismissal or separation are a potential outcome;

d. The Applicant mischaracterizes the evidence on record;

e. The decision was made following the conclusion of an investigation report of the Office of Internal Oversight Services (“OIOS”) finding sufficient evidence that the Applicant had had sexual relations with a 16-year old Ivorian girl while serving at UNOCI; the allegations, which, if established, would constitute serious misconduct;

f. In light of the allegations and charges of serious misconduct levelled against the Applicant, the decision was reasonable and constitutes a lawful exercise of discretion on behalf of the Respondent;

g. It was taken in accordance with the applicable legal framework;

h. Exceptional circumstances existed warranting the placement of the Applicant on administrative leave *without pay*—the allegations against the Applicant are “egregious” and of a most serious nature; the direct and circumstantial evidence resulting from the OIOS investigation allow the conclusion that there are reasonable grounds to believe (probable cause) that the Applicant engaged in this misconduct;

i. Given the circumstances, maintaining the Applicant on full pay throughout the disciplinary process would constitute an unacceptable risk to the reputation of the Organization and to the population it services in a mission setting; indeed, the Respondent has stated in his report on special measure for protection from sexual exploitation and abuse (A/71/818) that the Organization has taken a firm stance on sexual exploitation; the implementation of the Secretary-General’s zero-tolerance policy towards all forms of sexual exploitation and abuse by United Nations and related personnel is a priority for the Organization; the credibility of these efforts would be severely undermined were the Organization to continue paying the Applicant’s full salary while suspended from work, despite the seriousness of the allegations, and in light of the evidence supporting reasonable grounds to believe that the Applicant had sexual relations with a 16-year-old Ivorian girl;

j. Staff rule 10.4(d) makes clear that in cases where the alleged conduct would, if proven, lead to dismissal or separation of the staff member, it is

appropriate to place a staff member on administrative leave without pay; in the past, misconduct similar to that with which the Applicant is charged has resulted in dismissal of the staff member;

k. The Tribunal has found in recent cases that exceptional circumstances warranting ALWOP existed in the following matters where the exceptional circumstances relied upon were the egregious nature of the alleged conduct: a matter involving a staff member alleged to have assaulted another staff member who was pregnant and whose baby died shortly after birth (*Byakombe* Order No. 031 (NBI/2016)); a matter involving a Security Guard found to be in possession of concertina wire without authorization (*Nianzou* Order No. 007 (NBI/2016)); and a matter involving the repeated appropriation of goods purchased through false purchase orders (*Kabongo* Order No. 490 (NBI/2016));

l. The Organization continues to pay the Applicant's health insurance and pension contribution as well as any education-related entitlements; if the allegations are ultimately not sustained or if the Applicant's established conduct does not warrant dismissal or separation, his pay will be fully restored;

m. The application should be dismissed.

Consideration

Preliminary matter

18. The Tribunal grants the Respondent's motion of 2 December 2017, and the submission filed therein is accepted as part of the case file.

Merits

19. The Applicant contests the decision of 27 July 2017, which he received on 28 July 2017, to place him on administrative leave without pay. At the hearing it became apparent that the Applicant did not only contest the decision that the

administrative leave be *without* pay, but also his placement on administrative leave itself.

20. Administrative leave pending investigation and the disciplinary process is regulated by staff rule 10.4, which reads as follows:

Staff Rule 10.4

Administrative leave pending investigation and the disciplinary process

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the initiation of an investigation. Administrative leave may continue throughout an investigation and until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration.

(c) Administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.

21. Further, administrative instruction ST/AI/371, as amended, applicable at the time of the contested decision, provides in its section 4 that:

If the conduct appears to be of such a nature and of such gravity that administrative leave may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general rule, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

Administrative leave

22. The Tribunal first has to examine whether the decision to place the Applicant on administrative leave was lawful. The letter of 27 July 2017 conveyed to the Applicant, *inter alia*, that “the reason for [his] placement on administrative leave [was] that there [were] reasonable grounds on which it may be concluded that [he] engaged in [the alleged] misconduct” and that “[his] continued service, pending the conclusion of the disciplinary process, would create an unacceptable risk to the reputation and credibility of the Organization, and reassignment would not adequately address the identified risks”.

23. The Tribunal notes that pursuant to 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 pending an investigation until the completion of the disciplinary process. Paragraph 4 of ST/AI/371 contains an exhaustive list of reasons for which administrative leave may be contemplated, “[a]s a general rule”, namely if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

24. In the case at hand, at the time of his alleged misconduct, the Applicant worked at UNOCI, Ivory Coast. At the moment the decision to place the Applicant on administrative leave (without pay) was taken, the investigation had already been completed and the Applicant was no longer working in Ivory Coast, but serving as a Logistical Officer at the United Nations Global Service Centre in Brindisi, Italy. Accordingly, the decision to place him on ALWOP was and could not have been based on a risk of evidence being destroyed, interfered with or concealed.

25. Rather, as the letter of 27 July 2017 conveys, the decision was based on the reputational risk to the Organization in light of the allegations against the Applicant, relating to sexual abuse and exploitation of an underage girl, on the basis of the available evidence and findings of the report upon the completion of the investigation. The Tribunal is satisfied that the sensitive nature of the allegations, which were sustained by some evidence, justified the Administration’s decision, in its exercise of discretion, to put the Applicant on administrative leave, in order to

avoid any reputational risk to the Organization. The Tribunal also considers that it was reasonable for the Organization to conclude that the reputational risk persisted despite the fact that the Applicant was no longer working in Ivory Coast at the time of the contested decision. In its assessment, the Administration did not take into account irrelevant considerations, nor did it leave out relevant considerations. The Tribunal is thus satisfied that the Administration correctly exercised its discretion when it decided to place the Applicant on administrative leave.

Administrative leave without pay

26. The Tribunal has to further examine whether there were exceptional circumstances warranting that the administrative leave be without pay, pursuant to staff rule 10.4(c). Indeed, the Tribunal is of the view that when placing a staff member on administrative leave, without pay, the Organization has to make two separate decisions, namely one to place the staff member on administrative leave, and one that the leave be with partial or no pay.

27. It is concerned that in the letter of 27 July 2017 conveying the decision to the Applicant, the Administration did not explicitly refer to any exceptional circumstances warranting the administrative leave to be without pay. It merely states that “the reason for [the Applicant’s] placement on administrative leave [was] that there [were] reasonable grounds on which it may be concluded that [he] engaged in misconduct”, referring to the audio recording of the alleged victim providing information about the alleged sexual contact, and evidence of settlement discussions that the Applicant had with the family subsequent to the alleged sexual contact. Finally, the letter refers to the unacceptable reputational risk the Applicant’s continued service prior to the completion of the disciplinary process would create for the Organization, and that the nature of the alleged conduct was sufficiently serious that if proven it would lead to the termination of his appointment.

28. From the face of the letter of 27 July 2017, it is not apparent that there was a separate decision made for the administrative leave to be *without pay* taking into consideration the need to find that “exceptional” circumstances had been considered pursuant to staff rule 10.4(c). However, upon its inquiry, the Tribunal

was provided by the Respondent with internal communications which demonstrate that indeed, consideration was given to the existence of such “exceptional” circumstances, and that it was found that such circumstances existed, warranting the administrative leave to be without pay.

Exceptional circumstances for the purpose of staff rule 10.4(c)

29. The Tribunal notes that in light of the impact it has on a staff member, his or her placement on administrative leave *without pay* before the end of the disciplinary process, is a measure which has to be used with particular caution, taking into account all the circumstances of the case and the hardship ALWOP may imply for a staff member. It can only be applied if the Administration can indeed show that exceptional circumstances warranting such an extraordinary measure exist.

30. The Tribunal regrets that the legal provisions applicable at the time of the contested decision do not give much guidance with respect to a definition or determination as to what constitute exceptional circumstances warranting placement of a staff member on administrative leave without pay, pursuant to staff rule 10.4(c). The rationale behind this provision is not entirely clear, either. One could consider that placement on administrative leave without pay may be appropriate in certain cases of financial misfeasance by a staff member, to allow the Organization to use the unpaid salary to recover money that may have been embezzled if indeed the allegation is subsequently confirmed. However, the provision is not drafted so as to limit the ALWOP to allegations involving financial misfeasance; rather it appears that it is meant to potentially be applied to cases relating to any kind of allegations of misconduct.

31. The jurisprudence has tried to give some meaning to the notion of exceptional circumstances for the purpose of staff rule 10.4(c). In *Nianzou* (Order No. 7 (NBI/2016)), the Tribunal expressed the view that “‘exceptional circumstances refer to the *particular* set of circumstances which are ‘exceptional’ or as in this case ‘egregious’ and which surround the facts in issue in the particular case” (see also *Byakombe* Order No. 31 (NBI/2016), *Kabongo Mbaya* Order No. 490 (NBI/2016)).

32. In a recent decision, the Tribunal further held that “placement on [administrative leave without pay] requires more than a reasonable suspicion of misconduct and that the appropriate standard here is a probable cause. It follows that, for the measure to be applied before an investigation has yet taken place, the misconduct must be flagrant or readily probable upon available evidence” (*Abdallah* Order No. 80 (NBI/2017)).

33. The Tribunal further notes that the newly published administrative instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides:

Administrative leave without pay

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.

34. While the administrative instruction ST/AI/2017/1 entered into force only on 26 October 2017, it seems that the Administration prospectively applied the standard set down in its sec. 11.4(a) to the case at hand. Indeed, in justifying the Applicant’s placement on ALWOP, the Administration noted that there were reasonable grounds to believe (probable cause) that the Applicant engaged in the alleged sexual abuse of a 16-years old Ivorian girl. It did so in reliance on above-referenced jurisprudence of the Dispute Tribunal (*Abdallah*), noting that in the present case the investigation had already been completed.

35. The Tribunal recalls that ST/AI/2017/1 was not in force at the time of the contested decision. It also notes that in an early decision, the Tribunal ruled that the nature and gravity of the findings and allegations against a staff member do not constitute, in themselves, exceptional circumstances warranting such an exceptional measure as to deprive a staff member of his salaries during administrative leave (*Calvani* UNDT/2009/092).

36. According to the Respondent, in the case at hand, exceptional circumstances warranting the placement of the Applicant on ALWOP were found to exist, namely:

- a. the fact that the allegations against the Applicant—namely that he had sexual relations with a 16-year-old Ivorian girl—were “egregious” and of a most serious nature;
- b. there were reasonable grounds to believe (probable cause) that the Applicant engaged in this misconduct, as made out by the evidence—both direct and circumstantial—resulting from the completed OIOS investigation.

37. In the absence of a legal provision stipulating otherwise, the Tribunal is concerned that in referring to the egregious character of the alleged misconduct, and a standard of proof of “probable cause”, the Administration has prejudged the Applicant’s case, at a time at which he had not yet been provided with the possibility to provide comments on the allegations levelled against him (i.e. prior to the receipt of the charge letter). Although the Administration stresses that the placement on ALWOP is not a sanction, it is the Tribunal’s view that the presumption of innocence was sacrificed and that the decision, de facto, constitutes a punishment of some sort. In this respect, the Tribunal shares the view expressed in *Calvani*, namely that the egregious character of the allegations in itself does not justify the placement of a staff member on ALWOP. It’s also the Tribunal’s view that in light of the hardship it places on staff members, when taking the decision to put a staff member on ALWOP, the standard of the required evidence needs to be very high. Prior to the completion of the disciplinary process, placement on ALWOP could, for example, be justified in case a staff member admitted or did not deny the (egregious) allegations against him or her. In other words, the level of the available evidence should be such that it has all the indicia that it is clear and convincing that

the misconduct occurred. Placement on ALWOP under such circumstances would however be no predetermination of the final outcome of the matter at the end of the disciplinary process.

38. In light of the foregoing, the Tribunal is concerned that in the case at hand, upon the completion of the investigation report, the quality of the available evidence and the conclusions of the investigation report are questionable and allow very weak inferences to be drawn. To the Tribunal, the evidence available at the time leaves serious doubts as to what actually occurred, and when. For example, while initially it had been reported that the Applicant had “sometime in 2015” had a sexual relationship with a 16-year old Ivorian girl, the report concluded that “a reasonable inference can be drawn that, sometime in 2014, [the Applicant] sexually abused V01, a minor” (emphasis added). The report also states that “[o]ther than V01’s complaint to her mother and to OIOS there is no physical or other evidence to corroborate the reported sexual abuse of V01”, and that although he had attended a meeting knowing that the subject of it was the payment of compensation for his reported rape of V01, the Applicant had constantly denied the sexual encounter with V01. The Tribunal also observed that the investigation report noted that when provided with a photo array with several people, including the Applicant, V01 was not able to identify the latter. This must be a matter of some concern and consideration, given the nature of the allegations. Finally, the report concluded that “[t]he established facts constitute reasonable grounds to conclude that [the Applicant] *may* have failed to observe the standards of conduct expected of a United Nations Civil Servant” (emphasis added). The Tribunal is concerned by the level of evidence available upon the completion of the investigation report, which also remains somewhat vague as to what happened, and when. The Tribunal also notes that the Applicant has consistently denied any sexual encounter with V01.

39. The Tribunal considers that not only was the evidence available at the time the contested decision was taken insufficient to establish “probable cause”, that is, that there were facts of sufficient detail that would lead a reasonable person to conclude that the alleged conduct occurred. As importantly, the Tribunal is of the view that under the legal provisions in force at the time, and in the absence of norms providing otherwise, the standard of proof to be applied in order to justify

administrative leave to be without pay, for the purpose of staff rule 10.4(c), had to be similar to that of clear and convincing evidence, rather than “probable cause”. The Tribunal is not satisfied that the available evidence at the time of the contested decision was up to that standard.

Failure to take into account relevant considerations

40. Finally, the Tribunal notes that while the Administration has given some consideration to humanitarian grounds, namely social welfare benefits (such as health, pension and education) which would continue to be granted to the Applicant during his ALWOP, the internal documentation shared by the Respondent and the decision itself do not take into account the fact that the Applicant, as an international staff member, had to pay for a living for him and his family in a foreign country, which was not his home country. While he was ultimately allowed to travel to his home country (at his own cost), the record shows that prior thereto, the hardship placed on the Applicant by depriving him of a salary in a foreign country was given no consideration whatsoever. Such lack of consideration could not be cured, either, by the authorization, on 31 July 2017, that is, after the decision to place him on ALWOP had been taken and notified to him, of the Applicant’s explicit request to leave his duty station and travel to his home country. The Tribunal thus concludes that the Administration, in its exercise of discretion, failed to give consideration to a relevant matter (*Sanwidi* 2010-UNDT-084).

Remedies

41. It follows from the foregoing considerations that the decision of 27 July 2017 to place the Applicant on ALWOP is found to be illegal and should be rescinded, and its subsequent extension on 27 October 2017 is of no effect as it was predicated upon an illegal decision and was thus void *ab initio*. The Applicant has to be paid his net base salary from 28 July 2017 until such time as he ceases to be on administrative leave. Any claims for moral damages are rejected.

Conclusion

42. In view of the foregoing, the Tribunal DECIDES:

- a. The decision of 27 July 2017 to place the Applicant on administrative leave *without pay* is rescinded and the purported decision of 27 October 2017, predicated upon the 27 July 2017 decision, is declared to be void *ab initio*;
- b. The Applicant shall be paid his net base salary from 27 July 2017 until such time as he ceases to be on administrative leave as a consequence of the allegations against him;
- c. The above shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Rowan Downing

Dated this 22nd day of January 2018

Entered in the Register on this 22nd day of January 2018

(Signed)

René M. Vargas M., Registrar, Geneva