



United Nations Dispute Tribunal

Case No.: UNDT/NBI/2017/127

Judgment No.: UNDT/2019/059

Date: 17 April 2019

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GISAGE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Abbe Jolles

Counsel for the Respondent:

Mr. Mathias Schuster, AAS/ALD/OHR

INTRODUCTION AND PROCEDURAL HISTORY

1. At the time of filing this Application, the Applicant was a Security Officer with the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

2. On 7 December 2017, the Applicant filed an application contesting the decisions of the Under-Secretary-General for Management (USG/DM), dated 16 January 2017, to place him on Administrative Leave without Pay (ALWOP) and to extend the ALWOP for three months each on 28 April 2017 and 27 July 2017. As a remedy, the Applicant sought the restoration of his back salary and the resumption of payment of his salary.

3. The Registry served the application on the Respondent on 7 December 2017 with a deadline of 10 January 2018 to file a reply to the application.

4. In his reply to the application, filed with the Tribunal on 9 January 2018, the Respondent asserted *inter alia* that the application was not receivable, with respect to the decisions of 16 January 2017, 28 April 2017 and 27 July 2017, because the Applicant failed to submit timely requests for management evaluation.

5. By Order No. 010 (NBI/2018), dated 19 January 2018, the Tribunal directed the Applicant to provide a concise response to the issue of receivability as raised by the Respondent in his reply to the application.

6. On 15 February 2018, the Applicant filed his response pursuant to Order No. 010 (NBI/2018).

FACTS

7. On 16 January 2017, the USG/DM through the Under-Secretary-General for Field Support (USG/DFS), made the decision, on behalf of the Secretary-General, to place the Applicant on three months of ALWOP due to allegations of prohibited conduct under both section 3 of ST/SGB/2003/13 (Special measures

for protection from sexual exploitation and sexual abuse) and the MONUSCO Code of conduct. The Applicant was notified of the decision on 28 January 2017.

8. On 3 April 2017, the MONUSCO SIU completed its investigation report.

9. By letter dated 28 April 2017, the Applicant was notified of the decision to extend his ALWOP for an additional three months from 28 April 2017, pending the completion of the investigation and disciplinary process.

10. On 22 May 2017, Ms. Lisa Buitenheim, the Assistant Secretary-General for Field Support (ASG/DFS), referred the disciplinary matter concerning the Applicant to the Office of Human Resources Management (OHRM).

11. By letter dated 28 July 2017, the Applicant was notified of the decision to extend the ALWOP for a further three months pending the completion of the investigation and the disciplinary process.

12. By a memorandum dated 17 August 2017, the Applicant was presented with the allegations of misconduct, based on the outcome of the investigation report, the allegations read that between 7 and 9 December 2016, the Applicant:

- a) [...] transported up to five Congolese women in [his] service vehicle UN 24342, after having consumed alcohol;
- b) [...] had sexual intercourse with up to three of these women; and
- c) [...] eventually paid each woman 40,000 Francs Congolaise (FC) (approximately US\$ 25) through an intermediary.”

13. The memorandum further requested that within two weeks of its receipt, the Applicant provide a written statement or explanations in response to the allegations.

14. On 23 August 2017, the Applicant requested management evaluation review (MER) of the decision to place him on ALWOP without justification or explanation.

15. On 20 September 2017, the Applicant submitted a supplemental MER and attached a copy of the letter of 28 July 2017 informing him of the decision to

extend his ALWOP for an additional three months from 28 July 2017, or until completion of the disciplinary process; whichever is earlier. The Applicant stated, *inter alia*, that the extension was without explanation and that notice was not provided. The Applicant accordingly asked for immediate reinstatement with back pay and benefits.

16. On 19 October 2017, the Applicant received a combined response from the Management Evaluation Unit (MEU), regarding his requests of 23 August 2017 and 20 September 2017 respectively. The MEU noted that the Applicant failed to challenge either his initial placement on ALWOP or the first extension thereof within the applicable time limits set out in staff rule 11.2(c) and as such, the initial request of 23 August 2017 for review of the decision to place him on ALWOP, without explanation or justification was found to be time barred and therefore not receivable.

17. MEU further stated that only the supplemental request of 20 September 2017 for review of the decision to extend applicant's ALWOP from 28 July 2017 was receivable. The MEU concluded that the decision to extend the Applicant's placement on ALWOP for three months from 28 July 2017 was appropriate.

SUBMISSIONS ON RECEIVABILITY

13. The Respondent asserts as a preliminary issue that the application is not receivable for the following reasons:

- a. The Applicant failed to submit timely requests for management evaluation, with respect to the decisions of 16 January 2017, 28 April 2017 and 26 October 2017.
- b. The allegations against the Applicant, if established, would constitute serious misconduct; therefore, the Respondent was entitled to exercise his discretion to suspend the Applicant from his duties pending the outcome of the disciplinary process and to do so without pay.
- c. The Applicant's ALWOP was only limited to the Applicant's salary and not his health and social welfare benefits.

14. The Applicant submits that the application is receivable for the following reasons:

a. A decision with a continuous legal effect, such as placement of a staff member on administrative leave, is deemed to have been implemented, when it has been implemented in its entirety; that is at the end of the administrative leave.¹

b. The effect of an administrative decision is not immediately consummated. In its financial dimension it will, at a minimum, affect the Applicant's entitlements due at the end of two payment cycles. As such, the decision has not been "fully implemented" which makes this application receivable.²

c. Administrative decisions extending ALWOP are receivable and can be challenged. Once the decision is contested, it operates to challenge all future extensions of the same unlawful decision.³

d. The MEU recognized the receivability of this decision to extend the Applicant's ALWOP, finding the decision to be both lawful and discretionary.

e. Each extension of the Applicant's ALWOP, as in this case, whether it replaces or confirms a previous administrative decision is a new administrative decision with adverse impact and capable of review, and therefore; receivable.

CONSIDERATIONS

15. The issue arising at this stage for consideration is whether this Application is receivable.

16. The submission of a request for management evaluation is a mandatory first step that must be followed before an applicant may have recourse to the

¹ Abdallah v S-G, UNDT/NBI/2017/035 paragraph 31

² Ibid at paragraph 32

³ Article 8(c), UNDT Statute

Dispute Tribunal to appeal against an administrative decision that falls within the scope of staff rule 11.2(a).

17. Staff rule 11.2(c) provides that “a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested”.

18. Under art. 8.1(c) of the Dispute Tribunal’s Statute, an application shall be receivable if an applicant has previously submitted the requested administrative decision for management evaluation where required.

Considerations on the issue of receivability

Was the Applicant’s request for management evaluation of the Administrative Leave without Pay (ALWOP) on which he was placed made out of time? Is his request for management evaluation receivable only as to the second extension of his ALWOP dated 28 July 2017 and supplemental request of 20 September 2017?

19. The sequence of relevant events as already stated in the facts of this case bears repeating as follows:

20. On 28 January 2017, the Applicant was placed on ALWOP for three months for the first time. MONUSCO SIU completed its investigation report on 3 April 2017. The Applicant’s ALWOP was extended for another three months on 28 April 2017. The allegations against the Applicant and the investigation report were referred by the ASG/DFS to the ASG/OHRM on 22 May 2017.

21. Another extension was made to the Applicant’s ALWOP for a further three months on 27 July 2017. The Applicant was presented with charges of misconduct on 17 August. The Applicant requested management evaluation of the decision to place him on ALWOP on 23 August 2017 and, on 20 September 2017; he submitted a supplemental management evaluation request of the decision to extend the ALWOP.

22. MEU informed the Applicant that his initial placement on ALWOP in January 2017 and its first extension on 28 April 2017 could not be reviewed because they were time-barred and therefore not receivable. With respect to the second extension of the ALWOP dated 27 July 2017, MEU upheld the decision. Again, on 26 October 2017, the Applicant's ALWOP was extended for three more months.

23. The Respondent's case is that the initial decision to place the Applicant on ALWOP in January 2017 and the first extension of that ALWOP on 28 April 2017 cannot be challenged under art. 8.1(c) of the Tribunal's Statute because the Applicant did not request management evaluation of those decisions within the time limit of 60 days as provided by staff rule 11.2(c).

24. The Respondent submits that the Applicant's challenge of the ALWOP is receivable only in respect of the second extension dated 27 July 2017 for which management evaluation was sought within time and argues also that the third extension of the Applicant's ALWOP dated 26 October 2017 is not receivable because the Applicant did not specifically request management evaluation of the said third extension.

25. On his part, the Applicant contends that when he sought management evaluation on 23 August 2017 of the administrative decisions to place him on ALWOP, he did so within time. This is so because the decisions have continuous legal effect and are not yet fully implemented as they can only be fully implemented at the end of the last ALWOP. When ALWOP is challenged, each extension of it is similarly challenged and each is accordingly receivable.

26. In settling the issue of receivability, the principal question for the Tribunal to consider is whether a single challenge of an extension of administrative leave (AL) on which a staff member is placed affects the entire length of the particular AL.

27. Staff Rule 10.4 deals with AL pending investigation and the disciplinary process. In its sub-section (a), it provides that a staff member may be placed on AL, subject to conditions specified by the Secretary-General at any time after an

allegation of misconduct and pending the initiation of an investigation. It may continue throughout the investigation and until completion of the disciplinary process.

28. Both staff rule 10.4 (b)⁴ and paragraph 6 of ST/AI/371 as amended by paragraph 3 of ST/AI/371/Amend. 1, which govern this Application, provide that if administrative leave is authorized, the staff member shall be informed, among other things, of the probable duration of the said administrative leave.

29. In the present Application, when the Applicant was initially placed on ALWOP in January 2017, he was informed that the said ALWOP would continue for three months, or until completion of the investigation and disciplinary process. The ALWOP was subsequently extended in April, July and October 2017.

30. Can each instalment of this ALWOP be regarded as a separate administrative decision or parts of a whole? In other words, are the extensions of the ALWOP on which the Applicant was placed separate and distinct in themselves or parts of a coherent whole, a continuum?

31. The Respondent argues that the decision to place the Applicant on ALWOP had been implemented at the time it was challenged and therefore not receivable or reviewable by the Tribunal.

32. In *Coleman*,⁵ the Tribunal held that because the ALWOP on which the applicant in that case was placed was still ongoing at the time it was challenged before the Tribunal, it had not been fully implemented and could therefore be entertained. The Tribunal further rejected the Respondent's argument that the decision had been fully implemented and held that the application was receivable.

33. Also in *Kompass*,⁶ the Tribunal held that a decision to place a staff member on administrative leave, with or without pay, produces continuous legal effects during the entire period of the leave and is only fully implemented upon its

⁴ ST/SGB/2016/1.

⁵ Order No. 200 (NBI/2014).

⁶ Order No. 99 (GVA/2015).

completion. Similarly, in *Maina*,⁷ the Tribunal held that the ALWOP on which the applicant was placed had not been fully implemented and that it continued to have ongoing legal effects.

34. In the case of *Porter*,⁸ the applicant who was a P-3 staff member with the United Nations Mission for Iraq (UNAMI) had taken ill and was subsequently placed on sick leave in May 2011. For the next 26 months, he remained on medical leave and was denied medical clearance to return to his duties. During that period, he constantly communicated with UNAMI, the Department of Field Support (DFS) and the Medical Services Division (MSD). He received several contradicting decisions with regards to his status in the Organization.

35. When he returned to service after more than two years, the applicant queried the many administrative decisions and non-decisions which had kept him on medical leave for more than two years even after his doctors had recommended that he was fit to return to work. Having received no reply from the respondent, he approached the Tribunal.

36. The respondent challenged the receivability of Mr. Porter's application and argued that he did not file management evaluation of each of the contested decisions within time. The Tribunal found that "the entire 26-month period of the applicant's estrangement from the Organization clearly formed a continuum during which the applicant was kept in limbo; unaware, unsure and in a lingering state of confusion regarding his employment." The Tribunal found that his case was receivable.

37. In the present case, the applicable staff rule 10.4(b)⁹ provides that as far as practicable, AL should not exceed three months. The Tribunal finds that the ALWOP on which the Applicant was placed in January 2017 and all its subsequent extensions that were thereafter made at three-month intervals are all parts of a coherent whole, continuing and not fully implemented at the time that it was challenged in August 2017.

⁷ Order No. 275 (NBI/2014).

⁸ UNDT/2013/156.

⁹ ST/SGB/2016/1.

38. Much as there is a legal requirement regarding time limits to the challenge of administrative decisions, it is ridiculous to argue that each periodic extension of the same administrative decision must be challenged first at management evaluation and thereafter at the Tribunal. Such a method would unduly flood the Tribunal with a multiplicity of applications. There is therefore no merit in the Respondent's submission that only the challenge of the Applicant's ALWOP dated 27 July 2017 can be entertained by the Tribunal.

39. In other words, neither the initial placement of the Applicant on ALWOP nor any of its extensions can be separated. In fact, each extension of the same ALWOP decision triggers a challenge of all the previous related decisions. The challenge of any extension of the said ALWOP is therefore a challenge of the entire continuum of ALWOP, previous or subsequent. This Application is accordingly receivable.

Considerations on the merits

40. The Tribunal will examine two issues on which this case is hinged as follows: (1) Whether the Secretary-General was legally bound to make a finding that there were exceptional circumstances existing before placing the Applicant on ALWOP; and (2) Whether it was lawful and just to place the Applicant on ALWOP for a period of twelve consecutive months.

Was the Secretary-General legally bound to make a finding that exceptional circumstances existed before placing the Applicant on ALWOP?

41. It is the case of the Applicant that he was placed on ALWOP, which the Respondent continued to extend, without any legal basis. He submits that in order to place him on ALWOP, the Secretary-General must first make a finding that exceptional circumstances existed. He continued that there are no exceptional circumstances as provided for in staff rule 10.4 to warrant the deprivation of his salary even while on AL.

42. On the Respondent's part, it is argued on his behalf that the decision to place the Applicant on ALWOP fell within the discretion of the Respondent. He

submits further that it was a reasonable decision given that the Applicant was charged with serious misconduct following the conclusion of the MONUSCO SIU investigation that found *prima facie* evidence against him.

43. It was further submitted for the Respondent that exceptional circumstances existed and that these consisted of: (i) serious and egregious allegations that the Applicant had transactional sex with one or more Congolese sex workers and paid them through an intermediary; (ii) there were reasonable grounds to believe that the Applicant engaged in this misconduct; and (iii) the direct and circumstantial evidence gathered by the MONUSCO SIU.

44. The Respondent continued that there is no obligation on the part of the Secretary-General to make a preliminary finding of exceptional circumstances before placing a staff member on ALWOP or even prior to extending it.

45. It was also the Respondent's case that there was no violation of the presumption of innocence because the placement on ALWOP is not a disciplinary measure and does not have punitive character. 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.

46. In answer to the Applicant's case that no exceptional circumstances existed to justify his placement on ALWOP, the Respondent asserts that the allegations against the Applicant, evidence gathered by MONUSCO SIU and the fact that there were reasonable grounds to believe that the Applicant had engaged in misconduct all constituted exceptional circumstances.

47. The Respondent additionally cited the Tribunal's definition of "exceptional circumstances" in its order in *Nianzou*,¹⁰ where the Tribunal stated that "exceptional circumstances refer to a particular set of circumstances which are exceptional or as in this case egregious and which surround the facts in issue in the particular case."

¹⁰ Nianzou, Order No. 007 (NBI/2016), paragraph 42.

48. He continued that 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 serves in a mission setting. The Secretary-General has a zero-tolerance policy towards sexual exploitation and abuse by United Nations and related personnel and the credibility of the policy would be severely undermined if the Applicant's full salary continued to be paid while he was on AL.

49. The Tribunal does not find merit in the argument that the seriousness of the allegations against the Applicant constitutes an exceptional circumstance. An allegation, no matter how serious, is only an assertion that is yet to be proved. At the very least, there must be *prima facie* evidence implicating the Applicant. It was held in *Nianzou*,¹¹ already cited by the Respondent, that the mere fact that the allegations against the applicant are so serious that if proven, they would result in separation cannot constitute exceptional circumstances.

50. The Tribunal's view in that case that "exceptional circumstances" existed and that they "refer to the particular set of circumstances which are exceptional or egregious and which surround the facts in issue," can be distinguished from the instant case. In *Nianzou*, the Tribunal upheld the ALWOP based on the fact that there was strong *prima facie* evidence of wrong-doing obtained during investigations by the SIU **before** the placement of Mr. Nianzou on ALWOP.

51. However, in this case, in the letter of the USG/DFS dated 16 January 2017 conveying the decision to place the Applicant on ALWOP, the USG stated that it was alleged that the Applicant engaged in sexual relations with three Congolese sex workers in exchange for the promise of a specified amount of money and that the matter had been referred to the Office of Internal Oversight Services for investigation (OIOS). In paragraph 2 of that letter, he stated that the decision to place the Applicant on ALWOP was based on information¹² provided to the Department of Management by the Department of Field Support.

¹¹ Op. Cit.

¹² The information was comprised of: (i) a letter from the head of the MONUSCO Matadi office to CDT; (ii) a letter from the complainant's lawyer to the office of the Prosecutor at the Appeals

52. As to whether the Secretary-General ought to first make a finding of “exceptional circumstances,” which would form the basis for ALWOP pursuant to staff rule 10.4, the Tribunal is of the view that such a finding would be especially desirable in cases of ALWOP. Clearly the Respondent’s argument that while he has discretion to place staff members on ALWOP, he has no obligation to first make such a finding cannot be justified and is fraught with avoidable difficulties.

53. The Tribunal may decide that exceptional circumstances existed after reviewing the facts of a case. However, the Respondent must show at the time of his decision to place the Applicant on ALWOP that he acted in a fair and justifiable manner by moving beyond the mere allegations and taking the surrounding circumstances into consideration before choosing the option of ALWOP.

54. Even though the USG/DFS told the Applicant in his letter of 16 January 2017 that the reason for placing him on ALWOP was that there was sufficient *prima facie* evidence against him, no evidence had been collected and reviewed and no *prima facie* case had yet been out made against him as at that date. The Respondent cannot therefore base his action of placing the Applicant on ALWOP in January 2017 on a *prima facie* case since there were no investigative findings as at that date. That placement on ALWOP was therefore unlawful.

55. As to whether the three extensions of the Applicant’s ALWOP on 28 April 2017, 27 July 2017 and 26 October 2017 were lawful because at the times they were made, the Respondent was already in possession of the MONUSCO SIU investigation report, the Tribunal again finds no merit in this argument. It has been found that the entire 12-month period of the ALWOP in this case is a continuum which cannot be broken into parts to determine which parts were lawful and which unlawful. The unlawfulness from the beginning of the ALWOP in January 2017 tainted the entire continuum.

56. The Tribunal finds that in the absence of a *prima facie* case, the ALWOP on which the Applicant was placed since January 2017, even though based on

Court of Matadi; (iii) a letter from the Applicant denying the allegations in the lawyer’s letter; and (iv) a summons for the applicant from the office of the prosecutor.

allegations of serious misconduct, fell below the required threshold for the Respondent/decision-maker to show that indeed exceptional circumstances existed to support it.

Was it lawful and just for the Respondent to place the Applicant on ALWOP for twelve consecutive months?

57. The plain wordings of the first part of staff rule 10.4(d) are that “placement on AL shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.”

58. Staff Rule 10.2(a) deals with disciplinary measures and enumerates the nine forms that disciplinary measures may take. Under its subsection (iv), suspension without pay for a specified period is enumerated as one form of disciplinary measure. Also under subsection (v), the imposition of a fine is another form of disciplinary measure. Paradoxically, staff rule 10.2(b)(iii) provides that ALWOP is an administrative measure and not a disciplinary measure.

59. “What’s in a name? That which we call a rose by any other name would smell as sweet.” When the character Juliet uttered these words in Shakespeare’s *Romeo and Juliet*, she was stating the simple fact that a name does not change the innate characteristics of a thing. In other words, a label or tag does not change the nature of a thing. Before ST/AI/371/Amend.1 was promulgated on 11 May 2010, what is now referred to as AL was called “suspension”.¹³ The name or tag may have changed, but the characteristics have not. It needs to be borne in mind that suspension without pay for a specified period is a disciplinary measure.¹⁴

60. In the letter of the USG/DFS of 16 January 2017 placing the Applicant on ALWOP, it was stated, among other stringent conditions, that the Applicant may not leave his duty station of Matadi in the Democratic Republic of the Congo without approval from the MONUSCO Director of Mission Support. He was also to maintain his health insurance coverage, if he wished to do so, at his own

¹³ Section 3 of ST/AI/371/Amend.1 provided that the word “suspension” in ST/AI/371 was to be replaced by the phrase “administrative leave.”

¹⁴ Rule 10.2(a) (iv).

expense. Additionally, the Applicant was to be subject to the Staff Regulations, Staff Rules and other administrative issuances including the prohibition to engage in other employment.

61. Under the provisions of staff rule 10.4(b),¹⁵ AL should as far as practicable not exceed three months. There is no doubt that the intendment of the legislator here is that three months should normally be enough time to investigate the allegations against a staff member and, if necessary, take him or her through a disciplinary process.

62. Even though AL is not meant to be a disciplinary sanction, the difficulty that ALWOP imposes on a staff member is often worse than a disciplinary sanction. Where a staff member has the disciplinary sanction of termination or dismissal imposed on him or her, he or she would have the freedom to leave the duty station and to seek and find other employment. Sometimes, the process of conducting an investigation and instituting a disciplinary process and making a final decision may reasonably take longer than three months.

63. In the instant case, the investigations into the allegations against the Applicant started in January 2017 and by 3 April 2017, MONUSCO SIU had already completed an investigation report which was not submitted to OHRM by the ASG/DFS until 25 May 2017 - fifty-two days later. Meanwhile, after the investigation report was completed and before the referral of the case to OHRM, the USG/DM had extended the ALWOP of the Applicant on 28 April 2017.

64. It is evident that the only action taken by Management regarding the Applicant's case thereafter was on 27 July 2017 when his ALWOP was extended for another three-month period. Thereafter, a memorandum dated 17 August 2017 with formal allegations of misconduct was presented to him on 22 August 2017 for his response. It had taken the Respondent seven months to investigate the Applicant and to finally present him with charges of misconduct!

65. For the first time since he was placed on ALWOP, on 23 August and 20 September 2017, the Applicant challenged Management's actions by requesting

¹⁵ ST/SGB/2016/1.

management evaluation. On 26 October 2017, the ALWOP was extended for a third time bringing the period of the Applicant's ALWOP to a total of 12 months.

66. Since ALWOP is not meant to constitute disciplinary sanction but the affected staff member is usually stripped of a monthly salary and other allowances, medical insurance for himself and his or her family, the right to seek and accept other employment and cannot leave the duty station without approval, it is crucial and just that the required investigation and disciplinary process are accelerated. If the entire process is not treated with reasonable dispatch, it is disingenuous to claim that ALWOP does not constitute a disciplinary sanction or that the principle of presumption of innocence applies. The adage that actions speak louder than words cannot be truer in this case.

67. The Tribunal finds therefore that the Respondent's decision to place the Applicant on ALWOP for twelve consecutive months contravened the spirit of staff rule 10.4(b). The placement of the Applicant on AL for twelve consecutive months was unjust and unlawful.

JUDGMENT

68. The application succeeds.

69. The Respondent shall pay the Applicant his salary that was withheld during the period that he was unlawfully placed on ALWOP from 28 January 2017 to December 2017.

(Signed)

Judge Nkemdilim Izuako

Dated this 17th day of April 2019

Entered in the Register on this 17th day of April 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi