



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/049
UNDT/NBI/2020/085
Judgment No.: UNDT/2021/134
Date: 19 November 2021
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KUYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sètondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:

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

Andrea Ernst, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a Resident Auditor, with the Office of Internal Oversight Services (“OIOS”) at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Goma. He serves on a continuing appointment at the P-4 level.

2. This Judgment determines his two applications registered as UNDT/NBI/2020/049 filed on 30 June 2020 [Case#1] and UNDT/NBI/2020/085 filed on 21 October 2020 [Case#2]. These are overlapping cases contesting the 13 January 2020 decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) to place him on Administrative Leave Without Pay (“ALWOP”) for three months, which was extended retroactively on 13 May 2020 for a further three months.

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

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

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

5. The ALWOP was extended on 13 May 2020, with retroactive effect for three months from 13 April 2020. From 16 July 2021, the Applicant's ALWOP was converted to administrative leave with pay ("ALWP"). His position in this application is that the prior decisions to place him on ALWOP were unlawful.
6. The challenge to the ALWOP is partly moot as the retroactive part of it, from 16 April 2020 to 13 May 2020, was voluntarily rescinded.
7. The Respondent contends that the application is without merit as the ALWOP, along with its extension, was lawfully decided pursuant to staff rule 10.4(c) and section 11.4(b) of ST/AI/2017/1 ("Unsatisfactory conduct, investigations and the disciplinary process").
8. For reasons further explained in this Judgment, the Applicant succeeds on the merits of his challenge to the decision.

Background Facts and Procedural History

9. The background information available to the Respondent at the time when the decision was made, as summarised from the OIOS memorandum, was as follows:
 - a. On 20 November 2019, the alleged victim reported to the Conduct and Discipline Team ("CDT") in MONUSCO that she was raped on 29 June 2019 by the alleged perpetrator. She said she had previously reported this to another United Nations staff member, Mr. Loto, on 10 July 2019.
 - b. On 25 November 2019, the complainant/victim attended a meeting with the Applicant, the alleged perpetrator, Mr. Loto and another colleague, Mr. Okwakol who was the Applicant's First Reporting Officer ("FRO") and the OIOS, Chief Resident Auditor.
 - c. The complainant/victim recorded the meeting conversation, wherein she requested an apology from the alleged perpetrator. The actions he was to apologise for were not defined in the discussions. The complainant/victim also requested that the alleged perpetrator pay her USD2,000.00. The

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

d. The complainant/victim later attempted to withdraw the report from the CDT but was told it was referred to the OIOS.

e. At a later interview with the OIOS, the Applicant said that he was aware before the meeting that a complaint of sexual abuse had been made to CDT by the complainant/victim and that Mr. Loto and the alleged perpetrator were connected to the rape allegation. He was aware that an offer of money was made during the meeting but could not explain what it was for. He did not attempt to leave the meeting.

f. As to the purpose of the 25 November 2019 meeting, the Applicant said that it was ‘to deal with a misunderstanding about money between’ the complainant/victim and the alleged perpetrator and to explain to her the implications her complaint could have on Mr. Loto.

10. On 10 December 2019, the Applicant was notified by OIOS that he was the subject of an investigation into possible misconduct. He was alleged to have interfered with an OIOS investigation into sexual assault, by seeking to act as an intermediary between the complainant/victim and the subject of the investigation. The Applicant was told that he was being investigated for “assisting in, or contributing to, the commission of an act of misconduct”.

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

12. The Applicant sought management evaluation of the decision on 5 March 2020. The Management Evaluation Unit (“MEU”) upheld the decision on 23 April 2020.

13. On 15 May 2020, the Applicant received notification that the USG/DMSPC had decided to extend his ALWOP for an additional period of three months

retroactively from 13 April 2020, or until the completion of the disciplinary process, whichever comes earlier. The reason for the extension was expressed as “the considerations...warranting your placement on ALWOP continue to exist.” This rationale was based on a Code Cable received on 4 May 2020 which did not provide new information or assessments. It stated that “the reasons for the initial placement of the subjects on ALWOP have not changed.”

14. On 22 June 2020, the Assistant Secretary-General for Human Resources (“ASG/OHR”) revised the retroactive aspect of the decision to place the Applicant on ALWOP, and instructed that the Applicant be paid his salary for the period 13 April 2020 to 13 May 2020.

15. On 30 June 2020, the Applicant filed Case #1, a substantive application with the Dispute Tribunal to challenge the Respondent’s initial decision (January 2020) to place him on ALWOP.

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

17. On 15 July 2020, the Applicant sought management evaluation of the ALWP decision. He thereafter filed an application to the Tribunal for suspension of action of the ALWP decision. The application was dismissed on 23 July 2020 by Order No. 42 (NBI/2020). During those proceedings, the Respondent informed the Tribunal that the OIOS investigation report into the Applicant’s conduct had been referred to the ASG/OHR for consideration of whether a disciplinary process should be pursued under section 7.2 of ST/AI/2017/1.

18. Following the determination in the suspension of action application, the substantive application was docketed to the instant Judge on 1 September 2021, for

determination on the merits. The Tribunal held a case management discussion (“CMD”) with the parties on 15 September 2021.

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

Submissions

20. The Applicant underscores that the sole basis for the charges against him was his unwitting participation in the 25 November 2019 meeting. The Applicant says he was asked by his FRO, Mr. Okwakol, to attend the meeting. He was not aware of the events alleged to have taken place between the complainant/victim and the alleged perpetrator in June 2019. He only learned of the alleged victim’s allegation of sexual abuse on 25 November 2019 when he attended the meeting. By then it had already been reported to CDT and he could not have been attempting to conceal it.

21. According to the Applicant, failing to walk out of the meeting, on realising that the alleged victim was making demands for money, may have been a lapse in judgment. However, it did not reach the grave level of misconduct, such as financial fraud and sexual abuse, that merit dismissal or ALWOP. The Applicant found it unfair and disproportionate that he merely attended a mediation meeting convened by his supervisor, has not committed any sexual abuse and yet is treated to the same instantaneous ALWOP measure that is applicable in cases of such gross misconduct.

22. The Applicant contends, that in addition to these contextual factors having been ignored, there was no procedural fairness in the information gathering methods which generated the memorandum, based upon which the decision was made. Secret recordings, entrapment and badgering during interviews tainted the process. It was with a view to “break subjects into making confessions by telling them lies, berating and intimidating them.” These complaints were raised with the USG/DMSPC in August 2020. Thereafter, the interview process was re-started.

23. As to the merits of the case, the Applicant further contends that the unlawfulness of the Respondent's ALWOP decision is borne out by the Respondent's own actions in converting the Applicant's leave to ALWP. This was done both as it relates to the retroactive aspect of the ALWOP from mid-April to mid-May 2020 and from July 2020.

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

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

26. Counsel for the Respondent included in his closing submissions, new information that on 4 October 2021, the USG/DMSPC decided to impose on the Applicant the disciplinary measure of demotion, with deferment for two years of eligibility for consideration for promotion. The Respondent admits that since the Applicant's misconduct, was eventually found not to warrant dismissal or separation, any pay withheld will be restored to him pursuant to staff rule 10.4(d).

Consideration

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

28. The Tribunal's current focus, in assessing whether the decision was properly made within the regulatory framework for ALWOP, will be on information available at the time when the decision was made. In this process of review, the

Tribunal is mindful of the presumption of regularity of the Respondent's decisions.¹ However, while the Respondent's "classification of the objectively established circumstances as exceptional is a matter for his discretion," it "nonetheless must be exercised rationally."²

29. The regulatory framework governing instances when the Respondent may, in his discretion, decide to place a staff member on ALWOP pending investigation and completion of disciplinary proceedings 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

¹ *Niedermayr* 2015-UNAT-603; *Survo*, 2015-UNAT-595 (both quoting *Rolland*, 2011-UNAT-122). See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

² *Muteeganda*, 2018-UNAT-869, para. 38.

than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

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

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

The Unsatisfactory Conduct

32. Based on the above-mentioned provisions, the Tribunal must consider the basis upon which the Respondent considered that separation from service or dismissal would be warranted for the Applicant’s conduct.

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

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

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

...

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

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

36. It is only when the staff member receiving the information is subjectively, and in good faith, concerned or suspicious that misconduct took place, that a report must be made. This may reasonably exclude a situation where the staff member has knowledge of improper motives, such as malice or extortion, for the allegation against another person being disseminated. Making a report in such circumstances may put the staff member at risk of disciplinary action for malicious reporting. It may also deprive the staff member of protection against retaliation for making the report.³

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

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

(a) A detailed description of the unsatisfactory conduct;

³ Sections 2.1(a) and 2.3 of ST/SGB/2017/2 (Rev.1) (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

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

38. In the instant case there was no available information, when the decision was made, that when the Applicant was called by his supervisor Mr. Okwakol into a meeting he had anything but a fleeting awareness of the alleged victim's prior report of a rape. There is no indication that he knew any of the details of the allegation.

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

40. On the facts of this case, it was *prima facie* unlawful for the Applicant to have been placed on ALWOP. The circumstances of this case are like those addressed by the Tribunal in *Okwakol* Order No. 127(NBI/2020). The Tribunal reiterates the statement made at paragraph 22 of Order No. 127, as follows:

It is specifically worth noting that the Applicant is not investigated for having engaged in sexual exploitation and sexual abuse but, rather, for not reporting an act of rape and attempting to pervert the course of investigation through directing an alleged victim to withdraw her complaint. Facts put before the Tribunal do not show probable cause, for which it would be necessary to show that the Applicant had a sound knowledge of the commission of rape in the first place, knowledge of the pendency of an investigation in the second place or that he had threatened the victim or persuaded her to do something illegal. Otherwise, the Applicant may have been just a mediator in a private conflict. Neither is the Applicant's input in the impugned interaction disclosed, while it appears that other persons had been involved. The Tribunal understands that details relevant for these considerations may be known to the Respondent and may make up probable cause. This, by itself, however, would not substantiate the ALWOP.

41. There was *prima facie* no basis for the Respondent's finding that the alleged misconduct was grave enough, if proven, to warrant separation or termination. This is so whether based on the offences charged *per se* or on an examination of the record of information that was available to the decision maker.

The information before the Authorized Official

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

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

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

45. The information on record was that before the meeting the Applicant came to be aware that there had been a sexual abuse report by the alleged victim. However, the nature and extent of his knowledge was not defined.

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

allegations. On the contrary, the record available at the time the decision was made was that the Applicant's actions were only geared firstly, to dealing with a misunderstanding about money and secondly, to letting the alleged victim know about the impact of her actions on Mr. Loto, who was not the alleged perpetrator.

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

48. The impact of ALWOP on a staff member may be as onerous as summary dismissal but without the fundamental contractual procedural fairness protections. It is a draconian measure to be used only in exceptional cases.⁴

49. In the instant case the information available when the decision was made remained the same over an extended ALWOP period. The information was not sufficient for a determination that it was more likely than not that the Applicant committed misconduct grave enough to warrant dismissal. There is no indication that any consideration was given to a phased approach of administrative leave with partial pay as least from January 2020, at the start of the investigations. The Applicant ought not to have been summarily deprived of his contractual entitlements based on the information available.

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

⁴ *Antoine*, Order No. 172 (NBI/2020) ‘A staff member should not be surprised by a sudden loss of income before she or he could make provisions for sustaining him/herself and family during the investigation. Neither should placement on ALWOP serve to encourage resigning of expeditiousness in investigation, which is a risk where the Organization does not bear much cost of keeping a staff member of ALWOP. It follows that the financial burden of placing a staff member on administrative leave must be shared and administrative leave should be applied in a phased approach, with consideration given to leave with partial pay before ALWOP, the latter justified in genuinely exceptional cases, where objective reasons do not allow concluding the disciplinary process within a standard time’.

Conclusion

51. The Application succeeds on the merits.
52. The Tribunal makes the following consequential orders:
 - a. The decision to place the Applicant on ALWOP for six months is hereby rescinded.
 - b. The Respondent is to pay to the Applicant all salary and entitlements for the period 13 January 2020 to 16 July 2020, save for the period 16 April to 13 May 2020.
 - c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 19th day of November 2021

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi