Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KAVOSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Marisa Maclennan, UNHCR
Francisco Navarro, UNHCR

Background

1. The Applicant is an Assistant Protection Officer with the United Nations High Commissioner for Refugees ("UNHCR") based in Shira, Iran. On 7 October 2021 the Applicant filed an application seeking rescission of the decision to place him on administrative leave without pay ("ALWOP") from 17 February 2021, reinstatement of full pay from 17 February 2021, or in the alternative, partial pay from 17 February 2021, and moral damages. In his revised application dated 2 March 2022, he describes the contested decision as "imposition of [ALWOP], later amended to Administrative Leave with Partial Pay, (ALWPP)" ("the impugned decision").

2. The Respondent's reply was filed on 12 November 2021.

3. The case was assigned to the current Judge on 24 February 2022.

4. The parties then filed a revised application and reply on 2 March and 4 March 2022 respectively.[1]

Summary of relevant facts

5. On 11 October 2020, the Inspector General's Office ("IGO") received allegations that the Applicant might have engaged in sexual harassment. On 18 January 2021, the IGO received additional allegations that the Applicant might have engaged in sexual exploitation and Abuse ("SEA").[2]

6. On 16 February 2021, the Applicant received a Subject Notice of Investigation from the IGO, notifying him that the Office had received information implicating him in possible sexual misconduct.[3]

7. On 17 February 2021, the Applicant was placed on ALWOP up to 30 April

[1] Pursuant to Order No. 026 (NBI/2022) on the UNDT Practice Directions on filing of applications and replies.
[2] Revised reply, para. 6.
[3] Revised application, annex 1.

2021. The Applicant was notified of further extensions of ALWOP on 27 April, 28 June and 29 July 2021.[4]

8. On 6 April 2021, the Applicant received an updated Subject Notice of Investigation which added allegations of engaging in prohibited use of UNHCR Information Communication and Technology ("ICT") resources and assets and failure to fully cooperate with an IGO investigation.[5] On 27 April 2021, the Applicant received a further extension of ALWOP, from 1 May 2021 to 30 June 2021, on the same conditions.[6]

9. The Applicant was interviewed by the IGO on 3 April 2021. On 29 April 2021, he received the draft Investigation Report and provided his comments to on 14 May 2021.[7]

10. On 27 May 2021, the IGO concluded the investigation. The following day, the IGO informed the Applicant that the evidence supported a conclusion that he had committed misconduct and that it had submitted the investigation report and evidence to the Director of the Division of Human Resources ("DHR").[8]

11. On 28 June 2021, the Applicant received a further extension of ALWOP from 1 July 2021 to 31 July 2021. On 29 July 2021, he received a further extension of ALWOP, from 1 August 2021 to 30th September 2021 [9]

12. On 9 August 2021, the Applicant requested management evaluation of the decision to place him on ALWOP from 17 February 2021 to 30 September 2021.[10]

13. On 3 September 2021, the Applicant received notification that the Administration had decided to place him on ALWPP, from 1 August 2021. The

[4] Ibid., annex 2; revised reply, annex R/2.
[5] Ibid., annex 3.
[6] Ibid., para. 4.
[7] Revised reply, annex R/3; application annex 5.
[8] Revised application, annex 7.
[9] Ibid., annexes 8 and 9.
[10] Ibid., annex 10.

duration of ALWPP was extended through 30 September 2021. On 29 September 2021, the ALWPP was extended until 31 October 2021, and on 28 October 2021 through 30 November 2021.[11]

14. On 21 December 2021, the Applicant was charged with five matters arising from the investigation. He responded to the allegations on 15 January 2022.[12]

Applicant's submissions

15. The Applicant's case is summarized below:

a. His challenge of the impugned decision is receivable. A decision to place a staff member on ALWOP is one with continuing legal effect, is receivable and not moot.

b. An amendment of the decision to impose ALWOP by granting partial pay does not cure the unlawfulness or the harm caused by the initial decision.

c. ST/AI/371 (Revised disciplinary measures and procedures) does not provide authority to place the Applicant on ALWOP pending the outcome of the IGO investigation, as in this case. Consequently, the decision to place the Applicant on ALWOP on 17 February 2021, was *ultra vires*. The matter had not been investigated, and no evidence from the investigation had been provided to the Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM") to determine whether to pursue the matter, whether there was a prima facie case, and whether ALWOP was warranted.

d. The impugned decision was unnecessary and disproportionate. The Administration failed to give due regard to ALWOP being an extraordinary/exceptional measure, before it was imposed in this case.

[11] Revised reply, annexes R/4-R/6.
[12] Revised application, annex 14.

e. The reasoning given for placing him on ALWOP referred entirely to the allegations and their seriousness, which undermined the presumption of innocence, but additionally gave no reasons why such leave had to be without pay or partial pay.

f. The imposition of ALWOP and then ALWPP was not necessary to conduct the investigation. It did not deal with risk to others, interference with the investigation, or prevent further alleged misconduct. The effect was therefore punitive in nature, particularly having regard to the length of time that it has been maintained. The continued ALWPP is calculated to cause his resignation and thereby save the Administration the task of proving their case.

g. The decision to impose ALWOP, and later ALWPP had a disproportionate effect on the Applicant. He was without salary for nearly six months, and partial pay of USD1,000 per month from 1 August 2021 was insufficient to pay his debts or meet his basic needs.

h. The impugned decision contravened the spirit of staff rule 10.4(b), as set out in ST/SGB/2016/1 (Staff Rules and Staff Regulations of the United Nations), which provides that placement on Administrative Leave should, as far as practicable, not exceed three months and that, accordingly, the placement on ALWOP for over six months was unjust and unlawful.

i. The Administration has failed in their duty to conduct this investigation in a timely and diligent manner resulting in undue hardship to the Applicant. Whilst the IGO concluded and handed over the investigation report in May 2021, the Administration has failed to conclude the matter or explain the lengthy delay.

16. The Applicant seeks the following relief:

a. Rescission of the impugned decision;

b. Reinstatement of full pay, or partial pay from 17 February 2021; and

c. Moral damages on the basis that the impugned decision caused extreme financial hardship, enormous stress, and reputational damage, despite the presumption of innocence.

17. The Applicant also requests the Tribunal to grant him anonymity in these proceedings on the ground that he is innocent until proven guilty.

Respondent's Submissions

18. The Respondent's case is summarized as follows:

a. The application is only partially receivable. The Applicant is contesting the decision of 17 February 2021 to place him on ALWOP and all extensions. However, he did not seek management evaluation of the decisions of 17 February or 27 April 2021 within the statutory time limits. The application is not receivable *ratione materiae* in respect of the decisions of 17 February and 27 April 2021.

b. The decisions of 28 June and 29 July 2021 to extend the Applicant's placement on ALWOP were superseded by the decision of 3 September 2021 to place the Applicant on ALWPP. This is a different administrative status. Since 1 August 2021, the Applicant is not on ALWOP. Given that the Applicant contests the decision to place him on ALWOP, the Application is partially moot. The only live matter is the legality of the Applicant's placement of ALWOP between 28 June and 31 July 2021.

c. Further, the Applicant has not sought management evaluation of the decision of 3 September 2021 to place him on ALWPP. Accordingly, the Tribunal lacks jurisdiction *ratione materiae* to review the merits of that decision. The application is only receivable with respect to the Applicant's placement on ALWOP between 28 June 2021 and 31 July 2021.

d. ST/AI/371 was abolished on 16 October 2017 and does not apply. Administrative leave in UNHCR is governed by staff rule 10.4 and section 10 of UNHCR/AI/2018/18 (Misconduct and the Disciplinary Process). Staff rule 10.4 (a) and paragraph 10.1 of UNHCR/AI/2018/18 provide that a staff member may be placed on administrative leave at any time after an allegation of misconduct and pending the completion of a disciplinary process. In accordance with paragraphs 10.3 and 10.4 of UNHCR/AI/2018/18, the authority to place a staff member on ALWOP lies with the Director of DHR.

e. The Applicant was placed on ALWOP by the Director of DHR following allegations of misconduct. The initial decision and each individual decision to extend ALWOP was based on the evidence available at the time. The disciplinary process is still pending completion. The decision was thus made with the necessary authority and complied with the timing requirements provided by relevant rules.

f. There is probable cause that the Applicant engaged in SEA of a refugee. Staff rule 10.4 (c) provides that administrative leave shall be with 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. UNHCR/AI/2018/18 implements staff rules 10.4 (c) (i) and (ii) at paragraphs 10.3 and 10.4, respectively.

g. The evidence supporting the reasonable belief of SEA when the Applicant was placed on ALWOP on 17 February 2021 consisted of the complainant's testimony and two corroborating video recordings. Under oath, the refugee provided a credible account of how the Applicant engaged in sexual relations with her. In addition, the videos recorded by the complainant in the Applicant's apartment showed the Applicant half naked and stroking his penis. The Applicant's alleged conduct would constitute SEA under the

definition in ST/SGB/2003/13 (Special measures for protection from SEA).

h. A victim's credible oral testimony is sufficient to reach the standard of clear and convincing evidence. The complainant's testimony, which is corroborated by the video recordings, sustains the reasonable belief of misconduct required for placing the Applicant on ALWOP.

i. The decisions to extend the Applicant's ALWOP considered evidence that had come to light as the investigation advanced, including text messages and audio recordings.

j. There are exceptional circumstances warranting the Applicant's placement on ALWOP. In addition to probable cause of SEA, there existed exceptional circumstances that warranted the Applicant's placement on ALWOP pursuant to staff rule 10.4(c)(ii).

k. In addition to the allegations of SEA, there was evidence that made it more likely than not that the Applicant sexually harassed multiple staff members in the Shiraz sub-office while he was its acting Head. By 17 February 2021, the IGO possessed screenshots showing that, on 29 October 2018, the Applicant had sent a document to the Sub-Office's WhatsApp group entitled "The Sex Bible: The Complete Guide to Sexual Love". The document has graphic sexual content. The Applicant then shared the same document with a staff member under his supervision. This evidence suffices to meet the required standard of proof. The evidence was subsequently corroborated by the testimonies of two witnesses who were interviewed on 22 February 2021 and 2 March 2021, respectively.

l. The decision to place the Applicant on ALWOP is consistent with staff rule 10.4(c)(ii). Given that the available evidence makes it more likely than not that the Applicant engaged in the misconduct, which if confirmed would warrant a sanction of separation from service or dismissal, the

Applicant's placement on AWLOP is also consistent with paragraph 10.4 of UNHCR/AI/2018/18.

m. The decision to place the Applicant on ALWOP is lawful and proportionate. There is no merit to the Applicant's contention that ALWOP is being applied only because of the seriousness of the allegation or as anticipated disciplinary measure.

n. UNHCR is making best efforts to protect, during the pendency of the investigation and the disciplinary process, the interests of the Organization and the rights of the complainants, witnesses and staff members affected by the Applicant's alleged misconduct. Placing the Applicant on ALWOP is a reasonable measure to ensure that he does not interfere with the investigation or the disciplinary process by retaliating against or intimidating the complainants or witnesses, who include his supervisees. In this respect, UNHCR adopts a victim-centred approach in accordance with UNHCR/HCP/2020/4 (Policy on a Victim-Centred Approach to Sexual Misconduct (SEA and Sexual Harassment). Pursuant to paras. 9 and 11 of this Policy, UNCHR prioritizes the well-being, protection and security of victims.

o. In addition, placing the Applicant on ALWOP is a legitimate measure to achieve the objective of the Organization's policy of zero tolerance for sexual misconduct as well as to protect its reputation.

p. The Applicant's reliance on ST/SGB/2016/1 to submit that administrative leave should be limited to three months is legally incorrect. ST/SGB/2016/1 was abolished on 30 December 2016. There is no merit to the Applicant's contention that UNHCR has failed to conduct the investigation and the disciplinary process in a diligent and timely manner. The Respondent is filing, *ex parte,* a sworn statement by the investigator explaining why formal allegations of misconduct had not yet been issued.

q. Any adverse impact that the length of ALWOP might have on the

proportionality of the measure is addressed by the conversion to ALWPP effective 1 August 2021. The Director/DHR considered the Applicant's financial concerns and, based on an assessment of the cost of living, set his net take-home pay at USD1,000. This amount is equivalent to the net base salary (before deductions for medical insurance and pension contributions) of a staff member working in Iran at the G-2 level. It is also greater than Iran's average urban household income. In addition, UNHCR is paying the Applicant's and the Organization's contributions to maintain the Applicant's health insurance coverage and participation in the UNJSPF. The Applicant was allowed to leave the duty station indefinitely so that he could minimize his financial hardship.

r. The Applicant's submissions about his exceptional hardship are not only unsupported, but also inconsistent with his own communications to the Director of DHR. The Applicant asserts that he cannot visit his mother, yet he requested permission to go on holiday to Dubai and stayed at a four-star hotel. The Applicant also asserts that he cannot afford to have his car fixed, but he requested permission to stay a few weeks in Tehran to perform repairs in his apartment. It is legitimate and justified to put sexual predators at greater financial risk, with adequate safeguards in place for those subsequently found to be innocent. This is the case here.

s. The Applicant's submissions about his difficulties to receive medical treatment are unfounded. The Applicant continues to fully benefit from UNHCR's Medical Insurance Plan.

19. The Respondent submits that the Applicant's requests for remedies are unfounded.

a. The Applicant's request for the rescission of the decision to place him on ALWOP from 17 February 2021 and to have pay reinstated from that date is both not receivable *ratione materiae* and unfounded. The Applicant had to

seek management evaluation of the decisions of 17 February 2021 and 27 April 2021 within 60 days, but he only did so on 9 August 2021.

b. The Applicant's request for reinstatement of full pay is incompatible with staff rule 10.4(c). Where there is probable cause of SEA, the staff rule does not allow placing a staff member on administrative leave with full pay.

c. As regards his request for moral damages, the Applicant has failed to submit any evidence or any specific evidence of enormous stress. Similarly, the Applicant's submissions with respect to his alleged reputational damage are speculative and unsupported. Any damage to the Applicant's reputation is not related to his administrative leave but dependent on the outcome of the disciplinary process.

20. With respect to the Applicant's request for anonymity, the Respondent reserves the right to oppose the Applicant's request if a disciplinary process concludes before these proceedings with a finding that the Applicant engaged in the alleged misconduct.

21. For these reasons, the Respondent requests the Tribunal to reject the application in its entirety.

Considerations

22. The primary legal framework governing ALWOP is ST/SGB/2014/1 as amended in 2018 cited as ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations) to specifically address in staff rule 10.4 (c) the question of ALWOP in sexual misconduct cases and other exceptional cases. Rule 10.4 reads as follows:

> 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 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.

23. Sexual abuse and exploitation by United Nations staff undermines the implementation of the Organization's mandates and its credibility. The legal framework, as amended in 2018, is aimed at zero tolerance for sexual misconduct by imposing ALWOP on staff members where there is a reasonable basis for inferring sexual misconduct.

> Under the new Staff Rule 10.4(c), probable cause of sexual misconduct is a jurisdictional fact or condition precedent to a mechanical power to place a staff member on ALWOP. If there are reasonable grounds to believe sexual misconduct has occurred, the administrative leave will be without pay and, unlike in other instances of misconduct, the Secretary-General will have no discretion in that regard. The old rule differed significantly in that it did not specifically single out the regulation of sexual misconduct and the Secretary-General was at large to approach sexual misconduct cases (on the same basis as other misconduct) within his general discretion to place a staff member on ALWOP exceptionally.[13]

24. The Tribunal notes that UNHCR adopted staff rule 10.4(c), and incorporated it in art. 10.3 of UNHCR/AI/2018/18 (Misconduct and the Disciplinary Process). Therefore, the Administration acted within the legal framework and discharged its mandate by following the relevant regulatory framework. The Applicant is not correct in suggesting that legal provisions other than these apply to his case.

[13] *Muteeganda*, 2018-UNAT-869, para. 32.

25. Going by the jurisprudence, the rationale for imposing such an extraordinary administrative measure in matters of ALWOP concerning sexual misconduct is twofold, firstly, as explained in *Muteeganda*, to act as a deterrent for staff members from engaging in SEA. To this effect UNAT held that;

> The rule recognises that ALWOP is an extraordinary administrative measure designed to be of short duration. Though seemingly harsh, a decision to impose ALWOP in sexual misconduct cases is not disproportionate.5 It seeks to balance competing adverse and beneficial effects of the policy in order to achieve the desired end of behavior change in cases of sexual misconduct. It legitimately and justifiably puts sexual predators at greater financial risk, with adequate safeguards in place for those subsequently found to be innocent.[14]

And secondly, to protect the interests of the Organization by upholding its integrity and reputation as enunciated in *Gisage* that;

> ALWOP may be contemplated if the conduct in question might pose a danger to the Organization, including, in our view, the reputational harm to the Organization caused by its staff members engaging in exploitative conduct in disadvantaged communities subject to the protective mandate of the Organization.[15]

UNHCR's Obligations in ALWOP Situations

26. The two objectives enunciated above must however be balanced and in this regard, art. 10.8 of UNHCR/AI/2018/18 provides that to the extent possible, UNHCR will endeavour to prioritize the handling of the disciplinary process in cases in which a staff member has been placed on ALWOP. The objective is to secure an efficient resolution of the matter which would in turn vindicate either the staff member or the Organization without causing much damage to either party.

27. UNAT has also cautioned, that any decision to extend ALWOP must be reasonable and proportionate. A decision to extend ALWOP is a drastic

[14] Ibid., at para. 41.
[15] 2019-UNAT-973, para 37.

administrative measure and normally should be of short duration.[16] In determining whether an extension of ALWOP is lawful, the Tribunal shall be guided by factors such as, the circumstances of the case, including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need to follow due process.[17]

28. Applying the above regulatory framework and the jurisprudence to the case at hand, the Tribunal wishes to summarise the issues and analyse as follows:

29. There are two issues for consideration: (a) whether the Respondent acted in violation of the Applicant's terms and conditions of employment in placing him on ALWOP on 17 February 2021; and (b) whether the Tribunal can review the decision to place the Applicant on ALWPP effective 1 August 2021.

30. On 28 June 2021 a decision was made to extend that Applicant's ALWOP from 1 July to 31 July "in order to complete the review of the investigation findings".

31. On 29 July 2021 the Director/DHR noted that the IGO had completed the investigation and he was reviewing the Investigation Report and its supporting documentation in accordance with paragraph 7.1 of UNHCR/AI/2018/18. He then decided to extend the Applicant's administrative leave until 30 September 2021, or until a decision was made to close the matter, or until the completion of a disciplinary process (should one be initiated), whichever was earliest (Annex R/2).

32. The Respondent argues that as per staff rule 11, it is only these two decisions that are receivable for review in this Tribunal. Staff rule 11 provides that:

> 11.2 (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a

[16] Ibid., para, 40.
[17] Ibid.

> first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
>
> 11.2 (c) 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. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.
>
> 11.4 (a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

33. Regarding the decisions of 17 February and 28 April 2021, the Respondent argues that they are not receivable because the Applicant did not seek their management evaluations in a timely manner. The Applicant avers that the decision is reviewable.

34. The law on whether the Tribunal can hear and determine an application based on a decision made outside the management evaluation statutory period is well settled that this Tribunal has no jurisdiction to review such application.[18]

35. On the question whether this case contains more than one administrative decision, the answer is provided in the language of the communication from UNHCR Administration to the Applicant from 17 February to 29 July 2021. The communication is summarized by the Respondent as follows:

> There are [also] distinct administrative decisions in this case. The first decision was that of 17 February 2021 to place the Applicant on ALWOP. Then, on 27 April 2021, a separate decision was made to extend it. Further separate decisions to extend were made on 28 June and 29 July 2021. Each decision was made based on a fresh

[18] See for example in *Ajdini et al* 2011-UNAT-108, para. 23; *James* 2015-UNAT-600, para. 28; *Mohanna* 2016-UNAT-687, para. 29; *Muhsen* 2017-UNAT-793, paras. 12-14.

> assessment of the facts as they existed at the time. The decision on 17 February considered the complainant's statement under oath and the evidence then available. The decision on 27 April 2021 also considered the Applicant's statement during his interview on 3 April 2021, the testimonies of two witnesses and additional corroborating evidence. The decisions on 28 June and 29 July 2021 considered the findings of the investigation report dated 27 May 2021 and all its evidence (para 24 amended reply).

36. There is no contrary submission put forward by the Applicant regarding the separateness and individuality of the decisions. Assuming however, that the decision made on 17 February 2021 was one and the same spanning over a six- months period to 9 August, the Tribunal would find that the Applicant did not seek management evaluation in a timely manner rendering his whole case statute-barred.

37. In light of existing jurisprudence in particular, in *Gisage*, UNAT, found that the first decision of 16 January 2017 in that case was based mainly on the reports received from the sex workers and their representative and the intervention of the Democratic Republic of Congo ("DRC") prosecutor. If not probable cause, this evidence gave rise to at least a *prima facie* case justifying the commencement of an investigation. The subsequent decision of 28 April 2017 followed the completion of the investigation by the MONUSCO Special Investigations Unit and the submission of its report. The facts taken into consideration at that stage were different. As such, the decision to extend the ALWOP was based on a fresh assessment and constituted a separate decision. The decision of 27 July 2017 was based on even more cogent evidence which followed the preliminary review of the investigation report and supporting material by the Department of Field Support and the referral of the matter to OHRM on the basis that there was clear and convincing evidence that Mr. Gisage had engaged in serious misconduct.

38. In addition to the sworn statements of the three sex workers, there was Mr. Gisage's confirmation that he eventually paid the women through an intermediary. This decision was therefore also based on a fresh assessment by the decision-maker of the specific circumstances as they existed at the time and consequently constituted

a distinct administrative decision (para. 30). After making this assessment UNAT concluded that,

> Accordingly, the three decisions were distinct from each other and did not constitute single decision placing Mr. Gisage on ALWOP. Since Mr. Gisage failed to seek management evaluation with respect to the first two decisions, the application was receivable *ratione materiae* only in respect of the decision of 27 July 2017 to extend the ALWOP from that date (at para. 31, emphasis added).

39. Consequently, in keeping with prevailing jurisprudence, the determining factor whether there are more than one reviewable administrative decisions in a series of extensions concerning ALWOP is proof of fresh material, for instance, receipt of new evidence or where new investigation or disciplinary step is taken that has substantially changed the circumstances of the initial reason for placing a staff member on ALWOP.

40. The initial decision which the Applicant did not subject for management evaluation was based on probable cause, that the Applicant may have engaged in SEA. The circumstances changed when the investigations were completed, and the relevant authorities had to review the investigation findings. This was a necessary step in the disciplinary process that necessitated a decision to extend the ALWOP. The review having been completed, the next stage according to the Respondent was for the relevant official, the Director, to review the Investigation Report. This process required a decision to be made to extend the ALWOP.

41. Based on fresh facts and steps that necessitated decisions to renew the ALWOP, the Tribunal finds that there were in this case four distinct administrative decisions of 17 February, 28 April, 28 June and 29 July 2021. Each decision was made after considering fresh factors in the course of receiving the complaint against the Applicant, the investigation and disciplinary process.

42. The Applicant delayed in seeking management evaluation of the first two decisions made on 17 February and 28 April. Therefore, the Tribunal finds that only the two decisions of 28 June and 29 July 2021 are receivable.

43. Pursuant to art. 8.1(c) of the UNDT Statute, this Tribunal has jurisdiction to hear and pass judgment on the Respondent's decisions to place the Applicant on ALWOP on 28 June 2021 and on 29 July 2021 because it is these decisions that the Applicant had previously submitted for management evaluation within the stipulated time limit.

Whether the decisions to place the Applicant on ALWOP are unjust and unlawful

28 June 2021 Decision

44. The Director/DHR decided to extend ALWOP on 28 June 2021 on the ground that the Administration needed to complete the review of the investigation findings. The Applicant has not challenged this ground for extending his ALWOP.

29 July 2021 Decision

45. As the Applicant's ALWOP period was approaching expiry, the Director/DHR made another decision to extend the leave for another one month on the ground that she was reviewing the Investigation Report and its supporting documentation pursuant to UNHCR's disciplinary processes. The Applicant has not found issue with this reason for extending the leave.

46. The Applicant has nonetheless argued that the processes were unreasonably long. However, he has not made any submission to support this view. On the other hand, the Respondent has explained that this is a complex case and the Administration intends to ensure that the investigation is carried out with due process and that so far there has not been any unreasonable delays (Revised reply, para. 55).

47. It is clear that the Applicant has been ill-advised on the interpretation and application of ST/AI/371, jurisprudence and their effect on his case. The Tribunal wishes in turn to adopt the Respondent's comprehensive and yet concise and legally correct views on the relevant legal framework including jurisprudence in matters of ALWOP as a rebuttal to the Applicant's submissions.

a. To begin with, ST/AI/371 was abolished on 16 October 2017, while ST/SGB/2016/1 was abolished on 30 December 2016. They both do not apply to this case. The decision to place the Applicant on ALWOP for more than three months was made by the relevant authority in compliance with the applicable law.

b. There was probable cause that the Applicant engaged in SEA of a refugee and in terms of the applicable regulatory framework, the Administration's decision to place the Applicant on ALWOP was mechanical, the Respondent had no discretion to not to (*Muteeganda* para. 38).

48. The Respondent has also shown that, in addition to probable cause of SEA, there existed exceptional circumstances that warranted the Applicant's placement on ALWOP pursuant to staff rule 10.4(c)(ii). Citing *Muteeganda*, the Respondent avers that the objective circumstances in this case were that, there was evidence that made it more likely than not that the Applicant sexually harassed multiple staff members in his capacity as acting Head of Sub-Office Shiraz. By 17 February 2021, the IGO possessed screenshots showing that, on 29 October 2018, the Applicant had sent a document to the Sub-Office's WhatsApp group entitled "The Sex Bible: The Complete Guide to Sexual Love". The document has graphic sexual content. The Applicant then shared the same document individually with a staff member under his supervision (Annex R/10). This evidence together with corroborating testimonies of other witnesses suffice to meet the required standard of proof (*prima facie* evidence).

49. Contrary to the Applicant's assertions, which are not supported by evidence, his placement on ALWOP cannot be regarded as a disciplinary measure infringing on the presumption of innocence or aimed at inducing him to resign from his job. Staff rule10.2(b)(iii) specifically provides that administrative leave with full or partial pay or without pay pursuant to staff rule10.4 is not a disciplinary measure but an administrative measure. This fact was explicit in every communication that the Applicant received in relation to this matter.

50. The Respondent has shown that he is cognizant that ALWOP is an extraordinary measure designed to be of short duration. He asserts that the Applicant was on ALWOP for five and a half months before his status was converted to ALWPP. This period is not unreasonably long when viewed from a comparative basis with similar cases. For instance, the Appeals Tribunal upheld six months ALWOP in *Muteeganda,* eight months was found reasonable in *Gisage* and one year was justifiable in *Erefa*.

51. In any event, any adverse impact caused by the length of ALWOP was mitigated by the conversion to ALWPP effective1 August 2021.The Director of DHR considered the Applicant's financial concerns and based on an assessment of the cost of living and other factors, set the Applicant's net take-home pay at USD1,000. In addition, UNHCR is paying the Applicant's and the Organization's contributions to maintain the Applicant's health insurance coverage and participation in the UNJSPF (Annex R/13). This information contradicts the Applicant's assertion that he is experiencing medical hardship. The record also shows that the Applicant was allowed to leave the duty station indefinitely so that he could minimize his financial hardship (see Annex R/5). The Applicant has not disputed these facts.

52. In his revised application, the Applicant makes reference to his placement on ALWPP and asks the Tribunal to order that this too is unjust and unlawful. The Tribunal finds that the decision to place the Applicant on ALWPP is an individual decision made after the Administration had considered special circumstances regarding the Applicant's financial situation. This decision ought to have been subjected to management evaluation as a first step. There is no proof that such step was taken. The Tribunal lacks competence to review a matter that has not previously been referred for management evaluation (see para. 34 above). This part of the application is not receivable.

Applicant's request for anonymity

53. As a general rule, the proceedings of the internal justice system must be

transparent and that includes disclosure of names of parties[19]. In exceptional cases, the Tribunal may rule in favor of anonymity. A motion for anonymity must be justified by valid reasons, In *Williams,* UNAT stated that;

> … [t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability". And Mr. Williams has not shown any "greater need than any other litigant for confidentiality". Staff members of the Organization often challenge employment-related decisions pertaining to their performance or even misconduct before the internal justice system. If confidentiality attached in each case, there would be no transparency regarding the operations of the Organization, which would be contrary to one of the General Assembly's purposes and goals for the internal justice system. Thus, Mr. Williams's possible embarrassment or discomfort in discussing events at ICAO or events surrounding his father's death is not good cause to grant the motion for confidentiality.[20]

Further, UNAT has held that the purpose of confidentiality is to protect victims of misconduct. The Applicant has not shown that he is a victim of misconduct.[21] The Tribunal declines the motion.

Judgment

54. In conclusion the Applicant has not satisfied the Tribunal that the ALWOP later converted to ALWPP was unjust or unlawful. There is no proof of violation of his terms and conditions of employment therefore he is not entitled to any remedy. The application for rescission of decision, reinstatement on full or partial pay from 17 February 2021 and moral damages is without merit. It is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 30th day of March 2022

[19] *Buff* 2016-UNAT-639, para. 21.
[20] UNAT Order No. 146 (2013), para. 5.
[21] *Oh* 2014-UNAT-480, para. 23.

Entered in the Register on this 30th day of March 2022

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi