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

Judgment No. 2022-UNAT-1293



**James Okwakol
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:

Judge Graeme Colgan, Presiding

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Counsel for Mr. Okwakol:

Sètondji Roland Adjovi

Counsel for Secretary-General:

Angélique Trouche

participating in a meeting with others to negotiate the payment of compensation to the complainant in return for the withdrawal of her complaint.

6. On 13 January 2020, Mr. Okwakol was placed on ALWOP for lesser of a period of three months (i.e. until 13 April 2020)7J0.002 T(r)-1 (r)-6 (o)TJ0 Tc 0 T3pe th

Mr. Okwakol) were said to have directed

11. The decision to place Mr. Okwakol on ALWOP retroactively from 16 April to 12 May 2020 was rescinded on 22 June 2020 and he was paid for that period from 16 April to 12 May so that, effectively, he was on ALWP for that period. His ALWOP continued from 13 May to 15 July 2020. From 16 July, Mr. Okwakol's status was again altered to ALWP.

12. With the agreement of the parties, the UNDT decided Mr. Okwakol's claims on the papers filed and without a hearing of the evidence of witnesses.

13. The UNDT's Judgment was issued on 19 November 2021. As already noted, it found Mr. Okwakol's claims u

administrative leave was imposed and continued on unchanged grounds.⁴ The UNDT reasoned that this conclusion accorded with Staff Rule 10.4(a) which contemplates ALWOP continuing potentially until the completion of the investigative and disciplinary processes, which, if this extends beyond the maximum three-month period, contemplates (implicitly) an extension or even extensions of that period. The absence of new factors in, or grounds for, the extension of ALWOP, was significant in the UNDT's view. Had there been such factors present, the decisions may have amounted to a new administrative decision, but there were not. The UNDT decided in these circumstances that there was one effectively continuous ALWOP decision based on unchanging grounds which had been managerially evaluated.⁵

17. Turning to the merits of Mr. Okwakol's claims about the insufficient grounds for the ALWOP, the UNDT decided these by analysing whether the ALWOP decision was rationally made on the criteria for such a temporary sanction based on the information available to the Secretary-General at the time of the decision. The UNDT set that date as 13 January on the basis that, although the retroactive extension was announced on 13 May, this was against an unchanged factual situation.

18. In evaluating the placement of Mr. Okwakol on ALWOP, the UNDT considered itself bound by Staff Rule 10.4 and Section 11.4 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) which the UNDT concluded required the establishment by the Secretary-General of the existence of "exceptional circumstances". It held that there were two pre-conditions: first, the unsatisfactory conduct of which the staff member was accused must be sufficiently grave to warrant separation from service; and, second, that

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Initial ALWOP Decision”) and the 13 May 2020 ALWOP decision (which he terms “the ALWOP Renewal Decision”), were separate decisions.

27. The Secretary-General points out that Mr. Okwakol’s 25 June 2020 request for management evaluation was timely only as to the ALWOP Renewal Decision but was 104 days too late with respect.7 (e)-4.3 (A)2beu3(W)-3.1 (OP)-3 (1 (ti)-3.1 (e)- (e)-9.8 (ne)-4.4 (w)-1.7 (al)0..j-0.00

33. The Secretary-General maintains that the Dispute Tribunal improperly substituted its own judgment for that of the Administration when it concluded that the information available to the decision-maker, namely the OIOS Memorandum and the Code Cable, was “insufficient for a conclusion that it was more likely than not that some misconduct took place on the part of [Mr. Okwakol].”¹³

34. The Secretary-General submits that the Administration had determined that placement of Mr. Okwakol on ALWOP was warranted in accordance with section 11.4(b) of ST/AI/2017/1. Pursuant to that Administrative Instruction, a staff member may be placed on administrative leave without pay when “exceptional circumstances” exist including that “the unsatisfactory conduct is of such gravity that it would, if established, warrant separation or dismissal.” The Secretary-General argues that in line with the UNAT’s decision in *Muteganda*,¹⁴ “the Secretary-General’s classification of the objectively established circumstances as exceptional, is a matter for his discretion,” and the al ()]6 (c)-6.10-C (1) (S) 2-3 (M) 4-10-18

37. The Secretary-General argues that, taken together, the Dispute Tribunal's interpretation of both ST/SGB/2003/13 and ST/AI/2017/1 undermines the Organization's effective implementation of Staff Rule 1.2(c), which establishes a duty to report any breach of the Organization's rules, including Staff Rule 1.2(e) that prohibits sexual exploitation and abuse.

38. For the foregoing reasons, the Secretary-General requests that this Tribunal vacate the impugned Judgment.

Mr. Okwakol's Answer

39. Mr. Okwakol urges this Tribunal to reject the appeal because the Secretary-General has failed to satisfy any grounds for appeal under Article 2(1) of the UNAT Statute. To the contrary, in Mr. Okwakol's view, the Secretary-General is merely relitigating issues and facts that were reasonably adjudicated by the Dispute Tribunal. Mr. Okwakol also asserts that the Secretary-General has made false factual claims that warrant sanction.

40. Mr. Okwakol objects to the Secretary-General's use of the term "renewal" to describe the ALWOP decision of 13 May 2020. Mr. Okwakol points out that the 13 May 2020 ALWOP decision was an "extension" of the original ALWOP decision. He points to "

43. Moreover, Mr. Okwakol disputes the Secretary-General's characterization of the 13 May 2020 decision as being based on a fresh assessment of the circumstances. Unlike the situation in *Gisage*, Mr. Okwakol contends that there was no change from January to May 2020, as the investigation remained incomplete at the latter date.

44. He also submits that the Dispute Tribunal correctly found that his placement on ALWOP was unlawful based on the information available to the decision-maker at the time, and that the Secretary-General's disagreement with the UNDT's (He)-4.4enesu4o(He)-4.4e(e)-4.4 (-4.3 (

each decision point, the Administration reassessed the situation and the progress of the investigation. In one instance, that decision was made as the result of further information coming to hand.

49. On the estoppel argument raised by Mr. Okwakol, we are satisfied that the receivability question was addressed clearly by the MEU in its 2 October 2020 decision. It both identified that Mr. Okwakol's claim did not relate to the 13 January decision to impose ALWOP and held that, in any event, he had failed to make a timely evaluation request in respect of that decision. Mr. Okwakol was not led to believe that this was not an issue, as he appears to claim, until he was before the UNDT.

50. It follows from that conclusion that the substantive lawfulness of the 13 January decision was not properly before the UNDT which was entitled in law to evaluate the substantive lawfulness only of the 13 May decision to place the Respondent on further ALWOP and so we will deal with the merits of that aspect of the appeal.

51. While ALWOP is not a disciplinary sanction, its effects on a staff member, especially in cases involving a prolonged investigation, can be detrimental and in some ways at least as, or even more, detrimental than severance from service. That

53. The consequences of being on ALWOP are not only economic. The shame, stigma, humiliation, loss of dignity and other similar less tangible but nevertheless real consequences attaching to being suspected of serious misconduct are residual and oppressive. That may be so even if the staff member is eventually found to have been innocent of these serious charges.

54. While the emphasis placed by the Organisation on the identification and elimination of SEA is very important, so too are the human and due process rights of staff members who have not yet at least, been adjudged guilty of that misconduct. These factors must be carefully balanced in making decisions about administrative leave and particularly if this is to be without pay and for prolonged periods as in Mr. Okwakol's case.

55. For these reasons, the General Assembly has put in place some protections or safeguards against the improper use of ALWOP which, because of its potential effects on fundamental human rights, must be satisfied by the Organisation if it seeks to impose this administrative measure.

56. First, Staff Rule 10.4(b) requires that if a staff member is to be placed on administrative leave (irrespective of whether this is with or without pay), that staff member must be given a written statement of the reasons for such leave and its probable duration. This requirement focuses the Organisation's attention on the need to have good reasons for the interim sanction and to undertake and complete its investigation and decision-making in a timely, as well as a thorough, way.

57. Second, the presumption is that administrative leave will be on full pay (ALWP). That default position is subject to exceptions. The first is where there is "probable cause" (reasonable grounds to believe) that the staff member has engaged in sexual exploitation and sexual abuse". By the use of the word "and", the requirement for these conducts is apparently cumulative, that is that there must exist probable cause to believe that the staff member has engaged in both sexual abuse and sexual exploitation. These terms are not defined in the Staff Rules, but are addressed in Section 1 of the relevant Secretary-General's Bulletin, ST/SGB/2003/13, as follows:

The term "sexual exploitation" means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited

Similarly, the term “sexual abuse” means the actual or threatened physical intrusion is of a sexual nature, whether by force or under unequal or coercive conditions.

58. Mr. Okwakol cannot have been guilty of sexual exploitation or abuse as these terms are defined and so could not have been placed on ALWOP on this basis. That conclusion does not decide the case,

Judgment

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