
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/86
Judgment No.: UNDT/2021/135
Date: 19 Nov 2021. TJET/21/04
English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OKWAKOL

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

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17. On 13 July 2020, the Applicant sought management evaluation of the decision to place him on ALWP. He failed in a subsequent application to the Tribunal for suspension of action of the ALWP decision as it was dismissed by Order No.141 (NBI/2020). At paragraph 13 of the Order, it was noted that the Respondent L Q I R U P H G W K H 7 U L E X Q D O W K D W W K H 2 , 2 6 L Q Y H V W L J conduct had not 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. After the determinations in the motions, the application was docketed to the instant Judge on 1 September 2021 for determination on the merits. The Tribunal held a case management discussion 3 & 0 ' with the parties on 15 September 2021.

19. The parties agreed that the matter could be determined on the papers. They G X O \ I L O H G Z U L W W H Q F O R V L Q J V X E P L V C M B Q V L Q D F F directions.

Submissions

20. The Applicant contends that the application is receivable because there was one seamless ALWOP decision. This argument was accepted by the Tribunal in the related case of *Loto* Order No. 119 (NBI/2020).

21. The Respondent refutes this, contending that the Applicant failed to request management evaluation of the original ALWOP decision of 13 January 2020. Hence, his application is not receivable in so far as it challenges the first three months of his ALWOP.

22. The Respondent points out that the Tribunal had observed at paragraph 11 of Order No.127 that the ALWOP decision made on 13 January 2020 was not the subject of the suspension of action application then before the Tribunal. It was separate from the 13 May 2020 decision, which the Applicant sought to have suspended. The Tribunal opined that the 13 May 2020 which was before it for V X V S H Q V L R Q Z D V μ F O H D U O \ D G L V F U H W H D G P L Q L V W U decision that applied the ALWOP in the first place, E X W U H Y L H Z D E O H L Q O / 4 & •

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the first three months of his ALWOP is not receivable.

23. As to the merits of the case, the Applicant highlights that there was a lack of due process in the investigation, that gave rise to the memorandum, acted on to place him on ALWOP. He reported this to the USG/DMSPC in August 2020 and thereafter, the interview process restarted with new investigators.

24. The Applicant further submits that the XQODZIXOQHVV RI WKH 5HVS
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\$SSOLFDOQW V OHDWHWR \$ 3 relates to the retroactive
aspect of the ALWOP from April to May 2020 and for the months from July 2020,
immediately after the period that the instant application addresses.

25. C

29. The Respondent contends that the information available when the ALWOP decision was made was sufficient to conclude that it was more likely than not (a preponderance of evidence) that the Applicant committed the misconduct.

30.

34. In *Gisage* 2019-UNAT-973, the Appeals Tribunal explained the reason for finding an extension of the ALWOP, in that case, to be a separate administrative decision at paragraph 30, as follows:

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**. [Emphasis added]

35. Unlike the circumstances in *Gisage*, this case did not involve a situation of new decisions being made with each extension.

36. In this case, the Order No. 119 interpretation of the impugned ALWOP as one continuing decision fits squarely within the regulatory framework. Staff rule 10.4(a) contemplates ALWOP as potentially continuing until completion of the disciplinary process. Implicitly, extensions can be anticipated once an ALWOP decision is made.

37. Unless there are new facts and assessments giving rise to the extensions, the extensions *per se* may not fit within the characteristics clearly elucidated in *Gisage* to amount to new decisions. In such cases, staff members cannot be expected to submit repeated management evaluation requests and applications to the Tribunal.

38. In all the circumstances, the Tribunal finds that there was one continuing ALWOP decision, expressly based on the initial, 13 January 2020, considerations and reasons. No aspect of the challenge fails on grounds of non-receivability.

Merits

39. ~~TKH 7 U L E R E V I E W O F T H E~~ Review of the merits of this application focusses 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.

40. In this process of review, the Tribunal is mindful of the presumption of regularity

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41. The regulatory framework governing the placement of a staff member on ALWOP 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

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

² *Niedermayr* 2015

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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.

54. There was *prima facie* no basis at the time when the ALWOP decision was made to conclude 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.

55. In cons LGHULQJ ZKHWKHU WKH 5HVSRQGHQW¶V \$/:23 there must be further consideration whether, on (the 4004C0a4C0a4C0a4C0a4C0a4t7hr)-9(7538.51 bC0

59. The information on record was that the Applicant was saying

