



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1292



Richard Loto
(Respondent /Applicant)

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos , Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case No:	2022-1651
Date of Decision:	28 October 2022
Date of Publication:	16 December2022
Registrar:	Juliet Johnson

Counsel for Mr. Loto: Sètonджи Roland Adjovi

Counsel for Secretary-General: Angélique Trouche

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8. On 25 November 2019, the complainant attended a meeting with Mr. Loto, two other staff members of MONUSCO (Mr. O. and Mr. K.), and the UNV. The complainant recorded this meeting. During the meeting, Mr. Loto, Mr. O. and Mr. K. directed the complainant to withdraw her report to the CDT. Following this meeting, the complainant attempted to withdraw her report but was informed that her complaint had been already referred to the Office of Internal Oversight Services (OIOS). wiDieribenan46dOn(St b)2(th)-123

this is supported by “relevant information obtained by ID/OIOS during the investigation, including an interview with [Mr. Loto]”.

11. On 13 May 2020, Mr. Loto was notified that the USG/D MSPC was extending his ALWOP for an additional period of three months retroactively from 13 April 2020, or until the completion of the disciplinary process, whichever came earlier. It was stated that “[t]he reason for the extension is that the considerations under ST/AI/2017/ 1 warranting [his] placement on ALWOP continue to exist”.

12. On 14 June 2020, Mr. Loto filed an application before the UNDT, challenging the decision to place him on ALWOP.

13. On 17 June 2020, Mr. Loto filed a motion for interim measures pending determination of the application before the UNDT. He sought to change his administrative leave from ALWOP to Administrative Leave With Pay (ALWP).

14. On 19 June 2020, the Assistant Secretary General for Human Resources (ASG/OHR)

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seamlessly”.² The UNDT distinguished this case from *Gisage*³ in which the UNAT stated that “the decision to extend the ALWOP was based on a fresh assessment and constituted a separate decision”. The UNDT found that unless there are new facts and assessments giving rise to the extension, the extension of ALWOP is not a separate administrative decision. The UNDT held that its interpretation fits squarely within the regulatory framework, as Staff Rule 10.4(a) contemplates ALWOP as potentially continuing until completion of the disciplinary process and thus implicitly, extensions can be anticipated once an ALWOP decision is made. Accordingly, the UNDT held that the application was receivable in its entirety.⁴

18. On the merits, the UNDT held that the impugned ALWOP decision was not rationally based on the criteria for ALWOP, given the information available when the decision was made on 13 January 2020.

19. Regarding the nature of h e g t 6 - 0 . 9

deemed an ill-motivated act, to damage the reputation and career of a colleague. There was no rational basis, from the information available, to conclude that it was more likely than not that [Mr. Loto] committed misconduct worthy of dismissal, by not reporting [the complainant/ victim's allegations".⁷

21. As to the misconduct charges arising from the 25 November 2019 meeting the UNDT held that the information available in the OIOS memorandum was not conclusive as to whether Mr. Loto and others were discussing payment in exchange for not reporting a rape. The OIOS memorandum indicated that there was a recording of the meeting, which included demands by the complainant for payment from the UNV and directions by Mr. Loto that she should withdraw her complaint. There were alternate versions of events on the record, whether rape or money owed was the true problem faced by the complainant. The UNDT however held that there was cogent available information that Mr. Loto lied during his OIOS interview by denying that money was discussed at the 25 November 2019 meeting. Information available from the OIOS memorandum indicated that Mr. Loto attempted to have discussions with other witnesses before his OIOS interview, but the UNDT held that no information was available to clearly link this conduct to concealment of a Tc 0.02 Tw 2.07185 00.67 (aiT) (s wh-1.2 (ek)-01N)9.187 (DT. c

Submissions

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25. On the issue of receivability, the Secretary-General submits that the UNDT erred in law and

32. The Secretary-

37. Throughout his appeal brief, Mr. Loto argues that the Secretary-General refers to “renewal” of ALWOP in a misguided attempt to mislead the UNAT

42. The Appeals Tribunal will examine these matters in turn.

Whether the UNDT erred in law and fact by finding that both the initial ALWOP decision and the ALWOP decision which extended the initial decision were receivable ratione materiae

43. Article 2(1)(a) of the UNDT Statute confers jurisdiction upon the UNDT to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with the staff member's terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent Staff Regulations and Rules and all relevant administrative issuances in force at the time of the alleged non-compliance.¹¹

44. Under Article 8(1)(c) of the UNDT Statute, an application shall be receivable if the applicant has previously submitted a contested decision for management evaluation where required. This obligation upon the applicant is also prescribed in Staff Rule 11.2(a), which provides that a staff member wishing to formally contest an administrative decision shall, as a first step, submit to the Secretary-General in writing a request for management evaluation. Pursuant to Staff Rule 11.2(c), a request for management evaluation is to be submitted to the Secretary-General within 60 calendar days from the date on which the staff member received notification of the contested administrative decision.

45. Moreover, the Appeals Tribunal has held that it is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the Dispute Tribunal's judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to define the administrative decision challenged by a party and to identify the subject(s) of judicial review.¹²

46. Further, we recall that, per our jurisprudence, an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. Further, the date of an

¹¹ *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para.35.

¹² *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 26; *Cardwell v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-876, para. 23; *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20.

administrative decision is based on objective elements that both parties (the Administration and the staff member) can accurately determine.¹³

47. Deciding what is and what is not a decision of an administrative nature may be difficult . This determination must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.¹⁴ What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the

extensions, the extensions *per se* may not fit within the characteristics clearly elucidated in *Gisage* to amount to new decisions”.¹⁸

51. Finally, based on these findings, the UNDT concluded that “there was one continuing ALWOP decision expressly based on the initial assessment[on 13 January 2020]. The application is receivable in its entirety”.¹⁹

52. In his appeal, the Secretary-General submits that the UNDT erred in fact and law by finding that Mr. Loto’s application was receivable against one “continuing decision” in force since 13 January 2020, seemingly composed of the initial ALWOP decision, dated 13 January 2020, and the ALWOP decision, dated 13 May 2020, which extended Mr. Loto’s ALWOP for three more months retroactively from 13 April 2020. The Secretary-General contends that the 13 May 2020 ALWOP decision is a separate administrative decision, which was based on the reexamination by the Administration of the circumstances and concerns a separate and distinct period of time; specifically, the initial ALWOP decision was valid for the period 13 January 2020 to 12 April 2020, while the subsequent ALWOP decision covered the period 13 April 2020 to 12 July 2020.

53. The Secretary-General argues that the existence of two separate decisions is further shown by the Code Cable addressed by the MONUSCO SRSG to the USG/SPC on 4 May 2020, which prompted the 13 May 2020 ALWOP decision, wherein the SRSG had stated: “I am of the *considered* opinion that the reasons for the initial placement of the [Appellee] on ALWOP have not changed.”²⁰ Therefore, in the Secretary-General’s view, the 13 May 2020 decision had been taken after a fresh assessment of the circumstances at the time it was issued, and that assessment led to the conclusion that the basis for the ALWOP had not changed.

54. In urging the Appeals Tribunal to find that the UNDT erred on a question of law and fact in receiving Mr. Loto’s case concerning the 13 May 2020 administrative decision extending the ALWOP period, the Secretary-General cites Staff Regulation 11.1, which provides that: “The United Nations Dispute Tribunal shall, under conditions prescribed in its statute and rules, hear and render judgment on an application from a staff member alleging non-compliance with his or her terms of appointment or the contract of employment, including all pertinent

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regulations and rules". Based on this rule, the Secretary-General asserts that, by framing Mr. Loto's challenge as one against a continuing ALWOP decision, the UNDT exceeded its jurisdiction in the impugned Judgment, because Mr. Loto had not even filed an application with the Dispute Tribunal of the decision to extend his ALWOP on 13 May 2020.

55. In response, Mr. Loto claims that in Order No. 119, the UNDT had already rejected the Secretary-General's arguments that the 13 May 2020 retroactive extension of the 13 January 2020 ALWOP decision was a separate act,²¹ and in so doing, rejected his claims on receivability of the 13 May 2020 ALWOP decision.

56. Mr. Loto goes onto argue that:²²

Following the 1 September 2020 assignment of the instant case to the UNDT, the issue of receivability was not raised during the 15 September 2021 CMD [Case Management Discussion] and no further orders were issued ordering the Applicant to respond to the Respondent's arguments on receivability. Therefore, [Mr. Loto] submits that the issue of receivability ha[d] already been disposed of as a preliminary matter in these

defense that his challenge to the 13 May 2020 ALWOP decision was not receivable *ratione materiae* before the UNDT.

59. While this Tribunal unequivocally endorses the principle that, pursuant to Article 2(inci ivabts25.4 9Tc 0 8 (o)DN 2b()Tj/612 -0 (o)t.5 (rtu (.Tw 5t.196w 5),).9 (b.793 0 Td 04

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2022-UNAT2

(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
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therefore not dependent singularly on the opinion of the Secretary-General regarding their existence. Likewise, there must be a rational basis for the categorization by the Secretary-General of the circumstances as exceptional. Moreover, given the hardship caused by ALWOP, the onus is on the Administration to prove the objective existence or factual basis of the exceptional circumstances.

69. Under the applicable legal framework, in cases of misconduct the Secretary-General is not at complete liberty to place a staff member on ALWOP, as his discretion to do so is conditioned upon the existence of exceptional circumstances which, in instances of misconduct other than those concerning SEA²⁸, requires that: (1) 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 (2) there is information before the authorized official about the unsatisfactory conduct that makes it more likely than not (preponderance of the evidence) that the staff member engaged in the unsatisfactory conduct.

70. To decide whether there were exceptional circumstances justifying Mr. Loto's placement on ALWOP, the UNDT first established that "[t]here [was] no absurdity in the [Administration

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Section 11.4 (a) of ST/AI/2017/1 by analogy or broad reading. These provisions must be interpreted restrictively.

78. That said, however, the Appeals Tribunal will now examine whether the UNDT erred in law and in fact by finding that the available information did not establish by a preponderance

investigation including Mr. Loto's interview with OIOS, led the Administration to conclude that it was more likely than not (preponderance of evidence) that Mr. Loto had engaged in the above-described misconduct.

82. In these circumstances, there was thus undoubtedly a preponderance of evidence, i.e. more likely than not, that Mr. Loto had committed the alleged misconduct. It is a matter of record and it was not refuted by Mr. Loto that, on 10 July 2019, the complainant informed him of her alleged rape by the UNV, and that Mr. Loto did not report this SEA allegation to the competent United Nations authorities. Against this background, which objectively established the

THE UNITED N

Judgment

87. The Secretary-General's appeal is granted, and Judgment No. UNDT/2021/133 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Raikos

(Signed)

Judge Sandhu

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 16th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar