



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

Judgment No. 2019-UNAT-973



**Gisage
(Respondent/Applicant)**

v.

Secretary-General of the United Nations

Counsel for Mr. Gisage:

Abbe Jolles

Counsel for Secretary-General:

Nathalie Defrasne

5. The record indicates that the decision of 16 January 2017 was based on: i) allegations made on 10 December 2016 by three Congolese women to the Head of the MONUSCO Office in Matadi, Democratic Republic of the Congo (DRC) that Mr. Gisage had engaged in multiple sexual acts and had refused to make payment; ii) a letter dated 12 December 2016 from the counsel of one or more of the Congolese women to the office of a prosecutor of the DRC describing the allegations; iii) a letter dated 13 December 2016, from Mr. Gisage to the Chief Security Officer, MONUSCO, by which he denied having solicited sex from any of the women; and iv) a letter dated 19 December 2016 from a prosecutor of the DRC requesting Mr. Gisage to report to his office for questioning on the matter.

6. On 3 April 2017, the MONUSCO Special Investigation Unit (SIU) completed its investigation report.

7. By letter dated 28 April 2017, Mr. Gisage was notified of the decision to extend his ALWOP for an additional three months from 28 April 2017, pending the completion of the investigation and disciplinary process. This letter repeated that there was prima facie evidence of the misconduct and stated that the reason for the extension of the ALWOP was “that the considerations warranting your placement on ALWOP continue to exist”.

8. On 22 May 2017, the Assistant Secretary-General for Field Support (ASG/DFS), referred the disciplinary matter concerning Mr. Gisage to the Office of Human Resources Management (OHRM).

9. By letter dated 27 July 2017, Mr. Gisage was notified of the decision to extend the ALWOP for a further three months pending the completion of the investigation and the disciplinary process, if any. In this letter, the USG/DFS stated that the reason for the extension of the ALWOP was “that there are reasonable grounds on which it may be concluded that you engaged in misconduct. Specifically, the MONUSCO investigation revealed that there are signed and sworn consistent statements of three sex workers about the matter, as well as your confirmation that you eventually paid the women through an intermediary.”

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place him on ALWOP was time-barred and therefore not receivable. The MEU further stated that only the supplemental request of 20 September 2017 for review of the decision to extend Mr. Gisage's ALWOP from 28 July 2017 was receivable. The MEU then concluded that the decision to extend the Applicant's placement on ALWOP for three months from 28 July 2017 was appropriate in the circumstances.

14. On 26 October 2017, Mr. Gisage was notified that his ALWOP had again been extended.

15. On 7 December 2017, Mr. Gisage filed an application with the UNDT contesting the decisions of the USG/DM dated 16 January 2017 to place him on ALWOP and to extend the

18. The Secretary-General filed an appeal with the United Nations Appeals Tribunal (Appeals Tribunal) on 17 June 2019, and Mr. Gisage filed his answer on 9 August 2019.

Submissions

The Secretary-General's Appeal

19. The UNDT erred in finding that Mr. Gisage's application was receivable in its entirety. The UNDT's conclusion that the contested decisions formed one coherent decision ignores the fact that each of the decisions was taken at different stages of the process and were based on a fresh assessment of different sets of facts as they existed at the relevant time.

20. The first decision to place Mr. Gisage on ALWOP, of which he was informed in the 16 January 2017 letter, was based on credible allegations. The subsequent decisions to extend Mr. Gisage's placement on ALWOP followed the completion of the investigation by the MONUSCO SIU and the submission of its investigation report. The facts taken into consideration when extending the ALWOP were different from the allegations and other evidence relied on in January 2017. Accordingly, the decisions were distinct from each other and did not constitute a single decision placing Mr. Gisage on ALWOP. Since he failed to seek management evaluation with respect to the decision to place him on ALWOP and the first decision to extend his ALWOP, his application was not receivable in respect of those decisions. The UNDT therefore erred in concluding that the application was receivable in its entirety.

21. The UNDT also erred in concluding that no exceptional circumstances existed to support Mr. Gisage's placement on ALWOP. The applicable standard of proof to determine whether exceptional circumstances exist is that of probable cause. Reasonable grounds to believe that sexual misconduct had occurred is a circumstance that may reasonably be considered as exceptional. The complaints, surrounding circumstances and Mr. Gisage's confirmation that he paid the women through an intermediary provided reasonable grounds to believe that he committed prohibited conduct.

22. The UNDT further erred in concluding that Mr. Gisage's placement on ALWOP for 12 consecutive months was unjust and unlawful. There is no time limit on the period for which ALWOP may endure. ALWOP is not a disciplinary measure but an administrative measure. The investigation into allegations of sexual exploitation against a staff member and the disciplinary process can be complex and time-consuming, especially in certain duty stations

26. Mr. Gisage's placement on ALWOP was unlawful. For placement on ALWOP to be lawful, the Secretary-General must find exceptional circumstances. The existence of exceptional circumstances cannot be determined until surrounding circumstances have been considered. Such consideration must happen before ALWOP becomes operational. Although Mr. Gisage was informed on 16 January 2017 that there was sufficient prima facie evidence to place him on ALWOP, no such evidence existed at the time. Absent a prima facie case and investigative findings, Mr. Gisage's placement on ALWOP was unlawful. The Secretary-General's reliance on Muteeganda⁴ in support of his contention that Mr. Gisage's placement on ALWOP was lawful is misplaced, since a finding of probable cause requires some evidence. The standard established in Muteeganda supports the requirement that at the time of the decision to place Mr. Gisage on ALWOP, the Secretary-General must have acted in a fair and justifiable manner by moving beyond mere allegations and by considering surrounding circumstances before choosing the option of ALWOP.

27. The suspension without pay in Mr. Gisage's case operated as a disciplinary measure. It took the Organization seven months to investigate and advise Mr. Gisage of the charges against him. Multiple extensions brought Mr. Gisage's ALWOP up to twelve months during which time he was barred from engaging in paid work. Pursuant to the letter and spirit of the Staff Rules, when a staff member is placed on ALWOP, the process must be treated with reasonable dispatch. Staff members on administrative leave, who are forbidden to work, need money to live. Keeping Mr. Gisage on ALWOP for 12 months does in fact constitute a disciplinary measure.

28. Mr. Gisage requests that the Appeals Tribunal dismiss the appeal in its entirety and order evTD1age requests thatt

Considerations

29. Staff Rule 11.2(c) requires a staff member to seek management evaluation within 60 calendar days from the date on which the staff member received notification of the contested administrative decision. It is not disputed that Mr. Gisage did not seek management evaluation of the decisions of 17 January 2017 or 28 April 2017. He waited until the third decision of 27 July 2017 before seeking management evaluation.

30. The first decision of 16 January 2017 was based mainly on the reports received from the sex workers and their representative and the intervention of the 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 SIU 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. In addition to the

33. Staff Rule 10.4 as set out in ST/SGB/2016/1 was replaced by ST/SGB/2017/1 with effect from 1 January 2017. It reads:

36. As set out above, Mr. Gisage was placed on ALWOP initially in January 2017 upon receipt, by the Head of the MONUSCO Office in Matadi, DRC, of allegations of solicitation of sex in exchange for payment by the three Congolese women. In addition to these allegations, MONUSCO had received copies of a letter from the counsel of one or more of the Congolese women to the office of a prosecutor of the DRC describing the allegations, a letter from Mr. Gisage to the Chief Security Officer, MONUSCO as well as a letter of a prosecutor of the DRC requesting Mr. Gisage to report to his office for questioning on the matter. These led the MONUSCO SGoe.48

justifying the decision to extend the ALWOP on 27 July 2017. The UNDT's finding that no exceptional circumstances existed to extend Mr. Gisage's ALWOP is a material error of law.

40. The UNDT further erred in concluding that Mr. Gisage's placement on ALWOP for 12 consecutive months was unjust and unlawful because of its duration. Staff Rule 10.4(b) was amended by ST/SGB/2017/1, superseding ST/SGB/2016/1 with effect from 1 January 2017. It no longer includes a provision limiting the duration of ALWOP to three months. The UNDT misdirected itself by assuming that the legislator intended to limit ALWOP to three months. However, any decision to extend ALWOP must be reasonable and proportional. A decision to extend ALWOP is a drastic administrative measure and normally should be of short duration. That said, there was no basis for the UNDT to set an arbitrary time limit of three months to complete the investigation and the disciplinary process. Much will depend on the circumstances, 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. In the present case, the length of time required for the investigation and the subsequent disciplinary process was not unreasonable. The investigation was completed within three months and it established cogent reasons to believe that the prohibited conduct had occurred. The further delays related to the completion of the disciplinary process. Moreover, the UNDT exceeded its jurisdiction in reviewing the decision to extend the ALWOP on 26 October 2017, when such decision had not been challenged by Mr. Gisage.

41. Despite its potentially burdensome effects, Mr. Gisage's placement on ALWOP should not be regarded as a disciplinary measure infringing on the presumption of innocence. Staff Rule 10.2(b)(iii) specifically provides that administrative leave with full or partial pay or without pay pursuant to Staff Rule 10.4 is not a disciplinary measure but an administrative measure. To the extent that an ALWOP possibly infringes upon the presumption of innocence, the negative impact of the decision on an individual staff member is ameliorated by Staff Rule 10.4(d) which requires withheld pay to be restored without delay where the allegations of misconduct are not sustained. Additionally, where there is evidence supporting a contention that a decision to place a staff member on ALWOP, or to extend ALWOP, is *prima facie* unlawful, it is always open to the staff member to apply in terms of Articles 13 and 14 of the UNDT's Rules of Procedure for suspension of action pending management evaluation or the UNDT proceedings. Adequate safeguards exist for ensuring legality and proportionality for staff members subject to decisions to place them on ALWOP.

42. For these reasons, the appeal must be upheld and the decision of the UNDT be vacated.

Judgment

43. The appeal of the Secretary-General is upheld and Judgment No. UNDT/2019/059 is vacated.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Colgan

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

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