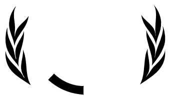

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/009, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 22 January 2018, in the case of *Muteeganda v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 23 March 2018, and Mr. Robert Muteeganda filed his answer on 4 May 2018.

Facts and Procedure

2. Mr. Muteeganda joined the Organization in 2006. At the time of his application before the UNDT, he was employed on a fixed-term contract as P-3 Logistics Officer at the United Nations Global Service Centre (UNGSC), Brindisi, Italy. Previously, he worked as a P-2 Supply Officer at the United Nations Operation in Ivory Coast (UNOCI) in Dalao, Ivory Coast.

3. While employed with UNOCI, Mr. Muteeganda was the subject of an investigation by the Office of Internal Oversight Services (OIOS) in connection with allegations of sexual misconduct involving a minor (JB). OIOS issued its investigation report on 26 May 2017.

4.

THE UNITED NATIONS

Submissions

The Secretary-General's appeal

11. The Secretary-General submits that the UNDT erred in law in substituting its judgment for that of the Secretary-General by concluding that the investigation report finding that Mr. Muteeganda had raped a minor did not constitute "exceptional circumstances"

in cases where there has not yet been an investigation but only reasonable grounds, i.e., probable cause, to believe that the staff member engaged in misconduct.

15. Secondly, the UNDT erred on a question of fact in finding that the evidence available at the time was insufficient to establish a probable cause, that is, that there were facts of sufficient detail that would lead a reasonable

20. The OIOS investigation reports conclusions were based on weak evidence. The alleged victim provided no evidence of the alleged rape and it was only reported several years after the alleged date of assault.

21. Mr. Muteeganda further submits that the Secretary-General incorrectly asserts that the UNDT ruled without authority and that it substituted its judgment for that of the Secretary-General.

22. Mr. Muteeganda requests that the Appeals Tribunal dismiss the Secretary-Generals appeal in its entirety and order the Secretary-General to comply with the UNDTs order within 10 days.

Considerations

23. The Staff Rule governing administrative leave pending investigation and the disciplinary process applicable to the facts of this case is Staff Rule 10.4 in ST/SGB/2014/1. As discussed below, Staff Rule 10.4 was amended in 2018 to address specifically the question of ALWOP in sexual misconduct cases. However, it is the old Staff Rule 10.4 which applies in this case. It reads:

> (e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

24. Paragraphs 4 and 5 of Administrative Instruction ST/AI/371 (Revised disciplinary measures and procedures), which were also applicable, read:[3]

> 4. If the conduct appears to be of such a nature and of such gravity that administrative leave may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general principle, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.
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> 5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether administrative leave is warranted. Administrative leave under Staff Rule 10.4 is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant administrative leave without pay, in both cases

misconduct with the consequence that there were no exceptional circumstances justifying the ALWOP decision.

27. The questions arising on appeal therefore are: what are exceptional circumstances and to what standard must they be proven? The Staff Rules do not provide a definition of, or any explanatory criteria for determining, "exceptional circumstances".

28. A qualification of a discretionary power, by way of a condition precedent requiring "exceptional circumstances" before it can be lawfully exercised, is intended to confer a more restricted power in order to alleviate or mitigate hardship that may otherwise arise, were the power permitted to be exercised conventionally or in the ordinary course. The constraint demands proof of surrounding circumstances that are extraordinary, thus justifying exceptional use of the power.

29. The requirement of "exceptional circumstances" is thus reviewable and the existence of the circumstances upon which the claim of exceptionality rests must be capable of objective determination, especially when the power which they qualify is drastic or burdensome, as in this case. The limitation upon the power to place a staff member on ALWOP, if it is to provide some relatively objective guarantee against arbitrary or capricious deprivation, cannot be founded exclusively on the subjective opinion of the decision-maker. The actuality of the alleged circumstances is objectively justiciable and 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.

30. The Secretary-General contends that egregious misconduct of a sexual nature posing a reputational risk to the Organization is *per se* an exceptional circumstance justifying ALWOP; and further that it is sufficient to discharge the onus by showing that there are

> 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.

Likewise, paragraph 11.4(a) of ST/AI/2017/1 provides that a staff member may be placed on ALWOP if there are reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse. The new policy advances the ethos of the Organization and its commitment to equality and non-discrimination. Sexual abuse and exploitation by United Nations staff undermines the implementation of the Organization's mandates and its credibility. The amendments aim at zero tolerance for sexual misconduct by imposing ALWOP on staff members where there is a reasonable basis for inferring sexual misconduct.

32. 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.

33. The new policy and amendments are not applicable to Mr. Muteeganda on account of his alleged misconduct having occurred before the amendments were enacted and promulgated. The question then is whether in this case the Secretary-General acted lawfully and reasonably, pursuant to the then applicable Staff Rule 10.4(c), in imposing ALWOP exceptionally on the basis that there were objective reasonable grounds to believe that Mr. Muteeganda had committed sexual misconduct.

34. In effect, the UNDT held that the insufficiency of the evidence meant that "exceptional circumstances" had not been established and that the exercise of power by the Secretary-General was accordingly illegal. The objective existence of exceptional