UNITED NATIONS DISPUTE TRIBUNAL

UNDT/2021/133

Date:

19 November 2021

Original:

English

Before:

- iv. The Applicant later¹ approached the alleged perpetrator who denied the allegation. The Applicant said the complainant/victim later² told him that she lied about the rape and she wanted to punish the alleged perpetrator because he owed her money and refused to answer her calls.
- v. The Applicant therefore believed this was a case of a misunderstanding about money between his two colleagues. The Applicant admits that he did not immediately report this as a rape when he heard of the allegation.
- vi. Several months later, on 20 November 2019, the complainant/victim reported the incident to the Conduct and Discipline Team ("CDT") in MONUSCO.
- vii. The Applicant was made aware of the complainant/victim's report the next day. He was questioned by the CDT about his failure to report.
- viii. He later sought guidance from another staff member, Mr O, and admitted to setting up a meeting for 25 September 2019.
 - ix. On 25 November 2019, the complainant/victim attended a meeting with the Applicant, the alleged perpetrator, Mr O and another colleague, Mr. Kuya. She recorded their conversation, wherein she requested an apology from the alleged perpetrator. The actions he was to apologise for were not defined in the discussions. The complainant/victim also requested that the alleged perpetrator pay her USD2,000.00. The Applicant, Mr. Okwakol and Mr. K directed her to withdraw her report to the CDT.
 - x. When the complainant/victim attempted to withdraw the report from the CDT, she was told that her complaint had been referred to the OIOS.

¹ R/3, paragraph 5. The word "later" is used in the OIOS Memorandum without specifying the time or date when the Applicant said he had this conversation with the alleged perpetrator. There is no

- xi. At a later interview with the OIOS, the Applicant responded 'no', when asked if money or compensation was mentioned in the 25 November 2019 meeting.
- xii. The Applicant requested a meeting with Mr. Okwakol and the alleged perpetrator on 11 December 2019, before his OIOS interview.
- 10. On 10 December 2019, the Applicant received an email from OIOS informing him that he was the subject of an investigation. He was required to submit to an interview on 13 December 2019.

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25. In substantiating these contextual points in the application, reference was made to an email sent on 27 November 2019³ to the MUNOSCO Chief of Staff. In that email, the Applicant pleaded for re-consideration. He had been orally informed by the Chief of Staff, that because he did not report the rape allegation, he would be suspended without pay and have a bad Christmas. The Applicant, while admitting that the complainant/victim at first came to him to say she had been raped, explained in his email:

I could not immediately inform CDU, because if the facts are not proven, it would be a slanderous denunciation. It was therefore necessary to be very cautious. I did not find myself in a proper place yet to report it to CDU.

- 26. In this way, the Applicant addressed the allegation of not reporting the alleged rape from the outset. The application and closing submissions do not address the allegations concerning his involvement in the meeting on 25 November 2019.
- 27. The Applicant's personal circumstances, including his prior 30 years of continuous, unblemished service with the United Nations, his financial responsibility for his immediate and extended family, were also highlighted in his application. This provided further contextual information on the impact of the ALWOP decision. There is no indication, in the decision correspondence, that personal circumstances were considered before implementing ALWOP, with immediate effect.
- 28. In closing submissions, Counsel for the Applicant made the additional argument that he relies on the point made in Order No. 119: that the retroactive aspect of the decision-making process tainted the decision as a whole and

first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

- 35. The Respondent contends that the 13 May 2020 retroactive extension was a separate administrative decision. There was a request by the Applicant for management evaluation, made out of an abundance of caution, but the time to consider it had not elapsed when he filed this application. In these circumstances, the Respondent's case is that consideration by the Tribunal of the period of ALWOP beyond the first three months is not receivable.
- 36. At the interim measures stage of these proceedings, the Tribunal made findings in Order

extensions per may not fit within the characteristics clearly elucidated in for to amount to new decisions. In such cases, staff members cannot be expected to submit repeated management evaluation requests and applications to the Tribunal.

41. Having considered the facts and circumstances in this matter, the Tribunal finds that there was one continuing ALWOP decision expressly based on the initial assessment. The application is receivable in its entirety.

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- 42. As aforementioned, the Applicant's closing submissions mainly challenge the lawfulness of the ALWOP decision based on it being tainted with illegality, by an attempt to make part of it retroactive.
- 43. However, the Tribunal's review of the merits of this application focusses primarily on

matter for his discretion," it "nonetheless must be exercised rationally."

47. The regulatory framework governing when the placement of a staff member on ALWOP is as follows:

Staff Rule 10.4

- A staff member may be placed on administrative leave, (a) 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.
- 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.
- 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 (Unsatisfactory conduct, investigations and the disciplinary process)

- 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;
- 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 rule 10.2 (a) (viii) or (ix), and 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.
- These provisions easily lend themselves to a literal interpretation. In other words: its plain English meaning. It is clear from the provisions, that when

⁶ Me∎l , 2000008u0.0-2()-2(2)6(0)-5(0TW82 Tm0 g0 G[()] TJETQ0.000008871 0 595.32 842.04 reW*nBT/F1 12 Tf

(e) Where a United Nations staff member develops **concerns or suspicions** regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, **he or she must report such concerns** via established reporting mechanisms;

53. The regulatory framework also guides the staff member on the elements he/she should consider when deciding whether to report on private interactions between colleagues, that have led to sexual abuse allegations. There is no indication that as soon as any staff member alleges to another, that a mutual colleague engaged in unwelcomed sexual conduct, the staff member receiving the information must report it to the Organization's investigators.

56. The Respondent has not established that each element of the Applicant's alleged actions herein is per grave enough to warrant ALWOP. This case must be examined on its own facts.

57. It is arguable that, whilst separately each alleged act of misconduct may not be sufficiently grave