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United Nations Dispute Tribunal

Case No.: UNDT/NBI/2017/127

Judgment No.: UNDT/2019/059

Date: 17 April 2019

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

GISAGE

v.

SECRETARY-GENERAL

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extend his ALWOP for an additional three months from 28 July 2017, or until completion of the disciplinary process; whichever is earlier. The

14. The Applicant submits that the application is receivable for the following reasons:

- a. A decision with a continuous legal effect, such as placement of a



22. MEU informed the Applicant that his initial placement on ALWOP in January 2017 and its first extension on 28 April 2017 could not be reviewed because they were time-barred and therefore not receivable. With respect to the second extension of the ALWOP dated 27 July 2017, MEU upheld the decision. Again, on 26 October 2017, the Applicant's ALWOP was extended for three more months.

23. The Respondent's case is that the initial decision to place the Applicant on ALWOP in January 2017 and the first extension of that ALWOP on 28 April 2017 cannot be challenged under art. 8.1(c) of the Tribunal's S

allegation of misconduct and pending the initiation of an investigation. It may continue throughout the investigation and until completion of the disciplinary process.

28. Both staff rule 10.4 (b)<sup>4</sup> and paragraph 6 of ST/AI/371 as amended by paragraph 3 of ST/AI/371/Amend. 1, which govern this Application, provide that if administrative leave is authorized, the staff member shall be informed, among other things, of the probable duration of the said administrative leave.

29. In the present Application, when the Applicant was initially placed on ALWOP in January 2017, he was informed that the said ALWOP would continue for three months, or until completion of the investigation and disciplinary process. The ALWOP was subsequently extended in April, July and October 2017.

30. Can each instalment of this ALWOP be regarded as a separate administrative decision or parts of a whole? In other words, are the extensions of the ALWOP on which the Applicant was placed separate and distinct in themselves or parts of a coherent whole, a continuum?

31. The Respondent argues that the decision to place the Applicant on ALWOP had been implemented at the time it was challenged and therefore not receivable or reviewable by the Tribunal.

32. In *Coleman*<sup>5</sup>, the Tribunal held that because the ALWOP on which the applicant in that case was placed was still ongoing at the time it was challenged before the Tribunal, it had not been fully implemented and could therefore be entertained. The Tribunal further rejected the Respondent's argument that the decision had been fully implemented and held that the application was receivable.

33. Also in *Kompass*<sup>6</sup> the Tribunal held that a decision to place a staff member on administrative leave, with or without pay, produces continuous legal effects during the entire period of the leave and is only fully implemented upon its

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<sup>4</sup> ST/SGB/2016/1.

<sup>5</sup> Order No. 200 (NBI/2014).

<sup>6</sup> Order No. 99 (GVA/2015).



completion. Similarly, in *Maina*,<sup>7</sup> the Tribunal held that the ALWOP on which the

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submits further that it was a reasonable decision given that the Applicant was charged with serious misconduct following the conclusion of the MONUSCO SIU investigation that found *prima facie* evidence against him.

43. It was further submitted for the Respondent that exceptional circumstances existed and that these consisted of: (i) serious and egregious allegations that the Applicant had transactional sex with one or more Congolese sex workers and paid them through an intermediary; (ii) there were reasonable grounds to believe that

48. He continued that maintaining the Applicant on full pay throughout the disciplinary process would constitute an unacceptable risk to the reputation of the Organization and to the population it serves in a mission setting. The Secretary-General has a zero-tolerance policy towards sexual exploitation and abuse by United Nations and related personnel and the credibility of the policy would be severely undermined if the Applicant's full salary continued to be paid while he was on AL.

49. The Tribunal does not find merit in the argument that the seriousness of the allegations against the Applicant constitutes an exceptional circumstance. An allegation, no matter how serious, is only an assertion that is yet to be proved. At the very least, there must be *prima facie* evidence implicating the Applicant. It was held in *Nianzou*<sup>11</sup> already cited by the Respondent that the mere fact that the allegations against the applicant are so serious that if proven, they would result in separation cannot constitute exceptional circumstances.

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52. As to whether the Secretary-General ought to first make a finding of “exceptional circumstances,” which would form the basis for ALWOP pursuant to staff rule 10.4, the Tribunal is of the view that such a finding would be especially desirable in cases of ALWOP. Clearly the Respondent’s argument that while he has discretion to place staff members on ALWOP, he has no obligation to first make such a finding cannot be justified and is fraught with avoidable difficulties.

53. The Tribunal may decide that exceptional circumstances existed after reviewing the facts of a case. However, the Respondent must show at the time of his decision to place the Applicant on ALWOP that he acted in a

allegations of serious misconduct, fell below the required threshold for the Respondent/decision-maker to show that indeed exceptional circumstances existed to support it.

Was it lawful and just for the Respondent to place the Applicant on ALWOP for twelve consecutive months?

57. The plain wordings of the first part of staff rule 10.4(d) are that “placement on AL shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.”

58. Staff Rule 10.2(a) deals with disciplinary measures and enumerates the nine forms that disciplinary measures may take. Under its subsection (iv), suspension without pay for a specified period is enumerated as one form of disciplinary measure. Also under subsection (v), the imposition of a fine is another form of disciplinary measure. Paradoxically, staff rule 10.2(b)(iii) provides that ALWOP is an administrative measure and not a disciplinary measure.

59. “What’s in a name? That which we call a rose by any other name would smell as sweet.” When the character Juliet uttered these words in Shakespeare’s Romeo and Juliet, she was stating the simple fact that a name does not change the innate characteristics of a thing. In other words, a label or tag does not change the nature of a thing. Before ST/AI/371/Amend.1 was promulgated on 11 May 2010, what is now referred to as AL was called

expense. Additionally, the Applicant was to be subject to the Staff Regulations, Staff Rules and other administrative issuances including the prohibition to engage in other employment.

61. Under the provisions of staff rule 10.4(b),<sup>15</sup> AL should as far as practicable notnot

management evaluation. On 26 October 2017, the ALWOP was extended for a third time bringing the period of the Applicant's ALWOP to a total of 12 months.

66. Since ALWOP is not meant to constitute disciplinary sanction but the affected staff member is usually stripped of a monthly salary and other allowances, medical insurance for himself and his or her family, the right to seek and accept other employment and cannot leave the duty station without approval, it is crucial and just that the required investigation and disciplinary process are accelerated. If the entire process is not treated with reasonable dispatch, it is disingenuous to claim that ALWOP does not constitute a disciplinary sanction or that the principle of presumption of innocence applies. The adage that actions speak louder than words cannot be truer in this case.

67. The Tribunal finds therefore that the Respondent's decision to place the Applicant on ALWOP for twelve consecutive months contravened the spirit of staff rule 10.4(b). The placement of the Applicant on AL for twelve consecutive months was unjust and unlawful.

## **JUDGMENT**

68. The application succeeds.

69. The Respondent shall pay the Applicant his salary that was withheld during the period that he was unlawfully



Entered in the Register on this 17<sup>th</sup> day of April 2019