



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

Judgment No. 2023-UNAT-1403

**Francis N. Fultang
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Graeme Colgan Judge Nassib G. Ziadé
Case Nos.:	2022-1761, 2022-1762
Date of Decision:	27 October 2023
Date of Publication:	14 December 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Sètondji Roland Adjovi
Counsel for Respondent:	Patricia C. Aragonés

JUDGE GAO XIAOLI, PRESIDING.

1. Mr. Francis N. Fultang (Mr. Fultang), a staff member of the United Nations Interim Security Force for Abyei (UNISFA) contested the decisions of the Administration: i) to place him on Administrative Leave with Pay (ALWP) for three months as of 14 June 2021 and/or until the completion of any further investigations into his conduct or other subsequent disciplinary process; and ii) to retroactively extend his ALWP for three months from 13 December 2021 through 13 March 2022, or until the completion of a disciplinary process, if any, whichever was earlier (contested decisions).

2. By Judgment No. UNDT/2022/102¹ (impugned Judgment No. 1), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed Mr. Fultang's first application and concluded that the initial decision to place him on ALWP was lawful and rational.

3. By Judgment No. UNDT/2022/110² (impugned Judgment No. 2), the UNDT also dismissed Mr. Fultang's second application. It further concluded that the reasons set out in support of Mr. Fultang's placement on ALWP continued to exist and that, therefore, the Administration acted lawfully when it decided to extend retroactively his ALWP. ...

4. Mr. Fultang lodged separate appeals of impugned Judgments Nos. 1 and 2 with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal). The Appeals Tribunal consolidated the two appeals.

5. For the reasons set out below, the Appeals Tribunal dismisses the appeals and affirms the impugned Judgments.

Facts and Procedure

6. In July 2009, Mr. Fultang joined the Organization. At the time of these events, he was employed as a Conduct and Discipline Officer, at the P-4 level, with UNISFA.

7. On 21 September 2020, Mr. Fultang filed an application before the UNDT contesting the decision not to pay him Daily Subsistence Allowance (DSA) (Case No. UNDT/NBI/2020/076).

¹ *Fultang v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/102.

² *Fultang v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/110.

8. On 24 November 2020, by Order No. 231 (NBI/2020), the UNDT struck the case off its docket because the matter had been resolved *inter partes*.³

9. On 22 March 2021, the Office of Internal Oversight Services (OIOS) informed Mr. Fultang by e-mail that an investigation had been opened with regard to “an allegation that [he] submitted fraudulent accommodation receipts relating to a stay in Entebbe, Uganda, in 2020, for which [he was] reimbursed by the United Nations”. In this e-mail, Mr. Fultang was also requested to be available for an interview on 24 March 2021.

10. On 24 March 2021, an OIOS investigator led an audio-recorded interview of Mr. Fultang.

11. On 27 May 2021, OIOS issued an Investigation Report in which it found that there were reasonable grounds to conclude that Mr. Fultang had failed to observe the standards of conduct expected of a United Nations civil servant by submitting false hotel receipts and making false statements to the Management Evaluation Unit (MEU) in order to unduly obtain USD 17,213 from the Organization (as part of a “MEU settlement”) in reimbursement for purported expenses (DSA) he never actually incurred.

12. On 13 June 2021, the Acting Head of Mission and Force Commander of UNISFA (Acting HOM) informed Mr. Fultang by letter that, based on the OIOS Investigation Report, he was being placed on ALWP for three months and/or until the completion of any further investigations into his conduct or other subsequent disciplinary process, in accordance with Staff Rule 10.4⁴ and Section 11.3(e) of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). The letter also stated that:

Please be advised that your (...) ALWP for three months, will commence on 14 June 2021, accordingly, you are placed on ALWP as of the date and receipt of this notification letter. The reason for your placement on ALWP is based on the information received from OIOS stating that you engaged in unsatisfactory conduct. I have also determined that given the egregious nature of the findings, coupled with your function as a Conduct and Discipline officer in UNISFA, there is a risk of reputational damage, repetition and/or possible continuation of unsatisfactory conduct.

The OIOS/ID Report states that you knowingly submitted fake receipts and false information to the [MEU] in furtherance of a claim for financial reimbursement for

³ *Fultang v. Secretary-General of the United Nations*, Order No. 231 (NBI/2020).

⁴ Secretary-General’s Bulletin ST/SGB/2018/1/Rev.1 (Staff Regulations and Rules of the United Nations).

costs you did not incur, and that you stayed in long term rental accommodation throughout the period that you claimed to have stayed in a hotel. The total cost of approximately USD 1,306, which you failed to declare to UNISFA, the MEU or OIOS, and as a result of such actions, OIOS estimates that you were paid USD 17,213 to which you were not entitled to have received.

Please note that the ALWP is for three months and/or until the completion of any further investigations, (...) OIOS or other, and subsequent disciplinary process, if any, whichever is earlier, at which point the matter will be revisited. The ALWP will be subject to review depending on developments on your case and you will be promptly informed of any decisions made regarding your status.

13. On 18 June 2021, Mr. Fultang requested management evaluation of the ALWP decision. On 2 August 2021, the MEU issued a written decision upholding the contested decision.

14. On 21 July 2021, the Administrative Law Division, Office of Human Resources (ALD/ OHR) issued a memorandum of formal allegations of misconduct to Mr. Fultang.

15. On 3 August 2021, Mr. Fultang filed an application with the Dispute Tribunal, contesting the Administration's decision to place him on ALWP (Case No. UNDT/NBI/2021/073).

16. On 10 September 2021, the Acting HOM informed Mr. Fultang by letter that his ALWP was extended for three months, from 13 September 2021 through 13 December 2021, or until the completion of a disciplinary process, if any, whichever was earlier. The letter also stated that:

The reason for my decision is that the conditions that warranted your initial placement on ALWP remain. Specifically, for the reasons set out in my letter to you of 13 June 2021, I am of the view that, coupled with your function as a Conduct and Discipline Officer, there is a risk of reputational damage to the Organization as well as a risk of a repetition of the conduct alleged in [OIOS] Report (...) of 27 May 2021.

17. On 13 September 2021, Mr. Fultang requested management evaluation of the Administration's decision dated 10 September 2021, to extend his ALWP. On 20 October 2021, the MEU issued a written decision upholding the decision to extend his ALWP.

18. On 11 January 2022, the Acting HOM informed Mr. Fultang by letter dated 10 January 2022 that his ALWP was retroactively extended for three months, from 13 December 2021 through 13 March 2022, or until the completion of a disciplinary process, if any,

whichever was earlier. The reasons provided were the same as those specified in the letter dated 10 September 2021.

19. On 17 January 2022, Mr. Fultang requested management evaluation of the Administration's decision dated 10 January 2022 to retroactively extend his ALWP. On 28 February 2022, the MEU issued a written decision upholding the contested decision.

20. Mr. Fultang's ALWP has subsequently been extended 4 times, i.e., until 13 March 2023.⁵

21. On 14 April 2022, Mr. Fultang filed an application with the Dispute Tribunal, contesting the Administration's decision dated 10 January 2022 to extend retroactively his ALWP from 13 December 2021 through 13 March 2022, or until the completion of a disciplinary process, if any, whichever was earlier (Case No. UNDT/NBI/2022/038).

22. On 3 August 2022, the Dispute Tribunal issued two separate Orders on case management in Cases Nos. UNDT/NBI/2021/073 and UNDT/NBI/2022/038, in which it informed the parties that "the relevant facts in the present case [were] clear and there [was] no need to conduct a hearing on the merits as the matter [could] be determined on the basis of the documents on record". The UNDT invited the parties to file their closing submissions by 16 August 2022.⁶

Impugned Judgment No. 1

23. On 7 October 2022, the Dispute Tribunal issued impugned Judgment No. 1, dismissing Mr. Fultang's application of 3 August 2021 in Case No. UNDT/NBI/2021/073 and finding that the Administration's initial decision to place him on ALWP was lawful and rational.

24. First, the UNDT rejected the procedural issues raised by Mr. Fultang.

25. With regard to Mr. Fultang's argument that no case management discussion (CMD) or oral hearing had been held, the UNDT observed that Mr. Fultang was nevertheless "fully granted the opportunity to present his case in depth, developing any issue raised in the proceedings, and to properly respond to the [Secretary-General]".⁷

⁵ Letters of extension of ALWP from the Administration to Mr. Fultang dated 2 March 2022, 1 June 2022, 5 September 2022 and 22 November 2022.

⁶ *Fultang v. Secretary-General of the United Nations*, Order No. 106 (NBI/2022); *Fultang v. Secretary-General of the United Nations*, Order No. 107 (NBI/2022).

⁷ Impugned Judgment No. 1, para. 22.

26. The UNDT also rejected Mr. Fultang's requests to strike off the record the ALD/OHR memorandum of allegations of misconduct as well as the OIOS Investigation Report.⁸

27. The Dispute Tribunal further concluded that even if the memorandum of allegations of misconduct was dated after the challenged decision, it was admissible and could "demonstrate the persisting interest of the Administration in the measure and also (...) corroborate the facts which constitute[d] the ground for the document".⁹

28. Moreover, the UNDT found that the OIOS Investigation Report was not stemming from privileged exchanges between the MEU and Mr. Fultang's counsel during the informal resolution process of Case No. UNDT/NBI/2020/076. On the contrary, referring to Article 18 of the Dispute Tribunal Rules of Procedures (UNDT Rules), the UNDT concluded that the OIOS Investigation Report was not subject to a confidentiality agreement between the parties, such as communications between Mr. Fultang and his counsel or exchanges between the parties during a mediation process.¹⁰

29. The UNDT recalled that "proceedings before the MEU are not comparable to the mediation run by the Ombudsman (...), because MEU is still part of the Administration and the MEU process is a kind of administrative review of the administrative decision". Consequently, the UNDT concluded that the OIOS Investigation Report was an autonomous document admissible to consider the objective behavior of the parties during the management evaluation process, such as, in the present case, Mr. Fultang's behavior "in the false demonstration of some costs subject to reimbursement by the Administration (which was party to that management evaluation (...) process)".¹¹

30. The UNDT also rejected Mr. Fultang's request to refer the case to the Secretary-General for possible action to enforce accountability because the MEU and the Secretary-General's counsel allegedly violated their mandate by sharing confidential documents that he filed in a different management evaluation request.¹²

31. Second, turning to the merits of the case, the UNDT recalled the legal framework applicable to placement of staff members on ALWP. Indeed, relying on Staff Rule 10.4, Section 11 of

⁸ *Ibid.*, paras. 24 and 31.

⁹ *Ibid.*, para. 24.

¹⁰ *Ibid.*, paras. 26-27.

¹¹ *Ibid.*, paras. 27-28.

¹² *Ibid.*, paras. 32-33.

ST/AI/2017/1 as well as on Appeals Tribunal jurisprudence, the Dispute Tribunal stressed that his placement on ALWP did not constitute a disciplinary measure and that the role of the UNDT was not “to substitute its own view for the Administration’s decision but to evaluate whether that decision was irrational or arbitrary”.¹³

32. In the present case, the UNDT concluded that the placement of Mr. Fultang on ALWP was lawful, rational, and taken without prejudice to his rights.¹⁴ The UNDT observed that the contested decision was rationally based on the information provided by OIOS with regard to Mr. Fultang’s alleged conduct which, if established, “would constitute a violation of Staff Regulation 1.2(b) and 1.7, as well as Sections 5 and 6 of [Information circular] ST/IC/2016/25 (Anti-Fraud and Anti-Corruption Framework of the United Nations Secretariat) and would amount to serious misconduct”. The Dispute Tribunal also noted that such a serious misconduct could lead to Mr. Fultang’s dismissal for breach of the duty of trust and confidence.¹⁵

33. Relying on the Secretary-General’s reply and on the letter from the Administration dated 13 June 2021, the UNDT found, in accordance with Sections 11.1 and 11.3 of ST/AI/2017/1, that multiple circumstances warranting the placement of Mr. Fultang on ALWP occurred:¹⁶

First, given his function as a Conduct and Discipline Officer and the alleged serious lapse of integrity, [Mr. Fultang] was unable to continue effectively performing his functions. His specific role involves appraising staff members of their duty to maintain the highest standards of integrity, accessing sensitive/confidential information of other staff members, and holding a special position of trust within the Organization. He could not continue effectively performing these functions in the face of the allegations of his serious lapse of integrity. Hence, the requirement established in Section 11.3 (a) of ST/AI/2017/1 was met.

Second, [Mr. Fultang]’s continued presence at the Mission as a Conduct and Discipline Officer in the face of the allegations of his serious lapse of integrity would be highly embarrassing to the Organization and would constitute an unacceptable reputational risk. Accordingly, the requirement established in Section 11.3 (c) of ST/AI/2017/1 was met as well.

Finally, there was a risk of repetition and/or possible continuation of [Mr. Fultang]’s unsatisfactory conduct. [Mr. Fultang]’s duty station is a Category E duty station,

¹³ *Ibid.*, paras. 38-41. See also *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

¹⁴ Impugned Judgment No. 1, paras. 44-45.

¹⁵ *Ibid.*, para. 50.

¹⁶ *Ibid.*, para. 46.

entitling him to Rest and Recuperation leave (“R&R leave”) every six weeks. If not placed on ALWP, he would have the opportunity to engage in similar conduct as he would be routinely traveling internationally for R&R leave; in addition, he might have the opportunity to engage in similar conduct with respect to other benefits and entitlements given the self-certifying nature of many [United Nations] benefits and entitlements. In consequence, the requirement established in Section 11.3(e) of ST/AI/2017/1 was equally met.

34. Moreover, the UNDT found that, in accordance with Staff Rule 10.4 and Section 11.1 of ST/AI/2017/1, Mr. Fultang had been informed of the duration of his ALWP, which was reasonable, “considering the duration of the investigation and the disciplinary proceedings”.¹⁷

35. Last, the UNDT rejected Mr. Fultang’s argument that his due process rights had been violated by OIOS because he had been interviewed by only one investigator instead of two, contrary to paragraph 14 of the OIOS procedure on interviews. Indeed, the UNDT found that the rule requiring the presence of two investigators was only applicable to audio-recorded interviews. Therefore, in the present case, the UNDT found that because Mr. Fultang had a video-recorded interview, it ensured that “everyone was accountable for their part in the process (...), so that the presence of two investigators was not necessary”.¹⁸

Impugned Judgment No. 2

36. On 10 October 2022, the UNDT issued impugned Judgment No. 2, dismissing Mr. Fultang’s application of 14 April 2022 in Case No. UNDT/NBI/2022/038 and finding that the Administration’s decision to extend retroactively his ALWP was lawful and rational.

37. First, the UNDT concluded that Mr. Fultang’s application was receivable. Indeed, the UNDT rejected the Secretary-General’s argument that a challenge to retroactive extension of ALWP was not receivable because it had no adverse direct consequences to Mr. Fultang. On the contrary, the Dispute Tribunal found that “given the right of any worker to perform his/her job, the placement of a staff member on administrative leave impact[ed] on the said right and cause[d] concrete negative consequence for the terms or conditions of appointment”.¹⁹

38. Second, the UNDT rejected the procedural issues raised by Mr. Fultang.

¹⁷ *Ibid.*, para. 49.

¹⁸ *Ibid.*, paras. 52-53.

¹⁹ Impugned Judgment No. 2, paras. 28 and 30-33.

39. With regard to Mr. Fultang’s argument that no CMD or oral hearing had been held as well as his request to refer the case to the Secretary-General for possible action to enforce accountability, the UNDT recalled its observation in impugned Judgment No. 1.²⁰

40. The UNDT also considered Mr. Fultang’s request to strike off the record annexes R-3 to R-5 moot because they were irrelevant to the adjudication of the case.²¹

41. Third, turning to the merits of the case, the UNDT found that the Administration’s decision to retroactively extend Mr. Fultang’s ALWP was in the interest of the Organization as well as in the “interest of the staff member”.²²

42. The UNDT further concluded that the measure was “fully justified by the need to preserve evidence and to avoid the risk of repetition or continuation of further acts similar to those [Mr. Fultang] was accused of”. Moreover, it found that the reasons for the Administration to place Mr. Fultang on ALWP as of 14 June 2021 “continue[d] to exist, pending disciplinary proceedings”.²³

43. Last, the UNDT noted that if Mr. Fultang “had (...) honestly believed his ALWP had ended”, he should have reported for duty on 13 December 2021 rather than “stay[ing] silent and simply continu[ing] to enjoy his leave with pay and benefits”.²⁴

Procedures before the Appeals Tribunal

44. On 5 December 2022, Mr. Fultang filed two separate appeals of impugned Judgments Nos. 1 and 2 with the Appeals Tribunal, to which the Secretary-General responded on 6 February 2023.

45. On 6 June 2023, the Appeals Tribunal decided to consolidate the two appeals as they were closely related.²⁵

²⁰ *Ibid.*, paras. 34-35 and 38-40.

²¹ *Ibid.*, paras. 36-37.

²² *Ibid.*, paras. 41 and 46.

²³ *Ibid.*, paras. 41-42.

²⁴ *Ibid.*, para. 45.

²⁵ *Francis Fultang v. Secretary-General of the United Nations*, Order No. 522 (2023).

Submissions

Case No. 2022-1761

Mr. Fultang's Appeal

46. Mr. Fultang requests the Appeals Tribunal to “set aside” impugned Judgment No. 1 and to award him “compensation for harm for the damage to his career and self-respect” pursuant to Article 9(1)(b) of the Appeals Tribunal Statute (the Statute). In the alternative, he requests that the case be remanded to the UNDT for additional findings of fact in front of a new judge.

47. Moreover, Mr. Fultang requests that the Chief of the MEU be referred to the Secretary-General for enforcement of accountability in accordance with Article 9(5) of the Statute.

48. With regard to impugned Judgment No. 1, Mr. Fultang submits that the Dispute Tribunal committed several errors of procedure, fact, and law in dismissing his application. He also contends that the UNDT failed to exercise jurisdiction vested in it when it refused to refer the conduct of the Chief of the MEU to the Secretary-General for possible action to enforce accountability.

49. First, Mr. Fultang submits that the UNDT erred in procedure, such as to affect the decision of the case, when it refused to hold a CMD and to allow him to contest the arguments submitted by the Secretary-General in his reply. He argues that this failure “led to serious errors of fact by the [UNDT] which could otherwise have been prevented”.

50. Second, Mr. Fultang argues that the UNDT also erred in procedure in admitting and considering the ALD/OHR memorandum of allegations of misconduct when it was “impossible” that the decision-maker took it into consideration because it “did not even exist at the time the impugned decision was made”.

51. Third, Mr. Fultang submits that the UNDT erred in fact, resulting in a manifestly unreasonable decision, when it found that the OIOS investigation process was not flawed and did not violate his rights even if only one investigator (instead of two) was present during his interview. Indeed, Mr. Fultang contends that the UNDT concluded erroneously that he had a video-recorded interview when it was, in fact, an audio-recorded one. Mr. Fultang submits

that “as a consequence, the [UNDT] (...) also erred in law in not granting [his] motion to strike the [I]nvestigation [R]eport in its entirety”.

52. Fourth, Mr. Fultang contends that the UNDT erred in fact in finding that there was a risk of repetition or continuation of unsatisfactory conduct if he was not placed on ALWP. On the contrary, Mr. Fultang argues that there was no risk of repetition because the allegations issued against him were raising from a “very specific circumstance of a negotiation with the MEU, which could never be replicated”. Furthermore, Mr. Fultang observes that his placement on ALWP did not protect the Organization against possible unsatisfactory conducts from him because he was still having “full access” to Umoja to submit his claims for benefits and entitlements.

53. Fifth, Mr. Fultang submits that the UNDT erred in law by “drawing negative inferences against [him]” when it found that “[he] raised no issue on the merit of the accusations”.²⁶ He notes that such inferences were “highly inappropriate based on the presumption of innocence and the right of an accused to be silent associated with the burden of proof”.

54. Sixth, Mr. Fultang contends that the UNDT erred in law in concluding that the duration of his ALWP was reasonable “considering the duration of the investigation and the disciplinary proceedings”.²⁷ Indeed, Mr. Fultang observes that there is no nexus between the duration of the OIOS investigation and the duration of his ALWP because the OIOS investigation ended on 27 May 2021, before he was even placed on ALWP.

55. Furthermore, Mr. Fultang argues that his ALWP had been extended six times and that, consequently, he had been on ALWP for 18 months already without “fresh assessment of the facts by the decision-maker(s) throughout the process”.²⁸ Therefore, he submits that by its “continued inaction” and “unreasonable delay in undertaking the disciplinary process”, the Administration not only breached its implicit duty of care, but also violated former Staff Rule 10.4(b)²⁹ as well as his right to an effective remedy implicitly incorporated in Article 8 of the Universal Declaration of Human Rights.³⁰

²⁶ Impugned Judgment No. 1, para. 54.

²⁷ *Ibid.*, para. 49.

²⁸ *Gisage v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-973, paras. 37-41.

²⁹ Former Staff Rule 10.4(b) provided that “so far as practicable, [ALWP] should not exceed three months”.

³⁰ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

56. Seventh, Mr. Fultang submits that the “only reason” the Administration obtained the OIOS Investigation Report is because “the MEU decided to engage in Alternate Dispute Resolution (ADR) with [him] to settle the cases”. Consequently, Mr. Fultang argues that all communications and documentation between him, his counsel and the MEU were “privileged and therefore inadmissible evidence against [him]”.

57. Mr. Fultang further submits that the UNDT also erred in law in denying his request to strike the OIOS Investigation Report and in concluding that the “proceedings before the MEU [were] not comparable to the mediation run by the Ombudsman”.³¹ Indeed, Mr. Fultang submits that the “MEU cannot be permitted to engage in ADR to settle cases pretending that they are acting like the Office of the Ombudsman and the Mediation Division and then use/share the information produced by the [s]taff [m]ember in settling the case to then enable OIOS and ALD to sandbag them”.

58. Last, Mr. Fultang contends that the UNDT failed to exercise jurisdiction vested in it by not referring the conduct of the Chief of the MEU to the Secretary-General for enforcement of accountability.

The Secretary-General’s Answer

59. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety. The Secretary-General submits that the errors claimed by Mr. Fultang were immaterial to the outcome of the case and, thus, that he failed to satisfy the requirements of Article 2(1) of the Statute.

60. First, the Secretary-General submits that the UNDT did not commit any procedural errors, such as to affect the decision of the case. Indeed, the Secretary-General recalls that, pursuant to Articles 16 and 19 of the UNDT Rules, the UNDT has broad discretion in its case management. The Secretary-General further contends that, in the present case, Mr. Fultang had the opportunity to present his case in depth. Moreover, contrary to Mr. Fultang’s submission, the Secretary-General notes that he was not “deprived” of the opportunity to contest the arguments submitted in his reply, as he did in his closing submissions.

³¹ Impugned Judgment No. 1, para. 43.

61. Second, the Secretary-General contends that the UNDT correctly relied on the ALD/OHR memorandum of allegations of misconduct, which provided the UNDT with relevant context. The Secretary-General submits that Mr. Fultang failed to explain how the admission of that evidence constituted a procedural error.

62. Third, the Secretary-General admits that the UNDT committed an error when it concluded that Mr. Fultang's interview was video-recorded. However, the Secretary-General submits that this error was immaterial and did not violate Mr. Fultang's due process rights or undermine the UNDT's conclusion that the investigation process was not flawed.

63. Fourth, the Secretary-General contends that the UNDT correctly concluded that there was a risk of repetition or continuation of unsatisfactory conduct justifying the placement of Mr. Fultang on ALWP. The Secretary-General further argues that Mr. Fultang's claim to the contrary is irrelevant and must fail. Indeed, Mr. Fultang only disputes this circumstance, when the UNDT found that there were multiple circumstances identified in Section 11.3 of ST/AI/2017/1 justifying his placement on ALWP whereas this Administrative Instruction only requires one circumstance to be present.³²

64. Fifth, with regard to Mr. Fultang's argument that the UNDT erred in "drawing negative inferences against [him]", the Secretary-General submits that this argument should be disregarded because it is speculative and, Mr. Fultang failed to explain how this error had an impact on the outcome of the present case.³³

65. Sixth, with regard to the duration of the ALWP, the Secretary-General contends that the error pointed out by Mr. Fultang is immaterial and did not undermine the UNDT's conclusion that the duration of Mr. Fultang's ALWP was reasonable.

66. The Secretary-General also contends that Mr. Fultang's arguments challenging the lawfulness of the decisions to extend his ALWP should be disregarded in their entirety because the present case is limited to the contested decision to place him on ALWP for three months as of 14 June 2021.

67. However, even if the Appeals Tribunal decides to consider Mr. Fultang's arguments, the Secretary-General submits that they do not have any merit. Indeed, with regard to Mr. Fultang's

³² *Ibid.*, para. 46.

³³ *Ibid.*, para. 54.

argument that there had been no “fresh assessment” of the circumstances justifying the extensions of his ALWP, the Secretary-General contends that this argument is speculative and that the reasons to place him on ALWP continue to exist until the end of the disciplinary process.³⁴ Moreover, the Secretary-General submits that Mr. Fultang’s argument that there was an “unreasonable delay” in the disciplinary process is also without merit because, pursuant to Staff Rule 10.4(a) and Section 11.4 of ST/AI/2017/1, there is no limit imposed on the duration of an investigation or disciplinary process. The Secretary-General also observes that the investigation and disciplinary process took place during the COVID-19 pandemic and that an investigation “into dishonest conduct (...) is serious and requires thorough investigation”.

68. Last, the Secretary-General submits that Mr. Fultang’s arguments in support of his claim that the UNDT failed to exercise jurisdiction vested in it by not referring the conduct of the Chief of the MEU to the Secretary-General to enforce accountability are largely a reiteration of the ones he submitted before the UNDT and should be disregarded on this basis alone.

69. However, even if the Appeals Tribunal were to consider his arguments, the Secretary-General submits that Mr. Fultang has failed to establish any reversible error committed by the UNDT when it found that the OIOS Investigation Report was admissible and that it did not refer to privileged communications between Mr. Fultang and his counsel. Indeed, the Secretary-General observes that Mr. Fultang did not identify any specific privileged communication referred to in the OIOS Investigation Report. The Secretary-General also notes that the false receipts submitted to the MEU were done with Mr. Fultang’s consent and knowledge and that he himself disclosed some of the information to OIOS during its investigation.

70. The Secretary-General recalls that even if the MEU is an independent unit, it forms part of the Organization’s system of internal justice that “can lawfully take into account the behavior of the parties during the [ME] process, including their assertions, non-privileged communications and documentary submissions made on their behalf and with their consent”. Therefore, the Secretary-General submits that “[s]taff members should not submit false documentation in furtherance of their claims” and that, in the present case, Mr. Fultang does not come with “clean hands” and “cannot rely on the MEU’s standard confidentiality clause in his settlement with the

³⁴ *Ibid.*, para. 48.

Administration to shield him from accountability for his misrepresentations and unsatisfactory conduct”.³⁵

71. Finally, the Secretary-General argues that even if the Appeals Tribunal were to consider the actions of the MEU in the present case as inappropriate, it does not undermine the lawfulness of the ALWP decision of 13 June 2021. Therefore, the Secretary-General submits that Mr. Fultang failed to establish a “justifiable basis” for a referral to the Secretary-General to enforce accountability.

Case No. 2022-1762

Mr. Fultang’s Appeal

72. Mr. Fultang requests the Appeals Tribunal to rescind the 10 January 2022 contested decision and to “[i]ssue a Personal Action (PA) with the effective date of 13 December 2021 restoring [him] to active duty and full pay status for the retroactive period” as well as to award him the “[c]redit for [his] leave entitlements and associated point credits for home leave and R&R (...) if these have been withheld during this period”. Moreover, he requests the Appeals Tribunal to award him “[c]ompensation for harm for the damage to his career, self-respect and career prospects” pursuant to Article 9(1)(b) of the Statute. In the alternative, he requests that the case be remanded to the UNDT for additional findings of fact in front of a new judge.

73. Moreover, Mr. Fultang reiterates his request that the Chief of the MEU be referred to the Secretary-General for enforcement of accountability in accordance with Article 9(5) of the Statute.

74. With regard to impugned Judgment No. 2, Mr. Fultang submits that the Dispute Tribunal committed several errors of procedure, fact and law in dismissing his application.

75. First, Mr. Fultang reiterates, as mentioned in his appeal in Case No. 2022-1761, that the UNDT erred in procedure when it refused to hold a CMD and to allow him to contest the arguments submitted by the Secretary-General in his reply.

³⁵ *Amarah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-898, paras. 28-29; *Kortes v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-925, paras. 36 and 38.

76. Second, Mr. Fultang contends that the UNDT erred in fact when it found that “the reasons for [his] ALWP (...) continue[d] to exist, pending disciplinary proceedings”. More specifically, Mr. Fultang reiterates that, for the same reasons as those outlined in his appeal in Case No. 2022-1761, there was no risk of repetition or continuation of unsatisfactory conduct.

77. Third, Mr. Fultang submits that the UNDT erred in fact, resulting in a manifestly unreasonable decision, when, referring to impugned Judgment No. 1, it found that his placement on ALWP “was fully justified by the need to preserve evidence”. He further submits that the Secretary-General never claimed that the contested decisions were justified by the need to preserve evidence.³⁶

78. Fourth, Mr. Fultang contends that the UNDT erred in fact and in law in providing no reason as to why the contested decision to retroactively extend his ALWP was lawful. Relying on *Gisage*,³⁷ he contends that each extension of his ALWP constitutes a distinct administrative decision and that, therefore, in the absence of a notification of extension of his ALWP prior to its expiration on 13 December 2021, he “should have immediately been returned to active duty status with regular pay”. Moreover, Mr. Fultang submits that the UNDT has previously ruled in other cases (and the Secretary-General acknowledged) that retroactive extensions of ALWP or Administrative Leave Without Pay (ALWOP) were unlawful. Therefore, he argues that the contested decision to extend retroactively his ALWP was “axiomatically unlawful”.

79. Fifth, Mr. Fultang submits that the UNDT erred in concluding that his ALWP “was in [his] interests” and that he stayed at home to “enjoy his leave with pay and benefits”.³⁸ On the contrary, Mr. Fultang notes that it is “soul destroying” to be sitting at home doing nothing and that it is “destructive to career advancement and any hopes he has for mobility in the UN system”.

80. Last, Mr. Fultang reiterates, as stated in his appeal in Case No. 2022-1761, that his extensions of ALWP confirmed that there was no “fresh assessment of the facts by the decision-maker(s) throughout the process”. Therefore, he submits that by its “unreasonable delay in undertaking the disciplinary process”, the Administration not only breached its implicit duty of

³⁶ Impugned Judgment No. 2, para. 41.

³⁷ *Gisage* Judgment, *op. cit.*

³⁸ Impugned Judgment No. 2, paras. 45-46.

care, but also violated former Staff Rule 10.4(b)³⁹ as well as his right to an effective remedy implicitly incorporated in Article 8 of the Universal Declaration of Human Rights.⁴⁰

The Secretary-General's Answer

81. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety. The Secretary-General submits that the errors claimed by Mr. Fultang were immaterial to the outcome of the case.

82. First, the Secretary-General submits that the UNDT did not commit any procedural errors, such as to affect the decision of the case. Indeed, with regard to Mr. Fultang's argument that the UNDT erred in procedure when it refused to hold a CMD and to allow him to contest the arguments submitted in his reply, the Secretary-General reiterates the same arguments as the ones he submitted in his response in Case No. 2022-1761.

83. Second, the Secretary-General submits that the UNDT did not commit any reversible errors of fact or law in impugned Judgment No. 2. More specifically, the Secretary-General admits that the UNDT erred when it found that the decision to place Mr. Fultang on ALWP "was fully justified by the need to preserve evidence".⁴¹ However, the Secretary-General contends that this error was inconsequential because Mr. Fultang is only disputing this circumstance while the UNDT found that the contested decision to retroactively extend his ALWP was warranted by multiple circumstances identified in Section 11.3 of ST/AI/2017/1.

84. Third, the Secretary-General reiterates, for the same reasons as those set out in Case No. 2022-1761, that the UNDT correctly concluded that there was a risk of repetition or continuation of unsatisfactory conduct justifying the retroactive extension of Mr. Fultang's ALWP.

85. Fourth, the Secretary-General submits that, contrary to Mr. Fultang's submission, the UNDT did not err in finding that the decision to extend his ALWP retroactively was lawful and that it provided the legal basis and reasoning in support of its conclusions. The Secretary-General further observes that Mr. Fultang's reliance on jurisprudence on ALWOP is misplaced and notes

³⁹ Former Staff Rule 10.4(b) provided that "so far as practicable, [ALWP] should not exceed three months".

⁴⁰ *Bertucci* Judgment, *op. cit.*

⁴¹ Impugned Judgment No. 2, para. 41.

that even if his placement on ALWP is “far from an ideal situation”, he has not provided evidence of negative consequences, “unlike in the event of a retroactive application of ALWOP”.

86. Moreover, relying on Appeals Tribunal jurisprudence,⁴² the Secretary-General recalls that only substantial procedural irregularities can render an administrative decision unlawful, which is not the case of the retroactive effect of Mr. Fultang’s extension of ALWP.

87. Fifth, the Secretary-General reiterates that Mr. Fultang’s argument that there had been no “fresh assessment” of the circumstances justifying the extensions of his ALWP is speculative and that the reasons to place him on ALWP continue to exist until the end of the disciplinary process.

88. Sixth, with regard to Mr. Fultang’s submission that the delay for the disciplinary process is “unreasonable”, the Secretary-General also reiterates that, for the same reasons as those set out in Case No. 2022-1761, this argument is also without merit.

89. Therefore, the Secretary-General argues that the decision to extend retroactively Mr. Fultang’s ALWP for three months, from 13 December 2021 to 13 March 2022, or until the completion of a disciplinary process, if any, whichever is earlier, was reasonable.

90. Finally, the Secretary-General submits that Mr. Fultang failed to establish a basis for a referral to the Secretary-General to enforce accountability.

Considerations

91. With the consolidation of the two cases, we will first discuss the procedural issue raised by Mr. Fultang in his two appeals and then analyze the substantive issues, namely whether the UNDT erred in fact or in law in finding that the two contested decisions were lawful and in refusing his request to refer the case to the Secretary-General for possible action to enforce accountability.

⁴² *Thiombiano v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-978, paras. 34 and 38.

Did the UNDT err in procedure in not holding a CMD or an oral hearing prior to issuing impugned Judgments Nos. 1 and 2?

92. Mr. Fultang submits that the UNDT erred in not holding a CMD in either case, which left him no opportunity to fully and properly contest the arguments presented in the Secretary-General's replies.

93. Article 16 of the UNDT Rules provides, in relevant parts:

1. The judge hearing a case may hold oral hearings.
2. A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.

94. Further, Article 19 of the UNDT Rules provides:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

95. In *Nouinou*,⁴³ we mentioned:

... The UNDT has broad discretion with respect to case management. (...)

... We can add that, as a court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. Therefore, the Appeals Tribunal should not interfere lightly with the broad discretion of the UNDT in the management of cases.

96. In *Onifade*,⁴⁴ we held:

... (...) It is our consistent jurisprudence that case management issues, including the question of whether to call a certain person to testify or to order the production of documents, remain within the discretion of the UNDT and do not merit a reversal except in clear cases of denial of due process of law affecting the right to produce evidence by a party.

⁴³ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-981, paras. 47-48.

⁴⁴ *Onifade v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-668, para. 41 (internal citation omitted).

97. Pursuant to Article 19 of the Dispute Tribunal Statute (UNDT Statute), it is clear that the UNDT is granted broad discretion with regard to its case management. A CMD is not mandatory and, in the present cases, lack of such a discussion is not a procedural error, especially as the two cases are not appeals against administrative decisions imposing disciplinary measures.

98. The UNDT issued Orders instructing the parties to file their closing arguments within a time limit and Mr. Fultang submitted his final submissions within that deadline.⁴⁵ He was not deprived of any opportunity to present his cases or to contest and challenge the replies of the Secretary-General. With respect to the decision not to hold a CMD or an oral hearing, the UNDT, as a court of first instance, was in the best position to decide what was appropriate for the fair and expeditious disposal of the case and do justice to the parties. Hence, we cannot agree with Mr. Fultang that the UNDT erred in procedure in not holding a CMD or an oral hearing prior to issuing impugned Judgments Nos. 1 and 2.

Did the UNDT err in finding that Mr. Fultang's placement on ALWP and retroactive extension of his ALWP were lawful?

99. We recall that an appellant has the duty to establish an error of the UNDT and that the appeals procedure before the UNAT is not an opportunity to relitigate a case, as we stated in *Millan*:⁴⁶

... Turning to the second appeal, we note that Mr. Millan's appeal brief altogether fails to identify which of the grounds of appeal set out in Article 2(1) of the Appeals Tribunal Statute he relies upon in challenging the Judgment on the merits. Mr. Millan's appeal brief solely expresses disagreement with the Judgment and repeats arguments already thoroughly considered and rejected by the UNDT. The appeal thus constitutes an impermissible attempt to reargue the merits of his case.

... Specifically, his arguments raised in the appeal are essentially identical to those raised before the UNDT. He has not identified any specific error made by the UNDT. The Appeals Tribunal has consistently stated that the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed in the lower court. Rather, he or she must demonstrate that the court below has committed an error of fact or law warranting intervention by the Appeals Tribunal. Hence, we are not disposed to examining every single assertion Mr. Millan has made before us or

⁴⁵ *Fultang v. Secretary-General of the United Nations*, Order No. 106 (NBI/2022); *Fultang v. Secretary-General of the United Nations*, Order No. 107 (NBI/2022).

⁴⁶ *Ray Steven Millan v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1330, paras. 98-99 (internal citation omitted).

repeating findings in relation to Mr. Millan's submissions with respect to the UNDT's assessment of the evidentiary material.

100. With regard to the Administration's discretion in administrative matters, we stated, in *Yasin*:⁴⁷

... When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. It may consider whether relevant matters were ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse. *It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.*

101. Therefore, in the two present cases, the UNDT was entitled to determine if the contested decisions were legal, rational, procedurally correct, and proportionate.

102. Staff Rule 10.4 provides, in relevant parts:

(a) A staff member may be placed on administrative leave, 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.

(b) 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.

...

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure (...)

103. Section 11 of ST/AI/2017/1 further outlines the conditions required for the Administration to be placing a staff member on ALWP. It provides:

11.1 In accordance with [S]taff [R]ule 10.4, a staff member may be placed on [ALWP or ALWOP] at any time after an allegation of suspected unsatisfactory conduct and pending the completion of the disciplinary process. The period of administrative leave may continue until the completion of the disciplinary process. Such action is without prejudice to the rights of the staff member and does not constitute a disciplinary measure. A staff member

⁴⁷ *Yasin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-915, para. 44 (emphasis added).

placed on administrative leave shall be given a written statement of the reason(s) for such leave and shall be informed of its likely duration.

...

11.3 The decision to place a staff member on [ALWP] may be made by the authorized official at any time following a report of suspected unsatisfactory conduct and following the authorized official's determination that at least one of the following circumstances is met:

- (a) The staff member is unable to continue effectively performing the staff member's functions, given the nature of those functions;
- (b) Continued service by the staff member would create a risk that the staff member could destroy, conceal or otherwise tamper with potential evidence, or interfere in any way with the investigation or disciplinary process, including by retaliating against individuals protected under ST/SGB/2017/2 or intimidating a witness;
- (c) The continued presence of the staff member on the Organization's premises or at the duty station could constitute a security or financial risk to the Organization and/or its personnel, or could otherwise prejudice the interests or reputation of the Organization;
- (d) The staff member's continued presence at the office could have a negative impact on the preservation of a harmonious work environment;
- (e) There is a risk of repetition or continuation of the unsatisfactory conduct.

104. To challenge the lawfulness of the contested ALWP decision, Mr. Fultang submitted several arguments.

105. Firstly, Mr. Fultang submitted that the contested ALWP decision was made by the Acting HOM and communicated to him on 13 June 2021. However, he only received the memorandum of allegations of misconduct from the ALD/OHR on 21 July 2021. He contended that the delegated authority for disciplinary process under Staff Regulation 10.1 and Staff Rule 10.3 is vested solely in the Under-Secretary-General for Management Strategy, Policy and Compliance. Therefore, as the Acting HOM had no role to play in the disciplinary process under Staff Rule 10.3, it was impossible for him to have considered the content of the memorandum of allegations of misconduct when he took the contested decision on 13 June 2021, especially as it did not even exist at that time.

106. We recall that pursuant to the Secretary-General's Bulletin ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), the heads of entity have delegated authority to decide an ALWP pending investigation for staff members at the D-2 level or below. Since Mr. Fultang was a Conduct and Discipline Officer at the P-4 level, the Acting HOM was duly authorized to place him on ALWP. Moreover, as stated in the contested ALWP decision, the Acting HOM was provided a copy of the OIOS

Investigation Report issued on 27 May 2021. As the official responsible for Mr. Fultang, he was entitled to be informed by OIOS of the underlying misconduct committed by Mr. Fultang in his unit and, on the basis of the outcome of the OIOS investigation alone, to place Mr. Fultang on ALWP. Therefore, we find that the Acting HOM had a good reason to take such an administrative action.

107. According to Section 11.3 of ST/AI/2017/1, “the decision to place a staff member on [ALWP] may be made by the authorized official at any time following a report of suspected unsatisfactory conduct and following the authorized official’s determination that at least one of the circumstances [detailed in that Section] is met”. In the present case, the UNDT found that more than one circumstance warranting the placement of Mr. Fultang on ALWP were present. The UNDT’s reference to the memorandum of allegations of misconduct aimed only to verify that circumstances warranting the placement of Mr. Fultang on ALWP occurred. It was not used by the Administration as proof to convey the ALWP. Therefore, we cannot support Mr. Fultang’s argument that the UNDT erred in procedure, such as to affect the decision of the case, in admitting and considering the memorandum of allegations of misconduct when it was “impossible” that the decision-maker took it into consideration because it “did not even exist at the time the impugned decision was made”.

108. Secondly, Mr. Fultang submitted that the OIOS Investigation Report was so erroneous that it should have been stricken by the UNDT. In particular, he contended that: i) the OIOS investigation procedure was flawed because he was interviewed only by one investigator instead of two; and ii) the OIOS Investigation Report was based on the confidential documents and privileged communications between him and the MEU during the informal resolution process of Case No. UNDT/NBI/2020/076, which were not supposed to be used as evidence against him in the OIOS investigation procedure.

109. In the present case, the OIOS Investigation Report stated that Mr. Fultang knowingly submitted fake receipts and false information to the Administration for financial reimbursement for costs he did not incur. Therefore, we find that the prerequisite for the enforcement of the ALWP was met on the basis of the OIOS Investigation Report.

110. Further, we agree with the UNDT’s finding that the OIOS Investigation Report did “not refer to the communications between [Mr. Fultang] and his counsel (...) nor to exchanges during

a mediation process (...) to settle the case, but only considered the objective behavior of [Mr. Fultang]”.⁴⁸ Mr. Fultang’s argument to the contrary has no support of fact.

111. Even though the UNDT committed an error in finding that Mr. Fultang’s interview was video-recorded, the UNDT did not err in refusing to strike the OIOS Investigation Report. The procedural irregularities raised by Mr. Fultang do not affect the lawfulness of the contested ALWP decision.

112. Thirdly, Mr. Fultang challenged the UNDT’s conclusion that the duration of his ALWP was reasonable “considering the duration of *the investigation* and the disciplinary proceedings”, by saying that prior to his placement on ALWP, OIOS had already completed its investigation on 27 May 2021.⁴⁹ It was therefore impossible for the duration of the investigation to have a nexus with the duration of his ALWP.

113. We find that the UNDT did not err in concluding that the duration of Mr. Fultang’s ALWP was reasonable. Even if the UNDT erroneously found that the duration of Mr. Fultang’s ALWP was reasonable considering, among other things, the duration of the investigation, we find that this alleged error is immaterial to the outcome of the case.

114. We recall that, pursuant to Section 11 of ST/AI/2017/1, “[a] staff member may be placed on [ALWP] at any time after an allegation of [misconduct or] suspected unsatisfactory conduct and pending the completion of the disciplinary process”. When the Investigation Report is completed, “the Assistant Secretary-General for Human Resources Management (...) [is entitled to] decide whether to (...) [i]nitiate a disciplinary process” or to take other actions under Section 8.2 of ST/AI/2017/1. When a disciplinary process is initiated, a staff member may be placed on ALWP at any time until its completion. In the present case, the disciplinary process was still ongoing during the proceedings before the UNDT. As a result, it was lawful for the Administration to keep Mr. Fultang on ALWP. Therefore, the UNDT did not err in concluding that the duration of Mr. Fultang’s ALWP was reasonable, especially considering the ongoing disciplinary proceedings.

115. Fourthly, Mr. Fultang submitted that he had been on ALWP for almost 18 months without any fresh assessment or progress in the process which left him with “no remedy to contest the

⁴⁸ Impugned Judgment No. 1, para. 27.

⁴⁹ Emphasis added.

situation”. He further submitted that by failing to conduct an investigation in a timely manner, the Administration violated his human rights and breached the terms of his employment contract.

116. It is well settled by Appeals Tribunal jurisprudence,⁵⁰ that with respect to any extension of administrative leave, “there [is] 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”. Hence, the ALWP duration of 18 months alone does not undermine the legality and rationality of the decisions to place and subsequently extend retroactively Mr. Fultang’s ALWP.

117. In *Millan*, we stated:⁵¹

... (...) Though ALWP is not as drastic an administrative measure as ALWOP, it nevertheless impacts on the staff member’s employment status and personal circumstances, requiring judicial scrutiny of the propriety of the Administration’s discretionary decision.

... In the present case, the UNDT found that the length of the OIOS’ investigation was not abusive or unreasonable. We agree. It is common knowledge that an investigation into allegations of unsatisfactory conduct of a sexual nature by United Nations personnel in a sensitive peacekeeping mission is serious and requires thorough investigation. The *investigative and disciplinary process also took place in the midst of the COVID-19 pandemic* while OIOS initiated its investigation in June 2020. OIOS interviewed multiple witnesses and subjects.

118. In the present case, Mr. Fultang was accused of providing falsified documents to the Organization. Dishonesty and impropriety are serious acts of misconduct which may warrant dismissal or other severe administrative sanctions. Consequently, it appears prudent for the Administration to carry out a cautious process instead of rushing to a hasty conclusion. Besides, the long distances between Mr. Fultang’s duty station, the location of the suspected misconduct and the venue of the investigative organ as well as the impact of the COVID-19 pandemic all added to the investigation’s woes.

119. Furthermore, Staff Rule 10.4 and Section 11 of ST/AI/2017/1 do not provide that every extension of ALWP shall be made upon a fresh assessment. On the contrary, following a report

⁵⁰Ray Steven Millan Judgment, *op. cit.*, para. 106; Gisage Judgment, *op. cit.*, para. 40.

⁵¹ Ray Steven Millan Judgment, *op. cit.*, paras. 107-108 (emphasis added).

of misconduct or suspected unsatisfactory conduct, the Administration may impose the placement of the staff member on ALWP as long as it deems that their continued presence at work will be unfavorable for the functioning of the Organization or create a risk to the ongoing investigation.

120. The ALWP decision had been extended every three months by an administrative decision made by the responsible official for Mr. Fultang. Mr. Fultang was entitled to contest these decisions under Chapter XI of the Staff Regulations and Rules. In fact, Mr. Fultang exercised his right by challenging two of the decisions. Hence, we cannot agree with him that the Administration not only breached its implicit duty of care, but also violated former Staff Rule 10.4(b) as well as his right to an effective remedy implicitly incorporated in Article 8 of the Universal Declaration of Human Rights.

121. Fifthly, with regard to the reasons justifying his placement on ALWP, Mr. Fultang observed that, contrary to the UNDT's finding in impugned Judgment No. 2, it never found, in impugned Judgment No. 1, that his placement on ALWP was fully justified by the need to preserve evidence. In addition, he also argued that there was no risk of repetition or continuation of further acts that would be mitigated by placing him on ALWP.

122. Section 11.3 of ST/AI/2017/1 sets out five conditions under which the authorized official may decide to place a staff member on ALWP. In the present case, given the level of the post occupied by Mr. Fultang and the nature of the suspected misconduct, it appears to us that his continued presence at the duty station was not appropriate at that time. His alleged dishonesty and deceit have raised reasonable doubt that he could fulfill his responsibilities in good faith, or posed a risk that he might take advantage of his post to repeat such misconduct or interfere in the subsequent disciplinary process. Furthermore, as Mr. Fultang held a senior position as a Conduct and Discipline Officer, he was supposed to set an excellent example for the other staff members in his unit. Even while under investigation, his presence could have undermined the working environment and created ambiguity among other staff members regarding the Organization's serious stance towards such alleged misconduct. Therefore, the decisions to place him on ALWP and subsequently retroactively extend his ALWP were rational, ensuring the legitimate aim of integrity and probity within the Organization, in accordance with the requirements of Staff Regulation 1.2(b).

123. Moreover, as reiterated in *Aghadiuno*,⁵² fraud, forgery and uttering falsified documents to the Organization constitute serious misconduct. Dishonesty and impropriety of this kind, if established, may justify summary dismissal without any benefits. In light of the serious nature of Mr. Fultang's alleged conduct, the contested decisions were proportionate administrative actions.

124. Although the UNDT committed an error in finding that the measure "was fully justified by the need to preserve evidence", which was not referred to by the Administration, this error is inconsequential. This is especially true considering that more than one circumstance identified in Section 11.3 of ST/AI/2017/1 warranted Mr. Fultang's placement on ALWP. Similarly, whether or not there was risk of repetition or continuation of further acts could not materially have affected the reasonableness of the contested decisions. Therefore, we find that the UNDT correctly established the lawfulness of the contested decisions.

125. Sixthly, Mr. Fultang contended that the UNDT erred in drawing negative inferences by stating that he did not raise any issue on the merit of the accusations against him,⁵³ because he "first needed to address those allegations under Chapter X of the Staff Regulations and Rules and ST/AI/2017/1, not Chapter XI".

126. We find that the UNDT, by making this statement, intended only to clarify the standards of review of the two contested decisions which involved administrative measures. It did not err in law or fact.

127. Seventhly, challenging the lawfulness of the retroactive extension of his ALWP, Mr. Fultang also submitted that the 10 September 2021 decision expired on 13 December 2021 and that the retroactive ALWP extension decision from 13 December 2021 to 13 March 2022 was therefore unlawful. He claimed that the UNDT erred in concluding otherwise.

128. Since the disciplinary process had not been concluded by the expiration of the ALWP decision on 13 December 2021, there was a substantial basis to extend the ALWP and the reasonableness for its extension was self-evident. Considering the above, the retroactive ALWP extension decision was a lawful and rational measure to take until the completion of the disciplinary process or until a time considered appropriate by the Administration. Meanwhile, the then Acting HOM stated his grounds for the extension decision in the letter dated

⁵²*Aghadiuno v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-811, para. 103.

⁵³ Impugned Judgment No. 1, para. 55.

10 September 2021, by stating that “the conditions that warranted [his] initial placement on ALWP remain[ed]”. Coupled with the legal framework provided by Staff Rule 10.4, as well as Section 11 of ST/AI/2017/1, Mr. Fultang should have been aware of the subsequent extension of his ALWP. If Mr. Fultang considered that the ALWP ended on 13 December 2021 and that the Administration had defaulted by not restoring him to his duty, which violated his rights under his employment contract, he should have taken timely and appropriate measures to prevent further loss, such as reporting for duty or consulting with the responsible official for next steps. However, Mr. Fultang did not take any action and let the state of his ALWP persist until the Administration ratified the contested retroactive extension decision. Even though there was a delay in the issuance of the retroactive ALWP extension decision, we recall that only substantial procedural irregularities can render an administrative decision unlawful. Consequently, the UNDT did not err in finding the contested retroactive ALWP extension decision lawful.

129. Therefore, the UNDT did not err in fact or in law in finding that the contested ALWP decision and the retroactive ALWP extension decision were lawful and rational.

130. As there has been no illegality established, Mr. Fultang’s claim for remedies cannot be granted.

Did the UNDT err in refusing to refer the case to the Secretary-General for possible action to enforce accountability?

131. Mr. Fultang complained that the UNDT failed to exercise jurisdiction vested in it by not referring the conduct of the Chief of the MEU to the Secretary-General for the enforcement of accountability.

132. Article 10(8) of the UNDT Statute provides:

The Dispute Tribunal may refer appropriate cases to the Secretary-General (...) or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

133. In *Dettori*, we mentioned:⁵⁴

... The purpose of Article 10(8) of the UNDT Statute and Article 9(5) of the UNAT Statute is to give the Tribunals a formal tool to make substantial breaches of procedure

⁵⁴ *Elizabeth Dettori v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1200, paras. 32, 36 and 38 (internal citation omitted).

and due process rights or other severe wrongdoings on the part of the managers of the United Nations and other separately administered funds and programmes immediately known to the Secretary-General (...) and the heads of these funds and programmes to enable them to review the matter and take appropriate action. (...)

...

... As the Appeals Tribunal found in *Cohen v. ICJ*, the exercise of the power of referral for accountability must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.

...

... In the present case, we find no error in the UNDT Judgment. It was within the UNDT's discretion under Article 10(8) of the UNDT Statute to reject Ms. Dettori's request to refer the ED and other staff members of UNICEF for accountability.

134. We have consistently held that the exercise of the power of referral for accountability in terms of Article 10(8) of the UNDT Statute must be exercised sparingly and only when the breach or conduct in question displays serious flaws. Under the strict condition of applying the power of referral, we note that the justifiable basis to refer the case for accountability is not sustained. Therefore, the UNDT did not err in rejecting Mr. Fultang's request for referral for accountability.

Judgment

135. Mr. Fultang's appeals in Cases Nos. 2022-1761 and 2022-1762 are dismissed, and Judgments Nos. UNDT/2022/102 and UNDT/2022/110 are hereby affirmed.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)

Judge Gao, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Ziadé

Judgment published and entered into the Register on this 14th day of December 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar