



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 20 July 2016, the Applicant, the Chief of Proactive Investigations, Investigations Division, Office of Internal Oversight Services (“OIOS”), filed an application contesting the decision of the Under-Secretary-General, OIOS (“USG/OIOS”), to deny his request for Special Leave with Pay (“SLWP”).

2. The Applicant requests that the decision of the USG/OIOS be overturned and that he be placed on SLWP until a final determination of Case No. UNDT/NY/2016/032 (also filed by the Applicant) is reached by the Tribunals and/or the Applicant receives medical clearance to return to work.

Factual and procedural background

3. On 3 March 2016, the Applicant’s physician recommended that he not return to work until 16 May 2016. He was placed on certified sick leave.

4. By interoffice memorandum dated 9 March 2016, and addressed to the USG/OIOS, through the Acting Director of the Investigations Division, OIOS, the Applicant requested SLWP for the period 3 March to 16 May 2016, noting that he had been placed on sick leave for this period on 3 March 2016.

5. By email dated 9 March 2016, the USG/OIOS responded to the Applicant stating, “I believe it should first be approved by your director”. The Applicant responded via email the same day asking to meet with the USG/OIOS the week of 23 March 2016.

6. By email dated 18 March 2016, the Acting Director, Investigations Division, OIOS, wrote to the Applicant to inform him that he could not support the Applicant’s request for SLWP.

7. The Applicant states that, on 24 March 2016, he was verbally informed by the USG/OIOS of the decision not to grant him SLWP.
8. In a management evaluation request dated 25 March 2016, the Applicant requested a review of the decision to deny his request for SLWP.
9. On 25 April 2016, the Under-Secretary-General for Management replied to the Applicant's request for management evaluation, informing him that the Secretary-General had decided to uphold the decision to deny his request for SLWP.
10. On 20 July 2016, the Applicant filed the present application.
11. On 21 July 2016, the application was transmitted to the Respondent who was instructed to file his reply by 22 August 2016.
12. On 21 July 2016, the case was assigned to the undersigned judge.
13. On 22 July 2016 the Applicant filed a "Request for certain documents to be filed under an Under Seal Application", requesting Annex 9 to the application to be filed under seal.
14. On 22 August 2016, the Respondent filed his reply to the application.
15. By Order No. 28 (NY/2016) issued on 29 September 2016, the Tribunal ordered that Annex 9 to the application is to remain under seal, that the case was to be determined on the papers before it, and that the parties could file their closing submission, if any, based only on the submissions and documents already before the Tribunal.
16. The Applicant filed his closing submissions on 3 October 2016.

Applicant's submissions

17. The Applicant's principal contentions may be summarized as follows:
- a. The USG/OIOS did not consider all of the relevant information and her decision was based on an irrelevant consideration;
 - b. The USG/OIOS had no knowledge of Appendix D to the Staff Rules (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations) prior to her decision to deny the Applicant the requested SLWP;
 - c. Staff rules 5.3(a) states that SLWP may be granted for "other important reasons" a category that applies in the present case as a result of prohibited conduct in the workplace. Staff rule 5.3(f) also states that a staff member may be placed on SLWP "in the interests of the Organization", a category that also applies in the present case. These considerations are independent of any application of ST/AI/2005/3 (Sick leave);
 - d. Staff rule 6.4 and Appendix D to the Staff Rules are irrelevant to the present application;
 - e. The Applicant has the right under the Staff Regulations and Rules to work in an environment free from discrimination, harassment and abuse. It is an attack on the principles of justice and fairness, and the underlying principles of the UN Charter that a staff member should be forced to utilize his extended sick leave entitlements because of the decisions and/or conduct of senior personnel, "whether these decisions were based on negligence, willful intent or corruption";
 - f. The USG/OIOS administers the Staff Rules independently of the Secretary-General. In the provision of this authority, the USG/OIOS denied the Applicant's request for SLWP. ST/AI/401 (Personnel

arrangements for the Office of Internal Oversight Services) was issued in 1995, thereby succeeding the provisions of ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), which was issued in 1989;

g. In his closing submission dated 3 October 2016, the Applicant informed the Tribunal that the Medical Services Division had approved his sick leave until 31 October 2016 and stated, *inter alia*, that:

1.0 Current Status of the Applicant's Sick Leave

1.1 For the purposes of providing the Tribunal all relevant/necessary information to enable it to base its determination(s), the Applicant can advise the Medical Services Division has approved his sick leave until 31 October 2016. The Applicant's return to duty has yet to be confirmed.

...

3.0 In the Interests of the Organization

3.1 Paragraphs 3 - 9 of Annex 1 of the Application are matters that are undeniably "*in the interest of the Organization.*"

3.2 Paragraphs 4 - 10 of the Application are matters that are undeniably "*in the interest of the Organization.*"

3.3 Paragraph 11 and Annex 13 of the Application are matters that are undeniably "in the interests of the Organization."

3.4 In his response to the Application the Secretary-General has provided absolutely no substantive response to refute the *prima facie* evidence outlined in paragraphs 3.1 - 3.3 above and/or the issues raised in Annex 8 or Annex 11 (see paragraph 24.c of Order 103 (NY/2013.)

4.0 Unlawfulness of the USG OIOS Decision to Deny the SLWOP Application

4.1 In his response to the Application the Secretary-General has provided absolutely no substantive response to the issues of irrelevant considerations, failure to consider relevant considerations in the

formulation of an absurd decision on the issues raised in Annex 8 or Annex 11 (see paragraph 23 of Order 103 (NY/2013.)

5.0 Staff Rule 6.4 and Appendix D

5.1 According to the English Oxford dictionary “attributable” is defined as [footnote omitted]:

Adjective: 1. Regards as being caused by:

“43 percent of all deaths in Ireland were attributable to cardiovascular disease.”

5.3 It is absurd for the SG to argue (assertion) *“the Applicant’s sick leave was attributable (i.e. caused by) the fact he is a UN staff member working in OIOS New York.”* Staff Rule 6.4 and Appendix D are for illness, death or injury attributable to service in high risk areas and/or incidents beyond the mandate of any United Nations policies or framework (i.e. third party liability claims.)

5.4 Notwithstanding the above, as outlined by Annex 3 to the Application, the USG OIOS was not even aware of the provisions of Staff Rule 6.4 and/or Appendix D when making her decision to deny the Applicant his request for special leave with pay.

5.5 In addition, the Applicants request for special leave with pay was submitted in accordance with Staff Rule 5.3(a) & (f) (see paragraphs 2.1 & 2.2 above) and as such Staff Rule 6.4 and Appendix D are irrelevant to his request for special leave with pay and/or the current Application.

6.0 The USG OIOS Authority to Place the Applicant on SLWP

6.1 The USG OIOS administers the Staff Rules independent of the Secretary-General. See paragraph 23 of Order No. 116 (GVA/2016.) In the provision of this authority the USG OIOS denied the Applicant his request for special leave with pay.

6.2 Notwithstanding this authority, even if the USG OIOS did not have full operational and administrative independence from the Secretary-General, her recommendations (emphasis added) to the ASG OHRM (as suggested by the Secretary-General in paragraph 14 of his response to the Application) would have been

unlawful (see paragraph 22 of 2014-UNAT-397 with specific reference to *Varnet v UNESCO* Judgment 179 International Labour Organization wherein it states: “*it applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.*”

6.3 Notwithstanding the Secretary-General’s arguments, ST/AI/401 (with emphasis to paragraph 5) was issued in March 1995 thereby succeeding the provisions of ST/AI/234 Rev 1 (which was issued in March 1989.)

Respondent’s submissions

18. The Respondent’s principal contentions may be summarized as follows:
- a. The Applicant was lawfully placed on sick leave status. Sick leave is the correct status for a staff member who is unable to perform his duties by reason of illness. The Medical Services Division has certified the recommendation of the Applicant’s physician that the Applicant be placed on sick leave from 4 March 2016 to 16 September 2016;
 - b. The source or cause of illness is irrelevant to his placement on sick leave. Neither staff rule 6.2, nor ST/AI/2005/3 distinguishes between work related and non-work related illnesses. Staff members are placed on sick leave independent of the source of their illness;
 - c. The Applicant is not entitled to be placed on special leave for extended illness under secs. 3.1 or 3.2 of ST/AI/2005/3 as he has not exhausted his sick leave entitlements;
 - d. The Applicant’s claim that his illness is attributable to service is unsubstantiated. Further, the Applicant has failed to exhaust internal remedies with respect to his claim of a service incurred illness. Should he believe his

illness is service-incurred he is request to follow the procedures set out in staff rule 6.4 and Appendix D to the Staff Rules;

e. The USG/OIOS does not have the authority to place the Applicant on SLWP. Pursuant to Annex II to ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), it is the Assistant-Secretary-General of Human Resources Management (“ASG/OHRM”) who has the authority to place a staff member on SLWP.

Consideration

Receivability framework

19. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O’Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases that are not receivable.

20. The Dispute Tribunal’s Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

21. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae and ratione materiae

22. The Tribunal notes that the Applicant is a current UN staff member and therefore the application is receivable *ratione personae*.

23. The Applicant is challenging the decision of the USG/OIOS, to deny his request for SLWP which is a reviewable administrative decision. The decision was orally notified to the Applicant on 24 March 2016 and he requested management evaluation on 25 March 2016, within 30 days from the date of notification. Therefore, the application is receivable *ratione materiae*.

Receivability ratione temporis

24. The Tribunal notes that the present application was filed on 20 July 2016, within 90 days from the date when the management evaluation decision was transmitted to the Applicant on 25 April 2016 and the application is receivable *ratione temporis*.

Applicable law

25. The Staff Rules provide, of relevance:

Rule 5.3 [formerly staff rule 105.2]

Special leave

(a) (i) Special leave may be granted at the request of a staff member holding a fixed-term or continuing appointment for advanced study or research in the interest of the United Nations, in cases of extended illness, for childcare or for other important reasons for such period of time as the Secretary-General may prescribe;

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted;

...

(f) In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization.

...

Rule 6.2

Sick leave

(a) Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by, the Secretary-General.

...

26. ST/AI/2005/3 (Sick leave) states:

Section 3

Relationship of sick leave to other entitlements under the 100 and 200 series

Exhaustion of sick leave entitlement

3.1 When the entitlement to sick leave has been exhausted, further certified sick leave shall be charged to annual leave. When the entitlements to sick leave and annual leave have been exhausted, the staff member shall be placed on special leave without pay.

3.2 When a staff member has used all of his or her entitlement to sick leave with full pay, the executive or local personnel office shall bring the situation to the attention of the Medical Director or designated medical officer in order to determine whether that staff member should be considered for a disability benefit under article 33 (a) of the Regulations of the United Nations Joint Staff Pension Fund while the staff member is on sick leave with half pay. When the staff member is being considered for such a benefit and paid leave entitlements have been exhausted because of a delay in the medical determination of the staff member's incapacity for further service or in the decision by the United Nations Staff Pension Committee whether to award a disability benefit, the staff member shall be placed on special leave with half pay until the date of such decision.

27. ST/AI/401 (Personnel arrangements for the OIOS), issued 18 January 1995, states:

1. Consistent with the desire of the General Assembly, expressed in its resolution 48/218 B of 29 July 1994, for the Office of Internal Oversight Services (OIOS) to exercise operational independence under the authority of the Secretary-General in the conduct of its duties, the Secretary-General defined in bulletin ST/SGB/273 the scope of the authority of the Under-Secretary-General for Internal Oversight Services in personnel matters, as follows:

(a) In keeping with the need for operational independence, the Under-Secretary-General shall, through appropriate arrangements of delegation of authority, exercise the degree of latitude and control over the personnel and resources of the Office, consistent with the Staff Regulations and Rules of the United Nations and the Financial Regulations and Rules of the United Nations, that is necessary to achieve the objectives of the Office;

(b) With respect to the staff of the Office, the Under-Secretary-General shall have powers of appointment, promotion and termination similar to those delegated by the Secretary-General to the heads of programmes, funds or subsidiary organs enjoying special status in these matters. Contracts of staff members appointed by the Under-Secretary-General shall be limited to service with the Office. Staff members holding regular United Nations appointments who are selected to serve with the Office shall retain their current status and their acquired rights under the Staff Regulations and Rules of the United Nations.

2. The purpose of the present instruction is to outline the administrative arrangements and the authority of the Under-Secretary-General for Internal Oversight Services in personnel matters.

3. The Staff Regulations adopted by the General Assembly and the Staff Rules and administrative instructions promulgated by the Secretary-General pursuant thereto will apply to staff members serving with the Office in the same manner as they do to the rest of the Secretariat.

...

5. Subject to the retention by the Secretary-General of his authority to promulgate and interpret the Staff Regulations and Rules and to take final decisions in appeals and disciplinary cases under the Staff Regulations and in compensation claims under Appendix D of the Staff Rules, full authority is delegated to the Under-Secretary-General for Internal Oversight Services by the Secretary-General as specified below, thus giving the Under-Secretary-General the responsibility for administering, in the name of the Secretary-General, the Staff Regulations and Staff Rules in respect of staff members serving with the Office.

6. To this end, the Secretary-General, in consultation with the Under-Secretary-General for Internal Oversight Services, will establish an OIOS Appointment and Promotion Panel to advise the Under-Secretary-General on the appointment, promotion and termination of all staff members up to and including the D-2 level. The Panel will consist of three members and three alternates: a chairperson to be nominated by the Under-Secretary-General for Internal Oversight Services, a member nominated by the staff of the Office and a senior staff member from the Department of Administration and Management. The Office of Human Resources Management will be represented ex officio. The functions and procedures of the Panel will be generally comparable to those of other United Nations appointment and promotion bodies. Secretariat policies, including the special measures to improve the status of women in the Secretariat, will apply.

...

9. Thus, in accordance with the relevant staff rules, the Under-Secretary-General for Internal Oversight Services will have authority to appoint all staff members whose appointments are limited to service with the Office up to the D-2 level, to promote staff members up to the D-1 level, and to terminate appointments of such staff members, except for termination under article X of the Staff Regulations, but including terminations for unsatisfactory services, with the advice of the OIOS Appointment and Promotion Panel.

28. ST/AI/234/Rev.1, issued 22 March 1989, as amended by ST/AI/234/Rev.1/Amend.2, issued 4 September 2014, states:

Matters within the authority of the Assistant Secretary-General for Human Resources Management

5. Matters within the authority of the Assistant Secretary-General for Human Resources Management are listed in annex II. The Assistant Secretary-General may delegate the exercise of this authority within and outside the Office of Human Resources Management, including to an Under-Secretary-General. Authority with respect to the matters indicated by an asterisk in annex II will be exercised by the Assistant Secretary-General for Human Resources Management in respect of staff at Headquarters and at United Nations missions and information centres and by the head of the office concerned in respect of staff at other offices away from Headquarters. Authority with respect to matters indicated by two asterisks in annex II will be exercised by the Assistant Secretary-General for Human Resources Management in consultation with the Controller. ...

...

Annex II

MATTERS WITHIN THE AUTHORITY OF THE ASSISTANT
SECRETARY GENERAL FOR HUMAN RESOURCES
MANAGEMENT

...

Rule 105.2 (a) Grant of special leave with full or partial pay, other than for jury service, and grant of special leave without pay for more than three months (except as provided in annex V)

29. ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules), provides, of relevance, that:

3.2 With the exception of the matters reserved exclusively for the Secretary-General or as otherwise indicated in the annex, all other matters related to the administration of the Staff Regulations and Rules are delegated to the Under-Secretary-General for Management.

...

4.1 In the exercise of delegated authority related to the administration of the Staff Regulations and Rules, the Under-Secretary-General for Management may amend, supersede, revoke or revise any and all existing delegations of authority unless such authority is retained by the Secretary-General or as otherwise indicated in the annex to this bulletin.

4.2 Notwithstanding section 3.2, the delegations of authority which currently exist through administrative issuances, memorandums or other written communications shall continue to be applicable unless (a) such authority is retained by the Secretary-General or as otherwise indicated through this bulletin; (b) abolished in accordance with section 5 below; or (c) otherwise amended, superseded, revoked or revised by decision of the Under-Secretary-General for Management.

4.3 The Under-Secretary-General for Management shall exercise any other authority related to the administration of the Staff Regulations and Rules which is (a) not retained by the Secretary-General or otherwise indicated in this bulletin; and (b) not delegated to other officials under existing delegations.

4.4 Where existing delegations of authority refer to provisions of the Staff Regulations and Staff Rules that are no longer in force, the most closely associated provisions of the Staff Regulations and Rules currently in force shall apply.

Findings

30. The Tribunal notes that the Respondent stated in his reply, *inter alia*, that:

The USG/OIOS does not have authority to place the Applicant on SLWP. Pursuant to Annex II of ST/AI/234/Rev.1 *Administration of the Staff Regulations and Staff Rules*, the authority to place a staff member on SLWP is reserved to the Assistant Secretary-General for Human Resources Management.

31. In his 3 October 2016 closing submissions, the Applicant stated that, “Notwithstanding the Secretary-General’s arguments, ST/AI/401 (with emphasis to paragraph 5) was issued in March 1995 thereby succeeding the provisions of ST/AI/234 Rev 1 (which was issued in March 1989.)”.

32. The Tribunal notes that ST/AI/234/Rev.1 was issued on 22 March 1989 and that only Annex 1 of this Administrative Instruction was superseded by ST/SGB/2015/1, which entered into force on the date of its issuance on 9 April 2015. It results from secs. 4.3, 4.4 and 5.2 of ST/SGB/2015/1 that Annex II of ST/AI/234/Rev.1 is still applicable, and it was not superseded by any other administrative issuances, including ST/AI/401 issued on 18 January 1995. Having reviewed the provisions of ST/AI/401 and ST/AI/234/Rev.1/Amend.2, the Tribunal concludes that, as submitted by the Respondent, it is the ASG/OHRM who has the delegated authority to grant or refuse a request for SLWP.

33. Paragraph 5 of ST/AI/401 states that “full authority is delegated to the Under-Secretary-General for Internal Oversight Services by the Secretary-General *as specified below*” (emphasis added). The subsequent provisions relate to the appointment, promotion and termination of staff in the OIOS but do not mention issues related to SLWP. Consequently, ST/AI/401 does not delegate authority for such issues to the USG/OIOS as opposed to that delegated to the ASG/OHRM.

34. Moreover, the Tribunal considers that solely the Secretary-General has the power to amend, supersede, revoke, revise or reconfirm, the delegation of his authority to another entity in matters related to the administration of the Staff Regulations and Rules. In the present case, the Secretary-General, being the Respondent, confirmed that the delegated authority to grant special leave with full or partial pay, other than for jury service, and grant of special leave without pay for more than three months (except as provided in annex 5 of ST/AI/234/Rev.1) rests with the ASG/OHRM.

35. Annex II of ST/AI/234/Rev.1 is not distinguishing between the different provisions of staff rule 5.3 and therefore, according to the principle *ubi lex non distinguit, nec nos distinguere debemus* (where the law does not distinguish, the judge cannot do so), in all situations, including the one mentioned in staff rule 5.3(f), the authority to decide on such a request is ASG/OHRM.

36. Matters related to special leave and/or sick leave within the authority of the heads of departments or offices, such as those dealt with in the present case within the authority of the USG/OIOS, are explicitly stated in Annex IV of ST/AI./234/Rev.1, notably:

- a. Grant of special leave without pay for up to three months, approval of sick leave (on advice of Medical Officer);
- b. Approval for staff member on sick leave to leave the area of the duty station (on advice of Medical Officer);
- c. Approval of sick leave within a period of annual leave (on advice of Medical Officer).

37. In the present case, there is no dispute that the decision to deny the Applicant's request for SLWP was taken by the USG/OIOS who, as results from the above considerations, has no delegated authority in this regard. The Tribunal therefore finds that the decision was unlawful because the USG/OIOS did not have the authority to decide (grant or deny) the Applicant's request for SLWP. The grounds of appeal related to the merits of the case are therefore not to be further analyzed.

38. The Tribunal further notes that, in accordance with the consistent and binding jurisprudence of the Appeals Tribunal, the Dispute Tribunal does not have authority to engage in a fact-finding exercise or substitute its discretion for that of the competent administrative authority (see, for instance, *Ivanov* 2015-UNAT-519, paras. 10 and 15– 19). Therefore, the Tribunal is not competent to make a decision regarding the Applicant's request for SLWP. Consequently, the application is to be granted in part in that the contested decision is to be rescinded and the Applicant's 9 March 2016 request for SWLP is to be remanded for consideration to the competent administrative authority, notably the ASG/OHRM in accordance with the authority delegated to her under Annex II of ST/AI/234/Rev.1/Amend.2. The ASG/OHRM is

then to consider the matter and issue a new reasoned written decision which, considering the urgency of the matter, should be made within 30 days. The Tribunal underlines that the present judgment is without prejudice to any proceedings, if any, related to the new decision to be issued by the ASG/OHRM.

Conclusion

39. In the light of the foregoing, the Tribunal DECIDES:

The application is granted in part. The contested decision is rescinded and the Applicant's 9 March 2016 request for SLWP is remanded for the ASG/OHRM's consideration within 30 days.

(Signed)

Judge Alessandra Greceanu

Dated this 7th day of October 2016

Entered in the Register on this 7th day of October 2016

(Signed)

Hafida Lahiouel, Registrar, New York