



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

HIRJI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Jonathan Croft, ALS/OHRM  
Susan Maddox, ALS/OHRM

## **Introduction**

1. The Applicant is a former staff member of the United Nations Mission in South Sudan (UNMISS). At the time of his separation from service on 4 October 2016, he was working as an Administrative Assistant at the GL-4/5 level with the Regional Service Centre in Entebbe, Uganda (RSCE).

2. The Applicant filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 18 December 2016 contesting the decision of the Under-Secretary-General for Management (USG/DM) to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity, in accordance with staff rule 10.2(a)(viii).

3. The application was served on the Respondent on 9 January 2017<sup>1</sup> and he submitted a reply on 4 February 2017.

4. The Tribunal held a case management discussion with the parties on 13 April 2017 and an oral hearing on 6 June 2017.

## **Relevant facts**

5. During the relevant period, the Applicant worked in the Finance Unit at the RSCE. He was responsible for processing financial transactions for several United Nations Peacekeeping Missions, including UNMISS, and Offices in Africa. The Applicant was responsible for: validating payroll documents; processing advances and F-10 claims for UNMISS International Individual Contractors (IICs) and United Nations Volunteers (UNVs); maintaining payroll records, journals and ledgers; reviewing arithmetic calculation; validating figures

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<sup>1</sup> The Applicant initially filed his application with the Registry via email on 18 December 2016. The Registry advised him on 19 December 2016 to create an account and resubmit his submission in the Tribunal's electronic Court Case Management System (CCMS). He resubmitted his application via CCMS on 7 January 2017.

and data on payroll documents; and making corrections and deductions when necessary.<sup>2</sup>

6. In early 2014, there were delays in payment of IICs in South Sudan. Consequently, RSCE staff members, including the Applicant, visited Juba, South Sudan, in 2014 on official mission to assist in resolving F-10 claim issues. During this visit, the Applicant met personally with Ms. Julie Mutumba, a Training Officer with UNMISS in Juba, to assist her with an F-10 claim issue.

7. On 14 August 2015, Ms. Mutumba reported to the UNMISS Special Investigations Unit (SIU) that the Applicant had assisted her with an F-10 claim submission and then, in February and March 2015, he demanded 50% of the value of the claim. She did not accede to his demand.

8. On 27 August 2015, Ms. Mutumba sent an email to SIU alleging that the Applicant had been taking money from United Nations Volunteers (UNVs) and IICs in exchange for processing their pending F-10 claims and other payments.

9. UNMISS SIU commenced preliminary investigations into the allegations reported by Ms. Mutumba in August 2015. In an initial investigation report dated 5 October 2015, which included interviews with Ms. Mutumba and the IICs/UNVs, UNMISS SIU recommended, *inter alia*, that a more extensive investigation should be conducted in conjunction with RSCE SIU.

10. A joint investigation team, comprised of the UNMISS and RSCE SIUs, was subsequently appointed to investigate the allegations of misconduct that had been brought against the Applicant by Ms. Mutumba. The joint investigation team, in its report dated 25 November 2015, concluded that the Applicant had received bribes from the IICs, solicited a bribe from Ms. Mutumba and improperly used his official position for private gain.

11. The Applicant was placed on Administrative Leave Without Pay (ALWOP) effective 2 February 2016. The ALWOP remained in effect until his separation from service.

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<sup>2</sup> Annex R-1 of the Respondent's reply, page 2 of the Joint Investigation Report (Case No. SIU/JUB/0748/2015) dated 25 November 2015.

12. After considering the conclusions in the joint investigation report, the Chief of the RSCE referred the matter to the Department of Field Support (DFS) on 22 February 2016 for action to be taken against the Applicant. DFS in turn referred the matter to the Office of Human Resources Management (OHRM) for action on 2 May 2016.

13. By memorandum dated 27 July 2016, the Assistant Secretary-General (ASG), OHRM, informed the Applicant of the allegations of misconduct against him, namely that in 2014 and/or 2015, he improperly used his position with the Organization for his own financial gain and solicited and/or accepted payments from one or more individual contractors. The ASG/OHRM provided the Applicant with a two-week deadline within which to provide a response to the allegations of misconduct.

14. A short time after he received the memorandum detailing the allegations of misconduct against him, the Applicant informed the RSCE that he was unable to access all the annexes to the said memorandum. Consequently, on 11 August 2016, the OHRM resent all the annexes to the Applicant by email.

15. On 22 August 2016, the Applicant requested and received an extension of time until 12 September 2016 to provide his responses to the allegations of misconduct. The Applicant submitted his response to the OHRM on 12 September 2016.

16. After a review of the entire dossier, the USG/DM concluded that the allegations of misconduct against the Applicant had been established by clear and convincing evidence and that his actions violated staff regulations 1.2(b) and (g) and staff rule 1.2(k). Consequently, the USG/DM informed the Applicant, by a memorandum dated 4 October 2016, of his decision to impose on the Applicant the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity, in accordance with staff rule 10.2(a)(viii).

17. The Applicant was separated from service effective 4 October 2016.

## **Submissions**

### *Applicant*

18. The Applicant asserts that the contested decision was unlawful and that the allegations of misconduct (i.e. bribery, extortion of funds and abuse of authority) are unfounded because he performed his duties with good faith, due diligence and goodwill and that he went above and beyond his assigned duties to assist his clients with their problems.

19. Further, it is the Applicant's case that the following administrative and procedural errors materially tainted the entire disciplinary process:

- a. His placement on ALWOP was unreasonably lengthy, misconceived and without a proper basis;
- b. He was not provided with notice when UNMISS SIU commenced the preliminary investigation on 3 October 2015;
- c. The investigation team handled his interrogation improperly and inhumanely because the investigators failed to consider the fact that he was in poor health after collapsing at work and being hospitalized some months before the investigation began;
- d. The investigation team coerced him into agreeing to certain statements that the team claimed would bolster his defense;
- e. The investigation team did not give him the opportunity to explain events and he was not given time to properly read through the statement that was prepared by one of the investigators;
- f. The Respondent failed to grant him access to his official emails/correspondence and supporting documents for 2014/2015, thus he was denied the opportunity to fully respond to the allegations against him;

- g. He did not have access to legal representation and this affected his right to a fair hearing;
- h. There was collusion among the witnesses; and
- i. The allegations against him were ambiguous and kept on changing.

20. The Applicant seeks the following remedies: (i) reinstatement to his position as an administrative assistant with UNMISS; (ii) payment of all salaries for the time that he was placed on ALWOP; (iii) payment of two months' annual leave that he had accumulated before his placement on ALWOP; and (iv) compensation for all inconveniences he suffered during the disciplinary process.

### **Respondent**

21. The Respondent's case is as follows:

- a. The facts have been established by clear and convincing evidence from the Applicant, Ms. Mutumba and the IICs who were affected by the Applicant's actions. The facts show that: (i) the Applicant unsuccessfully solicited money from Ms. Mutumba; (ii) some of the IICs paid the Applicant money so that he would process their delayed payments; and (iii) one IIC transferred money to another staff member for payment to be made to the Applicant.
- b. Although the Applicant denied having solicited payments from the IICs, the evidence shows that he received payments from them. The act of receiving money because of the assistance he was providing to the IICs based on his position within the Organization is prohibited by staff regulation 1.2(g) and staff rule 1.2(k).
- c. The evidence shows that the Applicant actively sought payments from Ms. Mutumba and at least one other IIC. Due to the Applicant's position at the RSCE, the IICs believed that he could influence the timely payment of their emoluments and for this reason, they made payments to

him. Consequently, the Applicant was not a beneficiary of donations or gifts from colleagues as he claims.

d. The established facts legally amount to misconduct under the staff regulations and rules. The Applicant solicited and/or accepted monetary payments from IICs and he knew that these payments were being made because of assistance he provided or was believed to have provided in his position with the Organization. The Applicant's acceptance of such payments violates staff regulation 1.2(g) and staff rule 1.2(k) and constitutes misconduct.

e. The disciplinary measure imposed on the Applicant was proportionate to the offence and in line with the Secretary-General's practice in similar cases. A sanction resulting in a staff member's separation or dismissal is consistent with the fact that taking advantage of one's position with the Organization for personal benefit contravenes the core value of integrity. The Applicant's admissions that he received money from the IICs were viewed as a mitigating factor that reduced the sanction from dismissal to a separation.

22. Additionally, the Respondent submits that the Applicant's rights to procedural fairness were respected as follows:

a. The Applicant was fully informed of the allegations against him, the basis of the allegations, and the regulations, rules and administrative issuances implicated by his alleged conduct.

b. Upon receipt of the allegations of misconduct, the Applicant reported that he was unable to access all the annexes so OHRM sent him the annexes. At his request, he was granted an extension of time to submit his response, which he did on 12 September 2016.

c. The Applicant was given three opportunities to provide statements during the investigation, all of which he signed as being true and accurate, and in two instances, he stated that he had provided all that he wished to say.

d. Contrary to the Applicant's contention, the RSCE provided him with an internal link through which he could access emails, including but not limited to, archived emails. He was also provided with information to assist him in retrieving his emails.

e. The Applicant has not provided any particulars as to how the insufficient notice he alleges hindered his ability to provide his account of events. He only alleges that he was under stress and that this affected his state of mind and health.

f. The Applicant's challenge against his placement on ALWOP is time barred since he failed to submit a request for management evaluation within 60 days of 2 February 2016.

## Issues

23. The Tribunal will interrogate the issues under the following headings<sup>3</sup>:

a. Were the allegations upon which the Applicant's separation was based proven sufficiently as to warrant disciplinary action against him?

b. Can the Applicant in the present application challenge the administrative leave without pay upon which he was placed before his eventual separation?

c. Were there any substantive or procedural irregularities or any flaws that tainted the investigative findings or disciplinary processes? In particular, the Tribunal will review whether there existed:

- i. Inadequate notice of investigation;
- ii. Denial of access to evidence needed for his defense (i.e. official emails and other correspondence for 2014-2015);
- iii. Applicant's inability to obtain legal assistance/representation.

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<sup>3</sup> *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098.



- iv. Applicant's denial of his recorded statements.

### **Considerations**

*Were the allegations upon which the Applicant's separation was based sufficiently proven as to warrant disciplinary action against him?*

24. By a memorandum of 27 July 2016, the Applicant was presented with formal allegations of misconduct. The Applicant was alleged to have improperly used his position within the Organization for his own financial gain by soliciting and receiving payments from some IICs at UNMISS in 2014 and 2015. He was informed that if it was established that he engaged in the alleged conduct, he would be found to have violated staff regulations 1.2(b) and 1.2(g) and staff rule 1.2(k).

25. While staff regulation 1.2(b) enjoins staff members to uphold the highest standards of efficiency, competence and integrity, staff regulation 1.2(g) forbids staff members from using their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour.

26. On its part, staff rule 1.2(k) provides that staff members shall not seek or accept any favour, gift, remuneration or any other personal benefit from another staff member or from a third party in exchange for performing, failing to perform or delaying the performance of any official act.

27. The Tribunal notes that the SIU investigators interviewed several witnesses. This included about eight IICs at UNMISS, some of whom were alleged to have either given money directly to the Applicant or given money to be passed on to him in order to have their overdue payments speedily processed and paid. They all gave written statements.

28. It is established that in 2014, the Applicant was part of a team of staff members from the RSCE who were assigned to assist UNMISS staff members with the completion of their F-10 forms with which they could make claims for their contractual entitlements. He was the focal point for the IICs. Ms. Julie

Mutumba was one of the IICs in Juba who asked for assistance from the Applicant. Upon his request, she gave the Applicant her personal contact information.

29. The investigators questioned the Applicant about emails he sent from his personal email account to Ms. Mutumba on 16 February 2015 in which he wanted to know when next she would be in Entebbe. They questioned him also as to why when she responded with possible dates, he stated in a follow-up email that he 'badly needed cash' but that he would wait until she came. He was further questioned about another email he sent her on 5 March 2015 stating that when she cashed her payment, he would get 50% of it.

30. In his statement to the investigators on 6 November 2015, the Applicant explained that he stated in the email of 16 February 2015 to Ms. Mutumba that he 'badly needed cash' because she had promised to give him something for his assistance with her F-10 claims. The Applicant at first denied sending the email in which he asked for 50% but later said he had sent it to her in error.

31. Under cross-examination by Respondent's counsel during the oral hearing, the Applicant said Ms. Mutumba had indicated she would reward him for his efforts. He further testified that he had stated in an email to Ms. Mutumba that he 'badly needed cash' because he had an intimate relationship with her and that they both usually contributed money to spend time together in a hotel room whenever she was in Entebbe. With regard to the email asking Ms. Mutumba for 50% of her payment, the Applicant said it was not meant for Ms. Mutumba but for a friend outside the work place.

32. The Applicant who made four separate statements to investigators<sup>4</sup> never stated in any of his statements that he was in an intimate relationship with Ms. Mutumba. He did not mention such a relationship in his pleadings either. While stating that his demand for 50% was meant for another friend outside work rather than for Ms. Mutumba, the Applicant has not thrown any light on the identity of

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<sup>4</sup> The Applicant's first statement to investigators was made on 3 November 2015, the second on 4 November 2015, the third on 6 November 2015 and the 4<sup>th</sup> statement was made on 9 November 2015.

this other friend. The Tribunal finds as a fact that the Applicant demanded financial gratification from Ms. Mutumba for performing his official duty of assisting her with F-10 claims. His emails to her dated 16 February 2015 and 5 March 2015 are proof of his expectations of and demand for money.

33. During the oral hearing in this case, the Tribunal observed the Applicant's demeanour and finds that the Applicant's story of an intimate relationship with Ms. Mutumba who had not only refused to give him a bribe but had also reported his demands for money and caused him to be investigated and disciplined is not only untrue but is merely a cowardly after-thought calculated to malign and humiliate her.

34. Mr. Ali Lumanisha, a former IIC, told investigators that the Applicant had never asked him for money. However, due to his worry about late payments, in May or June 2014 he acted on the advice of another IIC, Mr. Maganga, and sent USD100 to the Applicant through someone travelling to Entebbe so that the Applicant would speedily process his overdue payments. He stated that the Applicant acknowledged receipt of the money by phone and that he received his delayed payment one week later.

35. He also sent USD50 through Mr. Lubanjwa, a staff member at RSCE, in October 2014 to the Applicant and in November 2014, he again sent USD200 to the Applicant also through Mr. Lubanjwa's UNFCU bank account. He said that he informed Mr. Lubanjwa by email that the money was for the Applicant. Mr. Lumanisha who testified for the Respondent during the hearing also provided the relevant emails and a copy of his UNFCU bank statements showing that he wired money to Mr. Lubanjwa in support of his testimony.

36. Mr. Lubanjwa was the Respondent's second witness at the hearing. He had told investigators that on about three occasions in 2014, Mr. Lumanisha who was in Juba sent him wire transfers at RSCE through his UNFCU bank account. Mr. Lumanisha would then send an email to inform him that the money was to be given to the Applicant and he would withdraw the money and telephone the Applicant who would come to the Transport workshop at RSCE where he worked

to collect it. The first money sent him to be given to the Applicant was USD50, the second time it was USD100 and the third time it was USD200.

37. Mr. Lubanjwa's UNFCU bank statement for the month of November 2014 was produced together with five emails between Mr. Lubanjwa and Mr. Lumanisha where it was communicated by Mr. Lumanisha that certain sums of money were to be given to the Applicant.

38. When confronted with these allegations, the Applicant admitted to investigators that he received money sent by Mr. Lumanisha through a staff member at RSCE but said he never asked Mr. Lumanisha for money. He said he did not know why the money was sent to him but that he was willing to give the money back and that he would never have accepted the money gifts if he thought they were not given in good faith. In his second statement, the Applicant stated that he had remembered that on three separate occasions, Mr. Lubanjwa gave him money from Mr. Lumanisha.

39. On the other hand, during the hearing the Applicant testified that he remembered receiving money from Mr. Lumanisha only once and it was because they were very close friends and that he had received the money as a financial push from a friend and not because of any favours he did for Mr. Lumanisha. The Applicant testified that he did not know Mr. Lubanjwa.

40. The foregoing statements and testimonies show clearly that the Applicant received money from Mr. Lumanisha. It is also noted that although the Applicant had told investigators that he did not know why he was given the money, he told the Tribunal that Mr. Lumanisha gave him money because they were friends. Considering the Applicant's explanation, the question arises as to whether Mr. Lumanisha, an IIC with a temporary contract sent monies to the Applicant on those occasions simply because he wanted to be generous to a friend? This most certainly was not the case. The Tribunal finds as a fact that the Applicant corruptly accepted the money gifts in order to do his legitimate job of processing timely payments for Mr. Lumanisha and other IICs.

41. In his statement to investigators, Mr. Maganga stated that he and other IICs in Juba whose delayed payments were processed by the Applicant agreed to send money to the said Applicant to thank him. In May 2014, sums of money were contributed by Ms. Lee-Brapoh, Messrs. Jean Claude Pierre, Lumanisha and himself and he personally gave the said contributions of USD250 in the presence of his wife to the Applicant in the RSCE private parking lot in Entebbe.

42. Mr. Maganga continued that on a second occasion, he again contributed money with Ms. Lee-Brapoh and Mr. Jean Claude Pierre which was given to the Applicant. On a third occasion, he gave the Applicant the sum of USD100 from Ms. Lee-Brapoh. He stated also that the Applicant did not ask for money but that they gave him in gratitude for helping them with their payments. With regard to money he received from Mr. Maganga, the Applicant told investigators that he was given the money by Mr. Maganga to deliver to Mr. Maganga's wife or girlfriend and that he did.

43. However, in his fourth statement, the Applicant admitted that he received the sum of USD100 from Mr. Maganga at the RSCE private parking lot in the presence of Mr. Maganga's wife. Also in evidence was an email sent by the Applicant to Mr. Maganga on 4 November 2015 after he was first interviewed by investigators. In the said email, the Applicant mentioned that he was being investigated over the sum of USD100 given him by Mr. Maganga and that he thought the money was given in good faith and that he never asked for it

44. Another IIC at UNMISS, Mr. Joseph Mukuba, also stated to investigators that sometime in the middle of July 2015, the Applicant demanded the sum of USD300 from him when he cashed a cheque in the Barclays Bank branch at the RSCE. He stated also that the money which he cashed was less than USD3000 and had been owed him for about five months. He then followed the Applicant into the male restroom and gave him the money because he felt he had no choice as the Applicant could frustrate similar payments due to him in the future.

45. The Applicant on his part told the investigators that the money was given by Mr. Mukuba out of his own free will and that he did not ask for it. The Applicant admitted in his statements that he received USD100 each from Ms.

Lee-Brapoh and Mr. Jean Claude Pierre but stated that he did not know what the monies were meant for.

46. While being cross-examined, the Applicant denied receiving any money from Mr. Maganga, Mr. Mukuba, Mr. Jean Claude Pierre or Ms. Lee-Brapoh. He first said he knew Mr. Mukuba and that they were both Ugandans. Later in his answer to another question, he said he did not know Mr. Mukuba.

47. After thorough review of the evidence before it, the Tribunal observes that in total the statements of about nine individuals to investigators and the sworn oral testimonies of two of them are consistent that the Applicant received various sums of money from some IICs in the years 2014 and 2015. The evidence is clear that the sums of money were received by the Applicant in order to process the overdue payments of the affected IICs or as gratification for having processed the said payments.

48. In particular, the Tribunal believes the sworn oral testimonies of Messrs. Lumanisha and Lubanjwa. Their testimonies were further materially corroborated by the UNFCU bank statements of Mr. Lubanjwa for the relevant periods in 2014 and the email exchanges between them showing that the monies which were sent to Mr. Lubanjwa by Mr. Lumanisha were to be paid to the Applicant.

49. As already stated, the Tribunal believes the statements of Ms. Mutumba which are materially corroborated by the Applicant's emails to her showing his anticipation of receiving part of her legitimate earnings and further making demands for an equal sharing of the said earnings.

50. Mr. Maganga's statement to investigators that he sent various sums of money to the Applicant on behalf of himself and other IICs is also materially corroborated by the email sent to Mr. Maganga by the Applicant himself on 4 November 2015 following the Applicant's initial questioning by the investigators.

51. During his testimony, the Tribunal observed the Applicant closely as he stumbled from one lie to another. As he made efforts in his answers, while being cross-examined, to deny the admissions he made in his statements to

investigators, it was apparent that he was desperately attempting to clutch at straws.

52. The only witness who testified for the Applicant, Ms. Ndagire could not provide relevant evidence to support the Applicant's case. Her sworn testimony, which was irrelevant to the Applicant's case, was that she was in the team that worked on the payment claims of staff members in 2014 and that Ms. Mutumba was closer to the Applicant than to the other members of the finance team who were helping staff members.

53. In conclusion, the Tribunal makes no hesitation in finding that in the years 2014 and 2015, the Applicant corruptly received various sums of money from Mr. Maganga, Mr. Lumanisha, Mr. Mukuba, Mr. Jean Claude Pierre and Ms. Lee-Brapoh in abuse of his position as a finance assistant at the RSCE.

54. The Tribunal also finds and holds that the allegations of soliciting and receiving money from certain named IICs made against the Applicant were established by clear and convincing evidence which is the required standard of proof. In the circumstances, the charge of misconduct against the Applicant was clearly and sufficiently proven as to warrant disciplinary action against him.

***Can the Applicant in the present application challenge the ALWOP upon which he was placed during the disciplinary process and before his eventual separation?***

55. In this application, the Applicant seeks to also challenge the lawfulness of the Administrative Leave without Pay (ALWOP) upon which he was placed on 2 February 2016 while a disciplinary process was initiated against him. The said ALWOP was subsequently renewed on 2 May 2016 and 2 August 2016.

56. At the times material to this application, Administrative leave in the Organization was governed by ST/AI/371 and its amendment 1 (Revised disciplinary measures and procedures). The Applicant did not at any stage when the said ALWOP against him was in force in 2016 challenge it either through an interim application or a substantive one. The Respondent submitted that the Applicant ought to have challenged his ALWOP by first requesting management

evaluation within 60 days from 2 February 2016 when he was first placed on ALWOP. But the Tribunal has held in earlier decisions that an Administrative leave upon which an Applicant is placed can be challenged at any time during the pendency of the said Administrative leave.<sup>5</sup>

57. Since the last renewal of the ALWOP of the Applicant started on 2 August 2016 and ended on 4 October 2016 with his separation from service, the question arises as to whether the Applicant has raised the matter of its lawfulness within time. This application was filed on 16 December 2016 just after the Applicant had been separated from service.

58. While it would appear that despite his separation, the Applicant challenged the ALWOP within the 60-day time limit in which a staff member is allowed to challenge an administrative decision, it must be borne in mind that he did not seek management evaluation before approaching the Tribunal on that score. Even though he is not required to seek management evaluation in challenging his mandatory separation from service which is a disciplinary action, his ALWOP does not constitute disciplinary action and therefore management evaluation is a *sine qua non* for the purposes of challenging it before the Tribunal.

59. Going further, where as in this case the Tribunal finds that the disciplinary action against the Applicant is lawful, it goes without saying that the placement of the Applicant on ALWOP during the disciplinary process was justified. If on the other hand the Tribunal had made a finding that the disciplinary action against the Applicant was unlawful, an order for rescission of the disciplinary measure imposed on him would be made together with an order for the Applicant to be fully paid his salary and other entitlements for the period that he was placed on ALWOP.

60. Therefore, in the absence of a request for management evaluation of the ALWOP by the Applicant and in the face of a finding that the allegations against the Applicant were sufficiently proven; the placement of the Applicant on

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<sup>5</sup> *Calvani* UNDT/2009/092; *Ba* UNDT/2012/025.



ALWOP during the pendency of the disciplinary process cannot be entertained by this Tribunal.

***Were the investigative and disciplinary processes tainted by any substantive or procedural irregularities?***

61. The Applicant claimed that both the investigations and the disciplinary process were tainted and unfair. With regard to the investigations, he alleged that he was not given adequate notice and that he was in poor health and was not in a right state of mind to be interrogated by investigators. He also claimed that: (i) he was unable to access relevant official documents to respond to the allegations against him; (ii) his right to fair hearing was breached because he had no legal representation and (iii) the investigators tricked him into making confessions.

62. The Respondent on his part contended that all of these claims are untrue because the Applicant was fully informed of the allegations against him, the basis of the allegations and the regulations, rules and administrative issuances that his alleged conduct would have breached, if proven.

63. The Respondent also pointed out that the Applicant did not raise any objections as to his preparedness during his interview with investigators nor did he specify how or what hindrance he suffered in answering the allegations against him at that stage. He claimed that the Applicant was allowed to access and retrieve his emails in order to make his responses to the allegations.

***Inadequate notice of investigation***

64. In examining the Applicant's claim that he was not given adequate notice of the investigation against him, regard is had to ST/AI/371 which at the times material to this case was the relevant legislation on disciplinary measures and procedures. Its section 2 provides that where there is reason to believe that a staff member engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation.

65. Nowhere in that legislation is it provided that notice of any sort is to be given to the subject of an investigation. In *Powell* 2013-UNAT-295, the United Nations Appeals Tribunal (the Appeals Tribunal) held that:

“Obviously, all of the due process rights provided in former Staff Rule 110.4 and ST/AI/371 cannot apply during the preliminary investigation because they would hinder it. These provisions only apply in their entirety once disciplinary proceedings have been initiated. During the preliminary investigation stage, only limited due process rights apply.”<sup>6</sup>

66. Moreover, there are no rights to notice guaranteed in any international human rights instruments to individuals whose activities or conducts become the subject of proper and legal administrative or even criminal investigation. It cannot be denied however that the subject of an investigation must be informed of the allegations against him/her before he/she is called upon to answer to them. The Applicant’s claim is not that he was not told why he was being investigated.

*Poor health and not in a right state of mind*

67. The Applicant alleged that at the time he met with the investigators in this case, he was in poor health and therefore his interrogation was improper and inhumane. While answering questions from the Respondent’s counsel during his sworn oral testimony, the Applicant said that he had a medical condition and therefore ended up making admissions about things he did not do. However, he did not lead any evidence to show that he was in poor health during the interviews or that his state of health rendered the answers he gave unreliable.

68. On record as part of the Applicant’s evidence as to the state of his health in and around the time of the investigations is a letter dated 26 November 2016 from Nakasero Hospital in Kampala, Uganda, signed by a Dr. Simon Luzige. The letter stated that the Applicant was admitted at the said hospital on 2 January 2015 and discharged. The Applicant was later seen as an out-patient on 16 March 2015, treated and reviewed a week later. He was again admitted on 3 December 2015 and discharged the next day. The Applicant had a history of fits and suffered from tonic-clonic disorder otherwise known as epilepsy.

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<sup>6</sup> See also Applicant 2012-UNAT-209.

69. The records also show that the Applicant was interviewed by investigators on 3, 4, 6 and 9 November 2015. It would appear that the Applicant's last epileptic seizure before he was interviewed by investigators was nearly eight months prior in March 2015. The letter from Nakasero hospital did not show that the Applicant could not have been in his right mind at the time he met with investigators. The Applicant did not tell investigators at any of his four interviews with them that he was ill, confused or not in a right state of mind to answer questions or provide statements. There is also nothing to show that the Applicant was on certified or uncertified sick leave at the time of his interviews.

70. Again, the Tribunal finds that the Applicant did not plead neither did he lead evidence to show that the fact that he may have suffered from epileptic seizures or fits at certain times made him in any way not responsible for his actions when he solicited or took gratification for carrying out his legitimate duties within the Organization; or that the condition of being epileptic brought about a loss of memory that meant that he could not be expected to give his own accounts of what he was alleged to have done in 2014 and 2015.

*Denial of access to evidence needed for his defense.*

71. The Applicant stated in his pleadings that his requests to access official emails from his computer were denied. The Respondent rebutted the facts as pled. He contended that by email dated 11 August 2016, the Chief of RSCE informed the Applicant that a convenient solution had been found for him to access his official emails. An internet link was then provided to the Applicant through which he could access emails including even archived emails and information was also provided to assist him in retrieving the emails.

72. The Respondent stated also that after the Applicant had received the allegations of misconduct memorandum and was informed that he had two weeks to submit his response, the Applicant informed the RSCE that he was unable to access all the annexes to the memorandum. The said annexes were sent to him by OHRM. The Applicant was also allowed an extension of time to submit his response to the allegations. The Respondent's contentions are not rebutted.

*Inability to obtain legal assistance/representation*

73. The Applicant stated that upon receiving the charges against him, he was advised to seek legal assistance from the Office of Staff Legal Assistance (OSLA) or from private counsel at his own expense. He stated further that OSLA denied him representation or advice in responding to the charges against him and that he could not afford private legal counsel. It was his submission that the lack of legal representation violated his right to a fair hearing.

74. The Tribunal is at a loss to understand why legal representation or advice would be needed by the Applicant in responding to the allegations brought against him as his answers to the allegations would be purely based on facts within his knowledge and not on law. The Applicant's submission, made even before his case was heard at the Tribunal, that his inability to have legal representation amounted to a violation of his right to fair hearing is without merit.

75. In some cases that come before the Tribunal, access to justice for an applicant can become an issue. Certain unrepresented applicants have sometimes found it difficult to properly articulate their cases due the legal complexity of such cases which could be compounded also by language problems, low literacy levels of the applicant and a physical location where communication with the Tribunal poses a challenge.

76. In such cases, the Tribunal would take judicial notice of the situation and make efforts to see that the applicant's case is properly articulated and considered so that justice is served. In this application, the issues are straightforward. The Applicant is not hampered by language or any inability to appreciate what is at stake and the Tribunal took its time during the hearing to properly explain to the Applicant what was required of him in stating his case.

*Investigators tricked the Applicant?*

77. The Applicant stated in his pleadings that he was tricked by investigators into making admissions to the allegations against him. It was also part of the Applicant's case that his written statements during the investigations were recorded by the investigators and that he was asked to sign them without being

allowed to read them through. He also pled that he was not allowed to make any additional statements afterwards.

78. When he was being cross-examined during his sworn oral testimony, the Applicant said that his statement made on 6 November 2015 was not correctly recorded because he did not use the words 'F10 claim' as recorded in the statement. He said that except for the use of the word 'F10 claim', the other parts of the statement were correct. He told the Tribunal also that the investigators coerced him into making certain statements which they told him were useful for his defense. The Applicant continued that he was not given an opportunity to explain what happened.

79. The Applicant stated also that contrary to what was recorded in his statement of 3 November 2015, he never told investigators that he knew Ms. Lee-Brapho or that he received money from her, Mr. Pierre or from Mr. Maganga. He testified further that the investigators took advantage of him and tricked him into signing a statement he did not make. He said he did not recall making the statement of 6 November 2015 and telling investigators that he received money from Mr. Mukuba or that he had coffee with him.

80. The Tribunal has carefully examined the Applicant's claims that he was tricked and coerced by investigators into admitting what he did not do. It is clear from that examination that the Applicant is not a witness of the truth. Each of the Applicant's four statements were made on different dates and were all signed by him. Despite the Applicant's story that he was tricked, taken advantage of and coerced into signing his statements, he did not explain the form of coercion and tricks used or give details of how he was taken advantage of.

81. The Tribunal took time to watch the Applicant as he weaved his way through his pleadings and sought to explain that he did not admit to the wrong doings as recorded in his statements. Even in his sworn testimony, he has been mostly inconsistent. In answer to a question in cross-examination, he told the Tribunal in one breath that he received money from a friend and quickly reversed himself and said he did not receive any money.

## **Conclusions**

82. The Tribunal finds and holds as follows:

- a. The case against the Applicant was established by clear and convincing evidence and that disciplinary action was warranted in the circumstances.
- b. In this application, the Applicant cannot challenge his placement on ALWOP which preceded his separation from the Organization.
- c. The investigative and disciplinary processes which led to the Applicant's separation were not shown to be tainted by any irregularities.

## **Judgment**

83. In the light of the foregoing, this Application fails and is accordingly dismissed.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 28<sup>th</sup> day of November 2017

Entered in the Register on this 28<sup>th</sup> day of November 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi