



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

FULTANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sétondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Sergei Gorbylev, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Conduct and Discipline Officer at the United Nations Interim Security Force for Abyei (“UNISFA”), serving on a continuing appointment at the P-4 level, challenges the Administration’s decision to place him on Administrative Leave with Pay (“ALWP”) for three months, or until the completion of an investigation into his conduct and any disciplinary process.

Factual and procedural background

2. The Applicant entered into service of the United Nations on 1 July 2009.
3. On 21 September 2020, he filed an application before the United Nations Dispute Tribunal contesting the decision not to pay him Daily Subsistence Allowance (“DSA”). That application was registered as UNDT/NBI/2020/076.
4. On 12 November 2020, the Applicant informed the Tribunal that the dispute has been resolved *inter partes* and sought leave to withdraw proceedings.
5. On 24 November 2020, the Tribunal issued Order No. 231 (NBI/2020) granting the Applicant’s motion and striking the matter off the Tribunal’s docket.
6. On 22 March 2021, the Applicant received an email from the Chief Resident Investigator of the Office of Internal Oversight Services (“OIOS”) in South Sudan informing him that the Office was “investigating 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.”
7. The Applicant was invited to attend an interview regarding this investigation on 24 March 2021.
8. The Applicant attended the interview on the scheduled date by himself.
9. The Investigation Report (“IR/Report”) was issued on 27 May 2021.
10. On 13 June 2021, the Applicant was notified that he was being placed on ALWP, effective 14 June 2021, by the Acting Head of Mission on grounds of

unsatisfactory conduct.

11. The notification went on to state that given the “egregious nature of the findings,” and the post encumbered by the Applicant, “there [was] risk of reputational damage, repetition and/or possible continuation of unsatisfactory conduct.”

12. On 3 August 2021, the Applicant filed the application mentioned in para. 1.

13. The Respondent filed his reply on 28 September 2021 stating the impugned decision was lawful and rational.

14. On 3 August 2022, the Tribunal issued Order No. 107 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022. The Applicant and Respondent filed their respective closing submissions as directed.

Parties’ submissions

15. The Applicant submits that the Respondent has violated his due process rights and failed to comply with the requirements of staff rule 10.4(a) and section 11.3 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) in placing him on ALWP. The reasons provided for placing the Applicant on ALWP are not explained to the required standard.

16. The Administration used the wording of section 11.3 (e) of ST/AI/2017/1 without providing the facts to match the provision. Nowhere has he explained *how* there was any “risk of repetition or continuation of the satisfactory conduct”. The allegations against the Applicant stem solely from the previously withdrawn case (UNDT/NBI/2020/076), and it was therefore impossible for the Applicant to have continued to engage in the alleged misconduct.

17. Further, the Respondent’s evidence stem from privileged exchanges between the Management Evaluation Unit (“MEU”) and the Applicant’s previous counsel during the mediation process to settle the case which was withdrawn. The Applicant

argues that this procedural violation is fatal to the admissibility of the Investigation Report.

18. OIOS had no authority to make any conclusions or statements about whether they considered that the Applicant had engaged in any misconduct to influence the decision-maker.

19. As of the filing of closing submissions, the Applicant continues to be on ALWP; 14 months since he responded to the allegation on 19 September 2021.

20. The Respondent is unequivocal in his position that the application has no merit and should be rejected. The decision to place the Applicant on ALWP was lawful and rational. It was based on the information provided by OIOS following a procedurally proper investigation. The Applicant was informed of the duration of his ALWP, which was reasonable. Finally, the decision did not constitute a disciplinary measure. It was taken pending the completion of the disciplinary process and was without prejudice to the Applicant's rights.

Considerations

Procedural issues.

21. The Applicant complains about the acceleration in dealing with the case by the Tribunal once the case was assigned to the undersigned Judge.

22. The Tribunal, despite having in mind that the Applicant is on leave with pay during the proceedings, notes that it is generally in the interest of staff members that their rights, are promptly redressed. In any case, the Tribunal, recalling art. 19 of the Rules of Procedure, notes that the Applicant was fully granted the opportunity to present his case in depth, developing any issue raised in the proceedings, and to properly respond to the Respondent.

23. On 21 July 2021, the Applicant duly received written allegations of serious misconduct for making false statements and submitting false hotel receipts to unduly obtain USD18,519.12 from the Organization in reimbursement for purported expenses he never actually incurred. The Applicant contests that annex

R6 to the reply, containing the allegation of misconduct, is dated after the challenged decision and therefore asks to strike it off the records.

24. The Tribunal finds that the document is lawfully submitted and that, being subsequent to the challenged decision, it cannot found it, but in its evidentiary value it can demonstrate the persisting interest of the Administration in the measure and also can corroborate the facts which constitute the ground for the document. The relevance and weight of the document will be therefore subjected to scrutiny with reference to the present proceedings.

25. The Applicant also asks that the Investigation Report be struck-off, on grounds that some sentences in the report were subject to a confidentiality agreement.

26. The Tribunal, having in mind art. 18 of the Rules of Procedure and stating that in general documents illegally acquired or in breach of confidentiality rights may be used in court (although the author of the violation could be held responsible for that), finds that the use in trial of the investigation report is not related at all to the documents subjected to the confidentiality agreement between the parties, but is an autonomous document, which can be lawfully used in court.

27. The Report – which finds that the Applicant knowingly submitted fake receipts and false information to the MEU in case MEU/159/20/R, in furtherance of a claim for financial reimbursement for costs the staff member did not incur - does not refer to the communications between the Applicant and his counsel (which are privileged) nor to exchanges during a mediation process (which can be considered privileged only to a certain extent) to settle the case, but only considered the objective behavior of the Applicant in the false demonstration of some costs subject to reimbursement by the Administration (which was party to that management evaluation (“ME”) process).

28. Indeed, although the fact that the MEU is an independent unit in the office of the USG/DM (General Assembly resolution 62/22813, paras. 50 and 51; section 10 of ST/SGB/2010/9 (Organization of the Department of Management)) with the task to conduct an impartial and objective evaluation of administrative decisions

contested by staff members (as stressed in *Elmi* UNDT/2016/032), proceedings before the MEU are not comparable to the mediation run by the Ombudsman (where the parties are bound not to disclose privileged communications related to mediation attempts), because MEU is still part of the Administration and the ME process is a kind of administrative review of the administrative decision; therefore, the Administration can lawfully take into account the behaviour of the parties during the ME process, given its administrative nature.

29. The Applicant seems also to allege that the receipts of the accommodation, which were found false by the investigation report, were only indicative of average costs and they were used as a tool to leverage and come out with a better deal in the mediation process, so they are fully covered by the confidentiality of the process.

30. This argument fails, simply considering that – as the investigators considered in the report - the documents in question are not indicative but show effective costs the Applicant wanted to be reimbursed, and they were used in the administrative process and not for mediation purposes.

31. The Applicant's motion to strike-off the investigation report is therefore dismissed.

32. In his closing submissions, the Applicant also filed a motion to refer the conduct of the MEU and Counsel for the Respondent to the Secretary-General for the enforcement of accountability because they shared documents filed by the Applicant in a different ME request.

33. The motion has no merit. MEU is part of the Administration, which has to be regarded as a whole. Therefore, the documents exhibited in the ME have been legally acquired by the Administration.

34. The Applicant reiterates that his substantive due process rights were violated because:

- a. The decision maker failed to comply with the requirements of staff rule 10.4 (a) and section 11.3 of ST/AI/2017/1 in placing him on ALWP.

The reasons provided in placing him on ALWP are not explained to the required standard.

b. OIOS unlawfully influenced the decision maker and was not acting as an operationally independent entity.

c. OIOS failed to conduct the investigation in line with ST/AI/2017/1 and the required OIOS investigation procedures, therefore, reliance upon the flawed investigation report in making the impugned decision to place him on ALWP is axiomatically unlawful.

35. The Respondent argues that the Applicant's continued presence at the duty station, prior to a finalization of the disciplinary process in the matter, would have been prejudicial to the interest and reputation of the Organization and that the decision to place him on ALWP was lawful and guided by the view that there was a risk of reputational damage to the Organization as well as a risk of a repetition of the conduct he was accused of.

36. Rule 10.4 reads as follows:

Administrative leave pending investigation and the disciplinary process (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. (c) Administrative leave shall be with full pay except (i) in cases in which there is probable cause that a staff member has engaged in sexual exploitation and sexual abuse, or (ii) when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

37. ST/AI/2017/1 provides in relevant parts as follows:

Section 11

Administrative leave

11.1 In accordance with staff rule 10.4, a staff member may be placed on administrative leave with or without pay 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 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.

...

Administrative leave with pay

11.3 The decision to place a staff member on administrative leave with pay 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;

...

(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;

...

(e) There is a risk of repetition or continuation of the unsatisfactory conduct.

38. As regards the standard for judicial review of administrative decisions, including a decision to place a staff member on ALWP, it is well-established *per Sanwidi* 2010-UNAT-084, that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General." In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision."

39. In conducting judicial review of the decision to place the Applicant on ALWP, the Tribunal reviews whether the decision was lawful and rational,

considering the criteria stipulated in the Staff Rules and sections 11.1 and 11.3 of ST/AI/2017/1 and the information before the Administration at the time of the decision. It is not for the Tribunal to substitute its own view for the Administration's decision but to evaluate whether that decision was irrational or arbitrary. This task, however, includes an assessment of facts and has limitation only in the Secretary-General's discretionary powers.

40. As the Tribunal stressed in *Kavosh* UNDT/2022/032, the placement on administrative leave without pay ("ALWOP") cannot be regarded as a disciplinary measure infringing on the presumption of innocence or aimed at inducing the staff member to resign from his job, as the Staff Rules specifically provide that administrative leave with full or partial pay or without pay is not a disciplinary measure but an administrative measure.

41. Following *Gharagozloo Pakkala* UNDT/2021/076, administrative and disciplinary measures are different in nature, conditions, scope and consequences. In particular, disciplinary measures are intended to punish the infringement by the staff member of his/her duty inherent in the working relationship and presuppose a fact of misconduct, specifically provided in the rules as such and punished. On the contrary, administrative measures can be taken in cases where a staff member's conduct does not rise to the level of misconduct, but a managerial action is nevertheless required; their function is preventive, corrective and cautionary in nature.

42. In *Gisage* 2019-UNAT-973, par.a 37, UNAT stressed that

ALWOP may be contemplated if the conduct in question might pose a danger to the Organization, including, in our view, the reputational harm to the Organization caused by its staff members engaging in exploitative conduct in disadvantaged communities subject to the protective mandate of the Organization.

43. In the same judgment, UNAT has also cautioned (para. 40), that any decision to extend ALWOP must be reasonable and proportionate and that such a decision is a drastic administrative measure and normally should be of short duration. In determining whether an extension of ALWOP is lawful, the Tribunal shall be

guided by factors such as, the circumstances of the case, 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.

44. Applying these principles to the case at hand, the Tribunal finds that the contested decision was lawful and rational, made pursuant to staff rule 10.4 and sections 11.1 and 11.3 of ST/AI/2017/1.

45. The decision did not constitute a disciplinary measure. It was taken pending the completion of the disciplinary process and was without prejudice to the Applicant's rights.

46. More than one circumstance warranting the placement of the staff member on ALWP occurred, as the Respondent highlights:

First, given his function as a Conduct and Discipline Officer and the alleged serious lapse of integrity, the Applicant 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, the Applicant'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 the Applicant's unsatisfactory conduct. The Applicant's duty station is a Category E duty station, 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 UN benefits and entitlements. In consequence, the requirement established in section 11.3 (e) of ST/AI/2017/1 was equally met.

47. It is also useful to note that the memorandum (Applicant's annex 1) states "there is a risk of reputational damage, repetition and/or possible continuation of unsatisfactory conduct" and, while explicitly recalling Paragraph 11.3 (e) only, it implicitly refers to paragraph 11.3 (c) regarding "reputational damage", as emerges from the following part of the memorandum which this reputational damage refers to.

48. The disciplinary process is still pending. Until the end of it, the reasons for the Applicant's ALWP, as set out in the Respondent's reply, continue to exist.

49. The Applicant was informed of the duration of his ALWP, which was reasonable, considering the duration of the investigation and the disciplinary proceedings.

50. The administrative decision at stake was based on the information provided by OIOS and it is rational; if established, the Applicant's alleged conduct would constitute a violation of staff regulation 1.2(b) and 1.7, as well as sections 5 and 6 of ST/IC/2016/25 (Anti-Fraud and Anti-Corruption Framework of the United Nations Secretariat) and would amount to serious misconduct. The Applicant could be dismissed or separated from service with the United Nations for breach of the duty of trust and confidence, in particular, in view of his position as a Conduct and Discipline Officer.

51. OIOS did not unlawfully influence the decision maker. It properly informed the decision maker, using appropriate language, and left the assessment to the Office of Human Resources ("OHR"). OIOS only recommended that "appropriate action based on the report" be taken; It neither made conclusions nor operate as an administrative advisor.

52. The Applicant complains of having been interviewed by only one investigator instead of two. He submits that the action of only involving a single investigator in the interview process violated para. 14 of the OIOS investigative procedure for OIOS investigation of subjects ("All audio recorded interviews with subjects should be conducted by two investigators. Where only one investigator is available, approval to proceed must be sought in advance from the relevant Section Chief").

53. The Tribunal finds that the investigative procedure is not flawed. Indeed, the rule requiring the presence of two investigators is applicable to audio-recorded interviews, and it does not apply to videorecording. Indeed, by videorecording the interview, OIOS ensured that everyone was accountable for their part in the process, in total transparency of what happened, so that the presence of two investigators was not necessary.

54. Finally, the Tribunal notes that the Applicant raised no issue on the merit of the accusations.

Conclusion

55. In light of the above, the application is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 7th day of October 2022

Entered in the Register on this 7th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi