



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

ALMOGHAYER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Monika Ona Bileris

Counsel for Respondent:

Esther Saabel, LPAS/HRMS/UNOG

Introduction

1. The Applicant, a former Chief Executive Officer (“CEO”), Global Partnership Hub (“GPH”), Division for Prosperity (“DP”), United Nations Institute for Training and Research (“UNITAR”), contests the decision to place him on Special Leave Without Pay (“SLWOP”) following (i) the exhaustion of his leave entitlements, and (ii) the failure by the donor, the Arab Gulf Programme for Development (“AGFUND”), to transfer the necessary funds for the project under the Applicant’s responsibility and the absence of any other source of funding to cover his salary (the “contested decision”).
2. For the reasons set out below, the application is rejected in its entirety.

Facts and procedural history

3. By letter of appointment effective 15 November 2021, the Applicant was offered a temporary appointment as Senior Manager Online Learning and Education (P-6 level), Division for Peace, Peacekeeping Training Programme Unit (“PTPU”), UNITAR, until 13 November 2022. Documentary evidence of a private instant messaging exchange between the Director/UNITAR and AGFUND dated 29 September 2021 and 20 October 2021 suggests that the Applicant was onboarded as per the donor’s request.
4. On 15 December 2021, UNITAR and AGFUND signed two agreements to be managed by the Division for Peace of UNITAR, i.e., the “Afghanistan Project” and the “Financial Inclusion Project”.
5. On 15 February 2022, UNITAR and AGFUND signed an agreement to establish GPH. AGFUND committed to a budget for the activities of GPH in the first three years, which would cover, amongst other costs, the salary of the CEO of GPH (“CEO/GPH”).
6. Effective 1 March 2022, the Applicant was laterally transferred to the DP to assume the function of CEO/GPH under the supervision of the Director, DP, UNITAR (“Director/DP”).

7. By letter dated 10 March 2022, AGFUND welcomed the Applicant's appointment and committed to transferring the first-year funds upon finalization and approval of the implementation plan and budget.

8. On 11 April 2022, the Applicant's lateral transfer was formally confirmed via a memorandum from the Director of the Division of Operations, UNITAR ("Director/DO").

9. By the end of April 2022, the first financial transfer from AGFUND was still pending due to the donor's concerns regarding, *inter alia*, the proposed budget. Several exchanges followed between the Executive Director of AGFUND ("ED/AGFUND"), the Executive Director of UNITAR ("ED/UNITAR"), the Director/DP, the Director/DO, the Applicant, the Chief of the Finance and Budget Office, UNITAR, and the Director of the Project Department of AGFUND ("DPD/AGFUND"), but the transfer of funds remained outstanding.

10. After an attempt of the ED/UNITAR to use other sources of funding from AGFUND to cover the Applicant's salary, i.e., from the "Afghanistan Project" and the "Financial Inclusion Project", AGFUND informed UNITAR on 12 May 2022 that it could not retroactively approve the use of other resources for the CEO's salary for the period prior to 1 June 2022.

11. On 18 and 19 May 2022, the Applicant took uncertified sick leave.

12. On 18 May 2022, the ED/UNITAR sent an email to the ED/AGFUND specifying that (i) UNITAR is a project-based organization without any core funding, meaning that staff receive their salaries through specific projects they are assigned to; (ii) the CEO position is attached to the GPH project and needs to be remunerated through the GPH; (iii) AGFUND did not accept the proposal of UNITAR to prefinance the CEO/GPH salary from two ongoing projects pending receipt of the first GPH instalment; and (iv) if AGFUND does not comply with the agreement and GPH receives no resources, UNITAR would have to discontinue the related human resources arrangements.

13. On 20 May 2022, the Director/DP had a meeting with the Applicant, in which he informed the Applicant the content of the 18 May 2022 communication and the possible consequences.

14. On 27 May 2022, the Applicant requested certified sick leave from 30 May to 30 June 2022, which was granted and later extended until 31 July 2022.

15. By letter dated 16 June 2022, the Director/DP indicated to AGFUND that, following a constructive discussion between the ED/UNITAR and the ED/AGFUND on 13 June 2022, the Applicant had been reassigned as Senior Project Manager of the Afghanistan and Financial Inclusion Projects as of May 2022 and, consequently, his salary was being paid from the resources of these projects.

16. By email dated 23 June 2022, the ED/UNITAR informed the ED/AGFUND, *inter alia*, that (i) the position of CEO/GPH had been cancelled effective 1 June 2022; (ii) the Applicant had been reassigned as Senior Project Manager in the Afghanistan and Financial Inclusion Projects until the end of his temporary appointment on 13 November 2022; (iii) the Applicant was on sick leave during the month of June 2022; and (iv) the Applicant's salary would be charged against the two ongoing projects.

17. On 26 June 2022, the ED/AGFUND responded to the ED/UNITAR that he could not approve *inter alia* paying the Applicant's salary from the budget of the two projects in question and requested a freeze on all expenditures.

18. On 3 July 2022, the DPD/AGFUND indicated, *inter alia*, that AGFUND only granted exceptional permission for budget line expenditure in relation to the CEO's salary for one year as of mid-November 2022.

19. On 8 July 2022, the ED/UNITAR asked the ED/AGFUND to reconsider his previous decision so that the Applicant's salary could be paid from the two AGFUND projects from 1 June 2022. UNITAR did not receive a response to this request.

20. By memorandum dated 15 July 2022, the ED/UNITAR informed the Applicant that he had exhausted his leave entitlements on 12 July 2022 and that he would be placed on SLWOP effective 13 July 2022.

21. By memorandum dated 15 July 2022, the ED/UNITAR informed the Applicant that as the donor was not in a position to transfer the necessary funds for GPH and absent any other source of funding to cover his salary, he would be placed on SLWOP through the end of his appointment. In this memorandum, UNITAR confirmed that the Applicant's lateral transfer to the position of CEO/GPH was done following the request of AGFUND.

22. On 13 August 2022, the Applicant requested management evaluation of the contested decision, which was upheld by the Assistant-Secretary-General, Executive Director, UNITAR, on 30 August 2022.

23. On 25 November 2022, the Applicant filed the instant application against the contested decision.

24. On 9 January 2023, the Respondent filed his reply.

25. On 16 January 2023, the Applicant sought leave to file a rejoinder, which was granted by Order No. 4 (GVA/2023) of 17 January 2023.

26. On 27 February 2023, the Applicant filed his rejoinder.

27. By Order No. 93 (GVA/2023) of 4 August 2023, the Tribunal determined that the matter could be adjudicated based on the written submissions, and requested the parties to file their respective closing submission, which they did on 17 August 2023.

Consideration

Scope and standard of judicial review

28. The case at hand relates to an administrative decision to place the Applicant on SLWOP.

29. After a careful review of the parties' submissions and the evidence on record, the Tribunal identifies the following legal issues to be determined in the case at hand:

- a. Whether the decision to place the Applicant on SLWOP following the determination that there was no source of funding to cover his salary was lawful;
- b. Whether the decision to place the Applicant on SLWOP following the determination that he exhausted his leave entitlements was lawful;
- c. Whether UNITAR abused its discretionary authority by placing the Applicant on SWLOP;
- d. Whether UNITAR failed in its duty of care towards the Applicant;
- e. Whether the contested decision was tainted by bias or improper motives; and
- f. Whether the Applicant is entitled to any remedies.

Whether the decision to place the Applicant on SLWOP following the determination that there was no source of funding to cover his salary was lawful

30. On 15 July 2022, the Director/DP, UNITAR, informed the Applicant of his placement on SLWOP in the following terms:

1. I refer to your temporary appointment from 15 November 2021 to 13 November 2022 with a lateral move to Public Finance and Trade Programme Unit effective 01 March 2022 to implement the Global Partnership Hub project, as requested by the donor (AGFUND).
2. Unfortunately, the donor was not in a position to transfer the necessary funds for this project in accordance with the agreement signed, and there is no other source of funding to cover your salary.
3. In this context, and in accordance with the UNITAR policy (AC/UNITAR/2019/05, here attached), I have decided to place you on SLWOP through the end of your appointment.

31. According to the Applicant, the decision above was unlawful as it was tainted by procedural and substantive irregularities. Namely, that he was unilaterally transferred from a secure position to the DP, without any consultation, and that the necessary funding from AGFUND was available to the Organization.

32. The Applicant further advanced that UNITAR was at fault for the donor not being in a position to transfer the necessary funds for the project, due to its mismanagement of funds in various other instances. The Applicant argues that UNITAR is responsible for the funds not coming through and, consequently, blameable for the contested decision.

33. The Tribunal will analyse each of the Applicant's allegations in turn.

The alleged procedural and substantive irregularities

(i) The Applicant's transfer

34. The Applicant first joined UNITAR as a Senior Manager Online Learning and Education, PTPU, under a one-year temporary appointment. His onboarding was apparently requested by AGFUND, as suggests the private instant messaging exchanges dated 29 September and 20 October 2021 (see para. 3 above). He was later transferred to the DP to assume the function of CEO/GPH, in connection with an agreement to be funded by AGFUND.

35. According to the Applicant, he was unilaterally fast-tracked to CEO/GPH without being informed of the precariousness of the position due to its dependency on external funding, or that said funding was not secured.

36. The Tribunal notes, however, that, according to the evidence on record, the Applicant was well aware of both his lateral transfer to CEO/GPH and of the business model of UNITAR, which is dependent on external funding.

37. In fact, the Applicant drafted the job description of the position of CEO/GPH. In it, the link between the position of CEO and the GPH under the auspices of UNITAR and AGFUND was clearly defined, namely:

...

The Global Partnership Hub (hereafter called the Hub) was established by the United Nations Institute for Training and Research (UNITAR) and the Arab Gulf Program for Development (AGFUND) in 2022 to foster collaboration with donors and partners to deliver flagship projects and other high-impact and high-visibility initiatives.

Accountability:

The Chief Executive Officer (CEO), under the supervision of the Director, Division for Prosperity, will lead the Hub team in implementing the strategy and implementation plan.

38. Similarly, the Applicant's 15 November 2021 letter of appointment clearly stated that his appointment was limited to the availability of funds:

Special Conditions

This appointment is limited to service with the United Nations Institute for Training and Research and **to the availability of funds** (emphasis added).

In the case of non-availability of funds, the appointment can be terminated in accordance with Staff Regulations 9.6 and 9.8 and termination indemnity will be paid in accordance with the rates and conditions specified in Annex III to the Staff Regulations and Rules of the United Nations.

39. The Applicant signed the letter of appointment and, by doing so, he accepted the conditions therein and those laid down in the Staff Regulations and Staff Rules of the United Nations governing his employment with UNITAR, not exclusively the position of CEO/GPH.

40. In this context, the Tribunal finds it hard to believe that the Applicant was "unilaterally transferred" from his position or that he was unaware of the risks associated with a non-availability of funding.

41. The Tribunal cannot equally accept that the Applicant was somehow misled by UNITAR in relation to his position and appointment being dependent on external funding. The precariousness of the appointment, as alleged by the Applicant, is inherent to the business model of UNITAR and not at all a novelty feature.

(ii) *The alleged availability of funds*

42. Based on an email from the DPD/AGFUND dated 12 May 2022, the Applicant alleges that funding for his position was indeed available. He quotes the second paragraph of the email, which reads (emphasis added):

AGFUND is fully committed to cover 100% of CEO salary from the moment the Steering Committee approves a sound implementation plan. As discussed in our meeting, and given the unsatisfactory implementation of ongoing projects, **I hereby confirm AGFUND's commitment to cover CEO full salary using resources of the ongoing projects (financial education and Afghanistan) from June 1, 2022, until May 31, 2023.** We also accordingly grant 6 months no-cost extension for each of the projects in order to ensure implementation is brought back up to speed. The CEO is expected to act as the project manager, responsible for budget and implementation in close collaboration with Prof. Bader El Din, and the Arab Open University.

43. However, the Tribunal notes that the referenced email actually substantiates the Respondent's argument, which is that, at that time, AGFUND refused to retroactively cover the CEO's salary from the moment he was onboarded as CEO/GPH.

44. Following other exchanges, on 3 July 2022, the DPD/AGFUND backtracked and further determined (emphasis added):

I reiterate AGFUND's reply to UNITAR's urgent request on 12 May 2022 in which we stated: "As the CEO was onboarded to provide support for other UNITAR divisions, not directly related to the AGFUND projects, **we regret to inform you that AGFUND cannot give a retroactive approval for the use of resources for CEO salary.** Following up on UNITAR Executive Director e-mail message to AGFUND Executive Director, please note, **AGFUND only grants exceptional permission for this budget line expenditure as of mid-November 2022 - the salary corresponding to a one-year contract to successfully implement the two projects.**

45. It is clear from the record that the donor first delayed transferring the funds agreed upon to implement GPH, and then refused to cover the CEO's salary from the funds of other ongoing projects.

46. Regardless of the donor's reasons to delay the implementation of the project, or to refuse to cover the CEO's salary from other ongoing projects, the fact is that funding for GPH and, consequently, for the Applicant's salary, was not available.

47. The Tribunal is not mandated to review the conduct of UNITAR in relation to the implementation of its projects or its management of the expenditure budget, but rather its conduct in relation to the Applicant and the contested decision.

48. In this context, the Applicant's allegation that funding for his position was indeed available unequivocally fails.

(iii) Termination of temporary appointment

49. Lastly, the Applicant argues that, instead of being placed on SWLOP until the end of his temporary appointment, his contract should have been terminated, pursuant to para. 9(c) of AC/UNITAR/2019/05, and he should have received termination indemnity, in accordance with Annex III of the Staff Rules and Regulations.

50. The Respondent contends, however, that the Applicant was not placed on SLWOP due to non-availability of funds under para. 9(c), but for administrative purposes in accordance with para. 9(f). He argues that this decision was in line with the business model of UNITAR. The Applicant was appointed at the specific request of AGFUND and AGFUND announced it was not going to cover his salary for the duration of the temporary appointment. Placing the Applicant on SLWOP left a door open for him to resume his functions in case the situation were to be settled.

51. Paras. 9(c) and (f) of AC/UNITAR/2019/5 provide the following:

9. The following special conditions may apply to the appointments of the UNITAR regular staff members:

...

c. In the case of non-availability of funds, the appointment can be terminated in accordance with Staff Regulations 9.1 and 9.3 and termination indemnity will be paid in

accordance with the rates and conditions specified in Annex III to the Staff Regulations of the United Nations

...

f. Special Leave without Pay may also be approved for administrative reasons.

52. The Tribunal notes that a literal interpretation of para. 9(c) does not support a finding that the Respondent was obligated to terminate the Applicant's appointment due to the non-availability of funds. Instead, the language of the provision refers to an option available to the Administration, which is that the appointment can be terminated in the case of non-availability of funds. It does not say that the appointment shall be terminated.

53. The Tribunal accepts the Respondent's explanation for placing the Applicant on SLWOP under para. 9(f). Indeed, had the funding issue with the donor been resolved while the Applicant was on SLWOP, he would have been able to resume his functions and carry out the remainder of his contract. Had the Applicant been terminated instead, he would have been separated from service before the end of his appointment and any attempt of resolving the issue and implementing GPH would have been fruitless.

54. Accordingly, the decision to apply para. 9(f) instead of 9(c) was a lawful exercise of discretionary authority.

The alleged mismanagement of funds by UNITAR

55. At several times in the proceedings, the Applicant reiterated his belief that UNITAR mismanaged funds from AGFUND in other projects, and that this was the reason for the funds for GPH not coming through and, consequently, for him being placed on SWLOP. In support of his assertion, the Applicant raised several claims of budget mismanagement and irregular funding requests, and advocates that UNITAR failed to address several questions and concerns that the donor raised.

56. The Tribunal notes, however, that the management of funds by UNITAR, as well as its definition of budget, transparency or professional relationship with donors is not part of the current exercise of judicial review and do not constitute relevant information for the determination of the matter at hand.

57. The Tribunal's scope of judicial review is limited to determining whether the decision to place the Applicant on SWLOP was properly and lawfully exercised.

58. Regardless of who is to blame for AGFUND not honouring its commitment to fund GPH by the time the Applicant was onboarded, the fundamental and indisputable point is that AGFUND did not follow through with the funds.

59. Based on the business model of UNITAR, which is dependent on external funding from donors to function, the non-availability of funds to cover the costs associated with the project, including the Applicant's salary as CEO, lawfully triggered the application of para. 9(f) of AC/UNITAR/2019/05.

60. That UNITAR had the option of triggering para. 9(c) instead is undeniable. However, choosing to apply para. 9(f) was a lawful exercise of discretionary authority based on sound legal and factual grounds, as determined above.

61. Moreover, the Tribunal equally does not accept that UNITAR "irregularly linked [the Applicant's] salary to the Afghanistan and Financial Inclusion Projects in an attempt to escape donor review", or that the attempt of UNITAR to solve the issue through the use of other funds is somehow the reason why the Applicant was placed on SLWOP.

62. The timeline of events plus the evidence on record shows that the attempt to cover the Applicant's salary from the funds of other projects came only after the Applicant was onboarded as CEO/GPH and after the expected transfer of funds from AGFUND failed. There was no deliberate attempt to use other resources, as the Applicant seems to indicate. It was clearly an attempt by UNITAR to keep GPH operational while the issue with the implementation plan for it was still being resolved. An attempt that did not bear fruit because the DPD/AGFUND effectively denied it, as shown in the email dated 3 July 2022 (see para. 18 above).

63. Accordingly, the claims that UNITAR is at fault for the Applicant's position being cancelled are either not established based on the evidence available, or not subject to the Tribunal's review.

Whether the decision to place the Applicant on SLWOP following the determination that he exhausted his leave entitlements was lawful

64. The contested decision, dated 15 July 2022, placed the Applicant on SLWOP also due to the exhaustion of leave entitlements. It reads as follows:

1. I refer to your present contract and your ongoing medical leave from 30 May 2022 through 31 July 2022, certified by the UNOG Medical Service.

2. In accordance with the rules applying to your contract (AC/UNITAR/2020/08, para 29; ST/AI/2005/3, para 3.1 & para 3.2), your leave entitlements have been exhausted on 12 July 2022 and you will be placed on special leave without pay effective 13 July 2022.

65. According to para. 29 of AC/UNITAR/2020/08,

A staff member who holds a temporary appointment shall accrue sick leave at the rate of two working days per month in accordance with Staff Rule 6.2. A staff member may be granted the full entitlement of the sick leave for the duration of the appointment at any point in time during his/her appointment. In cases where a staff member is on certified sick leave at the date of expiration of his or her temporary appointment, the appointment shall be exceptionally extended for the purpose of allowing the staff member to utilize the balance of accrued sick leave days as of the date of expiration of the appointment. No further extension of sick leave shall be provided, nor does the extension give rise to any further accrual of leave days, other benefits or entitlements.

66. The fact that the Applicant exhausted his leave entitlements as per the provision above is not a point of contention. The divergence lies in whether the Applicant should have been placed on special leave with half pay in line with para. 3.2 of ST/AI/2005/3 on Sick Leave, instead of on SWLOP under para. 3.1. The relevant provisions read as follows:

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 the 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.

67. The Applicant alleges that, once his leave entitlements were exhausted, UNITAR failed to abide by para. 3.2 of ST/AI/2005/3 by not bringing his case to the attention of the Medical Director to determine if he should be considered for a disability benefit and, pending said determination, by not placing him on special leave with half pay.

68. The Respondent contends, however, that UNITAR did in fact alert the Medical Officer that the Applicant was about to exhaust his sick leave entitlements and asked for a determination whether he should be considered for a disability benefit from UNJSPF. The Respondent further claims that, as a staff member on a temporary appointment only entitled to two working days per month of sick leave, as per staff rule 6.2(b)(i), the Applicant was not entitled to sick leave on half pay following a period of sick leave on full pay.

69. Regarding the latter, the Tribunal finds it pertinent to refute the misguided interpretation of the Respondent that staff members on temporary appointments are not entitled to the protection of para. 3.2 of ST/AI/2005/3.

70. Staff rule 6.2(b) defines staff members' maximum entitlement to sick leave depending on the nature and duration of the appointment as follows (emphasis added):

Maximum entitlement

(b) A staff member's **maximum entitlement to sick leave** shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

(i) A staff member who holds a **temporary appointment** shall be granted sick leave at the rate of **two working days per month**;

(ii) A staff member who holds a **fixed-term appointment** and who has completed less than three years of continuous service shall be granted **sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months**;

(iii) A staff member who holds a **continuing appointment**, or who holds a **fixed-term appointment** for three years or who has completed three years or more of continuous service shall be granted **sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years**.

71. The above provisions limit sick leave with half pay to staff members holding a fixed-term or continuing appointment. It does not pronounce, however, that staff members on temporary appointments are not entitled to *special leave with half pay*, which is a different entitlement than *sick leave with half pay*.

72. Para. 3.2 of ST/AI/2005/3 foresees that when a staff member has used all of his/her entitlements to *sick leave with full pay*, the situation must be brought to the attention of the designated medical officer to determine whether that staff member should be considered for a disability benefit. In this scenario, said staff member will be placed on *special leave with half pay* pending a decision from the medical officer.

73. Accordingly, the fact that the Applicant was not entitled to sick leave with half pay under staff rule 6.2(b) does not limit his entitlement to special leave with half pay under ST/AI/2005/3 when the criteria therein is met.

74. In any event, nevertheless, the Tribunal observes that, indeed, on 1 June 2022 UNITAR sought the advice of the Medical Service on whether the Applicant's case should be presented to UNJSPF for a disability benefit, thus before the Applicant exhausted his leave entitlements, that is on 12 July 2022. Based on the medical documents, the medical officer decided on 7 June 2022 to not present the Applicant's case to UNJSPF for a disability benefit.

75. Accordingly, by the time the Applicant exhausted his leave entitlements on 12 July 2022, the Administration had already complied with para. 3.2 of ST/AI/2005/3, thus not warranting special leave with half pay.

76. As a result, the Applicant's allegation that the Administration did not let his case be considered for disability benefit is both speculative and meritless. Indeed, there is evidence that the Administration met its legal obligations under paras. 3.1 and 3.2 of ST/AI/2005/3, and that the decision to place the Applicant on SLWOP after the exhaustion of his leave entitlements was both lawful and procedurally correct.

Whether UNITAR abused its discretionary authority

77. The Applicant claims that UNITAR abused its discretionary authority by acting in direct contravention with the rules and policies of the Organization, intentionally trying to oust him and ensure he would not receive his benefits.

78. The Respondent submits that the contested decision constituted a proper exercise of the Administration's discretion, and that the Applicant's contentions are based on a misrepresentation of facts, misapplication of the relevant rules and a disregard to the specific operational realities and business model of UNITAR.

79. As determined above, the decision to place the Applicant on SWLOP was taken in accordance with the applicable legal framework. There is no evidence on record to support the Applicant's assertion that the Administration's interpretation of the rules was not a proper exercise of discretionary authority.

80. Indeed, the Applicant's claims are solely based on his own (mis)interpretation of the rules, not on facts or evidence. Disagreeing with the Administration's interpretation does not automatically render it abusive, even if it had been legally or procedurally incorrect, which is not even the case.

81. Similarly, the fact that the Administration had two lawful reasons to place the Applicant on SWLOP is not sufficient in itself to raise "suspicions" of ill motivation beyond the Applicant's mere speculation. There is no evidence to support his claim that the contested decision was "a pretext for the Organization to be able to oust [him]".

82. Accordingly, this argument also fails.

Whether UNITAR failed in its duty of care towards the Applicant

The lack of a proper workspace

83. The Applicant argues that UNITAR failed to treat him with the respect and dignity owed to international civil servants. Following the worst of the COVID-19 pandemic, he was instructed to return to the office, yet was not given a proper space to work. Before his transfer from PTPU to GPH in April 2022, he often worked at a spare table in his supervisor's office. Afterwards he incurred physical injury for being forced to sit uncomfortably for long periods of time, including working from a stairwell.

84. In response, the Respondent noted that UNITAR management was actively exploring options to find an office for the Applicant following the rapid return to the office after the COVID-19-related alternative working arrangements, the failure to secure the necessary funding for the GPH project, and the limited availability of offices. Pending a solution, the Applicant was offered to share an office with his supervisor, but rarely availed himself of that possibility, opting to mainly work from

home. On the few occasions where the Applicant came to the office, he worked in a meeting room equipped with a chair and desk, and was never required to work on the stairwell, which is prohibited for security reasons.

85. Furthermore, the Respondent argues that the claim that the Applicant suffered a “work-related injury” is unsubstantiated and not supported by any official documentation.

86. The Tribunal is not convinced by the Respondent’s counterarguments in relation to the Applicant’s workspace. Indeed, there is documentary evidence on record that staff members, including the Applicant, were instructed to return to the office, yet the Applicant was not provided with a workspace.

87. Furthermore, to allege that the lack of funding to cover the costs associated with the Applicant’s position is a sufficient reason for the unavailability of a workspace for the Applicant is simply untenable. While the tribunal is aware of the evolution of implementing the Agreement between UNITAR and AGFUND, the provision of a workspace should not have been contingent on funding coming through as the Applicant’s physical well-being at the workplace was the sole responsibility of UNITAR from the moment he started his temporary appointment and became a staff member.

88. Similarly, the limited availability of office space at the Organization does not justify failure to provide an employee, who was required to work from the office, with a workspace. The management of office space is the employer’s responsibility alone. The Applicant, or any other staff member, should not have to bear it.

89. Accordingly, the Tribunal accepts the Applicant’s claim that he was not designated a proper workspace for a period of time after his transfer in April 2022 despite being instructed to work from the office and that, on at least one occasion as shown on a photo on record, he resorted to working from a stairwell as a result.

90. Duty of care is an implicit obligation crystallized in the legal framework of the Organization. Staff regulation 1.2(c) shines light on the matter, by determining that:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority, the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

91. It is also established in the jurisprudence of the Tribunal that the Organization has a duty of care vis-à-vis its staff members (see *Applicant* UNDT/2021/043, para. 177; *Kusuma* UNDT/2014/143, para. 33; *McKay* UNDT/2012/018, para. 41; confirmed in *Mc Kay* 2013-UNAT-287; *Edwards* UNDT/2011/022, para. 59; *Cahn* 2023-UNAT-1329, para 53-55).

92. In *Cahn*, the Appeals Tribunal stated:

38. [...] the Administration of the Organization has a duty of care to ensure a harmonious work environment and protect staff members from harm by way of, *inter alia*, taking appropriate preventive and remedial measures in each specific case. This duty is an inherent part of the employment relationship and a fundamental condition of service and must be fulfilled by the Administration with due diligence and without delay (footnotes omitted).

93. In the case at hand, the Tribunal finds that the Organization's failure to provide the Applicant with a proper workspace constituted a breach of its duty of care regarding his mental and physical well-being.

94. In light of the totality of the evidence on record, the Tribunal is satisfied that the Administration had been made aware of the Applicant's poor working environment yet failed to resolve it efficiently.

95. By failing to take protective action upon having been made aware of the issue, the Administration breached its duty of care towards the Applicant.

Work-related injury

96. Notwithstanding the above, the Tribunal finds that the Applicant has not met his burden of proof with respect to the allegation of having suffered a work-related injury as a result of not being provided with a designated workspace.

97. Indeed, there is a photograph showing the Applicant sitting at a stairwell. Said photograph does not prove that the Applicant was instructed to use a stairwell, that he had only the stairwell as a viable option as a workspace, or that the Applicant used said stairwell more than once or for long periods of time. It does not serve as probative evidence of a work-related injury.

98. Similarly, the medical certificates produced by the Applicant do not clarify the origin of his injury. In fact, the only medical document that refers to a possible cause is a medical form submitted on 16 September 2022 to the Medical Service, Office of the United Nations at Geneva, which does not contain a diagnosis following a forensic/medical determination, but only the Applicant's own assertion as to the origin of his injury. Namely, it provided:

...

The following information is submitted CONFIDENTIALLY in respect of the above-named, who is/was under my medical care:

1. Nature of illness/operation injury (ICD-10): Patient is referred to phlebologist to perform surgical intervention related to disorders of venous origin in relation to work injury, poor posture seated on a staircase on a laptop extended period of time.

99. The other certificate that provides some light into the matter is signed by the Applicant's Surgeon-Phlebologist-Proctologist on 5 October 2022, which reads as follows in its relevant parts (emphasis added):

Anamnesis:

Static Complaints: pain, heaviness, itching, restless right leg with nocturnal cramps and oedema. **The patient attributes the complaints to frequent sitting for long periods on a staircase with the laptop on his lap.**

...

Addition:

...

Working seated on a staircase on a laptop for longer periods might not be the direct cause of the complaints. However, these working conditions will definitely have supported the development of these complaints and will have made them worse.

100. As the evidence shows, the Applicant is the one who attributed the origin of his injury to having had to work for long periods at a stairwell. However, the criteria of “working from a staircase for long periods” is not established. Even if it had been, the medical certificate basically denies the Applicant working at a staircase as the direct cause of the injury and, at best, could support that such improper working conditions would have made the Applicant’s injury worse.

101. Therefore, it is impossible for the Tribunal to assess whether the Applicant suffered a work-related injury. In any event, this question should have been posed to the Medical Service as the appropriate authority to assess and determine the matter.

102. Finally, the Tribunal further notes that all the medical certificates that the Applicant provided were issued months after the determination of the Medical Officer dated 7 June 2022 to not present his case for disability benefit.

103. Accordingly, the Applicant fails to meet the burden of proof in this respect.

Whether the contested decision was tainted by bias or improper motives

104. The Applicant further argues that he suffered prejudice, malice, and ill will when:

- a. He was laterally transferred to a post with unsecured funding even though he had a secured temporary appointment;
- b. He was subjected to abusive treatment by being denied a proper workspace and being forced to sit in a stairwell;

c. He was forced to grovel to a donor with whom UNITAR had a precarious relationship and forced to mend relations in order to secure his own salary and that of others; and

d. He was irregularly placed on SLWOP, denied termination indemnity and special leave with half pay and, as a result, lost his medical coverage.

105. Based on the above, the Applicant asks the Tribunal to set aside the contested decision for being malicious and taken in bad faith.

106. On the opposite side, the Respondent recalled that pursuant to the established jurisprudence of the Appeals Tribunal (*Azzouni* 2010-UNAT-081; *Obdeijn* 2012-UNAT-201), the Applicant has the burden of proving any allegation of bias, ill-motivation or improper motives. In the instant case, the Applicant's allegations are based on a misrepresentation of facts and purely speculative, clearly failing to meet the burden of proof.

107. Indeed, the Applicant did not provide any evidence in support of his assertion that the contested decision was tainted by personal prejudice, bias, ill will and/or discrimination from UNITAR officials. Instead, he simply repeated the arguments used to contest the lawfulness of the contested decision.

108. As provided in the sections above, the Tribunal already pronounced itself on the legality of the contested decision and the reasons for it and will not repeat itself. Nonetheless, it bears recalling that, even if the Tribunal had found otherwise, an eventual illegality in the making of an administrative decision does not automatically render it improperly motivated, discriminatory, or biased. There needs to be evidence of ill intent, which is not proven by simply alleging a breach of rules and policies.

109. Accordingly, the Applicant's assertion that the contested decision was tainted by bias and ill-motivated is meritless.

Whether the Applicant is entitled to any remedies

110. As explained above, the Tribunal finds the contested decision both lawful and procedurally correct. The Applicant is not entitled to any remedy in this regard. Similarly, the Applicant is not entitled to any remedy with respect to the alleged work-related injury, which has not been duly established.

111. With respect to the Organization's breach of its duty of care towards the Applicant, the Tribunal finds that the Applicant has not met its burden of proof concerning moral damages and a right to compensation.

112. Pursuant to the jurisprudence of the Appeals Tribunal, "an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award" (*Al Othman* 2022-UNAT-1196, para. 117; *Asariotis* 2013-UNAT-309, para. 36).

113. As provided in *Asariotis*:

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm,

stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

114. In the case at hand, the Tribunal finds that, although the Organization has indeed failed in its duty of care towards the Applicant to some extent, as determined in paras. 83 to 103 above, the direct causal link between said failure and the Applicant's alleged suffering is not sufficiently established. The Applicant's allegations are generic and speculative, as indicated on the medical certificates on record. He failed to provide reliable evidence for the physical and psychological harm allegedly suffered, and he did not successfully establish a nexus between the alleged damage and the Organization's conduct.

115. Even though the Tribunal acknowledges that not providing a staff member with a proper workspace is an issue, an award for moral damages solely based on it is not warranted. From the evidence on record, there was no breach of substantive entitlements in relation to the Applicant's contract, the number of times the Applicant had to resort to working from a stairwell is not confirmed, and neither is the Organization's responsibility for the Applicant's decision to sit in a stairwell instead of in all of the other available seats in the common areas of the building. Furthermore, any mental/psychological harm allegedly suffered by the Applicant has not been established under the applicable standard.

116. Accordingly, the identified breach of duty of care does not sufficiently warrant in itself an award for compensation for moral damages.

Conclusion

117. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Sun Xiangzhuang

Dated this 15th day of December 2023

Entered in the Register on this 15th day of December 2023

(Signed)

René M. Vargas M., Registrar, Geneva