



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/031

Judgment No.: UNDT/2024/037

Date: 21 June 2024

Original: English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

NOBLE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Halil Göksan, AS/ALD/OHR, UN Secretariat

Introduction

1. On 15 September 2023, the Applicant, a Senior Security Officer with the United Nations Department of Safety and Security (“UNDSS”), filed an application contesting the decision of the Captain, Central Scheduling Unit (“C/CSU”), UNDSS to place him on the “Priority Two” list with respect to his request to work overtime on 10 April 2023 (the “contested decision”).

2. On 16 October 2023, the Respondent filed his reply contending that the application is not receivable *ratione materiae* because the contested decision is not a reviewable administrative decision within the meaning of art. 2.1(a) of the Statute of the Dispute Tribunal. The Respondent further submitted that should the Dispute Tribunal find that the application is receivable, it lacks merit.

3. By Order No. 138 (NY/2023) dated 8 December 2023, the Duty Judge ordered the Applicant to file a rejoinder responding to the Respondent’s submissions on the receivability and merits of the case.

4. On 12 January 2024, the Applicant duly filed his rejoinder.

5. On 1 April 2024, the case was assigned to the undersigned Judge.

6. On 4 April 2024, a case management discussion (“CMD”) was held to discuss the further proceedings at which Counsel for the parties, as well as the Applicant, were present. Both Counsel confirmed that no further submissions were necessary for the Tribunal to determine the issue of receivability. The Judge informed the parties that the issue of receivability will be adjudicated as a preliminary matter.

Facts

7. On 10 April 2023, the Applicant requested overtime work but was excluded from the overtime eligibility roster (“Priority One” list). The Applicant was placed on the “Priority Two” list for overtime purposes on that day.

8. On the same day, the Applicant inquired with his Platoon Captain and C/CSU as to the reasons for the contested decision.

9. The C/CSU stated that the reason for the contested decision was that the Applicant had not completed five days of work after his last sick leave absence.

10. On 26 May 2023, the Applicant filed a request for management evaluation with Management Evaluation Unit (the “MEU”).

11. On 22 June 2023, the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance (the “USG/DMSPC”) decided to uphold the contested decision (based on the MEU's recommendation).

Consideration

Parties' submissions

12. The Respondent's submissions may be summarized as follows:

a. The application is not receivable *ratione materiae* because the contested decision is not a reviewable administrative decision within the meaning of art. 2.1(a) of the Statute. The contested decision is: “(i) a purely internal matter; (ii) within the Organization's managerial prerogative; (iii) not adversely affecting the Applicant's rights; and (iv) without any direct legal consequences to the terms and conditions of his appointment. Furthermore, the Applicant's general interest in the legality of the UNDSS' actions is not sufficient to file an application for judicial review”.

b. The order of priority among security officers for overtime assignment purposes is a “purely internal” matter and it is “within the boundaries of the administration”. It is within the Organization's managerial prerogative to put such an internal plan (the “Plan”) in place to ensure an equal distribution of

overtime among security officers. The Plan does not contradict any provision of the Organization's regulatory framework. It requires all security officers to complete 40 regular working hours to be placed on the "Priority One" list for overtime work purposes upon returning from sick leave or unscheduled annual leave. The Plan resulted from extensive discussions with the Staff Union, including the Applicant's participation in recent discussions in his capacity as staff representative. It is a reasonable means to ensure that overtime is assigned in a fair, equitable, and consistent manner among security officers.

c. The Applicant's placement on the "Priority Two" list did not adversely affect the determination of the scope of the Applicant's rights, legitimate expectations or a direct and substantial interest.

d. The contested decision is "free from invidious or improper motivations and [is] based upon the exercise of reason and proper judgment". As such, it should be sustained. Assuming *arguendo* that the Dispute Tribunal is of the view that the contested decision or the Plan is a poor managerial decision, that conclusion would not be a "sufficient ground [...] to justify judicial recourse by a staff member" (*Collins* 2020-UNAT-1021, para. 29).

e. The Applicant is in substance attempting to contest the Plan and he has no more than a "general interest in the legality" of UNDSS's actions. As the United Nations Appeals Tribunal held in *Reilly* 2022-UNAT-1309, para. 92:

... [A] staff member's concern with legality of administrative action is not regarded as an interest that is worth protecting in itself. Judicial review applications should be restricted to persons with direct and sufficient interest and should not be turned into *actio popularis* which allow any person to bring an action to judicially review the legality of the Administration's behaviour.

13. The Applicant's submissions may be summarized as follows:
- a. The issue in this case is clearly receivable as an administrative decision. The contested decision in this case had an immediate, direct and adverse impact on the Applicant.
 - b. It is recalled that what is at issue is overtime pay, part of the remuneration of staff working in UNDSS and clearly a condition of service. In the Applicant's case, he regularly accepted overtime work to supplement his take-home pay.
 - c. When the Applicant applied for the next overtime roster on 10 April 2023, he was told he was not eligible as he had not completed five days of work since taking sick leave. There was an immediate impact on him since he was denied the overtime pay to which he would otherwise have been entitled, thereby reducing his remuneration. There was also a long-term impact in that it posed a future penalty for utilizing his sick leave entitlement. The discriminatory motivation behind the policy is reflected in the obvious demotivation to utilize sick leave because of the possible economic consequences. This was the administrative decision he contested.
 - d. In effect the contested decision unfairly penalized the Applicant for availing himself of his earned sick leave entitlement. Ironically, the bar to overtime would not have been applied had the Applicant been on approved annual leave. Consequently, the UNDSS has imposed a unique restriction on the use of sick leave that has not been applied outside the UNDSS and which impedes access to one of his basic conditions of service.
 - e. It is important to underscore that the Applicant is not challenging the managerial right to allocate overtime in a fair manner. The Applicant's objection was not directed at challenging the legality of having an overtime policy that fairly allocates overtime but specifically at how it was applied to him.

Legal framework

14. Article 2.1(a) of the Statute of the Dispute Tribunal provides that a staff member may file an application against “the Secretary-General as the Chief Administrative Officer of the United Nations” or may appeal “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” and the “terms ‘contract’ and ‘terms of appointment’ include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance”.

15. For an application to be receivable, and for the Dispute Tribunal to thereby have jurisdiction under its Statute, the relevant staff member must therefore be able to (a) identify a particular and affirmative legal right in her/his employment relationship with the Organization, and (b) prove that this right has been violated by the Administration.

16. The Tribunal’s jurisprudence is firm that “an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member’s terms and conditions of appointment” (see the Appeals Tribunal in *Larriera* 2020-UNAT-1004, para. 29, as affirmed in, for instance, *Handy* 2020-UNAT-1044, *Kennes* 2020-UNAT-1073, *Toson* 2021-UNAT-1161, *Loto* 2022-UNAT-1292, and *Reilly* 2022-UNAT-1309).

17. Chapter V of the Staff Rules governs Attendance and leave. Staff rule 5.1 provides (emphasis in the original):

Hours of work

- (a) The Secretary-General shall set the normal number of working hours per week for each duty station pursuant to staff regulation 1.3
- (b). Exceptions may be made by the Secretary-General as the needs of service may require. A staff member may be required to work beyond the normal number of working hours whenever requested to do so.

Overtime and compensatory time off

- (b) A staff member in the General Service, Security Service or Trades and Crafts category, or in the Field Service category up to and including level FS-5, who is required to work in excess of the normal number of working hours per week shall be given compensatory time off or may receive payment for overtime, under conditions established by the Secretary-General.
- (c) Should the exigencies of service permit, and under conditions established by the Secretary-General, occasional compensatory time off may be granted to staff members serving in the Professional and higher categories and in the Field Service category at the FS-6 and FS-7 levels who have been required to work substantial or recurrent periods of overtime.

Discussion

18. The foregoing legal provisions speak to the position that the decision to allocate overtime work is discretionary. A staff member has no right under the employment relationship with the Organization to overtime work.

19. The Tribunal is alive to the position that discretionary decisions must not be abused. It is, however, incumbent on the Applicant to prove that the discretion was abused (see *Awoyemi* UNDT/2017/008, para 23 citing the Appeals Tribunal in *Assad* 2010-UNAT-021, *Sanwidi* 2010-UNAT-084, and *Abbasi* 2011-UNAT-110).

20. In this regard, the Respondent maintains that the application is not receivable because the contested decision to not grant the Applicant first priority in the allocation of overtime work is purely an internal exercise of managerial authority and has no adverse consequences or effect on the Applicant's conditions of service.

21. The Applicant, on the other hand, states that he is not challenging the managerial right to allocate overtime in a fair manner. He is, in essence, arguing that the managerial discretion was abused in that it discriminates against staff members who have been on sick leave. In the Tribunal's view, the argument that there was abuse of discretion goes to the merits of the case rather than to the issue of the receivability of

the application. The aspects of evidence which are relevant to the issue of receivability are: (i) the fact that the decision was discretionary (which is not contested) and therefore did not relate to the terms of the Applicant's employment, and (ii) the Applicant did not suffer any harm on account of the contested decision.

22. That the Applicant did not suffer any harm or that the decision did not cause any adverse consequence to the terms of the Applicant's appointment is underlined by the undisputed fact that he was placed on the "Priority Two" list for overtime work purposes. Despite his placement on the "Priority Two" list, he did indeed work overtime on both 7 and 11 April 2023. The records indicate that he worked a total of 259.5 hours of overtime during the period from 1 January to 5 June 2023. The Respondent maintains in his reply dated 16 October 2023, that the Applicant's "total overtime during the latest quarter was 172.5 hours while the average overtime among all security officers during the same period was 161 hours." He was therefore granted an above average amount of overtime compared to his peers. The Applicant does not dispute this fact. Clearly, the Applicant's remuneration was not affected by the contested decision.

23. Based on the foregoing, the Tribunal finds that the Applicant has not proved that he suffered any direct adverse effect on account of the contested decision. The contested decision is therefore not an administrative decision within the meaning of art. 2(1) of the Dispute Tribunal's Statute. (See: similarly, *Mirella et al.* 2018-UNAT-842, para. 44, *Minzer* 2023-UNAT-1338, para. 27, *Kallon* 2017-UNAT-742, para. 44, *Toson* 2021-UNAT-1161, paras. 27 and 28, *Mboob* 2022-UNAT-1215, para 33).

24. The Tribunal therefore finds that the contested decision is not receivable *ratione materiae*.

Conclusion

25. The application is dismissed for lack of receivability.

(Signed)

Judge Margaret Tibulya

Dated this 21st day of June 2024

Entered in the Register on this 21st day of June 2024

(Signed)

Isaac Endeley, Registrar, New York