



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Wanda L. Carter

BROWN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Wei Zhuang, DAS/ALD/OHR, UN Secretariat

Sergei Gorbylev, DAS/ALD/OHR, UN Secretariat

Introduction

1. On 9 April 2024, the Applicant, a Security Officer at the United Nations Interim Security Force for Abyei (“UNISFA”), filed an application challenging a 16 January 2024 decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) to impose upon him the disciplinary measure of written censure and loss of two steps in grade for conduct which violated staff regulation 1.2(b) and staff rule 1.2(c) (“the contested decision”).

Historical and procedural background

2. The Applicant joined the Organization in 2010 and, at the time of filing the application, served as a Security Officer in Abyei, Sudan, on a continuing appointment.

3. In March 2020, when travel restrictions were introduced due to the COVID-19 pandemic, a number of UNISFA staff members -who were temporarily working in Entebbe, Uganda - found themselves unable to leave the town and proceed to their home leave destinations or their duty station in Abyei. The Applicant was among this group of staff members.

4. In 2021, the Office of Internal Oversight Services (“OIOS”) conducted an investigation into allegations of possible misconduct involving Mr. Francis Fultang, Conduct and Discipline Officer, UNISFA. The investigation concerned Mr. Fultang’s accommodation during the period when he was stranded in Entebbe, during the COVID-19 lockdown.

5. On 16 April 2020, Mr. Armend Surdulli, Field Security Coordination Officer, United Nations Department of Safety and Security (“UNDSS”), Entebbe, requested the Applicant to follow up on UNISFA staff stranded in Entebbe by maintaining a staff list, checking their status once a week and using the UNISFA vehicle in Entebbe to assist UNISFA staff in Entebbe to have access to essentials.

6. On 22 April 2020, the Applicant sent the draft list to the UNISFA staff in Entebbe and requested them to complete it with accurate information. On the same date, Mr. Fultang - one the Applicant's colleague stranded in Entebbe - sent the Applicant back the information stating that his residential address was Mowi Crab Hotel.

7. On 27 April 2020, the Applicant sent the updated list to UNISFA staff in Entebbe encouraging them to review it and provide all missing information.

8. Between 22 April 2020 and 14 August 2020, the Applicant regularly submitted UNISFA staff lists to Mr. Roger Lewis, Chief Security Officer, UNISFA, and the Applicant's supervisor; the list indicated that Mr. Fultang's residential address was Mowi Crab Hotel.

9. Mr. Fultang was then investigated by OIOS in South Sudan, under 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." The Investigation Report ("IR") was issued on 27 May 2021. Mr. Fultang was placed on Administrative Leave with Pay ("ALWP") for some months until the completion of an investigation into his conduct and any disciplinary process (measure later found lawful by Judgments No. UNDT/2022/102 and Judgment No. UNDT/2022/110, later affirmed by Judgment No. 2023-UNAT-1403), and then disciplined, with the imposition of the disciplinary measure of dismissal in accordance with staff rule 10.2(a)(ix), and the request to reimburse the Organization for its financial loss up to the amount of USD17,213.00 in accordance with staff rules 10.1(b) and 10.2(b)(ii) (measures later found lawful by Judgment UNDT/2024/022).

10. The allegations of misconduct levelled towards Mr. Fultang were as follows:

- a) between mid-March and mid-September 2020, on one or more occasions, you misrepresented to the Organization your place of accommodation by stating that you were staying at the "Mowi Hotel Adjacent Virus Institute"/"Mowi Hotel"/"Mowi Crab Hotel" in Entebbe, Uganda, whereas you did not actually stay there for more than one day within this period; you stayed in long-term rental apartments, i.e.,

the “Felix” apartment and the Zack Apartments for a total cost of around US\$ 1,306.00;

- b) on 15 September 2020, you misrepresented to the Organization your actual expenses for accommodation and food in Entebbe, Uganda, in the period between mid-March and mid-September 2020, for which it was agreed with the Organization, as part of the MEU settlement of your DSA related dispute, that the Organization would reimburse you up to US\$ 18,519.12; you submitted that your expenses had been US\$ 28,600.00, in fact, they were only around US\$ 1,306.00; and
- c) on 15 September 2020, you submitted to the Organization false receipts as proof of your actual expenses for the period between around mid-March and mid-September 2020, totaling US\$ 28,600.00, for which it was agreed that the Organization would reimburse you up to US\$ 18,519.12.

11. On 10 March 2021, the Applicant was interviewed as a witness by OIOS in the context of the said investigation concerning Mr. Fultang.

12. On 15 April 2021, the Applicant was advised that he was the subject of an OIOS investigation into allegations that he knowingly provided false information to the United Nations which assisted in the commission of fraud.

13. On 19 August 2021, the Director of Investigations Division/OIOS informed the Assistant Secretary-General, Office of Human Resources (“ASG/OHR”) that during the investigation in relation to the conduct of Mr. Fultang, OIOS had identified evidence of possible misconduct involving the Applicant. In an investigation report dated 19 August 2021, OIOS concluded that the Applicant had failed to observe the standards of conduct expected of a United Nations staff member and recommended that the Office of Human Resources take appropriate action based on the report.

14. On 23 October 2023, the Director, Administrative Law Division, Office of Human Resources, transmitted the OIOS investigation report and allegations of misconduct to the Applicant. The report concerned allegations that the Applicant had failed to cooperate with a duly authorized investigation and that he had knowingly provided inaccurate information concerning Mr. Fultang’s

accommodation. The Applicant was required to respond to the allegations within one month, which he did on 21 November 2023.

15. On 16 January 2024, the ASG/OHR, on behalf of the USG/DMSPC transmitted the contested decision to the Applicant. The USG/DMSPC concluded that it had been established to the standard of the preponderance of evidence that the Applicant had failed to cooperate with the duly authorized investigation concerning Mr. Fultang by the following:

a. On 10 March 2021, when interviewed as a witness under oath, telling the OIOS investigator that he did not have enough information to tell him where Mr. Fultang had been located during lockdown, when in reality he had visited him several times and would regularly pick him up at his accommodation;

b. On 10 March 2021, when asked during his interview as a witness under oath if he could remember any of the other locations where he had met Mr. Fultang at any time when he was in Entebbe, omitting to reveal that he had visited Mr. Fultang at his apartment on Abdu Close near Lunyo, and at the apartment Mr. Fultang had later relocated to on Bishop Close, off Uringi Crescent; that he had regularly picked Mr. Fultang up at this accommodation for transportation purposes; and that he had met with Mr. Fultang at the Wash and Wills hotel in Mbale in September 2020;

c. On 17 March 2021, writing to the OIOS investigator that he had visited Mr. Fultang at the Mowi Crab Hotel on 29 April 2020, when in reality he had visited Mr. Fultang at his residence in an apartment on Abdu Close near Lunyo; and

d. Providing vague and evasive statements in response to the OIOS investigator's questions, when the record indicates that he had considerable first-hand information about the matters asked.

16. On 9 April 2024, the Applicant filed the application mentioned in para. 1.

17. On 13 May 2024, the Respondent filed his reply, contending that the contested decision was lawful.

18. On 5 August 2024, the case was assigned to the undersigned Judge.

19. In Order No. 121 (NBI/2024), dated 3 September 2024, the Tribunal determined that since the relevant facts in this case are clear, there was no need to conduct a hearing on the merits, and that the matter could be determined based on the documents on record.

20. The parties filed closing submissions on 13 September 2024.

Parties' submissions

21. The Applicant's principal contentions are:

a. The Respondent's limited factual analysis omits the impact of the COVID-19 related lockdown which existed during the period in question and impacted his interactions with his colleagues. Ignoring this context thereby ignores the difficulties in interacting and the exceptional personal risk involved in helping UNISFA staff stranded in Entebbe in that highly stressful environment. This can be contrasted to the Mission's abandonment of the staff members in Entebbe without any arrangements for support and little administrative assistance.

b. His limited role was only to receive and report residential location information, as provided by UNISFA staff stranded on lockdown in Entebbe. He went further on his own initiative and at personal risk to meet with some staff members to provide reassurance and support in a way that the Mission did not.

c. The UNISFA Chief of Mission Support ("CMS"), Mr. Robert Kirkwood, declined to approve use of the UNISFA vehicle making his *ad hoc* tasks impractical. He never made any financial claims for the usage of his personal vehicle for official duties, to which he was entitled.

d. Mr. Fultang and other UNISFA personnel in Entebbe had provided their contact address information to UNDSS at the United Nations Regional Service Centre in Entebbe (“RSCE”) before he arrived in Uganda on 20 March 2020.

e. Regarding a visit to Mbale, he did not travel with his spouse as erroneously concluded and stated by the Respondent, as she was already in Mbale. He was in fact accompanied by a Ugandan friend (Solomon) who drove them both to visit his spouse. They had met Mr. Fultang in the Wash and Wills hotel during breakfast.

f. The Applicant was unaware of any investigation of Mr. Fultang until OIOS contacted him. The nature of the questions posed by OIOS presupposed he had personal knowledge of Mr. Fultang’s whereabouts. During the material time, the Applicant’s responsibility was restricted to monitoring and providing security assistance for approximately 20 or more UNISFA staff stranded in Entebbe; it was not part of his remit to verify where they were located. Whether or not he was able to recall details of addresses or individual meetings long after the fact is not evidence of impropriety, and is not a basis for assuming misconduct or wrongdoing on his part. On the contrary, it demonstrates his commitment to cooperating with OIOS by verifying information that was not within his memory at the time of the interview, to ensure accuracy.

g. The issue regarding his factual knowledge of where Mr. Fultang resided during the period in question is based on conjecture. Having met Mr. Fultang at various public locations does not imply that Mr. Fultang was living there. He explained both to OIOS and in his response to the allegations, that he knew Mr. Fultang to have resided in two separate rented apartments, one before COVID-19 (a rented accommodation in Lunyo, Mayors’s Road) and another at some time later during and after the COVID-19 pandemic (an apartment around the Santas Maria area, going toward Country Bar). He had also met Mr. Fultang at the Mowi Crab Hotel once but never entered his accommodation. This was the location Mr. Fultang had given as his residence.

h. The Respondent has not adduced any evidence to indicate that he knew where Mr. Fultang was residing, or that he had any knowledge of Mr. Fultang's relationship with the owners of any of the premises where he may have met Mr. Fultang. There was no evidence of any residential contractual arrangements. This issue was never raised.

i. The Respondent's erroneous speculation regarding what he should have known or should have better recalled due to his position as Security Officer is mere subjective opinion; it is not evidence and is of no probative value. The Respondent has attempted to conflate the instructions given to him regarding his limited *ad hoc* role of monitoring staff in Entebbe during the lockdown with his wider and more substantive role as a Security Officer operating at his assigned duty station in Abyei.

j. There was no failure on his part to cooperate with OIOS. It was only during the OIOS interview that he was informed that the investigation concerned allegations of entitlement fraud relating to Mr. Fultang during his stay in Entebbe. This could have involved several possible expenses, not just accommodation, and it was unfair to presume that he should have known what the investigation was about. It is equally unfair to suggest that because he had met Mr. Fultang in various locations that he had specific information about his residential location and had failed to provide it. All such meetings were in public places.

k. It is unreasonable to expect him to be able to immediately recall and provide dates of every instance that he had met with Mr. Fultang. While his inability to recall dates and times is being characterized as deceptive, no such inference is being drawn regarding other staff members' inability to recall exact dates and times they were present with both the Applicant and Mr. Fultang in the same places.

l. The OIOS investigator's mode of inferring dishonesty from his inability to provide him with the incriminating information he was seeking is entirely unwarranted, as is the Respondent's incorrect conclusion that there was a

failure to cooperate with the investigation. He was not provided with any information to refresh his memory by the investigator and the attacks on his character and integrity, based solely on the opinion of the investigator, are unreasonable and unfair.

m. He was being retaliated against because he had cooperated as a witness in an investigation concerning the possible misconduct of the CMS/UNISFA. His claim of retaliation is both relevant and substantiated. The link between the protected activity and the adverse action against him is critical. A statement made by the CMS/UNISFA in an email dated 23 January 2021, to OIOS, falsely associated him with Mr. Fultang's alleged wrongdoing, by maliciously stating, "[d]uring his stay (along with 20 or so others) he was regularly checked on by a UNISFA Security Officer, [Applicant]." This incriminating statement was picked up and used by OIOS to initiate the investigation against him without any other evidence that he had engaged in any possible misconduct. OIOS abused its discretionary authority regarding what to investigate by acting at the behest of the CMS/UNISFA.

n. None of the seven witnesses interviewed by OIOS had provided information that contradicted his testimony that he had met Mr. Fultang occasionally in various locations. From 10 March 2021 when he was interviewed as a witness to Mr. Fultang's case, to 15 April 2021 when he was interviewed as a subject, the investigator had relied on the flawed recollections of two witnesses to suggest he was not cooperating, which no one had suggested.

o. He repeatedly objected to the behaviour of the OIOS investigator. Information and summaries of testimonies were formulated to support a pre-determined narrative. The transcripts of his and presumably other interviewees were incomplete and misleading. He cannot be faulted for reacting to the investigator's accusatory behavior, suggesting he was already convinced there was some collusion between the Applicant and Mr. Fultang. Regardless of which case he was pursuing, the investigator should not have contacted the Applicant's counsel to solicit privileged information. It is clear

that OIOS is pursuing its investigations with complete impunity. The UNISFA Chief of Security, who was interviewed, had to file a formal objection to the investigator's behavior, corroborating his unbalanced and biased approach to Mr. Fultang's investigation, and this case before the Tribunal.

p. The imposed sanction is disproportionate. His long record of service and reputation for honesty have been ignored.

22. For all these reasons, the Applicant requests the Tribunal to rescind the contested decision and award him appropriate compensation for the violation of his rights and *dignitas*.

23. The Respondent's principal contentions are:

a. It has been established by at least a preponderance of the evidence that the Applicant had specific information concerning Mr. Fultang's location during the COVID-19 lockdown but failed to provide it to the OIOS investigator during his witness interview.

b. The evidence on record, consisting of the screenshots of WhatsApp messages, email correspondence, and the OIOS interview records of the Applicant and several witnesses, shows that the Applicant had met Mr. Fultang around six times at his accommodation, had picked Mr. Fultang up for transportation around eight times from his accommodation, and had even attended a party at Mr. Fultang's apartment when they were in Entebbe during the COVID-19 lockdown.

c. The Applicant was, however, reluctant to provide information about the above-mentioned events to the OIOS investigator during his witness interview claiming that: (i) he did not consider personal encounters to be pertinent to the investigation; (ii) he had only limited contact with staff members due to the COVID-19 lockdown; (iii) he was tasked with checking the status of UNISFA staff stranded in Entebbe for security rather than

entitlement purposes; and (iv) he lacked logistical or administrative support and had used his own personal resources to perform this task.

d. The Applicant's claims are irrelevant and meritless. The Administration did not sanction the Applicant for any deficiencies in fulfilling his task of checking the status of UNISFA staff stranded in Entebbe, whether such deficiencies occurred due to limited contact with staff members or for other reasons. Rather, the Applicant was sanctioned for his failure to disclose to the investigator the information about Mr. Fultang's location and the venues of their meetings, which took place regardless of logistical or administrative limitations claimed by the Applicant. As such, what matters is that by fulfilling the task of checking the status of UNISFA staff stranded in Entebbe, the Applicant acquired information about Mr. Fultang's location that he did not provide to OIOS during his witness interview.

e. Despite repeated interactions with Mr. Fultang, the Applicant asserted during his witness interview that he needed to check his records and mentioned general meetings with staff members, displaying evasiveness and supporting the conclusion that he was withholding information. The Applicant tried to deflect and generalize the information in his answers while the investigator probed specifically about Mr. Fultang. His hesitation and referral to collective meetings with staff in public places, when the investigator asked specifically about Mr. Fultang's accommodation, are also indicative of deflection and a lack of candour.

f. When the investigator confronted the Applicant about a meeting with Mr. Fultang at the Wash and Wills Hotel, which he had failed to disclose, the Applicant responded vaguely, further demonstrating his evasiveness and untruthfulness. The Applicant's admission in his subject interview that Mr. Fultang had mentioned to him that he had "a case with MEU," and that he thought that this had happened before his witness interview, also supports that the Applicant had deliberately withheld information in his witness interview.

g. The Applicant's assertion that he responded to the investigator's questions as best as he could recall is unconvincing. The obligation to cooperate with the investigation requires not only attendance at the interviews, but also being candid, forthcoming, and truthful. Considering the totality of the evidence, it is highly unlikely that the Applicant could not recall any of the interactions with Mr. Fultang at the time of his witness interview, which occurred less than six months after their last recorded meeting at the Wash and Wills Hotel in Mbale, and less than eight months after the party at Mr. Fultang's apartment.

h. The Applicant misrepresented the facts to the investigator about the location of his visit with Mr. Fultang on 29 April 2020. The correspondence between the Applicant and OIOS indicates that on 17 March 2021, when asked by the investigator to clarify the location of his visit with Mr. Fultang on 29 April 2020, previously reported as "his accommodation located in Lunyo Entebbe, Mayor's Road", the Applicant wrote to the investigator that he had visited Mr. Fultang at the Mowi Crabs Hotel on that day and clarified that he did not enter Mr. Fultang's accommodation, and that they had sat in the bar area. However, the record indicates that Mr. Fultang had stayed at the Mowi Crabs Hotel only for one night - on 16 April 2020. Furthermore, while the Applicant maintained twice during his subject interview that he had visited Mr. Fultang at Mowi Crabs Hotel, when confronted with the evidence that Mr. Fultang had stayed at Mowi Crabs Hotel only for one night, he changed his account and admitted that Mr. Fultang lived in an apartment near Mowi Crabs Hotel.

i. The dishonesty in the Applicant's correspondence with the investigator and his admission during his subject interview conclusively establish that he was aware of the real location of the visit to Mr. Fultang on 29 April 2020, but had misrepresented it, demonstrating a clear attempt to mislead the investigator.

j. By providing incomplete, false, and vague information to the investigator both during his witness interview and in subsequent

correspondence with OIOS, the Applicant failed to uphold the highest standards of integrity and demonstrated a lack of probity and honesty, thereby violating staff regulation 1.2(b).

k. In doing so, the Applicant also failed to comply with his duty to cooperate with the duly authorised investigation, thereby violating staff rule 1.2(c). Duly authorized investigations rely on staff members' cooperation to establish the facts. When staff members in general and witnesses in particular fail to cooperate, investigations can be delayed, frustrated, or otherwise hindered. This can result in expending additional resources and impeding accountability efforts. As such, the Applicant's actions amount to misconduct.

l. The Applicant's misconduct warrants the imposition of the disciplinary measures of written censure and loss of two steps in grade. There is no merit in the Applicant's claim that his long service and the considerable stress caused by the disciplinary measures in question should mitigate the sanction. The Administration duly considered his long service in a mission setting as a mitigating factor. Nevertheless, the Administration's consideration of certain factors as mitigating factors does not automatically result in a less severe sanction because the decision-maker must weigh and balance all the circumstances of the case and all the relevant factors when choosing the appropriate sanction. The aggravating factor – the Applicant's role as a security officer – outweighs the mitigating factor, as the Applicant provided the investigator with incomplete, false, and vague information, whereas his role involves a position of trust.

m. Furthermore, while the Organization's inquiry into his conduct might have contributed to the alleged stress, this cannot be attributed to the Organization but to the Applicant himself, and as such, it cannot be considered as a mitigating factor. The medical report dated 25 November 2023, showing that the Applicant had a health condition requiring a specialist assessment on 28 November 2023, does not establish a causal link between

his alleged medical condition and the imposition of the sanction on him, which occurred only on 16 January 2024.

n. The key elements of the Applicant's rights to due process in the investigation and disciplinary process were respected in this case. No substantial procedural irregularities attended the investigation and the disciplinary process. The onus is on the Applicant to provide proof of the lack of due process and how it negatively impacted the outcome of the investigation and/or the disciplinary process.

o. The Applicant failed to establish any procedural irregularities. The Applicant also failed to demonstrate how any procedural irregularities, if established, could have negatively impacted the outcome of the investigation and disciplinary proceedings. Even if established, the irregularities identified by the Applicant are of no consequence on the establishment of the facts relevant to the determination of proportionality, given the kind and amount of evidence proving the Applicant's misconduct.

p. Apart from a general assertion of retaliation stemming from his participation as a witness in an investigation concerning the possible misconduct of the CMS/UNISFA, the Applicant did not present any evidence or details to substantiate his claim.

q. There is no merit in the Applicant's claim that the Respondent has taken the opinions of the investigator as evidence and relied solely upon the findings in the OIOS investigation report. In reaching its decision, the Respondent conducted an independent and thorough assessment of evidence gathered during the investigation and scrutinized the entire dossier in full compliance with ST/AI/2017/1 (*Unsatisfactory conduct, investigations and the disciplinary process*). The Applicant did not object to the Tribunal's admission of the record assembled by the Respondent, including the OIOS investigation report, into the case record in accordance with art. 9.4 of the Tribunal's Statute.

24. Finally, the Respondent submits that the decision to impose the sanction on the Applicant was based on the facts established by at least a preponderance of the evidence and was taken in compliance with applicable legal norms. Therefore, the decision constitutes a reasonable exercise of the Secretary-General's broad discretion in disciplinary matters with which the Tribunal should not lightly interfere. Accordingly, the Respondent respectfully requests the Tribunal to reject the application in its entirety.

Consideration

Scope of the review

25. In reviewing disciplinary cases, art. 9.4 of the Tribunal's Statute, as amended on 22 December 2023, provides that:

the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.

26. The Appeals Tribunal observed that:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.¹

27. UNAT also held 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 Tribunal is not conducting a "merit-based review, but a "judicial review" explaining that a "judicial review is more

¹ *Sanwidi* 2010-UNAT-084, para. 40.

concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".²

Whether the facts on which the disciplinary measure was based have been established by evidence

28. The challenged disciplinary measure is based on the answers given by the Applicant to OIOS investigators, when interviewed as a witness under oath, on the information about where Mr. Fultang had been located during the COVID-19 lockdown, as the Respondent finds that the Applicant had provided vague and evasive statements in response to the OIOS investigator's questions when the record indicates that he had considerable first-hand information about the matters asked.

29. The answers the Applicant gave are in the report, which are on the record, and are proven; the dispute poses the difficult issue of assessment of those statements and of their deceptive or evasive nature, if any.

30. The Tribunal finds it useful to highlight other facts, demonstrated by the parties or in substance uncontested, that are relevant to give the context of the situation where the facts happened.

31. The first fact is that the Applicant, Mr. Fultang, and the other more than 20 staff members were working temporarily in Entebbe, which was not their ordinary duty station, and that they were stranded there after the outbreak of the COVID-19 pandemic and a limitation of movement enforced.

32. The second fact is related to the specific period of the facts, which was during the COVID-19 lockdown, which existed during the period in question and impacted the Applicant's interactions among the staff member while they were stranded in Entebbe with poor arrangements for support and little administrative assistance. It is also uncontested that the Applicant did not benefit from the use of the UNISFA vehicle and that he had no obligation to record routes.

² *Ibid.*

33. In the situation arising from the said two facts, one can envisage that people are not so accurate in noting and storing in memory the places where they meet other people, also considering the number of persons in that situation.

34. A third fact to be considered concerns the Applicant's tasks whose limited role was only to receive and report residential location information, as provided by UNISFA staff stranded in lockdown in Entebbe. The Applicant's tasks were limited to preparing the list of the staff members' accommodations following their statements and without any check; he had to know where colleagues stranded in Entebbe lived only to assure them of any possible support they might need; the Applicant was charged with the wellbeing of the personnel, but it was not part of his remit to verify "where they were located", nor was it part of his tasks to verify their behaviour in relation to the reimbursement of accommodation expenses by the Organisation during that service in another duty station.

35. A fourth fact relevant to the case is that Mr. Fultang and other UNISFA personnel in Entebbe had provided their contact address information to UNDSS at the RSCE before the Applicant arrived in Uganda on 20 March 2020, and that the personal address Mr. Fultang had communicated to the Applicant listed stated that he was living at the Mowi hotel.

36. A fifth relevant fact is that Mr. Fultang was investigated because he had declared that he was living at the Mowi hotel (and sought reimbursement of false receipts from that hotel), while he had actually lived elsewhere, and in many other locations.

37. The said facts are established: we have the Applicant's statement to investigators and the context in which they were given.

Whether the established facts legally amount to misconduct.

38. It is worth to preliminarily note that the accusations levelled against the Applicant are not related to a concurrence in the fraud perpetrated by Mr. Fultang, but are related to a lack of cooperation by the Applicant with the pending investigation.

39. Having so said, the Tribunal is of the view that the facts with which the Applicant is reproached do not amount to misconduct.

40. This is essentially for two reasons.

41. Firstly, it was not part of the Applicant's remit to verify where the staff members were located: he had to know how to get in contact (by any way) with the colleagues in order to see if they needed support, but not to check their accommodations.

42. Also, the content of the list prepared by the Applicant reflected only what each staff member declared as his residence, as part of the requirement for each interested person to update the information on his/her availability.

43. On this point, Mr. Lewis, the UNISFA Chief Security Officer and the Applicant's supervisor, admitted that he had not instructed the Applicant to monitor UNISFA staff members whilst telecommuting in Entebbe:

I asked him not to monitor them but to contact them and find out about their wellbeing ... while they were in Entebbe" (par. 61 of the OIOS Report).

44. Secondly, charges against the Applicant are essentially based on the assumption that his statement to investigators were intended to objectively give help to Mr. Fultang in committing his fraud. This could be seen as true had the Applicant confirmed that Mr. Fultang, who stated in the list for the Administration that his residence was at the Mowi Crab Hotel, was effectively found there by the Applicant during the long period in Entebbe. From the records, instead, it emerges that the Applicant declared to investigator that he had met Mr. Fultang at that hotel only once, but had never entered his accommodation. Instead, the Applicant told investigators that on different occasions he visited Mr. Fultang at different places where he lived.

45. It results from file that the Applicant had told the investigator that he knew Mr. Fultang to have resided in two separate rented apartments, one before COVID-19 (a rented accommodation in Lunyo, Mayors' Road) and another at some time

later during and after the COVID-19 pandemic (an apartment around the Santas Maria area, going toward Country Bar).

46. In other terms, the Applicant's statements to the investigator, considered from a mere objective point of view, with reference to their effect more than the subjective intent of their author, cannot be seen as deceptive, intended to cover Mr. Fultang's fraud.

47. The Tribunal is aware that it has in any case to assess if the Applicant's behaviour was collaborative with investigators or not, given that obligations by staff members comprise the utmost promptness to cooperate with investigators on any fact they deem relevant.

48. On this point, the Tribunal observes that as the Applicant was not allowed to refresh his memory by consulting records, the lack of specific recollection in some occasion cannot constitute intentionally deceptive behaviour with the intent of obstructing the investigation. While the Applicant was more silent when facing open questions (for instance, "when and where you met Mr. Fultang during the period from March to September 2020"), posed many years after the facts occurred, when asked specific concrete questions, he answered and told what he recalled (and none of the witnesses interviewed during Mr. Fultang's trial contradicted his statements).

49. The Tribunal is of the view that the issue regarding the Applicant's factual knowledge of where Mr. Fultang resided during the period in question is based on conjecture.

50. Having met Mr. Fultang at various public locations, and generally in meeting related to their private life, does not imply the knowledge of the effective place where he lived.

51. Moreover, in the reply, paras. 15 and 18, the Respondent recalls that

On 25 April 2020, the Applicant reported to Mr. Lewis that the Applicant had met Mr. Fultang, along with other staff members, at Hotel Le Feve.¹¹ On 30 April 2020, he reported the meeting with

Mr. Fultang at his accommodation located in “Lunyo Entebbe, Mayor’s Road.” On 2 May 2020, the Applicant checked on Mr. Fultang at his accommodation again. In or around June 2020, the Applicant, together with Mr. David Ocendi, Field Security Assistant, Entebbe, visited Mr. Fultang at an apartment located in a residential building called “Zack Apartments” where he was staying. In June or July 2020, the Applicant attended a party hosted by Mr. Fultang at “Zack Apartments.” Between 3 and 5 September 2020, the Applicant stayed at the Wash and Wills Hotel in Mbale and interacted with Mr. Fultang, who was also staying there. ... When the investigator asked the Applicant where Mr. Fultang was located during lockdown, the Applicant replied that he did not have enough information to respond unless he checked his records, but he recalled his meetings with Mr. Fultang at the Le Feve Hotel and Santa Maria Hotel. The Applicant also remembered meeting Mr. Fultang at the Betty Hotel near the base, Mowi Cribs Hotel in Lunyo, and the area “around the bank”.

52. The Applicant did not contest this assertion and therefore we can assume that Mr. Fultang lived at least in those locations just mentioned.

53. It is worth also noting that the Administration knew of the locations above mentioned following the statement by the Applicant himself, and, therefore, one can assume that the Applicant had nothing to hide to the Administration on this point.

54. The OIOS Report itself, para. 72, recalls

... Mr. Fultang said he stayed in “*a series of hotel and apartments*”, during the lockdown period in Uganda, claiming to have moved frequently between locations.

55. The Tribunal notes that the said locations are many, they cover a long period of at least one year, they regard a period when the general concern (and probably the Applicant’s concerns as well) focused on the COVID-19 emergency and not on the place where a number of colleagues temporarily lived; also, those location were referred to one colleague out of many, they are not specifically linked to an event worth recalling (but to generic meetings) and the Applicant was asked to recollect them after many months. All this can justify a behavior before the investigator not recollecting them, or even badly recollecting them (and omitting something: see sanction letter, page 2, para. (b)) (see *AAE*, 2023-UNAT-1332, para. 120, about the

disciplinary irrelevance of inconsistencies or mere lack of recollection), and even an answer (see sanction letter, page 2, para. (a)) that states that the Applicant did not have enough information to tell where Mr. Fultang was located during lockdown.

56. Also, the fact the Applicant, when interviewed by the investigator by specific questions about the place where he met Mr. Fultang, evoked his need to check his records before answering, was justified by the numbers of meeting with all the personnel during almost one year, and does not entail evasiveness in itself (also considered that no specific additional information was required at a later stage by the investigator).

57. The Respondent has not adduced any evidence to indicate that the Applicant always and effectively knew where Mr. Fultang was residing in each moment, or had any knowledge of Mr. Fultang's relationship with the owners of any of the premises where he may have met Mr. Fultang. The Respondent's erroneous speculation regarding what the Applicant should have known or should have better recalled due to his position as Security Officer is mere subjective opinion which has not been corroborated by the evidence collected.

58. Finally, the accusation under page 2, para (d) of the sanction letter refers more to a generic attitude (deflection, being evasive) than to specific facts; they regard at least a "lack of candour", as recalled by the Respondent. However, this is not misconduct.

59. It is possible that the Applicant, who at a certain point knew that there were some issues between Mr. Fultang and the Administration, wanted to be cautious before recalling facts (especially when he was not certainly aware of) or stating hypothetical places of Mr. Fultang's residence, especially when those statements could have an unforeseen impact to his colleague, but in the Tribunal's view this - although it could have disappointed the investigator - does not entail a lack of cooperation.

60. In sum, the Applicant can be considered to have been a bit, but not to have been a liar; his statements to the investigator cannot be seen as misleading, objectively deceptive, nor incorrect.

61. In any case, there is no misconduct that could be relevant from a disciplinary point of view. Whether or not the Applicant was able to recall details of addresses or individual meetings with Mr. Fultang long after the fact is not evidence of impropriety, and is not a basis for assuming misconduct or wrongdoing on his part.

62. The disciplinary sanction is therefore without grounds; the challenged decision is to be rescinded.

Conclusion

63. In light of the foregoing, the application is granted, and the challenged decision is rescinded.

(Signed)

Judge Francesco Buffa

Dated this 4th day of November 2024

Entered in the Register on this 4th day of November 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi