



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

FULTANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Sètondji Roland Adjovi, Etudes Vihodé

Counsel for the Respondent:

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

Introduction

1. The Applicant, a Conduct and Discipline Officer at the P-4 level with the United Nations Interim Security Force for Abyei (“UNISFA”) in Sudan, challenges the Administration’s decision of 28 November 2022 to recover the amount of US\$ 17,213.00 from his final entitlements or emoluments, in accordance with Staff Rule 3.18(c)(ii).
2. On 5 January 2023, the Applicant filed an application requesting suspension of action pending management evaluation of the contested decision.
3. The application was served on the Respondent the same day with a deadline of 9 January 2023 (5 p.m. Nairobi time) to file a reply. In his reply of 9 January, the Respondent averred that the application is not receivable because the contested decision had been implemented on 28 November 2022.
4. The same day, the Applicant submitted a motion for leave to respond to the Respondent’s reply.
5. The Tribunal decided to deny the application for leave to respond since the SOA procedure requires only a *prima facie* view of the facts and the law and as such a response is not required in the circumstances.

Facts

6. The Applicant served as a Conduct and Discipline Officer at the P-4 level with UNISFA.¹
7. In March 2020, UNISFA staff members were asked to report health conditions that could put them at higher risk from COVID-19.² Due to his health condition, the

¹ Application, section VII, page 3, para 1.

² Annex 02-20210919 *Fultang Response to Allegations*, para 3. Annex 01-20210721 *Allegations re Mr. Fultang*, section II, para 4.

Chief Medical Officer (“CMO”) advised the Applicant who was in Entebbe, Uganda, to not return to the mission area.³

8. On 24 March 2020, the Applicant’s request for Daily Subsistence Allowance (“DSA”) for a month with other benefits was denied.⁴

9. On 22 April 2020, a UNISFA Security Officer wrote to UNISFA staff members requesting accurate information regarding their accommodation. The Applicant replied on the same day that he was staying at the Mowi Crab Hotel in Entebbe, Uganda⁵.

10. On 9 May 2020, the Applicant requested for a management evaluation of the rejection of his DSA request.⁶

11. On the same date, the contact list for UNISFA staff members in Entebbe referred to Mowi Crab Hotel as the Applicant’s reported address.⁷

12. On 14 August 2020, the contact list for UNISFA staff members in Entebbe also indicated that the Applicant stayed at the Mowi Crab Hotel.⁸

13. On investigation, a UNISFA Field Security Assistant in charge of the Security Operations Center in Entebbe, Uganda, stated that the Applicant did not stay more than four days at the Mowi Crab Hotel.⁹

14. On 15 September 2020, the Applicant submitted an accommodation and food expense account from mid-March to mid-September 2020 for a total amount of USD 34,800.00, in response to a request by the MEU for proof of effective expenses.

³ Annex 01-20210721 Allegations re Mr. Fultang, section III, para 6.

⁴Ibid, para 7.

⁵ Ibid, para 11.

⁶ Annex 02-20210919 Response to Allegations, para 6.

⁷ Ibid, para 14.

⁸ Annex 02-20210919 Response to Allegations, para, para 16.

⁹Ibid.

15. On 28 November 2022, the Applicant was dismissed for serious misconduct in accordance with staff rule 10.2(a)(ix).¹⁰ The same day, the OHR requested that UNISFA HR “Take necessary action to recover the total amount of US\$ 17,213.00 to the extent possible by deducting that amount from [the Applicant’s] final entitlements or emoluments, in accordance with Staff Rule 3.18(c)(ii), as specified in the sanction letter.” OHR further requested that UNISFA inform it when these steps had been taken.¹¹

16. On 5 January 2023, the Applicant submitted a request for management evaluation of the contested decision.¹²

17. On 9 January 2023, the Applicant submitted a motion for leave to respond to the Respondent’s reply to the application for suspension of action.

Considerations

18. In accordance with art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of the Rules of Procedure, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation. For an application for suspension of action to be receivable, a basic requirement is that the relevant decision is yet to be implemented. If the decision, lawful or not, has already been implemented—in a case concerning suspension of action under art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of its Rules of Procedure—the Tribunal is not authorized to suspend it, because neither the Statute nor the Rules of Procedure allows the Tribunal to reverse an already implemented contested administrative decision.

19. It is well established that where a contested decision has been fully implemented, suspension of action cannot be granted. The Tribunal notes however that UNISFA HR was supposed to inform OHR when steps had been taken to effect the recovery decision. The Respondent has not proffered any documentary evidence from

¹⁰ Reply, page 1, para 1. Application, section VII, page 4, para 5.

¹¹ Reply, annex R/1.

¹² Application, section VII, page 4, para 6.

UNISFA HR showing that steps have been taken towards implementation of the contested decision.

20. The Tribunal rejects this application for suspension of action on the basis that the Applicant failed to prove the element of urgency.

21. The Tribunal recalls that:

If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206; *Maloka Mpacko* UNDT/2012/081, reiterated in *Majoul-Hunter* UNDT/2012/117).

22. The Applicant indicated in his application that the contested decision was notified to him on 28 November 2022, but he waited until 5 January 2023 to request management evaluation and file this application. He does not explain why he chose to wait more than a month to contest a decision he knew would be forthcoming in the wake of his dismissal from service.

23. Under the circumstances of this case, the Tribunal finds that the urgency is self-created and, accordingly, that the Applicant has failed to meet the test of urgency under art. 2.2 of the Tribunal's Statute.

24. Since one of the three cumulative conditions required for temporary relief under art. 2.2 of the UNDT Statute has not been met, the Tribunal does not need to examine the two remaining conditions, namely *prima facie* unlawfulness and irreparable damage.

Conclusion

25. In view of the foregoing, the application for suspension of action is rejected in its entirety.

(Signed)

Judge Francis Belle

Dated this 13th day of January 2023

Entered in the Register on this 13th day of January 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi