



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

FULTANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sètondji Roland Adjovi, *Études Vihodé*

Counsel for the Respondent:

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

Sergei Gorbylev, DAS/ALD/OHR, UN Secretariat

Introduction

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

Factual and procedural background

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

10. On 13 June 2021, the Applicant was notified that he was being placed on ALWP, effective 14 June 2021, by the Acting Head of Mission on grounds of unsatisfactory conduct.

11. On 18 June 2021, the Applicant sought management evaluation (“ME”) of the 13 June 2021 decision.

12. On 2 August 2021, the Management Evaluation Unit (“MEU”) upheld the decision.

13. On 3 August 2021, the Applicant filed an application on the merits challenging the 13 June 2021 decision. That application is registered as UNDT/NBI/2021/073 and is also assigned to the undersigned Judge.

14. On 10 September 2021, the Respondent informed the Applicant of his decision to extend his ALWP from 13 September 2021 to 13 December 2021.

15. On 13 September 2021, the Applicant sought management evaluation of the 10 September 2021 decision.

16. On 20 October 2021, the MEU upheld the decision.

17. On 13 December 2021, the period of ALWP specified in the 10 September 2021 memo expired. The Applicant had received no notification of any further extension by 13 December 2021. He was therefore prepared to return to work but had no instructions.

18. On 11 January 2022, the Respondent informed the Applicant of his decision to retroactively extend ALWP from 13 December 2021 through 13 March 2022, or until the completion of a disciplinary process, if any, whichever is earlier.

19. On 17 January 2022, the Applicant sought management evaluation of the decision dated 10 January 2022.

20. On 28 February 2022, MEU upheld the retroactive decision.

21. On 2 March 2022, ALWP was extended for a further three months from 14 March 2022 through 13 June 2022, or until the completion of a disciplinary process, if any, whichever is earlier.

22. As of the filing of closing submissions in this case, the Applicant remains on ALWP.

23. On 14 April 2022, the Applicant filed an application to challenge the Respondent's decision of 10 January 2022 to extend his ALWP for a further three months, or until the completion of an investigation into his conduct and any disciplinary process.

24. The Respondent filed his reply on 21 May 2022 stating the impugned decision was lawful and rational.

25. On 3 August 2022, the Tribunal issued Order No. 106 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022. The Applicant and Respondent filed their respective closing submissions as directed.

Parties' submissions

26. The Applicant argues that the 10 January 2022 decision is patently unlawful because it extended the ALWP retroactively, and one month after the decision had expired. Absent any notification prior to the expiration of the previous ALWP extension on 13 December 2021, the Applicant should have immediately been returned to active-duty status.

27. Indeed, the Respondent has previously admitted that retroactive extensions of Administrative Leave are unlawful.

28. The Respondent, recalling *Kuate*, 2022-UNAT-1205, paras. 47-50, submits that any challenge to the retroactive extension of ALWP is not receivable on grounds that it posed no adverse consequences to the Applicant.

29. As to the lawfulness of the Respondent's decision to place and extend the Applicant on ALWP, the Respondent submits:

The Application has no merit and should be rejected. The Applicant merely refers to arguments he already made in his application of 3 August 2021, regarding the lawfulness of his initial placement on ALWP (case UNDT/NBI/2021/073).² Those arguments fail for the reasons in the Respondent's reply of 28 September 2021. On 21 July 2021, the Applicant duly received written allegations of serious misconduct for making false statements and submitting false hotel receipts to unduly obtain US\$ 18,519.12 from the Organization in reimbursement for purported expenses he never actually incurred. On 19 September 2021, after receiving an extension, the Applicant submitted his comments. The disciplinary process is expected to conclude in the near future. Until that time, the reasons for the Applicant's ALWP, as set out in the Respondent's abovementioned reply continue to exist.

Considerations

Receivability and other procedural issues

30. The application is receivable.

31. While *Kuate* 2022-UNAT-1205, paras. 47-50, recalled by the Respondent, does not provide any assistance in a case involving a decision to place or extend a staff member on administrative leave, the receivability of challenging a decision to place or extend a staff member on administrative leave is directly confirmed by staff rule 10.4(e)

A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

32. Moreover, in the employment contract, the execution of the work performance responds not only to the interest of the employer but also to that of the worker, due to the existential implications of the work.

33. Therefore, given the right of any worker to perform his/her job, the placement of a staff member on administrative leave impacts on the said right and causes concrete negative consequence for the terms or conditions of appointment.

34. The Applicant complains of the acceleration in dealing with the case by the Tribunal, once the case was assigned to the undersigned Judge.

35. The Tribunal, despite having in mind that the Applicant is on leave with pay during the proceedings, notes that it is generally in the interest of applicants having their rights, if any, quickly redressed. In any case, the Tribunal, recalling art. 19 of the Rules of Procedure (“RoP”), notes that the Applicant was fully granted the opportunity to present his case in depth, develop any issue raised in the proceedings and to properly respond to the Respondent.

36. The Applicant contests that annexes R3 to R5 to the reply were unlawfully filed and asks the Tribunal to strike them off the records.

37. The Tribunal, applying art. 18 of the RoP notes that, generally, even improperly acquired documents or those in breach of confidentiality rights may be used in court (although the author of the violation could be held responsible for that). In this case, the Tribunal finds annexes R3, R4 and R5 irrelevant to the adjudication of this case. The motion is therefore moot.

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

39. The Tribunal is of the view that the MEU is an independent unit in the office of the Under-Secretary-General for Management (General Assembly resolution 62/228, paras. 50 and 52; section 10 of ST/SGB/2010/9 (Organization of the Department of Management) with the task of conducting an impartial and objective evaluation of administrative decisions contested by staff members (as stressed in *Elmi* UNDT/2016/032). Proceedings before the MEU are not comparable to the mediation run by the Ombudsman (where the parties are bound not to disclose privileged communications related to mediation attempts), because MEU is still part of the Administration, and the ME process is like an administrative review of the administrative decision. Therefore, the Administration can lawfully take into

account the behaviors of the parties during the ME process, given its administrative nature.

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

Merits

41. As to the placement in ALWP in general, the Tribunal recalls its observations in *Fultang* UNDT/2022/102 filed by this Applicant. The measure is provided in the interest of the Organization; and was fully justified by the need to preserve evidence and to avoid the risk of repetition or continuation of further acts similar to those the Applicant was accused of.

42. The reasons for the Applicant's ALWP, as set out by the Administration, continues to exist, pending disciplinary proceedings.

43. The present case poses the additional issue of the lawfulness of the retroactivity of the placement in ALWP.

44. The impugned 10 January 2022 decision to retroactively extend the Applicant's ALWP, which had previously expired on 13 December 2021, was lawful.

45. Indeed, the Applicant failed to report for duty on 13 December 2021, as he should have done, had he honestly believed his ALWP had ended. In fact, the Applicant stayed silent and simply continued to enjoy his leave with pay and benefits.

46. In this situation, the Tribunal notes that it was in the interest of the staff member for the retroactive application of ALWP for the period not covered by service or by previous decisions on ALWP.

Conclusion

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

(Signed)

Judge Francesco Buffa

Dated this 10th day of October 2022

Entered in the Register on this 10th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi