

UNDT/2021/152, Millan

UNAT Held or UNDT Pronouncements

Article 18.3 of the UNDT Rules of Procedure provides that a party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence. That the Applicant chose to obtain the documents outside the Tribunal process must be frowned upon. Because of the method the Applicant used to obtain the documents, their authenticity let alone their probative value cannot be guaranteed. The documents in issued were therefore ruled inadmissible. The Tribunal held that the ALWOP decision was based on the criteria set out in section 11.4 b of ST/AI/2017/1. In the Tribunal's view, based on the nature of the allegations (being a passenger in a clearly-marked United Nations vehicle in which acts of a sexual nature publicly took place) and its gravity (a combination of its nature and reputational effect to the Organization), it cannot be said that the impugned decision was disproportionate. Further, based on established legal principles (Gisage) it cannot be said that the decision was punitive and that it violated the presumption of innocence. The Tribunal found that the 1 July 2020 decision to place the Applicant on ALWOP from 1 July 2020 for a period of three months, or until the completion of the investigation and any disciplinary process, whichever was earlier was lawful.

Decision Contested or Judgment/Order Appealed

The Applicant challenged two decisions: the 1 July 2020 decision to place him on Administrative Leave Without Pay ("ALWOP") and the 30 June 2020 decision to seize his personal smartphone for purposes of an investigation.

Legal Principle(s)

Article 18.3 of the UNDT Rules of Procedure provides that a party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General or the official with delegated authority amongst the various courses of action open to them. Nor is it the role of the Dispute Tribunal to substitute its own view about what decision ought to have been taken. And, as a general principle, the Dispute Tribunal does not lightly interfere with the exercise of managerial discretion. In conducting judicial review of decisions to place an applicant on ALWOP, the Dispute Tribunal reviews whether the decision was lawful and rational, considering the criteria stipulated in the Staff Rules and ST/AI/2017/1 and the information before the head of entity at the time of the decision. It is not for the Dispute Tribunal to substitute its own view for the head of entity's decision, but to evaluate whether that decision was irrational or arbitrary. ALWOP remains an administrative measure and not a disciplinary measure. Under section 11.4(b) of ST/AI/2017/1 for the requirement of "exceptional circumstances" to be met, there must be: (i) information about the unsatisfactory conduct that makes it more likely than not (preponderance of evidence) that the staff member engaged in the unsatisfactory conduct; and (ii) evidence that the unsatisfactory conduct is of such gravity that it would, if established, warrant termination of employment relationship, namely, separation or dismissal.

Outcome

Dismissed on merits

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

Millan

Entity

UNTSO

Case Number(s)

UNDT/NBI/2020/75

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

9 Dec 2021

Duty Judge

Judge Tibulya

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Investigation (see category: Investigation)

Non-disciplinary/administrative measures

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Staff Rules

- Rule 10.4