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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/067

Judgment No.: UNDT/2021/144

Date: 30 November 2021

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ANTOINE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicants:**

Sètondji Roland Adjovi, *Etudes Vihodé*

Charles A. Adeogun-Phillips, Charles Anthony LLP

**Counsel for the Respondent:**

Jacob B. van de Velden, AAS/ALD/OHR, UN Secretariat

Romy Batrouni,



The UNTSO staff members implicated in the report are the Applicant and another UNTSO staff member.

7. On 2 July 2020, the Applicant received notification of the Under Secretary-General of the Department for Management Strategy, Policy and Compliance's ("USG/DMSPC") decision placing him on Administrative Leave Without Pay ("ALWOP").<sup>2</sup>

8. On 14 July 2020, the Applicant filed a management evaluation request challenging two decisions: (i) the 2 July 2020 ALWOP decision and (ii) the seizure of his personal cell phone by OIOS during a 30 June 2020 interview.<sup>3</sup> On the same date, he also filed an application for suspension of action ("SOA").

9. On 22 July 2020, the UNDT issued Order No. 139 (NBI/2020) rejecting the SOA application.

10. On 30 August 2020, the Applicant filed an application on the merits contesting the same two decisions (para. 8 above), which was assigned Case No. UNDT/NBI/2020/070. On the same day, the Applicant filed a motion for interim measures to suspend the contested decisions.

11. On 9 September 2020, the UNDT issued Order No. 172 (NBI/2020) partially granting the Applicant's motion for interim measures and suspended the decision to place the Applicant on ALWOP.

12. On 11 September 2020, the Applicant was placed on ALWOP pursuant to UNDT Order No. 172 (NBI/2020) and UNDT Order No. 173 (NBI/2020).

14. On 9 June 2021, the Applicant received the contested decision.





- a. Annex 18 was a publicly released commentary and analysis of the case and the Applicant's Counsel is not its author.
- b. The fact that Annex 18 is dated 11 October 2020 is irrelevant; it does not make the analysis of the evidence and the actions taken by the Respondent at the time of the decisions less credible.
- c. The Applicant has submitted other publicly available commentary on the case with his applications. The Inner City Press was extensively relied









subject interview in March 2021, the Applicant was no longer on CSL. OIOS consulted UNTSO Medical Services as to whether he was considered fit to participate in interviews. UNTSO Medical Services responded that the Applicant's CSL had ended in February 2021, and that his subsequent request to extend the CSL until 31 March 2021 was not approved by Medical Services. UNTSO Medical Services advised OIOS that the Applicant was medically able to take part in an interview under certain conditions.

- c. *The Applicant is not entitled to any 8.4m(P)an)21)10)8(t(8.7m(i)18(n)2(e)4r)5vi)18(e)4*

19. The Respondent submits that the Applicant's attempt to cloak his failure to provide contact information for F01, a material witness who could corroborate his story for whom only he had the necessary contact information, is without merit. There were various ways to protect F01's confidentiality. OIOS could have interviewed her on an anonymous basis. Alternatively, F01 could have filed a statement redacting her name, and F01 could have provided her testimony before this Tribunal *in camera*.

*Respondent's request that Annex 18 to the application be ruled inadmissible.*

20. The Respondent requests that the Tribunal rules Annex 18 to the application inadmissible on the grounds that it is dated 11 October 2020 and is therefore not relevant to the contested decision which was issued on 9 June 2021, i.e., eight months later. The Respondent further submits that Annex 18 contains derogatory and insulting statements to the Counsel for the Respondent and to the USG/DMSPC and that by submitting Annex 18 in support of the application, Counsel for the Applicant violated art. 4.4 of the Code of Conduct for legal representatives and litigants in person requiring them to maintain the highest standards of professionalism and upholding basic ethical standards.

21. In view of the foregoing, the Respondent requests that the Tribunal dismiss the application in its entirety and reject all reliefs sought by the Applicant.

## **Considerations**

*Annex 18 to the application*

22. Articles 18.1 and 18.5 of the UNDT Rules of Procedure stipulate:

1. The Dispute Tribunal shall determine the admissibility of any evidence.

...

5. The Dispute Tribunal may exclude evidence which it considers irrelevant, frivolous or lacking in probative value. The Dispute Tribunal may also limit oral testimony as it deems appropriate.

Annex 18 to the application is inadmissible. According to the Applicant, the annexure comprises of a publicly released commenta

(c) The continued presence of the staff member on the Organization's premises or at the duty station could constitute a security or financial risk to the Organization and/or its personnel, or could otherwise prejudice the interests or reputation of the Organization;

25. The Tribunal is called to examine the following issues:

a. Whether the delays in the process and the failure to charge the Applicant render the Respondent's 9 June 2021 decision to extend the Applicant on ALWP for yet another three months abusive, a violation of due process rights and an abuse of discretion.

b. Whether the reasons provided in placing the Applicant on ALWP meet the statutory standard.

26. While both parties agree that the decision-maker has the discretionary authority to place a staff member on administrative leave, the Applicant asserts that the use of such discretion rising to the level of abuse (which he maintains has occurred in this case) is not unfettered and cannot be accepted. Citing *Gisage*, he specifically points to the fact that he has been kept on administrative leave for more than a year without being charged which he argues is abusive and unlawful being that the period taken far exceeds the legally acceptable 12-month period from investigation to sanction. Unlike in the present case which involves a decision to extend ALWP, in *Gisage* the staff member had

ST/AI/2017/1 and the information before the head of entity at the time of the decision.

b. It is not for the Dispute Tribunal to substitute its own view for that of the head of the entity, but to evaluate whether that decision was irrational or arbitrary.<sup>6</sup>

c. The period of time for placement of staff on administrative leave should be reasonable and proportionate<sup>7</sup>, but the Tribunal may not set arbitrary time limits for the Organization to complete an investigation and any subsequent disciplinary process.<sup>8</sup>

28. It is recalled that the Applicant was initially placed on ALWP on 11 September 2020. ALWP was thereafter extended on three occasions (on 8 December 2020, on 9 March 2021 and on 9 June 2021) on the basis that the circumstances which warranted the Applicant's initial placement on ALWP still exist.

29. Based on the uncontroverted evidence that the Applicant refused to:

a. inform the investigators early in the process whether he was the passenger seated in the rear near-side passenger seat captured in the clip;

b. provide relevant contact information which only he had, about a material witness (F01) to the investigation; and

c. participate in a follow-up interview to provide additional information,

which conduct, in the Tribunals view, amounted to refusal to cooperate with the investigation, the Tribunal determines that the impugned decision is fully consonant with appellate jurisdiction guidance that the length of time an investigation may take will depend on the circumstances including any practical challenges at the duty

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<sup>6</sup> *Gisage*, paras. 37 - 40.

<sup>7</sup> Paragraph 16 of the ILOAT judgment of *K v ILO*, Judgment No. 4039, referring to para. 7 of *R.D.A.G. v PAHO*, Judgment No. 3295.

<sup>8</sup> *Gisage*, para. 40.

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represented during the investigation process.<sup>15</sup>

34. In any case, there is sufficient basis for a finding that the Applicant was not on CSL in March 2021 when he was contacted by OIOS for a second subject interview. The Respondent maintains that the Applicant was on CSL between 9 September 2020 and 30 November 2020, between 1 December 2020 and 29 January 2021, and between 1 February 2021 and 26 February 2021. Further that the OIOS consulted UNTSO Medical Services to ascertain whether the Applicant was considered fit to participate in interviews and UNTSO Medical Services responded that his CSL had ended in February 2021, and that his subsequent request to extend the CSL until 31 March 2021 was not approved by Medical Services. UNTSO Medical Services advised OIOS that the Applicant was medically able to take part in an interview under certain conditions.

35. The Tribunal finds the above facts credible since the Applicant does not deny them. Those facts fully support the assertion that the Applicant refused to participate in the follow-up interview.

36. The Respondent again asserts that while the Applicant is the only one with the relevant contact information about a material witness (F01), he refused to provide the information to the investigators yet witness F01 is the only one who could have

c uncorroborated the Applicant's account of c / a .

he made a counter offer. This does not amount to cooperation at all. There is moreover no evidence (e.g. an email and maybe a response from FO1's lawyer), that he indeed forwarded the Respondent's contact details to the witness (F01) and her lawyer. Based on this, the Tribunal finds that the Applicant indeed refused to cooperate with the investigation.

38. All factors considered, the Tribunal finds that the contested decision, having been made under staff rule 10.4 and section 11.3 of ST/AI/2017/1 by the authorized official was lawful and rational. And, based on the Applicant's refusal to cooperate with the investigation as explained above, the Tribunal finds that the delays in the process and the failure to charge the Applicant to which the Applicant contributed in no small measure, and that the resultant Respondent's 9 June 2021 decision to extend the Applicant on ALWP for yet another three months was not abusive, did not violate his due process rights and did not amount to abuse of discretion in the particular circumstances of this case.

*Whether the reasons provided in placing the Applicant on ALWP are not explained to any required standard.*

39. The Applicant maintains that in the letter which communicated the impugned decision, the decision-maker did not give reasons for the impugned decision but that there was mere reference or wording drawn from the existing and relevant legal provisions (section 11.3 of ST/AI/2017/1) which is never sufficient to justify a decision. He asserts that it is essential for a fully motivated decision to quote the law and show how the facts match that law.<sup>18</sup>

40. Staff rule 10.4 (b) provides that a staff member placed on administrative leave shall be given a written statement of the reason(s) for such leave and its probable duration. The Tribunal notes that in the letter which communicated the impugned 9 June 2021 decision<sup>19</sup>, the decision-maker made reference to the original justification

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<sup>18</sup> See paras. 28 - 29 of *Applicant*, Order No. 062 (NBI/2020).

<sup>19</sup> Application, annex 17.

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