

Introduction and procedural background

1. On 7 September 2021, the Applicant, a Security Officer at the FS-5 level at the United Nations Truce Supervision Organization (“UNTSO”), Department of Safety and Security in Jerusalem, Israel, filed an application contesting the 22 June 2021 decision by the Acting Head of Mission, UNTSO, to extend his placement on administrative leave with pay (“ALWP”) for another three months or until the completion of an investigation and any disciplinary process, whichever is earlier (“the contested decision”).
2. The Respondent filed a reply on 8 October 2021.
3. The Tribunal held a case management discussion on 15 October 2021 during which the parties agreed, *inter alia*, that the case could be decided on the basis of their written submissions and that no closing submissions were necessary.
4. On 22 October 2021, the Applicant filed a rejoinder to the reply.
5. The Respondent filed observations on the rejoinder on 26 October 2021.

Summary of the relevant facts

6. On 24 June 2020, the Investigations Division, Office of Internal Oversight Services (“ID/OIOS”) received a report of possible unsatisfactory conduct implicating staff members at UNTSO in Jerusalem. Evidence submitted in support of the report included a video clip (“the clip”). On 25 June 2020, Mr. Ben Swanson, the Director, IO/OIOS sent an e-mail to UNTSO’s Acting Head of Mission informing him of the report and the clip.¹ The clip showed two male individuals and a female individual driving through a busy street in a clearly-marked United Nations vehicle. The male individual seen in the back seat and the female were allegedly engaging in an act of a

¹ Reply, annex 1.

sexual nature as the vehicle was driven along a heavily trafficked street. The UNTSO staff members implicated in the report are the Applicant and another 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").²

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.³ On the same date, he also filed an application for suspension of action ("SOA").

9. On 22 July 2020, the UNDT issued Order No. 138 (NBI/2020) rejecting the SOA application.

10. On 14 September 2020, the Applicant filed an application on the merits contesting the same two decisions (para. 8 above), which was assigned Case No. UNDT/NBI/2020/075. On the same day, the Applicant filed a motion for interim measures to suspend the contested decisions.

11. On 23 September 2020, the UNDT issued Order No. 185 (NBI/2020) partially granting the Applicant's motion for interim measures and suspended the decision to place the Applicant on ALWOP.

12. On 24 September 2020, the Applicant was placed on ALWP for an initial period of three months by the Acting Head of Mission, UNTSO.⁴

13. By letters dated 22 December 2020 and 22 March 2021, the Acting Head of Mission informed the Applicant that his placement on ALWP was being extended.⁵

² Reply, annex 5 and application, annex 2.

³ Application, annex 11.

⁴ Application, annex 12 and reply, annex 16.

⁵ Application, annexes 14 and 15 and reply, annex 18.

disciplinary action”. Former staff rule 10.4(b) stated that ALWP, so far as practicable, “should not exceed three months”. The removal of this phrase in the current staff rule 10.4(b) should not embolden the Respondent to simply sit on their hands and abusively take advantage of the Applicant.

iv. Were the Respondent to be allowed to continue to adopt this strategy and the continued positions of the Management Evaluation Unit endorsed, the result would be that the investigation and disciplinary process need never be completed and thus bar the staff member from ever being able to challenge being on ALWP and the unreasonable, abusive and unfair delays.

v. Not only does this deny the Applicant the right to an effective remedy that is implicit in established human rights norms and enshrined in UNAT jurisprudence, it violates the terms and conditions contained within his employment contract. By failing to conduct an investigation in a timely manner, the Administration breached an implicit duty of care. The unreasonable delay in undertaking the disciplinary process constitutes such a breach of a duty of care. Consequently, the terms and conditions of his appointment have been violated.

vi. The Applicant was on certified sick leave (“CSL”) since August 2020 and had advised that due to his illness, any contact should be through his Counsel, who had been given sworn Power of Attorney to be contacted for all matters as of 16 August 2020. No one contacted the Applicant’s Counsel as instructed nor his medical professionals who had provided medical certificates justifying his certified sick leave.

b. The reasons provided in placing him on ALWP are not explained to any required standard.

i. The justification provided in the 24 September 2020, 22 December 2020 and 22 March 2021 memoranda placing him on ALWP all refer to the original justification without providing any further explanation. The decision maker only used the wording of Section 11.3 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process)

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 thahaA()-n0.0y and

abuse of authority) and violations of staff regulations 1.2(a)-(b) and staff rule 1.2(f) for knowingly issuing the false and defamatory press statements.

e. Accountability enforced for the misconduct/unsatisfactory conduct by then Director, ID/OIOS, the Chief ID/OIOS Vienna, Chief of Section, ID/OIOS Vienna and the USG/DMSPC for abuse of authority under ST/SGB/2019/8, violating the Applicant's rights under ST/AI/2017/1 and violations of staff regulations 1.2(a)-(b) and staff rule 1.2(f) so the Organization could be seen to be taking action in response to negative press coverage.

Respondent

18. The Respondent's case is summarized as follows:

a. *The contested decision was lawful and rational.*

i. As head of entity, the Acting Head of Mission had delegated authority to make the contested decision and lawfully exercised his discretion by determining that the criteria for placement of the Applicant on ALWP under sections 11.3(a) and (c) of ST/AI/2017/1 were met.

ii. In determining the Applicant's ability to continue to perform his functions at the Organization, pursuant to section 11.3(a) of ST/AI/2017/1, the Acting Head of Mission reasonably concluded that given the seriousness of the matter, the Applicant was unable to effectively perform his functions as a Security Officer in a position of command at UNTSO operating in a delicate setting of a conflict-affected area. Further, the Acting Head of Mission reasonably found that the Applicant's continued presence in UNTSO could otherwise prejudice the interests or reputation of the Organization, pursuant to section 11.3 (c) of ST/AI/2017/1.

iii. It is not in dispute that the Applicant's conduct posed a significant harm to the reputation and credibility of the United Nations and UNTSO. It was thus reasonable for the Acting Head of Mission to conclude that having the Applicant regain his functions at UNTSO could potentially further damage the Organization's reputation.

iv. The contested decision complied with staff rule 10.4(b). In the contested decision, the Acting Head of Mission explained the reason for the extension of the Applicant's placement on ALWP by referring to sections 11.3(a) and (c) of ST/AI/2017/1 and to the former letters addressed to the Applicant in relation to his ALWP, including the letter informing him of his initial placement on ALWP dated 24 September 2020, which had explicitly referred to Order No. 185 (NBI/2020). The language used in the contested decision is clear and unambiguous, and the reasoning set forth precise and intelligible. The Applicant was properly informed of the facts underpinning the decision to place him on ALWP, and the decision to extend.

v. The Applicant did not challenge the initial decision to place him on ALWP dated 24 September 2020. He cannot therefore via the back door in the present case challenge the basis for his initial placement on ALWP.

b. There was no delay in the process.

i. OIOS initiated its investigation in June 2020, be Head of Mission 792 2ntD

dated 12 August 2021, setting out formal allegations of misconduct against him.

ii.

- c. *The Applicant is not entitled to any remedy.*
- i. The contested decision was lawful, and as such, the Applicant's request for rescission of the contested decision should be rejected.
 - ii. The Applicant is not entitled to monetary or other compensation as he has not provided any evidence of harm as required by art. 10.5(b)

20. 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

Admissibility of Annex 18 to the application

21. 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 commentary and analysis of the case. Such

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longer on certified sick leave. The assertion that OIOS consulted UNTSO Medical Services as to whether the Applicant was considered fit to participate in interviews and that UNTSO Medical Services confirmed that he was no longer on CSL at the material time was not challenged and the Tribunal accepts it. The assertions that no subsequent request to extend the CSL was received by the Medical Service49(r)-6(e)4(c)4(e)4(i)18(ve)4(d)-149(by

36. 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 22 June 2021 decision¹⁵, the decision-maker made reference to the original justification provided in para. 2 of the 24 September 2020 memorandum¹⁶ in the following terms;

In consultation with the Regional Conduct and Discipline Section (RCDS), I have determined that the factors forming the basis for the initial placement on ALWP continue to exist.

And, when the Applicant was initially placed on ALWP¹⁷, the decision-maker made reference to the 1 July 2020 ALWOP decision. In the first paragraph of the letter which had communicated the ALWOP decision¹⁸, the Applicant was informed that,

the ID/OIOS was investigating allegations that on the 21 May 2020, the Applicant was a passenger in a clearly-marked UN vehicle in which acts of a sexual nature took place as it circulated in a heavily-trafficked area of Tel-Aviv.

37. In all ALWP ex21(i)38(o)-19(n)-10(i)38(o)-39(n) tn leud-19(i)18(nag)-29(e)-21(h)20(e)4()-99(t)m

