



Case No.: UNDT/NBI/2010/025/
UNAT/1674
Judgment No.: UNDT/2013/111
Date: 30 August 2013
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Introduction

1. The Applicant is a former staff member of the United Nations Mission in Sudan (UNMIS) who was placed on Special Leave With Full Pay (SLWFP) on 16 January 2006 following issuance of a December 2005 draft audit report by the Office of Internal Oversight Services (OIOS) into procurement activities and pending a follow-up investigation by a specially-constituted OIOS investigative body known as the Procurement Task Force.

2. The Applicant is appealing against the decision of the Secretary-General to place him on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006. He alleges that this decision has violated his rights and resulted in significant damage to him given the manner in which it was imposed.

Procedural history

3. Following the decision to place him on SLWFP, the Applicant appealed to the former Joint Appeals Board (JAB) on 15 May 2006. The JAB found that “the Respondent’s actions constituted a fundamentally serious and damaging violation of the [Applicant’s] due process rights as well as to his reputation” and recommended compensation in the amount of two years net base salary at the time the decision was implemented on 16 January 2006. The Respondent rejected the recommendation of the JAB.

4. In this connection, on 12 August 2008, the Deputy Secretary-General transmitted a copy of the JAB report dated 30 August 2007 to the Applicant and advised him of the Secretary-General's decision which was as follows:

The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. He is of the view that it cannot be determined that the decision to place you on SLWFP was taken in a manner that resulted in a violation of your due process rights or in damage to your reputation. He has therefore decided not to accept the conclusions and recommendations of the JAB and has also decided to take no further action in this matter.

10. On 23 September 2011, the Parties requested a postponement of proceedings to 3 October 2011 to finalize their settlement discussions. The Tribunal granted an extension to 14 October 2011¹.

11. On 14 October 2011, the Applicant informed the Tribunal in a joint

and information technology, and to report thereon to the General Assembly at its sixtieth session;

5. *Also requests* the Secretary-General to entrust the Office of Internal Oversight Services, in the light of the increasing demands with which the Department of Peacekeeping Operations is faced and the burden this is putting on its functioning, with carrying out a review of the management structures of the Department, while

1. In view of the ongoing audit and investigation into the Organization's procurement activities, the Secretary-General has decided that it is in the best interest of the Organization to place you on special leave with full pay pursuant to staff rule 105.2(a) (i), effective immediately.

2. While on special leave, you will not be discharging any of your normal functions but will be expected to cooperate fully with all audit and investigation processes. The situation will be assessed following an appropriate determination of the facts, and you will be returned to duty if no further action is required at that time.

3. I wish to emphasize that your placement on special leave with full pay is a purely administrative measure, which is not disciplinary in nature and is taken to assist the Organization in conducting a full assessment of the situation.

25. Prior to the Applicant's placement on SLWFP, he was provided with a copy of the Draft OIOS Report and allowed to submit comments, which he did in January 2006. However, according to the Applicant his comments were not included in the formal DPKO reply to the draft OIOS Report and subsequently PTF initiated an investigation into the allegations relating to his role in UNMIS.

26. Following a management audit of DPKO and the Department of Management (DM), OIOS issued its final report on 19 January 2006 (Final OIOS Report). The same day, an Associated Press story was published which named the Applicant as well as the seven other staff members as the staff placed on SLWFP.

27. On 30 January 2006, the then Secretary-General disseminated a letter on procurement activities to United Nations staff that informed, *inter alia*, of an OIOS investigation into a number of cases of possible fraud, abuse and waste that had been identified during an audit; and that 8 staff members "in positions related to procurement" had been placed on SLWFP in "response to the findings" of the audit report.

28. By a letter dated 17 April 2006, the Applicant submitted a request for administrative review to the Secretary-General. By a letter dated 21 April 2006, Ms. Adele Grant, then Officer-in-Charge, Administrative Law Unit, Office of Human Resources Management (OHRM) informed the Applicant as follows:

[T]he decision to place you on [SLWFP] was taken by the Secretary-General in the interests of the Organization pursuant to staff rule 105.2(a)(i) in view of events taking place in the procurement area, relating to issues which arose when you were serving as Chief Aviation Officer. These events are subject to a number of fact-finding investigations within the Organization, as well as investigations by national bodies.

Your placement on [SLWFP] was intended to prevent accusations that key personnel involved in procurement influenced the outcome of these investigations. The decision was not linked to your performance or conduct, neither of which are being pre-judged.

29. On 14 August 2006, Mr. Malloch Brown advised the Applicant that his SLWFP was being lifted and that on the basis of the PTF findings, he would be charged with misconduct. He was then charged with misconduct on 15 August 2006 for lack of management oversight. On 6 September 2006, the PTF issued a revised investigation report concerning the allegations against the Applicant and on 14 September 2006, the Respondent issued a revised set of allegations. The Applicant submitted comments and supporting documentation in response to the charges on 13 October 2006.

30. On 16 January 2007, Ms. Jane Holl Lute, the then Assistant Secretary-General, DPKO, wrote to the Applicant advising that as a result of a further review, “the Organization has concluded that you have provided a satisfactory explanation of your conduct [...]. Accordingly, it has been decided that these matters should not be pursued further”. The letter also contained a reprimand for his failing to exercise the necessary level of management oversight. Additionally, Ms. Holl Lute informed the Applicant that he would not be returned to his assignment in UNMIS but would be placed in another position commensurate with his qualifications and the Organization’s needs.

31. On 22 January 2007, Ms. Holl Lute advised the Applicant that, on the instruction of the Secretary-General, the reprimand was being withdrawn and removed from his file.

The issues

32. Based on the parties pleadings and subsequent submissions³, the Tribunal deems the following to be the issues for determination:

- a. Whether the imposition of SLWFP was justified;
- b. Whether the Applicant's due process rights were respected;
- c. Whether the Applicant's placement on SLWFP damaged his reputation; and
- d. Whether the Applicant is entitled to compensation.

33. At the time the Application was filed, the issues of reprimand and transfer of the Applicant from UNMIS had not been resolved. The Tribunal notes that these issues have been judicially determined⁴ following a referral to the Joint Disciplinary Committee (JDC) in December 2007. In its report of February 2009, the JDC recommended that the administrative reprimand be reinstated.

34. The Applicant challenged that decision before the United Nations Dispute Tribunal (UNDT) in New York. Judge Memooda Ebrahim-Carstens, who heard the case, found that the decision to withdraw the reprimand and refer the matter to the JDC for advice was a breach of the Applicant's terms of appointment but that the initial imposition of the reprimand was not an improper exercise of the Secretary-General's discretion⁵. The Judge also found that the wording of the reprimand was inappropriate. The Judge also found that the w

2013-UNAT-346. This Tribunal refers to it for the purposes of pointing out that the issues of reprimand and transfer are now *res judicata*.

35. The Tribunal therefore considers that the only issues remaining to be determined are whether the Applicant should have been put on SLWFP and whether his due process rights were respected.

Applicant's submissions

36. The Applicant submits the following:

- a. The facts indicate that a routine investigation was being carried out and there was no clear rationale or exceptional circumstances for the decision to place him and seven other staff members on SLWFP pursuant to former staff rule 105.2(a)(i).
- b. The Respondent did not articulate clearly the exceptional circumstances that could justify his being placed on SLWFP.
- c. The decision to place him on SLWFP was arbitrary and capricious in that no informed reasons were provided for such an action.
- d. His placement on SLWFP was, in effect, a *de facto* suspension from service and a disguised disciplinary measure without any of the procedural safeguards associated with that measure and was widely disseminated in the media thereby failing to preserve the confidentiality of the investigation.
- e. The decision of the Respondent not to follow the JAB recommendations constitutes discriminatory treatment on the ground that the Respondent has not justified why he accepted the recommendations for payment of compensation to some of the eight staff members and rejected the recommendations of compensation in his case.
- f. The Applicant has suffered public humiliation, damage to his reputation and his career, as well as physical injury.

Respondent's submissions

37. The Respondent submits as follows:

a. The Secretary-General, as Chief Administrative Officer of the Organization, is vested with broad authority over the placement of staff members. Indeed staff rule 1.2(c) provides in relevant part that “[s]taff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations”. Accordingly, it is well within the discretionary authority of the Secretary-General to direct the placement of staff members as required.

b. Pursuant to staff regulation 5.2, “[s]pecial leave may be authorised by the Secretary-General in exceptional circumstances”, that is, to avoid the contamination of evidence, or the appearance of such contamination.

c. Former staff rule 105.2(a)(i) provides, in relevant part, that “[i]n exceptional cases, the Secretary-General may, at his initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization”.

d. The Secretary-General had authority to place the Applicant on SLWFP, since the circumstances in which the Applicant and the Respondent found themselves were unprecedented and presented an exceptional case. The irregularities and allegations contained in the OIOS Report and Deloitte Report created an unprecedented and extraordinary situation and, further, such placement was considered by the Secretary-General within his discretion and his broad authority, to be in the interest of the Organization. Thus, the decision to place the Applicant on SLWFP in this case fell squarely within the parameters of former staff rule 105.2(a)(i).

e. In the period immediately prior to the events to which this Application relates, the report of the Independent Inquiry Committee into the United Nations Oil for Food Programme had exposed major

was conducted fairly and correctly and in the interests of the Organization,
and that it would be conducted in a manner that would protect the

39.

given to the Secretary-General be used in an unbridled way and outside the context of the Staff Regulations.

43. In *Kamunyi* UNDT/2010/214, Shaw J. concluded that the words “exceptional cases” relate to:

[...] situations referred to earlier in the clause such as where the staff member is undertaking research that will benefit the United Nations, or where a valuable staff member is unable to perform his or her duties by reason of illness or child care obligations. It is not a catch-all which extends to Chapter X disciplinary measures. That Chapter has its own provisions for suspension.

44. From the case law there are two examples where the former United Nations Administrative Tribunal has made some observations on the kinds of exceptional cases that may warrant the placement of a staff member on SLWFP. In the case of *Makil*⁷,

105.2(a)(i) did not permit placing a staff member on SLWFP where an investigation was being made into possible wrongdoing by that staff member. This Tribunal endorses the reasoning in *Johnson* that:

To use former staff rule 105.2 in such a manner would render the provisions of former Chapter X of the Staff Rules and ST/AI/371 meaningless, since the protections of former Chapter X and ST/AI/371 would not need to be respected when the more general former staff rule 105.2 could be relied upon.

47. Former Chapter X of the Staff Rules and ST/AI/371 contain an extensive regime to deal with instances of misconduct. It is not necessary to cite all relevant provisions here but the following suffice to show that distinct processes existed for suspending staff members during investigation and disciplinary proceedings at the time the Applicant was put on SLWFP.

48. Former staff rule 110.2 provided:

(a) If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. The suspension shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

(b) A staff member suspended pursuant to paragraph (a) shall be given a written statement of the reason for the suspension and its probable duration.

49. ST/AI/371 (Revised disciplinary measures and procedures) is also relevant for the present purposes. Section 2 provides that where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation. Pursuant to section 3, if the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts

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different protagonists that matter but the real substance of the situation generated by the actions of the administration. From the facts, it is reasonable to infer that

iv. The December 2005 OIOS draft internal Audit Report AP2005/600/20 titled “Comprehensive Management Audit of the Department of Peacekeeping Operations—Procurement”. This draft Report mentioned the name of the Applicant as well as other names as having been linked to several procurement cases.

i. The reply of the Respondent also makes clear that the placing of the Applicant on SLWFP was not a purely administrative measure but part of a broader investigation into misconduct within the Organization. This is what the Respondent submits:

[O]nce the possibility of corruption and fraud in the procurement activities of the United Nations had been

suspension and it was reported as such in the press. Public affirmations that it was an administrative rather than a disciplinary action only serve to underscore the evident disciplinary implications it carried; if the action was truly administrative in nature, such affirmations would have been unnecessary. Accordingly, it is established that the suspension of the Applicant was for an investigation into a case involving a disciplinary matter and as such, the application of the Secretary-General's discretion under staff rule 105.2 was a breach of the Staff Rules.

56. The Tribunal concludes therefore that former staff rule 105.2(a)(i) did not empower the Respondent to place the Applicant on SLWFP in the context of an investigation into alleged wrongdoing.

Did the decision to place the Applicant on SLWFP violate his due process rights?

57. The Applicant submits that his due process rights were not respected due to the following⁹:

- a. He was not provided the opportunity to comment on the draft OIOS report prior to his suspension even though it was widely circulated;
- b. The Respondent failed to follow proper procedures for notifying staff of allegations against them in that he learned about the extent of the investigation through the media;
- c. He was never advised that he was the target of an inquiry or allowed counsel; and
- d. OIOS reported the case as fact to the General Assembly before the investigation process was completed and had to issue a corrected report because of the errors it contained.

58. Former staff rule 110.4 set out the due process rights of a staff member in relation to alleged misconduct:

⁹ The Applicant's Written Observations on the Respondent's Answer dated 28 December 2009.

(a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations.

(b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate....

59. Should the due process rights set out in staff rule 110.4 and section 6 of ST/AI/371 have been complied with in the case of the Applicant?

60. The Tribunal has previously concluded that although the Applicant was placed on SLWFP by the Respondent, he was in actual fact suspended from

63. Additionally, in *Powell* 2013-UNAT-295 and in *Applicant* 2012-UNAT-209, the Appeals Tribunal clearly laid down that the due process rights provided

67. Additionally, in *Powell*¹³

consisted in telling him that he was being placed on SLWFP “in view of the ongoing audit and investigation into the Organization’s procurement activities”.

72. Prior to his being placed on SLWFP, the Applicant was provided a copy of the Draft OIOS Report and he submitted comments. But this did not amount to the Applicant being informed of the allegations against him. He was merely being informed of findings made without compliance with the basic procedural requirements. The Tribunal notes also the Applicant’s contention that his comments were not included in the formal DPKO reply to the draft Report. This leads the Tribunal to infer that although the Applicant was given the opportunity to respond, his response was not presented to OIOS and therefore not taken into consideration by the OIOS investigators prior to finalization of their report on 19 January 2006.

73. In view of the foregoing, the Tribunal concludes that the decision to place the Applicant on SLWFP violated his due process rights.

Did the decision to place the Applicant on SLWFP damage his reputation?

Parties’ submissions

74. The Applicant asserts that his placement on SLWFP coupled with the publicity adversely affected his reputation and standing in the international community as well as within his professional field. He submits that prior to his placement on SLWFP, he had been placed in a P-5 level post although he was a P-4 and that this would have automatically led to his eventual promotion to the P-5 level a few months later by ratification. However, when the SLWFP finally ended, he was not restored to the same post or to any P-5 post.

75. The Respondent asserts that the Applicant suffered no harm because: (i) the Organization took every precaution to ensure that his reputation was protected; (ii) the Applicant has not provided any evidence that his professional reputation has been damaged; and (iii) the Applicant was exonerated as a result of the subsequent investigation. Additionally, the Respondent submits that the Organization cannot be held accountable for the unauthorized release of the

Applicant's information nor for the alleged adverse publicity because his name was released into the public domain not as a result of an official statement of the Organization but rather due to an unauthorised leak.

Considerations

76.

An internal U.N. probe of the department that runs international peacekeeping operations **has uncovered extensive evidence of mismanagement and possible fraud, and triggered the suspension of eight procurement officials** pending an investigation [...] (emphasis added).

In a letter to staff on procurement activities broadcast on 30 January 2006, the then Secretary-General, Mr. Kofi Annan, stated:

Last June, the General Assembly requested a comprehensive management audit of the Department of Peacekeeping Operations. From September to December, the Office of Internal Oversight Services performed the procurement portion of that review. **Its report documents various instances of non-compliance with procurement rules, and indicates that more serious wrongdoing may have occurred as well** U.8824 vices-6.1(a-4.8(as))TJo

82. To this end, the Tribunal endorses the JAB's finding that:

In all, the handling of the case in the internal and external media shows that, in the efforts to bolster perceptions as to the Organization's commitment to stamp out corruption, the Administration created a perception that [the Applicant] was involved in or at least associated with that corruption [...]. No amount of reassurance by the Administration that this measure was not in fact linked to his performance or conduct could mitigate or avoid the perception created that he was considered a threat that required exceptional measures in administering him.

The Panel agrees that it is a practical impossibility to avoid all press leaks. However, the Panel would consider that, if the Administration thought there to be exceptional circumstances requiring SLWFP to protect the Organization's reputation, an appropriate balancing would call for exceptional procedures to safeguard information that, if released, might adversely affect reputations of staff members [...]. Thus, while the Organization

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The Tribunal observes that, under well-established case-law from the former United Nations Administrative Tribunal, moral damages were awarded “where a subjective right that affects the victim’s sensitivity and feelings is infringed” (see Judgment No. 920, Lefebvre (1999), para. IV).

87. The Learned Judge also referred to the case of *Makil* (*supra*) where it was held:

that nominal damages might be an appropriate measure of compensation where a “mere technical breach of a right” has occurred and where no actual damage has been inflicted, but held that “a more appropriate measure of compensation in relation to the Applicant’s claim under this heading [was] necessary”;

88. She also referred to the case of *Bangoura*¹⁷ which involved the dissemination of information by a United Nations spokesperson that had not been verified or corroborated and which caused injury to the staff member’s reputation. In that case, the former Administrative Tribunal said:

The Tribunal is concerned that the Spokesman for the executive head of the United Nations should thus disseminate information that has not been verified and that, moreover, is later not corroborated, about a staff member of the United Nations whose reputation is permanently affected as a result, with all the serious consequences that this entails.

89. Similarly in the former Administrative Tribunal’s case of *Van Der Graaf*¹⁸, moral damages were granted for the humiliation brought upon the Applicant, which was considered disproportionate and unnecessary, especially where a press release contained the Applicant’s name. The judgment, *inter alia*, found as follows:

A letter informing the Applicant of his suspension without pay was
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press release containing the Applicant's name, nationality and status, and details regarding the allegations against him.

The Tribunal finds this conduct unreasonably insensitive and public. Both the humiliation that resulted from the manner in which the Applicant was escorted from his office and the publication of the allegations against him were unnecessary and inappropriate.

90. The Tribunal holds that the Applicant is entitled to compensation for the following reasons:

- a. The Respondent made a wrong application of section 105.2(a)(i);
- b. The decision of the Respondent to place the Applicant on SLWFP was a veiled disciplinary suspension;
- c. The Respondent could not justify the placement of the Applicant on SLWFP;
- d. By not taking any measures to protect the Applicant after his name was made public in the context of the investigation, the Organization effectively condoned the unauthorized and untimely dissemination of information that should have been confidential at least until the conclusion of the PTF investigation. The absence of protective measures resulted in damage to the Applicant's reputation and violated his rights.

91. For the above reason the Tribunal awards the Applicant the amount of two years' net base salary at the rate in effect on the date of the Applicant's placement on SLWFP.

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(Signed)

Judge Vinod Boolell

Dated this 30th day of August 2013

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