



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES



Onifade
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Rosalyn Chapman Judge Richard Lussick
Case No.:	2016-879
Date:	30 June 2016
Registrar:	Weicheng Lin

JUDGE SOPHIA

... On or about 11 March 2013, the Applicant prepared an MOP for Ms. M to travel on a United Nations flight from Juba, South Sudan, to Wau, South Sudan, on 15 March 2013. On the MOP, the Applicant stated that Ms. M was travelling by virtue of her association with an organization by the name of "Peace Alliance". In the field provided for the endorsement of the [traveller's] head of organization, that is, Peace Alliance, the Applicant provided and signed his name.

... The Applicant also provided and signed his name as the approving officer for the MOP and stamped the form using a stamp that identified him as "State Coordinator".

... In conjunction with the MOP, the Applicant prepared and submitted, on behalf of Ms. M, a General Release from Liability in Connection with Travel by Third Parties on UN-Provided Aircraft form (the "general release form"). This purported to release the Organization from all risks and liabilities for any loss, damage, injury, or death sustained by the traveler during the course of travel. In this document he again stated that Ms. M was affiliated with "Peace Alliance".

... On 15 March 2013, on the basis of the MOP and general release form, Ms. M travelled on a United Nations flight from Juba to Wau. There was no security or safety incident during the flight.

... From 15 to 27 March 2013, Ms. M stayed with the Applicant in his UNMISS-provided residence. The Applicant neither requested nor obtained authorization for a temporary occupant to stay in his residence, and claims that he was unaware of the need to do so. There was no security or safety incident during Ms. M's stay at Applicant's accommodation.

... On or about 21 March 2013, the Applicant prepared another MOP and general release form for Ms. M to travel from Kuajok to Juba on 27 March 2013. The Applicant again stated that Ms. M was travelling by virtue of her supposed affiliation with "Peace Alliance", endorsed the MOP as head of the traveller's organization and approved the MOP in his capacity as approving officer.

... On 27 March 2013, the Applicant and Ms. M travelled from Kuajok to Juba on an UNMISS flight. There was no safety or security incident during the flight.

... On 9 April 2013, the Office of Internal Oversight Services ("OIOS") received a report of possible misconduct with regard to the foregoing matter.

... On or about 22 April 2013, the Applicant, of his own accord, publicly disclosed, admitted to, and apologized for his actions during a Town Hall meeting. The Respondent alleged that according to a witness present at the meeting he made statements in an apparent attempt to excuse his behaviour.^{2]}

² The Dispute Tribunal ruled that this hearsay evidence was unreliable and had no probative value.

... On 5 June 2013, the matter was referred by OIOS to the Department of Field Support (DFS), UNHQ, for “appropriate action”. The letter of referral stated that upon DFS’ acknowledgment of receipt of the referral, OIOS would “consider the matter closed”.

... On 2 July 2013, DFS/UNHQ referred the matter to UNMISS. On 8 July 2013, the UNMISS Conduct and Discipline Team (“CDT”) referred the matter to the UNMISS Special Investigations Unit (“SIU”) for investigation.

...

... The Applicant was interviewed twice by SIU investigators during the course of the investigation, on 22 July 2013 and on 24 July 2013. The SIU investigators also interviewed Ms. M and six other individuals.

... The Applicant’s interviews were recorded in the form of statements which he signed as a true and accurate record of the interview. At the beginning of each of his statements it is recorded: “My name is [the Applicant], State coordinator of Warrap State. I am making this statement with no objection to the Chief of SIU Unit.... In regard to an incident of possible misconduct in 2013 at UNMISS Kuajock State Headquarters”.

... In his first interview, the Applicant admitted to filling out the 11 March 2013 MOP incorrectly and allowing Ms. M to stay at his UNMISS-provided residence without having sought authorization. He stated that he was not aware at the time of

... The aggravating factors included his abuse of trust as the P-5 head of office and approving officer; that his conduct prevented the Organization from accurately determining the purposes for which air assets were being used and that his conduct involved a fundamental lapse in integrity.

4. On 10 July 2014, Mr. Onifade filed an application with the Dispute Tribunal contesting the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. On 15 October 2014, the Secretary-General filed his reply to the application. The parties agreed that the case could be decided on the papers.

5. On 29 October 2015, the Dispute Tribunal issued Judgment No. UNDT/2015/101, which dismissed the application in its entirety. The Dispute Tribunal rejected Mr. Onifade's claims that he was not accorded due process and procedural fairness during the investigation. The Dispute Tribunal found that the investigation was not *ultra vires* as there was no

19. In any event, Mr. Onifade has failed to show any harm to his due process rights that warrants a reversal of the disciplinary measure. The Dispute Tribunal found that the investigation was carried out properly and his due process rights were observed during the disciplinary process. The established facts constitute misconduct and the sanction imposed was proportionate.

20. Mr. Onifade has improperly raised new arguments in his appeal that he did not make before the Dispute Tribunal. Mr. Onifade's new claims regarding the referral of the matter for further action by DFS to OHRM, the internal disciplinary review performed by OHRM, and the validity of the 30 June 2014 letter informing him of the disciplinary measure should not be considered by the Appeals Tribunal.

21. The Dispute Tribunal acted within its discretion in its evidentiary rulings. Mr. Onifade has not established how the evidence he sought to be produced would have affected the outcome of the case.

22. Mr. Onifade's motion seeking the production of additional evidence has no merit. There are no exceptional circumstances that warrant the receipt of additional evidence under Article 2(5) of the Appeals Tribunal Statute.

23. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment.

Mr. Onifade's additional motion

24. On 10 March 2016, Mr. Onifade filed a motion in which he seeks leave to respond to the Secretary-General's "belated" answer to the appeal. He also requests that the Appeals Tribunal conduct a *de novo* review of the case. On 17 March 2016, Mr. Onifade filed additional pleadings in response to the answer.

25. In his Observations filed on 21 March 2016, the Secretary-General opposes the motion. He states that the answer to the appeal was not filed late and there are no exceptional circumstances that warrant the filing of additional submissions by Mr. Onifade. It is well-established that the Appeals Tribunal does not have competence to hear cases *de novo*.

Considerations

Preliminary issues

Mr. Onifade's motions for leave to respond to the answer to the appeal and request for production of documents and evidence

26. Articles 8 and 9 of the Appeals Tribunal Rules of Procedure (Rules) respectively provide for an appellant to submit an appeal form accompanied by a brief, and for a respondent to submit an answer accompanied by a brief. However, under Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1, we may grant leave to file additional pleadings after the filing of the answer if there are exceptional circumstances for doing so. We find that there are no such exceptional circumstances, as Mr. Onifade merely expresses his disagreement with the statements made by the Secretary-General in his answer, and seeks to reiterate or supplement the arguments put forward in his appeal.

27. In his motion filed on 10 March 2016, Mr. Onifade incorrectly asserts that the Secretary-General did not file his answer within the 60-day time limit set out in Article 9 of the Rules. In accordance with Article 29 of the Rules on calculation of time limits, the deadline for the Secretary-General to file his answer was 7 March 2016. The Secretary-General filed his answer on that day.

28. In his appeal, Mr. Onifade requests an order for production of documents and additional information by the Secretary-General. Article 8(1) of the Appeals Tribunal Statute (Statute) provides that this Tribunal “may order production of documents or such other evidence as it deems necessary, subject to article 2” of the Statute. Under Article 2(5) of the Statute, “[i]n exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence ... it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings”. Save for these limited circumstances, all evidence is to be submitted to the first instance Tribunal.³

³ *Kalil v. Commissioner-General of the United Nations*, 2015 UNAT 133 (2015), paras. 13-14, 16-17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183, 185, 187, 189, 191, 193, 195, 197, 199, 201, 203, 205, 207, 209, 211, 213, 215, 217, 219, 221, 223, 225, 227, 229, 231, 233, 235, 237, 239, 241, 243, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267, 269, 271, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 297, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365, 367, 369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 513, 515, 517, 519, 521, 523, 525, 527, 529, 531, 533, 535, 537, 539, 541, 543, 545, 547, 549, 551, 553, 555, 557, 559, 561, 563, 565, 567, 569, 571, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599, 601, 603, 605, 607, 609, 611, 613, 615, 617, 619, 621, 623, 625, 627, 629, 631, 633, 635, 637, 639, 641, 643, 645, 647, 649, 651, 653, 655, 657, 659, 661, 663, 665, 667, 669, 671, 673, 675, 677, 679, 681, 683, 685, 687, 689, 691, 693, 695, 697, 699, 701, 703, 705, 707, 709, 711, 713, 715, 717, 719, 721, 723, 725, 727, 729, 731, 733, 735, 737, 739, 741, 743, 745, 747, 749, 751, 753, 755, 757, 759, 761, 763, 765, 767, 769, 771, 773, 775, 777, 779, 781, 783, 785, 787, 789, 791, 793, 795, 797, 799, 801, 803, 805, 807, 809, 811, 813, 815, 817, 819, 821, 823, 825, 827, 829, 831, 833, 835, 837, 839, 841, 843, 845, 847, 849, 851, 853, 855, 857, 859, 861, 863, 865, 867, 869, 871, 873, 875, 877, 879, 881, 883, 885, 887, 889, 891, 893, 895, 897, 899, 901, 903, 905, 907, 909, 911, 913, 915, 917, 919, 921, 923, 925, 927, 929, 931, 933, 935, 937, 939, 941, 943, 945, 947, 949, 951, 953, 955, 957, 959, 961, 963, 965, 967, 969, 971, 973, 975, 977, 979, 981, 983, 985, 987, 989, 991, 993, 995, 997, 999, 1001.

29. We do not find any exceptional circumstances

33. The primary issue raised by Mr. Onifade's appeal is whether the UNDT erred in concluding that the investigation of Mr . Onifade for possible misconduct was not *ultra vires*.

34. The authority to take a decision to investigate a staff member for possible misconduct

39. We accept the argument of the Secretary General that, following the completion of the investigation by the UNMISS SIU, the SRSG ratified the action of the Chief of CDT by subsequently referring the case to the USG/DFS for further action.⁷

40. From the foregoing, we affirm the decision by the Dispute Tribunal that the investigation was not *ultra vires*. Even if the initiation of the investigation gave rise to a procedural irregularity, there was overwhelming uncontested evidence of Mr. Onifade's actions, which he also admitted.⁸ In addition, the investigation was carried out properly and Mr. Onifade's due process rights were respected during the investigation and disciplinary stages. Furthermore, the Dispute Tribunal correctly found that the facts were established by clear and convincing evidence, the finding of misconduct was warranted, and the sanction was proportionate.

41. Mr. Onifade further raises issues of procedural irregularities by the UNDT for refusing his requests for the production of documents and evidence from OIOS. It is our consistent jurisprudence that case management issues, including the question of whether to call a certain person to testify or to order the production of documents, remain within the discretion of the UNDT and do not merit a reversal except in clear cases of denial of due process of law affecting

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar