



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND
RELIEF

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Stephen Margetts, ALS/OHRM
Sarahi Lim Baró, ALS/OHRM

Introduction

1. The Applicant, a staff member at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), challenges decisions dated 26 February 2014 to revoke his driving privileges and to place adverse material into his personnel file.

2. The Tribunal held an oral hearing on 21, 22 and 24 September 2015 at which the Applicant and three witnesses gave evidence.¹

Facts

3. The following facts are taken from the pleadings and documents submitted by the Parties and from the oral testimony of the witnesses.

4. The Applicant joined MONUSCO in February 2003 and currently holds a

7. On 26 February 2014, the MONUSCO Deputy Chief Transport Section, who was then acting as the OiC Transport Section, sent the Applicant a memorandum. The subject was “Drivers Conduct-Suspension of MONUSCO DP”. It stated:

Reference:

- a. Administrative Instruction No. 2013/151 - Advisory Committee on Traffic Safety (ACTS) dated 03 September 2013.
1. Transport section would like to inform you that your MONUSCO DP is suspended for an indefinite period with immediate effect for the following:
 - a. Your continued unjustified absence from the workplace for which administrative measures have been adopted as your absence has been considered to be in breach of UN Rules and regulations.

8. The Memorandum requested the Applicant to hand over his DP immediately to the Transport Section in Goma. He was advised that he was not authorized to operate any United Nations Owned Equipment (UNOE) and United Nations Contingent Owned Equipment (UNCOE) vehicles during the “above mentioned period” and that a copy of the report would be placed in his driver’s record file.

9. The Memorandum was copied to the Director of Mission Support (DMS), the Chief of Integrated Support Services (CISS) and Mr. Torres.

10. On 28 April 2014, the Applicant requested management evaluation of the decision.

11. The OiC Transport Section sent the Applicant an email on 12 May 2014 advising him that his MONUSCO drivers permit would be reinstated once he

12. On 2 June 2014, the Management Evaluation Unit (MEU) advised the Applicant that on 8 May 2014 it had been notified that the decision to suspend his driving privileges would be revoked, his driving privileges were fully reinstated

18. He alleged that he had a difficult relationship with Mr. Tafani. In his performance appraisal for 2010-2011, Mr. Tafani rated him as “does not meet expectations”. The Rebuttal Panel replaced that assessment with “fully meets expectations” in a report that was released in October 2013. The Applicant said that from then on Mr. Tafani began using tactics to get rid of him and alleges that the revocation of his DP was one of these tactics.

19. He stated that he was not paid his salary for the period he was marked absent but was later retroactively paid a lump sum to cover the non-payment. He is contesting the amount he should have been paid in separate proceedings.

20. The Applicant told the Tribunal that before his DP was suspended he used United Nations vehicles but no particular vehicle was assigned to him. He used the vehicles to travel to and from work, to do shopping and for liberty travel. He also used them to move between offices and for attending meetings. He said he was never asked by anyone at MONUSCO to justify his misuse of an official United Nations vehicle or asked to return a vehicle. This evidence was not challenged by the Respondent under cross examination.

21. The Applicant alleged that the loss of his DP caused him humiliation and embarrassment. Colleagues were asking him questions about it. He also alleged the decision endangered his safety as he had to rely on taking local transportation such as motorcycle taxis or walking to the office. He accepted that the United

2012 with Mr. Tafani he refused Mr. Tafani's instruction to change the

vehicle with colleagues. United Nations vehicles were needed for operations and it was impossible for them to get them back from the Applicant.

28. He said he had discussed the Applicant's driving privileges with Mr. Torres briefly before the suspension memorandum was issued and was surprised that Mr. Torres had suspended the driving licence because that was for the DMS and is not in the power of the HoO.

29. Mr. Tafani said that the mission security rules forbid the use of taxis for transport and that it was too dangerous for staff to walk to work due to the possibility of attack. He said "Goma is a very, very dangerous town" and that it was not easy for international staff to use the United Nations shuttle buses which were mainly for national staff who worked different hours.

30. Ray Torres, who is the Director of Political Affairs for MONUSCO and was

- d. Whether the Applicant was absent without authority from work for the period of November 2013 to June 2014 is in dispute. These matters are the subject of separate proceedings.
- e. The Applicant was reimbursed for the salary withheld due to his alleged unauthorised absences although the amount is in dispute.
- f. The Applicant was never questioned, formally or informally about the use of United Nations vehicles or about his conduct as a driver.
- g. The decision to suspend the Applicant's DP was taken by Mr. Torres based on information given to him by Mr. Tafani.
- h. The Applicant's DP was reinstated after review by the MEU.

Submissions

38. At the conclusion of the evidence the Parties made oral and written submission which are summarised below.

Applicant's submissions

39. The memorandum containing the contested decision contains the legal basis for the decision - MONUSCO Administrative Instruction No. 2013/15 (Advisory Committee on Traffic Safety (ACTS) dated 3 September 2013. There is no inherent power to suspend a DP. The decision is unlawful because:

- a. It is based on an instrument that is *ultra vires*. MONUSCO Administrative Instruction No. 2013/15 was not promulgated in accordance with para 4.2 of ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances).
- b. Pursuant to section D.5.3 of the DPKO Surface Transport Management in the Field (the Transport Manual), the method for cancellation of a DP is decided upon locally by the DMS. The Transport Manual was violated because the decision maker was not the DMS but the Head of Office.

c. The DP was suspended for improper and extraneous reasons. The Administration cannot suspend his driving privileges for prolonged or frequent absences from work this reason.

d. Chapter X of the staff rules provides a range of disciplinary or administrative measures that could have been imposed on the Applicant after providing him with due process rights. Suspension of driving privileges is not an administrative measure.

e. Administrative Instructions relating to the abandonment of post (ST/AI/400), performance management and development (ST/AI/2010/5), and recording of attendance and leave (ST/AI/1999/13) provide a range of tools for dealing with staff members who are frequently or consistently absent without authorisation.

f. If the real reason for the suspension was the misuse or refusal to return a United Nations vehicle there was no evidence that the Applicant was advised of this or that a request for return was made of him. The Applicant was not prevented from obtaining the keys nor was he asked for the return of the keys to any vehicle. The Applicant's alleged performance issues were unfounded. They have been formally rebutted.

g. The wording of the decision strongly suggests it was a punitive measure designed to humiliate and show authority over the Applicant.

42. The Applicant's evidence about the reputational harm he suffered was

48. The Administration acted rationally and properly in exercising its discretion. The Applicant failed to use United Nations vehicles for the performance of official duties and he failed to coordinate his use of United Nations vehicles with other staff. For these reasons his use of United Nations vehicles was withdrawn. Since the purpose of issuing a DP is to evidence that a staff member has authority to use United Nations vehicles, a staff member who is not authorised to use United Nations vehicles has no business holding a DP.

49. Administrative measures include everything that is not disciplinary, such as performance management and withdrawing salaries.

50. On remedies, the Respondent submitted that the amendment to article 10.5(b) of the Tribunal's Statute requires the Applicant to present compelling and objective evidence of harm. The Applicant did not show that he suffered sufficient inconvenience to warrant an award of damages.

51. It was well known that the Applicant suffered reputational damage as a result of his poor performance but he created that. The root cause of his problems was his poor performance.

52. There was no ulterior motive for the decision and it was not designed to humiliate the Applicant.

53. Counsel for the Respondent advised the Tribunal that the report had been placed on the Applicant's driving file and had since been removed.

Considerations

54. The principle issue is whether, given the facts before the decision maker, it was within his lawful discretion to suspend indefinitely the Applicant's DP.

55. It is inherent to the Tribunal's powers to review the validity of a decision and to control abuse of the discretionary powers of the Secretary-General that reasons are given for an administrative decision.⁵The Tribunal may interfere with

⁵ *Obdejin* 2012-UNAT-201.

the exercise of administrative discretion if it finds that the reasons given for the decision breached the principles of administrative law which include unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality.⁶

56. The memorandum to the Applicant advising him of the suspension of his DP expressly referred to MONUSCO Administrative Instruction No. 2013/15 and is the best evidence that the Administration relied on at the time the decision was made.

57. The MONUSCO AI advised staff of the establishment and constitution of an Advisory Committee on Traffic Safety (ACTS), an advisory body to the DMS on matters arising from damage to, or improper or careless use of United Nations vehicles. ACTS is responsible for enforcement of road safety in the Mission and implementation of corrective measures for improper use of vehicles and traffic violations.

58. That AI has not been promulgated pursuant to ST/SGB/2009/4. The question is whether this renders the contested decision null and void as alleged by the Applicant.

59. Pursuant to ST/SGB/2009/4, an Administrative Instruction is a rule, policy or procedure intended for general application and prescribed for the implementation of the financial regulations and rules, the staff regulations and rules or the Secretary-General's bulletins, and must be duly promulgated⁷.

60. The MONUSCO AI is of general application to the extent that it applies to all MONUSCO personnel but it was not expressly issued for the implementation of any specific rule or ST/SGB. Therefore it is not subject to the ST/SGB/2009/4 requirement that it be duly promulgated.

61. The Tribunal holds that the status of the AI is more akin to an inter-office memorandum or information circular than an Administrative Instruction. It is a

⁶ *Sanwidi* 2010-UNAT-084.

⁷ Sections 1.2 and 4.1 of ST/SGB/2009/4.

public pronouncement of policy and procedures applicable and binding on the administration and staff of the Mission. The lack of formal promulgation of the AI does not render the contested decision null and void.

62. The DPKO Manual for Surface Transport Management dated 1 February 2014 which was referred to by the Respondent during the hearing as the legal

68. The Tribunal finds that the purpose of the MONUSCO AI is to ensure that corrective measures are taken in case of traffic offences in United Nations vehicles by staff members with DPs. There is no provision in the AI for a corrective measure to be imposed for unjustified absence from the workplace such as was alleged in the 26 February 2014 memorandum to the Applicant.

69. The Administration did not identify any breach of the infractions listed in the AI to justify withdrawal of the Applicant's driver's permit.

70. The Tribunal does not accept the Respondent's submission that the Administration has inherent discretion to use the power of suspension of a DP for purposes other than those in the AI. The Administration cannot invoke an unwritten inherent discretion to depart from applicable policies and procedures in reliance on the mantra of "responsible management". In this case, having referred to the AI as the reason for the decision in the memorandum to the Applicant, the Administration was bound to comply with its provisions.

71. The Respondent's case was that the suspension was not punitive but an exercise of managerial discretion to control the use of the United Nations vehicle fleet at MONUSCO because the Applicant failed to use United Nations vehicles for performance of official duties and he failed to coordinate his use of the vehicle with other staff. This submission was predicated on the basis that if the Applicant had been absent from work as alleged he could not have been using the vehicle for official duties.

72. The Tribunal holds that the memorandum advising the Applicant of the suspension of his driver's permit has all the characteristics of a punitive measure. Its subject is "Driver's conduct". It refers to administrative actions for continued unjustified absence from the workplace and it refers to a breach of United Nations Rules and Regulations although it does not specify which of these has been breached. It purports to impose a measure derived from the list of corrective measures in MONUSCO Administrative Instruction No. 2013/15.

73. Staff rule 10.2(b) refers to administrative measures short of disciplinary action that may be taken against a staff member who has failed to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances. They include, but are not limited to, written or oral reprimand, recovery of monies owed to the Organisation and administrative leave.

74. Such administrative or non-disciplinary measures cannot be imposed on a staff member without an investigation and the due process rights specified in staff rule.10.3.

75. As the Applicant had not been subject to performance management or objective investigation in relation to the allegations of absenteeism he was unfairly deprived of due process and there was no proper evidential basis for the official reason given at the time of the decision to suspend his DP.

76. The Transport Manual confers overall management of the United Nations vehicle fleet to the CTO but pursuant to the MONUSCO AI, the DMS has the sole authority and discretion to issue or withdraw DPs. In this case the impugned decision was made without authority by the HoO.

77. Finally, the Tribunal finds that there is a high probability that one of the motivations for the decision to suspend the Applicant's DP was Mr. Tafani's reaction to the rebuttal of the Applicant's performance assessment. His decision to mark the Applicant continually absent from work shortly after the rebuttal outcome defies coincidence. As the HoO relied on Mr. Tafani's reports of the Applicant's absenteeism in the absence of any performance management or investigation to justify the suspension of his DP his decision was tainted by the ill motivation.

Conclusions

78. The Tribunal finds that the decision to suspend the Applicant's DP was unlawful. It was an arbitrary exercise of a wrongly assumed discretion, it was taken without authority and it was unfair and ill motivated.

79. The placement of the report of the suspension on the Applicant's drivers file was consequently unjustified. Nevertheless, the Tribunal accepts the Respondent's assurance that no such report was placed on the Applicant's personnel file and that it has since been removed from his driver's file. It does not amount to a substantive breach of the Applicant's rights.

Remedies

80. The unlawful decision in this case was the indefinite suspension of the Applicant's DP. The Tribunal may award compensation for damage which is directly linked or reasonably attributed to that decision.

81. The Applicant claims monetary compensation for damages arising from humiliation, violations of his fundamental employment rights, suspension of driving privileges in a Hardship E duty station, and other moral damages.

82. The Respondent submitted that the amendment to art. 10.5(b)⁸ of the UNDT Statute requires the Applicant to produce "compelling and objective evidence of harm". However, the amendment does not use the words "compelling and objective evidence". It states that the Dispute Tribunal may order "[c]ompensation for harm, supported by evidence".

83. Further, the contested decision in this case was dated 26 February 2014 and the Application was filed on 22 August 2014. Both of these dates predate the amendment of the Tribunal's statute. The amendment could apply to an award of compensation in this case only if it is applied retrospectively.

84. In *Nogueira* 2014-UNAT-409 and reiterated in *Hunt-Matthes* 2014-UNAT-444, the United Nations Appeals Tribunal (Appeals Tribunal) recalled the general principle of law against retrospective effect/application of laws.

85. An

transport, apart from sharing with other staff members, are regarded as either dangerous or impracticable.

90. In these circumstances the inevitable and direct consequence of the unlawful suspension of the Applicant's driver's permit was that his ability to travel safely to and from work in a highly dangerous situation was compromised.

91. For these reasons the Tribunal awards the Applicant the amount of USD500 for each month he was deprived of the DP making a total of USD1500.

92. The total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated this 16th day of November 2015

Entered in the Register on this 16th day of November 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi