



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/025

Judgment No.: UNDT/2021/116

Date: 11 October 2021

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LISHCHYNSKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

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

Isavella Maria Vasilogeorgi, AAS/ALD/OHR, UN Secretariat

Background

1. On 2 April 2020, the Applicant filed an application challenging what he describes as allegations that he engaged in a verbal and physical altercation with a Kenyan police officer and damaged the police officer's umbrella. The Applicant was separated from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a)(viii) ("the contested decision").

2. The Respondent replied to the application on 2 May 2020.

Facts and Procedure

3. At the time of the contested decision, the Applicant held a fixed-term appointment at the P-4 level, as an Investigator in the Office of Internal Oversight Services ("OIOS") based at the United Nations Office at Nairobi ("UNON").

4. He was dismissed from service by letter dated 2 January 2020. According to the sanction letter¹, the decision was arrived at after the Applicant was informed through a memorandum, dated 13 September 2019, from the Office of Human Resources, setting out allegations of misconduct against him, in particular that he engaged in a verbal and physical altercation with a Kenyan police officer and damaged the police officer's umbrella.

5. In the said memorandum, he was informed that if the above allegations were established, his conduct would constitute a violation of staff regulations 1.2 (a), 1.2(b) and 1.2(f).

6. He was also asked to provide, within one month of his receipt of the memorandum containing the allegations, any written statement or explanation that he wished to provide in response to the allegations. He was advised that he was free to

¹ Application, annex 4; reply, annex R/7.

request at the earliest time possible for any extension of time to submit his response if he needed more time.

7. The Applicant was also advised that he could avail himself of the assistance of the Office of Staff Legal Assistance and that he could seek the assistance of any counsel at his own expense to assist him to prepare his case in response.

8. After a thorough review of the entire dossier, including his comments, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMPSC”) concluded that the allegations against the Applicant were established, by clear and convincing evidence, hence the dismissal. The USG/DPMSC’s decision was communicated to him by the Assistant Secretary-General for Human Resources (“ASG/HR”).

9. At a case management discussion held on 16 April 2021, the parties were in agreement that an oral hearing was necessary for a fair and expeditious disposal of this case. Vide Order No. 085 (NBI/2021), the Tribunal scheduled the case for a hearing from 24-26 May 2021 and directed the parties to, *inter alia*, identify the witnesses to be called and to provide a synopsis of their anticipated evidence.

10. On 6 May 2021, the Applicant submitted his list of proposed witnesses. The Respondent filed a motion objecting to the Applicant’s proposed witnesses and requested for summary judgment on 7 May 2021.

11. On 19 May 2021, the Tribunal, vide Order No. 100 (NBI/2021), decided:

a. The Applicant’s claim in respect to the revocation of his functional immunity was irreceivable.

b. The Applicant’s claim for financial compensation as a result of a toxic and harmful workplace and failure to protect his privacy was irreceivable.

c. The Applicant’s claim in relation to being subjected to a biased and unfair investigation and separation from service decision was receivable.

d The Respondent's objection to some of the Applicant's proposed witnesses was partly upheld.

12. The Tribunal heard the case on 25 May 2021. During the hearing the Tribunal received evidence from the Applicant and from Mr. Ben Swanson, who was at the time of the contested decision the Director of OIOS.

13. The parties filed their closing submissions on 29 June 2021.

Submissions

The Applicant

14. The Applicant maintains that had the investigation been properly conducted, the conclusions which the investigator and the United Nations Administration arrived at would have been different. Consequently, the decision to terminate his appointment was premature and predicated on bias as well as inaccurate information.

15. The Applicant argues that the Administration's decision not to take into consideration the Applicant's attempts at understanding the triggers that led to his actions and the steps he undertook to rectify his behaviour following the incident are both egregious and further prove that the decision to terminate his appointment was rooted in confirmation bias.

16. He argues that during the hearing, the following was established:

a. The investigators indeed failed to provide the Applicant with an opportunity to speak about the most salient video clip (clip D) during the investigation. No explanation as to why the investigators failed to provide the Applicant with that opportunity was offered.

b. The decision to discontinue his appointment was based, at least in part, on incorrect assumptions which could, in some cases, have been clarified had the Applicant been given the opportunity to speak to the salient video.

c. The investigation didn't pursue avenues that could have clearly proven that the Applicant, mistakenly or not, truly believed at the time of the incident that he was witnessing a crime, is distressing, and suggests bias on the part, not only of the investigator but also on the part of the ASG/HR. Additionally, interviewing the Applicant's son and wife, as well as interviewing the Kenyan police officer could have gone a long way in confirming that at the time of the incident, even if he let his emotions get the better of him, he was acting in good faith. The fact that this wasn't taken into consideration as a mitigating factor intones bias on the part of both the investigator and the ASG/HR in her findings.

d. The Applicant disputes the ASG/HR's contention that the Applicant's claim that the Kenyan police officer tried to push him away with her umbrella and made him drop his phone is not supported by video footage. He submits that at 0:02:46 of clip D, the video very clearly shows the Applicant trying to take a photo of the Kenyan police officer, and the police officer subsequently using her umbrella to make the Applicant's phone fall out of his hands. The Applicant subsequently picks up the dropped phone and continues on trying to take a picture of the police officer.

e. This explains, even if it doesn't justify why, later on, the Applicant attempts to push away the police officer's umbrella from her face which leads to the unfortunate destruction of her umbrella. The ASG/HR suggests that the video doesn't show the incident when it clearly does. Additionally, the incident surrounding the destruction of the police officer's umbrella is only visible on video clip D, and on no other clips – a video clip the Applicant was not given the opportunity to view and to speak to during his interview with investigators, despite its probative value and importance.

f. The Applicant concedes that there is no proof that he was assaulted by both the Kenyan police officer and her colleague but maintains that the investigation didn't pursue investigative avenues that could have uncovered

the truth. The Applicant provided a ripped shirt to the Kenyan police, which was placed into exhibits. It doesn't appear that the question was ever posed to anyone in the Kenyan police as to whether or not anyone assaulted the Applicant. The question was never posed to the Applicant's wife or son. The Kenyan Police provided a list of passers-by they wished to call as witnesses in court. None of these were questioned by the United Nations investigators. Additionally, the Applicant brought to the attention of the United Nations a number of grotesque violations of his rights that followed his arrest. These were not investigated and don't appear to have given anyone in the United Nations pause before abandoning the Applicant to the whims of the Kenyan authorities when the Organization revoked his immunity, in a country that is infamous for its corruption and for being incapable of providing due process to persons charged with crimes.

g. There is a serious factual error in the ASG/HR's argument that the videos that were not shown to the Applicant were essentially the same as those that were shown to the Applicant. In his response to the charge letter, he notes that, during the investigation, he was only shown video clips C and E and was never given the chance to respond to the footage on video clips A, B and D. This is highly relevant because the gist of the altercation between the Applicant and the Kenyan police officer, including what happens to the police officer's umbrella and the Applicant's phone, are not shown on video clips C and E as they only review the incident up to the Applicant's initial contact with the police officer. The gist of the incident is to be found on video clip D, a video clip which the Applicant was never given the opportunity to review and discuss with investigators. The ASG/HR erred when she stated that the Applicant was shown video footage clips D and E and subsequently incorrectly concludes that the Applicant was essentially shown the incident in its entirety. While this would have been effectively accurate if the Applicant had been shown video clips D and E, it is most certainly not given that he was only shown video clips C and E, as video clip D is highly pertinent.

h. The Applicant rejects the ASG/HR's contention that the video footage of the incident shows his actions without ambiguity. All incidences are ambiguous if not placed in proper context. The opportunity to put the incident in its proper context before the investigation was concluded was taken away from the Applicant and this cannot be remedied once the bias in the investigation is visible and formalized.

i. During his testimony, Mr. Swanson incorrectly stated that the leak of the Applicant's video did not come from OIOS. This is false as many investigators viewed the video on Gocase despite the fact that they should not have been given access. These same investigators can testify that they had discussions with Mr. Swanson about the video, meaning that Mr. Swanson was fully aware that the information he provided to the court was false. The fact that Mr. Swanson would do such a thing to the Applicant demonstrates the difficulties the Applicant was placed in following the incident and must be taken into consideration within the context of his ability to properly protect his interests.

The Respondent

17. The Respondent submits that, as determined in Order No. 100, the only issue still before the Tribunal is whether the Applicant was subjected to an allegedly biased and unfair investigation resulting in the sanction for his serious misconduct that he admits. In light of this, the Respondent makes the following submissions:

a. During the hearing the Applicant was forced to admit that on 14 November 2019, the Administration provided him the opportunity to comment on the testimony of the Kenyan police officer, who on 4 October 2019 testified, under oath, that the Applicant had injured her, had obstructed her in her line of duty, and had repeatedly apologized to her for the incident.

b. The Applicant confirmed in writing that he had no comments on this statement. He thus had a full opportunity to comment on the Kenyan police

officer's damning statement regarding his misconduct, and, therefore, the statement stands.

c. Even if there had been a lack of a fair hearing or due process in this case, which the Respondent refutes, there would be no bar to the sanction, since this is a case, where a gross assault was widely witnessed – the Applicant assaulted a Kenyan police officer in plain public view at a busy junction, causing the Kenyan Government great offence and the United Nations great reputational damage. In such a case, the no-difference principle applies to any procedural issues and the sanction should stand.

18. The Respondent submits that the application should be dismissed.

The role of the UNDT in disciplinary cases

19. The Tribunal will be guided by established jurisprudence which lays down its judicial review role as being that of determining if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate.² To this end, the Tribunal will examine the following issues;

- a. whether the facts on which the sanction is based have been established;
- b. whether the established facts qualify as misconduct under the Staff Regulations and Rules; and
- c. whether the sanction is proportionate to the offence.

20. Part of the test in reviewing decisions imposing disciplinary sanctions is whether due process rights were observed.³ The Tribunal will therefore, in addition examine the issue of whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction

² *Sanwidi* 2010-UNAT-084, para. 42.

³ *Applicant* 2012-UNAT-209, para. 36.

against the Applicant.

Burden and standard of proof

21. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.⁴ And, when termination is a possible outcome, the Administration must prove the facts underlying the alleged misconduct by “clear and convincing evidence”, which requires more than a preponderance of evidence but less than proof beyond reasonable doubt, and “means that the truth of the facts asserted is high.

Whether the facts on which the sanction is based have been established.

22. The Applicant was sanctioned for having engaged in a verbal and physical altercation with a Kenyan police officer and for damaging the officer’s umbrella. The Applicant has consistently admitted that the verbal and physical altercation took place and that he damaged the officer’s umbrella.⁵ He only challenges the investigation process which he maintains was biased and unfair since it didn’t consider the context of the interaction. He also complains that the most pertinent aspects of the case which were caught on video were never provided to him and he therefore didn’t speak to them in the context of the investigation.

23. Since the Applicant does not deny that he was involved in a verbal and physical altercation with a Kenyan police officer and that he damaged the officer’s umbrella, the Tribunal finds those facts, which formed the basis for the sanction, have been established through clear and convincing evidence.

⁴ *Nyambuza* 2013-UNAT-364.

⁵ Paragraphs 3 and 4 of annex 2, (the Applicant’s response to the charge letter) and his evidence before the Tribunal.

Whether the established facts qualify as misconduct under the Staff Regulations and Rules.

24. Staff regulations 1.2(a), 1.2(b) and 1.2(f) which were cited as having been violated by that Applicant provide as follows:

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status ...

25. The Tribunal determines that by engaging in the altercation and by damaging the police officer's umbrella, the Applicant violated the above-cited staff regulations. The Applicant indeed admits that he had used poor judgment⁶ and that he is guilty of misconduct, but only expressed remorse for how he handled the situation.⁷ The Tribunal finds that the established facts qualify as misconduct under the Staff Regulations and Rules.

⁶ Ibid., at para. 49 and in his evidence before the Tribunal as discussed at para. 31 below.

⁷ Transcript of proceedings from the merits hearing, page 28 lines 1-5.

Whether there were multiple procedural violations which require that the impugned decision be nullified.

26. The Applicant maintains that the decision to terminate his contract was made on the basis of an unfair and biased investigation and that the decision was reached on the basis of inaccurate, false and/or incomplete information. He advances four complaints in this regard, the first being that a number of Closed Circuit Television (“CCTV”) video footage was made available to the investigators but he was not shown the one video (clip D) that showed the specific actions that were most relevant to the case. He argues that had he been shown that clip, he could have demonstrated step by step exactly what transpired.

27. The Applicant’s assertion that he was not shown video Clip D is factually incorrect. It was in evidence⁸ that he received all five video clips as supporting documents when the allegations memorandum was issued to him and that he had a chance to review them before submitting his comments. He stated that there were no word or page limits imposed on him with regards to his comments. His evidence before the Tribunal negates the suggestion that Clip D was not shown to him.

28. That the Applicant was not given the opportunity to explain himself to the investigators in real time while observing clip D as he was with other videos is of no consequence given that his comments about the contents of the clip D which he admits to have made⁹ must have been considered together with his other comments to the allegations memorandum. The Tribunal rejects as baseless the assertion that a subsequent explanation in writing cannot accomplish the same objectives as a real-time interview while observing the video footage. There is no evidence that the Applicant suffered any prejudice because the investigation method that was employed.

⁸ Ibid., page 7, lines 6 to 16.

⁹ Ibid., page 8, line 21.

29. The Applicant argued that the investigation findings were arrived at on the basis of a biased and incomplete investigation. In this regard he points to the fact that his wife, son and the victim police officer were not interviewed, and that the CCTV footage had no sound.

30. This argument does not, however, go to the key issue of whether the facts which formed the basis for the sanction were proved, which were admitted by the Applicant in any event. The argument was only raised to galvanise the assertion that mitigating factors such as the Applicant's state of mind prior to exiting his car and to what he could see from his vantage point, which his wife and son could have spoken to, were not considered, which will be traversed when determining the question of proportionality of the sanction.

31. The complaint that the victim was not interviewed was overcome by the Applicant's own testimony that it is "a minor issue" which is "more of a judgment call".¹⁰ More important is that the Applicant cannot be heard raising such a complaint since he admitted that he received the police officer's sworn statement for his comments and he indicated that he had no comments on it.

32. The Applicant complains that his right to confidentiality was violated because other colleagues in OIOS received notice of the fact that a file concerning him was opened in the OIOS database. He claims that this file contained CCTV footage of the incident without context or the benefit of the completed investigation. He maintains that when the file was initially opened, access was given to all OIOS investigators, contrary to protocol which normally restricts access to cases involving OIOS members. This he claims, seriously damaged his reputation and created a hostile environment at a time of great stress in his life.

33. This complaint is without basis in view of Mr. Swanson's testimony that in this case nobody in OIOS had access to the database since the case-management

¹⁰ Ibid., page 20, lines 6-13.

system was blocked down to himself and the then acting Chief of the Operational and Support Section. The Tribunal found him credible.

34. The complaint that the Organization did not consider the fact that he sought assistance after the incident does not also go to the key issue of whether the facts which formed the basis for the sanction were proved.

35. The Tribunal finds that the alleged procedural violations cited by the Applicant are either without basis or of no consequence as has been demonstrated. The Applicant has for example not shown how any of the witnesses he claims were not interviewed could have provided exculpatory evidence related to the specific misconduct on which the disciplinary measure was based.

Whether the sanction is proportionate to the offence.

36. The proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.¹¹

37. Other relevant principles are that; the Secretary-General has wide discretion in determining the appropriate disciplinary measure, due deference should be shown to the Secretary-General's disciplinary decisions. It is not the role of the Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, and the Tribunal is more concerned with how the decision-maker reached the impugned decision, not the merits of the decision.¹²

38. It is well established that only if the sanction imposed appears to be blatantly

¹¹ *Samandarov* 2018-UNAT-859.

¹² *Sanwidi* 2010-UNAT-084.

illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence.¹³

39. The Applicant's assertion that the decision to separate him from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a)(viii) was disproportionate to the misconduct is premised on multiple arguments. First that he honestly believed that he was witnessing a crime when he approached the police officer. Secondly, that mental challenges he was labouring under at the time triggered his reaction. Thirdly, that he was remorseful and would not repeat the misconduct if given the opportunity to remain in service.

40. As the Applicant later concedes, he was not sure that he was in fact witnessing the commission of any crime.¹⁴ And, even if that were true, it would not excuse his conduct of exiting his car and approaching the police officer as he did, considering his international civil service position.

41. About the Applicant's mental state at the time, the Tribunal agrees with the Respondent that it is suspicious that the Applicant only sought medical help after this case came up.

42. The Respondent rightly considered that the gross assault was widely witnessed since the Applicant assaulted the police officer in plain public view at a busy junction, causing the Kenyan Government great offence and the United Nations great reputational damage.

43. The sanction that was imposed is consistent with practice of the Secretary-General in similar cases in which measures at the stricter end of the spectrum have normally been imposed by the Organization.¹⁵

¹³ *Portillo Moya* UNAT-2015-523; *Aqel* UNAT-2010-040; *Konaté* UNAT-2013-334.

¹⁴ Transcript of proceedings from the merits hearing, page 28, lines 21 to 25 and page 29, lines 1 to 5 and 17 to 25.

¹⁵ See Compendium of disciplinary measures (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2019) available at

The Tribunal is not convinced that any mitigating factors were ignored and finds that the disciplinary sanction was proportionate to the conduct.

44. The Tribunal finds that that there is clear and convincing evidence that the Applicant committed the misconduct complained of, further that the established facts qualify as misconduct under the Staff Regulations and Rules and that the sanction is proportionate to the offence and therefore lawful. The Tribunal also finds that there were no due process violations in the investigation and in the disciplinary process leading up to the disciplinary sanction against the Applicant.

Judgment

45. The application is dismissed.

(Signed)

Judge Margaret Tibulya

Dated this 11th day of October 2021

Entered in the Register on this 11th day of October 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%2009-%20December%202019.Final_10.08.2020_0.xlsx The practice of the Secretary-General in disciplinary cases of criminal behaviour from 1 July 2009 to 31 December 2019 shows that the sanctions in such cases range from censure to outright dismissal. As of 1 July 2014, the sanction meted out by the Secretary-General for verbal and physical assault has consistently been separation from service with compensation in lieu of notice and with termination indemnity.