
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/058

Judgment No.: UNDT/2013/012

Date: 29 January 2013

Original: English

Before: Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TOUKOLON

v.

SECRETARY

from Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) charging him with misconduct and inviting him to provide comments.

8. The charge against the Applicant was brought pursuant to provisional staff rules 10.1(a) and 10.3(a) and paragraph 5 of ST/AI/371, (Revised disciplinary measures and procedures) for the assault of Ms. Oduke and for verbally abusing a UNMIS Security Officer and engaging in uncooperative behaviour towards him.

- b. The whole incident lasted about one hour.
 - c. The Applicant continuously attempted to try and assault her after Mr. Perera's intervention.
14. Mr. Perera's testimony is summarized below:
- a. The Applicant slapped Ms. Oduke and he intervened immediately to prevent any repeat, whereupon the Applicant became verbally abusive.
 - b. He did not see Ms. Oduke fall.
 - c. The incident may have lasted less than seven minutes before he went to get Mr. Benn.

Applicant's submissions

15. The Applicant's case is summarized below.
16. He does not deny the essential facts of the incident, nor does he argue that his actions did not amount to misconduct. His sole contention is that the sanction imposed was disproportionate to the nature and gravity of the misconduct.
17. A review of the practice of the Secretary-General in disciplinary cases reveals that very few incidents of assault result in the imposition of a sanction as severe as dismissal.
18. He is not accustomed to drinking alcohol and became drunk during the happy hour at the UNMIS Log Base. He felt that Ms. Oduke was acting insultingly towards him, became irrationally angered and slapped her once with an open hand. There was no justification for his action and he apologized to her the next day and she accepted his apology.
19. Whilst the Applicant concedes that physical violence is to be deplored and should not go unpunished, the practice of the Secretary-General in disciplinary cases reveals that the normal sanc B

26. The Applicant's misconduct rose to the level of serious misconduct warranting his separation from service with compensation in lieu of notice and with termination indemnity. The Applicant has generally conceded the underlying facts of the case, however, he attempts to downplay the severity of his misconduct by describing it as being merely unpleasant and inappropriate. The details of the Applicant's conduct on the night of 4 June 2010 indicate otherwise.

27. During the hearing, Ms. Oduke testified that she had omitted certain details of the assault when she provided her signed statement to investigators. She explained that she did so because she did not want the Applicant to lose his job. As such, she had no reason to exaggerate the severity of the incident in her testimony before the Tribunal.

28. The accounts of Ms. Oduke and Mr. Perera are more reliable than that of the Applicant since with regard to the Applicant's recollection of the details of the evening, it is important to keep in mind that he admitted that he had been drinking alcohol at the event, he couldn't precisely remember how much he had to drink, he was not accustomed to drinking alcohol and at the time of the incident, he was not in a sober mood. By contrast, Ms. Oduke testified that she had consumed four drinks over the course of the evening, and that they did not affect her memory or behaviour. Similarly, there is no indication that Mr. Perera's perception or memory of the evening was impaired.

29. The Respondent submits that, even if the Tribunal accepts the Applicant's account of the evening, the facts as admitted by the Applicant rise to the level of serious misconduct, warranting the Applicant's separation from service with compensation in lieu of notice and with termination indemnity. The Applicant has admitted that he physically assaulted Ms. Oduke on the night in question. The Applicant has not disputed that he did this by striking her on the face. The Applicant has further admitted that Mr. Perera intervened in his dispute with Ms. Oduke, and that he used abusive language in the course of an ensuing struggle.

30. The Respondent submits that the Applicant's misconduct amounted to a significant departure of the standards of conduct expected of an international civil servant, had a negative impact upon the welfare of the victims, and put at risk the reputation of the Organization.

- a. The Applicant and Ms. Oduke had been friends for a few months prior to meeting up for a drink at the log base where the Applicant and other UNMIS staff resided.
- b. The Applicant physically assaulted Ms. Oduke, a female, non-UN staff member by slapping her on the face during a happy hour event at the UNMIS log base.
- c. The Applicant was drunk during the incident.
- d. Mr. Perera intervened in the assault encounter with Ms. Oduke.
- e. The Applicant used abusive language in the course of an ensuing struggle.
- f. Mr. Benn was informed of the incident and he cautioned the Applicant and

37. The Respondent had submitted that the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity was based on the Applicant's acts of misconduct which included a physical assault of Ms. Oduke, a female non-UN staff member who worked at the UNMIS compound in Malakal, the verbal abuse of Mr. Perera, a UN Security Officer and engaging in aggressive and uncooperative behaviour directed at Mr. Perera.

38. While the physical assault of Ms. Oduke by the Applicant at the Log Base at UNMIS during a late-night "happy hour" event is firmly established, the question still remains as to what the proper intervention of the Organization must be in the circumstances. It is settled law that when the Organisation receives allegations of misconduct by one staff member against another, the Organization's remit, in the first instance, is to consider whether the substance of the allegations fall within the preserve of the Staff Regulations and Rules.²

39. Whereas the Organization is entitled to look into complaints brought to it, it must first do so with a view to determining whether such complaints are those it can lawfully and properly entertain. The Appeals Tribunal has held that staff members must conduct themselves at all times in a manner befitting their status as international civil servants and not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations and that the obligation imposed on a staff member by virtue of this rule does not require a nexus between the alleged misconduct and the workplace³.

40. It was within the province of the Respondent or his agents in this case to investigate the events leading up to the physical assault of Ms. Oduke. Having established that Ms. Oduke had been physically assaulted, the appropriate action for the Administration after that would have been for Ms. Oduke, as a non-staff member, to be advised or even assisted to file charges against the Applicant for assault in the appropriate local court, the Administration, *inter alia*, having complied with its rules on waiver of privileges and immunities. The Organization's jurisdictional competence does not extend to the physical assault of a non-UN staff member even where the assault is perpetrated by a staff member. What is the appropriate action that the UNMIS

² *Marshall* 2012-UNAT-270 at paras. 44-46.

³ *Ibid.*, at paras. 3 and 47.

Administration should have taken in a situation such as the present where a staff member physically assaulted a non-UN staff member in UN premises?

41. Paragraphs 9 and 10

letter, it was also noted that Ms. Oduke was questioned about her presence on the Base after curfew time and she had claimed that she was invited by two UN staff members who denied the claim.

44. The Organization's definition of misconduct includes acts or behaviour that would discredit the United Nations. To engage in acts or behaviour that would discredit the Organization, it would mean that a staff member conducts his or herself in a way that the Organization is disgraced or its reputation harmed in the estimation of right-thinking members of the public or the local community.

45. In the present case, the physical assault of Ms. Oduke, reprehensible as it was, took place in a UNMIS recreational event within UNMIS premises organized for UNMIS staff members who were in turn allowed to invite their friends. The costs of alcohol sold during the "happy hour" event were subsidized by the UNMIS Staff Welfare Committee. Considering the nature of the event and its audience, it cannot be said that the Organization had lost face or reputation as clearly, it was only the Applicant who had misbehaved at the event that had succeeded in disgracing himself before other staff members. Paragraphs 38-40 of the Standards of Conduct for the International Civil Service (2007) provide as follows:

The private life of international civil servants is their own concern and organizations should not intrude upon it. There can be situations, however, in which the behaviour of an international civil servant can reflect on the organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization. This can also result from the conduct of members of international civil servants' households and it is the responsibility of international civil servants to make sure that their households are fully aware of this.

The privileges and immunities that international civil servants enjoy are conferred upon them solely in the interests of the organizations. They do not exempt international civil servants from observing local laws, nor do they provide an excuse for ignoring private legal or financial obligations. It should be remembered that only the executive head is competent to waive the immunity accorded to international civil servants or to determine its scope.

Violations of law can range from serious criminal activities to trivial offences, and organizations may be called upon to exercise judgement in the light of the nature

25. A staff member verbally abused, and made a physically threatening movement with respect to, another staff member. *Disposition*: censure and loss of five steps in grade.

27. A staff member, while inebriated, assaulted a Security Guard. *Disposition*: censure.

50. In view of the foregoing, the Administration, in line with its own practice and in proper application of its internal laws, ought to have imposed the sanction of a censure against the Applicant and advised Ms. Oduke to file criminal charges against him in the local courts of competent jurisdiction, if she was minded to. The conclusions of the local courts could then have formed the basis for more serious administrative action.

Findings

51. Having carefully considered the facts of this case and applied the relevant law, the Tribunal concludes:

- a. The Organization's jurisdictional competence does not extend to the physical assault of a non-UN staff member by a staff member.
- b. It was within the province of the Respondent or his agents in this case to investigate the events leading up to the physical assault of Ms. Oduke.
- c. Having established that Ms. Oduke had been physically assaulted, the appropriate action for the Administration after that would have been for Ms. Oduke, as a non-staff member, to be advised or even assisted to file charges against the Applicant for assault in the appropriate local court. The conclusions of the local court could then have formed the basis for any subsequent administrative action against the Applicant.
- d. United Nations Managers have no competence to make pronouncements of law on certain legal matters which fall squarely within the province of national courts.
- e. The Administration, in line with its own practice and in proper application of its internal laws, ought to have imposed a sanction, not more serious than a censure against the Applicant for verbally abusing Mr. Perera and for engaging in aggressive and uncooperative behaviour directed towards him at the same time.

- f. The fact of the Applicant's drunkenness, his remorse concerning the incident and his apology to Ms. Oduke and all concerned in the incident, as soon as he sobered up and the fact that Ms. Oduke a non-UN staff member was at the Base outside curfew hours were mitigating factors which ought to have been taken into account.
- g. The doctrine of proportionality is applicable in this case to reduce the Applicant's separation from service without compensation in lieu of notice and termination indemnity to a censure in line with the Secretary-General's practice in disciplinary cases.

Judgment

52. In view of the foregoing, the Tribunal and noting that Security Council resolution 1997 (2011) instructed the Secretary-General to complete the withdrawal of civilian UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011:

- a. Rescinds the Applicant's separation from service with compensation in lieu of notice and with termination indemnity and holds that until the date of closure of UNMIS, he remained lawfully in the service of the Organization;
- b. Orders the Respondent to pay the Applicant all his salaries and entitlements from 6 July 2011 until the date of closure of UNMIS; and
- c. Rejects all other pleas.

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(Signed)

Judge Nkemdilim Izuako

Dated this 29th day of January 2013

Entered in the Register on this 29th day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi