
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/007
Judgment No.: UNDT/2014/052
Date: 14 May 2014
Original: English

Introduction

1. The Applicant is a former member of staff of the United Nations Mission in South Sudan (UNMISS). He joined the Organization on 5 June 2000 and at the time of his separation he was serving as a Finance Assistant on a fixed-term appointment at the FS-5 level in Juba, South Sudan.

2. He was separated from service on 18 January 2013 and on 25 February 2013, he filed the current Application with the Tribunal contesting the decision to impose on him the disciplinary measure of separation from service. He submitted that all the grounds upon which the decision to separate him from service were based were not justified.

3. The Respondent filed his Reply on 12 April 2013 stating that it had been established that the Applicant abused his position of authority and took steps to grant himself an interest free loan. By doing so he had n

7. At the time of the review, none of the overpayments had been recovered by the Organization. These concerns were forwarded to Mr. Abdul Wahab, Chief Finance Officer of UNMIS.

8. Mr. Wahab contacted Mr. Nicolas Von Ruben, Director, Mission Support, on 26 April 2010 stating that he had spoken to both the Applicant, and his immediate supervisor, in regards to the overpayments.

9. It was alleged that the Applicant admitted to having increased the payment in his favour without prior authorization from his supervisor or from the Human Resources Section. Secondly he had manually entered a “W” (for withheld) into the Payroll System Software. The effect of such an entry would be to prevent automatic recovery of the overpayment from his subsequent monthly remuneration, until it is removed manually.

10. Mr. Wahab recommended that a reprimand letter be placed in the Applicant’s Official Status File. The Applicant was also transferred with immediate effect from the Payroll Unit to the Accounts Unit and his access to the ProgenPayroll System and Sun Systems was suspended.

11. Before the discoveries came to light, it had been recommended that the Applicant be made an approving officer in the Payroll Unit and the request was being processed. Following the discovery of the overpayments, Mr. Wahab recommended that the Field Budget and Finance Division withdraw the processing of his delegation of approving authority.

12. The Applicant was then reassigned from the Payroll Unit and served as Secretary to the Board of the Local Contracts Committee which oversaw procurement functions for the Mission.

13. After about 9 months, following a review of the Applicant’s performance, his access to Sun Systems was restored and he was placed in charge of the Accounts Unit and the Archive Unit in Juba. He served in this capacity up until his separation from service in January 2013.

14. On 18 May 2010 the Special Investigations Unit (“SIU”) of UNMIS was instructed to conduct an investigation into allegations of financial irregularities and potential fraud involving the Applicant.

15. The Applicant’s First Reporting Officer, Mr. Shamsul Haque, on 21 September 2010, told investigators that his duties and responsibilities, as the Regional Finance Officer, included the supervision of the Payroll, Payments and Cash Units of the regional office in Juba; and the review and approval of expenditures, staff entitlements, monthly subsistence allowances, among other functions. He also told investigators that the Applicant was in charge and responsible for the payroll and payments including Monthly Payment Order (“MPO”) reconciliations.

16. The findings of the SIU investigator submitted on 13 February 2011 established that:

- a. During the period of July 2009 - February 2010, the Applicant made two unauthorized adjustments of the amounts of his local salary portion (August 2009 and February 2010) in the Payroll System which resulted in the occur

19. On 22 March 2012, Mr. Anthony Banbury, Assistant Secretary-General, DFS, referred the findings of the SIU investigation to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) concluding that the Applicant violated the Staff Regulations of the United Nations and recommended that he face appropriate disciplinary action.

20. On 6 September 2012, Ms. Martha Helena Lopez, Officer-in-Charge (OIC), OHRM charged the Applicant and invited him to respond to the allegations.

21. The Applicant, through legal counsel, responded to the allegations on 7 November 2012. The Applicant expressed remorse for his actions and admitted that while serving as Finance Assistant and responsible for processing the monthly payroll in the Progen Payroll System, he made unauthorized entries into the Payroll System Software. The Applicant admitted to having placed a “W” against the figures, such action having the effect of preventing automatic recovery.

22. By letter dated 18 January 2013, the ASG/OHRM informed the Applicant that there was sufficient evidence to indicate that he had on three occasions created overpayments.

23. The ASG/OHRM concluded that there was clear evidence that he failed to inform his superiors of the overpayment and subsequently took steps to prevent the recovery of said overpayments. By said failure the Applicant clearly violated the rules relating to recovery of overpayments made to staff members and acted contrary to expected standards of integrity and conduct. The Under-Secretary-General for Management considered the established misconduct was serious in nature and gravity and the disciplinary measure of immediate separation from service was arrived at.

24. On 25 February 2013 the Applicant submitted an Application to the

as long as they are present in the system. There is simply no way that the overpayments could not have been recovered.

39. The Applicant did not take unauthorised or fraudulent steps to increase his salary. In line with proper practice he filled out Salary Distribution Forms which set out what he required his local portion of salary to be and the remainder to be deposited in New York.

40. He served the United Nations with all honesty, dedication, integrity and sacrifice. He had been the OIC of the Payroll Unit in Juba for a period of two years from 1 May 2007 to 31 March 2009, when Mr. Haque took over the Regional Finance responsibilities. At no time during this period as OIC did he attempt any fraudulent act. Never having engaged in any misconduct while OIC, he would not have attempted to defraud the Organization at a time when he had a supervisor who checked his work and that of other payroll staff.

Respondent's case

41. The Respondent's case is summarized as follows.

42. In August 2009, the Applicant received an overpayment of USD1,000. He then manually entered a "W", in the Payroll Software System, for "withheld" to prevent the automatic recovery of manually 34BT 0 06 [(p)-32(r)-8Q q BT /F1 11.28 Tf 0 0 0 rg 0.

45. The overpayments and the actions the Applicant took to prevent their recovery were hidden until discovered by Mr. Ricardo Ramirez-Garcon, Chief, Accounts Unit, and Mr. Joseph Brent, Chief, Payments Unit, UNMIS, in April 2010 in the course of an accounts review.

46. In his comments on the allegations of misconduct, the Applicant explained that he was “sometimes flexible when processing the payroll,” only to “help himself in managing his funds”. The Respondent considered that the Applicant did not provide a satisfactory explanation to justify his conduct, which was serious in nature and gravity.

47. The Applicant acted knowingly and not from negligence, in that he manually entered a “W” in the Payroll Software System on three different occasions to prev

49. In his statement to the SIU, his statement to OIOS and in his memorandum to the DMS, the Applicant admitted that he prevented the overpayments from being automatically recovered the month following each such overpayment by manually placing a “W” in the Payroll System Software against the overpayments.

50. The facts on which the disciplinary measure was based had been established by clear and convincing evidence.

51. The Respondent also took into consideration the fact that the Applicant failed to duly inform his supervisor at a time when he was responsible for the Payroll Unit in Juba, which fact made the Applicant’s failure all the more serious.

52. Mr. Haque, who was the Applicant’s Unme

objectively assess the actions a staff member has taken to advise the Organization of an overpayment.

65. There is evidence that salaries for UNMIS staff members were calculated at the United Nations Headquarters in New York (“UNHQ”) and could be distributed between a local bank in the mission area, and the balance sent to the staff

nor the submission of MPO reconciliations sufficed to discharge the Applicant's responsibility in that regard.

70. The Applicant testified that Mr. Haque knew his name and must have been aware that he had received overpayments as per both the payroll batches as well as the MPO reconciliation statements.

71. Counsel for the Respondent submitted that the Applicant entered inaccurate information into the MPO reconciliation statement he prepared in d

76. This argument does not detract from the fact that Mr. Haque was the approving officer and must take responsibility for the accuracy of the payroll and the due recovery of

Payroll Unit in Juba. The Applicant testified that Mr. Haque was in charge of approving payroll at the times material to this Application.

84. The Applicant testified that his duties included the processing of payroll and MPO reconciliations as well as various accounts and payment functions allocated to him and to other members of the Finance Section. With the exception of his statement on 7 November 2012, he has repeatedly stated that he was not in charge of the Payroll Unit but was only responsible for processing the payroll before submitting it to Mr. Haque for approval.

85. On 8 September 2010, Mr. Haque was interviewed by an SIU investigator, regarding the overpayments the Applicant had received. In a follow-up memorandum dated 21 September 2010, the investigator sought to clarify what Mr. Haque's duties were as Regional Finance Officer. Mr. Haque stated that he was tasked to "review and approve expenditures with efficiency and [in a]/F1 1-11(1 435.12 446.28 T1.28 T

was responsible for approving the accuracy and quality of the work of the Finance Section.

Did the Applicant take authorised steps to delay recovery of his overpayments?

90. Counsel for the Respondent submitted that the Applicant abused his access rights to the Payroll System Software. Without authorisation he sought to prevent the recovery of the overpayments owed by him by placing a “W” in the Payroll System Software at various times; not solely in April 2010 as he testified.

91. He also submitted that the Applicant entered incorrect information into the MPO reconciliation statement for August 2009 indicating that this overpayment had already been recovered. This misrepresentation was aimed at delaying recovery.

92. The Applicant stated that he had no intention of permanently preventing the recovery of the overpayments when he placed a “W” in the system. He however responded to the Applicant’s statement that “I did not have any intention of preventing the recovery of the overpayments when I placed a “W” in the system. I only intended to prevent the recovery of the overpayments for a short period of time.”

requests the Chief Finance Officer to delay the recovery; authorisation which the Applicant argues he properly obtained.

96. The wordings of ST/AI/2009/1 create a duty for staff members not only to report the receipt of overpayments but also to take steps to ensure their recovery. In other words, it necessarily prohibits the unauthorised prevention of said recovery.

97. It has not been alleged that the Applicant sought to permanently prevent recovery of the sums he received as overpayments from the Organization, rather the Respondent submitted that it was the Applicant's intention to obtain financial advantage in the form of a *de facto* interest-free loan.

98. In his testimony, Mr. Wahab stated that Ms. Carol Joseph was not an approving officer and did not have the authority to authorise a delay in the recovery of overpayments. There is no doubt that the Applicant ignored his own direct line of reporting, that is, Mr. Haque and Mr Wahab, and instead contacted the Chief of Payroll in Khartoum to seek a delay in recovery. The Applicant did not obtain proper authorisation to delay the recovery of his overpayments.

99. The Applicant admitted placing a "W" in the Payroll System Software to delay recovery, but only in April 2010. He testified that before this time, the overpayments he received were still in his 'Accounts Receivable' where they were not subject to automatic recovery.

100. The Respondent countered that the evidence bears out the likelihood that

Payable' where it could be automatically recovered by the Payroll System Software from the staff member's next payroll cycle.

102. The Applicant relied on 'Ageing Analyses of Accounts Payable' ("Ageing Analysis") in the course of his testimony. These documents show, for the entire

107. The evidence indicates that steps

- c. that this delay gained him a financial advantage in the form of a **de facto** interest free loan.

112. The Tribunal found that one of these three factors on which the Respondent based the sanction did not exist because the Applicant was not supervisor of the Payroll Unit at the relevant time.

113. In disciplinary cases, the Appeals Tribunal has repeatedly stated that when a disciplinary sanction is imposed, the role of the Tribunal is to “examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offense.”¹

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117. The Respondent had submitted that in deciding the sanction to be imposed on the Applicant, mitigating circumstances such as the fact that the Applicant had reimbursed the Organization in full in April 2010, his conduct during the investigation, his sincere remorse and his previously unblemished service record were taken into consideration.

118. It is noteworthy that the Applicant's immediate supervisors put his actions down to a mistake of judgement on his part rather than gross or serious misconduct. Having spoken to the Applicant in regard to the overpayments, Mr. Wahab forwarded a memorandum to the Director of Mission Support. He noted that the Applicant's actions were a 'mistake' and recommended that his activities be closely supervised, the earlier recommendation for him to be delegated approving authority be revoked and a written reprimand be placed in his file.

119. The Applicant had continued to perform within the Finance Section in Juba for almost two years prior to his separation and during this period received positive performance reviews from both his First and Second Reporting officers.

120. In order to determine whether the disciplinary measure of separation from service is a proportionate sanction given all the mitigating factors in this case; it is instructive to examine the Appeals Tribunal's views on the issue of proportionality.

121. In *Sanwidj* it was held that:

In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive.³

122. The Respondent submitted that the Organization's jurisprudence supports the sanction of dismissal in cases where staff members have been found to have engaged in dish11(e)17()]109p323 as a discipline TJ ET Q q BT /F19.84 44913(f)88 287.04 Tm [(I)-8(n)90

Judgment

128. The Applicant failed to discharge his duty to inform his supervisors of

Entered in the Register on this 14th day of May 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi