
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/029

Judgment No.: UNDT/2020/204

Date: 8 December 2020

Original: English

Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Miryoung An, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant served at the United Nations Interim Security Force for Abyei (UNISFA) on a continuing appointment and was based in Abyei, Sudan.

Procedural History

2. The Applicant was separated from service of the United Nations for misconduct in violation of staff regulations 1.2(a) and (b), staff rules 1.2(e) and (f), and sections 1 and 3.2(a) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) on 20 December 2018 with compensation *in lieu* of notice but without termination indemnity.

3. The Applicant filed his application to challenge that decision on 14 March 2019 at the United Nations Dispute Tribunal sitting in Nairobi.

4. The Respondent filed his reply to the application on 16 April 2019.

5. The parties attended a case management discussion (CMD) before the Tribunal on 4 August 2020.

6. Oral hearings were held over two days in September 2020. Three witnesses testified for the Applicant.

Facts and Submissions

7. On 15 September 2016, following a complaint by the local Dinka Chief of sexual harassment and abuse by the Applicant, the Conduct and Discipline officer to whom this was assigned referred the matter to the Office of Internal Oversight Services (OIOS

nd/or

abused.

8. On 21 October 2016, an OIOS Investigator sought to interview the Chief but he declined on grounds that he did not have first hand information; he gave the investigator nine names and told her that he had instructed them to speak to her. These nine people were interviewed between 21-24 October 2016.

9. The Applicant was interviewed on 8 May 2017 and provided the Investigator further information by email on 9 and 11 May 2017.

10. OIOS issued its Report on 25 August 2017. It found that there were reasonable an international civil servant, and recommended that the United Nations Department for Field Support take appropriate action.

11. The matter was referred to the Assistant Secretary-General for Human Resources Management on 10 January 2018.

12. The Applicant was charged with sexual abuse and exploitation on 24 August 2018. He was invited to respond to those charges.

13. On 2 November 2018, the Applicant responded by denying all the charges. His response stated that he was being retaliated against by the local leader and the the procurement of services.

14. On 20 December 2018, the Applicant received notice that he was being separated from service of the Organization with compensation *in lieu* of notice, but without termination indemnity.

Considerations

15. In reviewing the Secretary-Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

When judging the validity of the Secretary-discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

16. In *Mbaigolmem* 2018-UNAT-819, the United Nations Appeals Tribunal Appeals Tribunal explained that in a disciplinary case, what is required is

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satisfaction that the Applicant was afforded fair and legitimate
UNDT held that the right to cross-² Similarly, in *Oh*, the

and the proper consideration and determination of the relevance and admissibility of any evidence led during an oral hearing. Article 25 of the UNDT Rules of Procedure requires the UNDT to issue its judgments in writing and to state the reasons, facts and law on which they are based. It is incumbent on the judge in his or her judgment to set out the nature and content of the evidence and to make appropriate factual and legal findings in relation to it. This involves an analysis of its admissibility, its probative value (cogency, sufficiency, reliability and credibility) and its relevance to the issues in dispute (*facta probanda*) and/or the facts relevant to the facts in issue (*facta probantia*) (emphasis added).

29. The Respondent also objected to the calling of the three witnesses on the disagreed with the Respondent and allowed the Applicant to call them. The Tribunal finds that these witnesses gave relevant evidence, which evidence was of probative value to the inquiry in this case. They spoke to the context within which the complaints against the Applicant were made. The witnesses corroborated each testimony,

30. These witnesses generally addressed the atmosphere in which UNISFA staff in Abyei functioned, including the reaction of the principal chiefs of the Dinka tribe to policy changes which they did not like. This raised issues to be considered in assessing the complaints of Complainants 1 and 2.

31. The Tribunal therefore accepts the A and admissible.

The Evidence

32. The witnesses for the Applicant were: Mr C, Mr H, and Mr L.

33. In disciplinary matters, the onus is on the Respondent to demonstrate that there was clear and convincing evidence of the misconduct that is alleged against the Applicant. The R in this case is made difficult by the context which points to a history of conflict and lack of trust. In this context, the stories of the accusers is left without corroboration and has not been shown worthy of credibility by standing

39. The Applicant takes issue with the OIOS investigators for failing to explore exculpatory evidence and for focusing solely on the C without even seeking to have it corroborated. The Applicant submits that facts relied on by the Respondent were not established by clear and convincing evidence; that there were glaring contradictions in the C statements, which were neither clarified nor corroborated. The Applicant also contends that the OIOS investigator failed to appraise him of the charges against him before beginning an interview as part of investigations of the charges against him.

Assessment of the Evidence

Failure to authenticate statements of Complainants 1 and 2

40. Complainants 1 and 2 did not sign or indicate the veracity of their statements. This failure to authenticate the statements therefore creates doubt as to the veracity of the statements provided especially where they failed to identify the author of the statements or the truthfulness of the statements.

41. A witness whose evidence is being recorded in a language that is foreign to the investigator should be treated with an abundance of caution, so that the evidence in its final form can be reread to the witness and corrected if necessary or compared with oral evidence provided at trial.

42. In this case, it is in evidence that the Applicant and the Complainants did not speak the same language, could barely understand each other, and communicated using gestures.⁵ The Complainants and the investigators also did not speak the same language. The Tribunal therefore finds it curious that the investigators took no steps to authenticate the translation of the statements taken. This means that there is no official record of the accuracy of the translation and therefore some doubt as to whether the

⁵ Investigation Report, para. 19.

translation of the statements can be relied upon.⁶

43. Since Complainants 1 and 2 were not called to give evidence at the oral hearing, the discrepancies in their statements could neither be tested nor resolved. They could not be cross-examined by Counsel for the Applicant and their written statements could not be deemed consistent with their interviews or evidence at trial. Consequently, the Tribunal is left with no other evidence than that provided in written statements by the Complainants 1 and 2 or other supporting witnesses. The Tribunal opines that this approach to a contentious trial is not fair to the Applicant.

44. The Tribunal cannot therefore, without more, find the statements of the two Complainants to be reliable.

The surrounding circumstances of alleged disaffection with the A enforcement of new policies relating to employment of cleaners and payment only for work done.

45. The A

importance in the Abyei community. The Applicant was responsible for employment of some of the Cleaners and enforcing employment related policies. He had changed certain policies which caused some objection from the independent contractor cleaners.

51. The evidence of the Respondent also revealed instances of favouritism on the part of the Applicant. While the Applicant may deny any favouritism, it is open to the Tribunal to find that such favouritism could have been a cause for retaliation which cross-examination could have addressed.

Clear and convincing evidence

52. The analysis provided of the evidence above sets the stage for a further

53. The Tribunal must embark upon an exercise in weighing the evidence provided to determine whether the evidence against the Applicant is clear and convincing.

54. In *Negussie* 2020-UNAT-1033, the Appeals Tribunal opined as follows:

convincing evidence of misconduct, including as here, serious
that the evidence of misconduct must be unequivocal and manifest.

evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

55. Firstly, the submission that the Applicant was the subject of a previous similar allegation which caused his transfer from another duty station while prejudicial cannot be probative of any of the allegations made against him.

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rise to that of evidence beyond reasonable doubt but is higher than that of evidence of probability. The jurisprudence consistently states this to mean that the truth of the facts

