UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/2011/033
Judgment No.: UNDT/2012/072
Date: 17 May 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NASRALLAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Kevin Browning, ALS/OHRM, UN Secretariat

Introduction

1. On 30 June 2011 the Applicant filed an Application with the United Nations Dispute Tribunal (UNDT) appealing against the decision of the Secretary-General to separate him from service with compensation in lieu of notice and with termination indemnity, effective 5 May 2011.

2. The Respondent filed his Reply on 28 July 2011 and a hearing was held on 21 February 2012.

Facts

3. The Applicant joined the United Nations Interim Force in Lebanon (UNIFIL) as a Language Assistant on 23 July 2007.

4. On 28 April 2008, the Applicant was arrested by the Lebanese police for the illegal possession of 388 grams of hashish. He was remanded in custody. During the period of his imprisonment, pending trial and subsequent release, the Applicant was placed on Special Leave by UNIFIL. From 18 April to 17 July 2008 he was placed on Special Leave With Full Pay (SLWFP), then from 18 July to 17 October 2008 he was placed on Special Leave With Half Pay (SLWHP), and finally from 18 October 2008 he was placed on Special Leave Without Pay ("SLWOP").

5. The Applicant was tried on 15 January 2009, when he was convicted of illegal use of drugs. He was sentenced to nine months' imprisonment and a fine of 3,000,000 Lebanese Lira, roughly equivalent to 2000 USD. The Applicant was given credit for time served and was released on 18 January 2009. He paid the fine on 18 April 2009.

6. On 26 January 2009 the Applicant wrote to the Conduct and Discipline Unit to explain his conduct and to ask for the opportunity to continue working for the Organisation. The Applicant explained that his duties were never affected by smoking hashish and that whilst in custody he had undergone a rehabilitation programme and was "100% clean". The Applicant attached medical evidence for the latter assertion.

7. The Applicant remained on SLWOP until some six months later when he received a memorandum, dated 30 June 2009, from the Office of Human Resources Management (OHRM) setting out charges of misconduct but confirming that he could return to duty pending the outcome of the disciplinary process. The memorandum indicated that the Applicant was charged with violating the local law of Lebanon and the standards of conduct expected of staff members of the United Nations by illegally possessing a controlled substance. These were said to be in breach of staff regulation 1.2(b), (e) and (f), and staff rule 101.2, as well as ST/SGB/2002/13, section 22. The memorandum gave the Applicant two weeks in which to provide his response to the charges, and concluded:

> Given that the criminal proceedings against you have been completed and you have been released, there is no justification for your continued placement on special leave without pay.
>
> In light of this recent development, it has been decided that you should be permitted to return to duty pending the outcome of the disciplinary process. You will be informed of the date of your return to duty and of your assignment shortly.

8. The Applicant returned to duty and performed successfully for almost two years before being dismissed. In that period, he received two ePAS reports, both of which were complimentary. He was described as "skilled and experienced", "very client focused", "always demonstrat[ing] a good level of integrity and professionalism", "trustworthy" and "always fully reliable", and the quality of his work was described as "constantly very good". It was also said that "[h]e projects a very good image of the mission when dealing with external clients among the local community and is a credit to the organisation."

9. Nonetheless, on 11 March 2011, the Respondent wrote to the Applicant informing him that he was to be separated from service with compensation in lieu of notice and with termination indemnity. The Applicant received the letter on 5 May 2011 and in view of the contents, was separated from service immediately.

The Parties' submissions

10. The Applicant does not deny the conduct for which he was punished in Lebanon; nor does he deny that this amounts to misconduct within the meaning of the various staff regulations, rules and administrative issuances cited by OHRM as the legal basis for the charges against him.

11. The Applicant challenges the decision on the basis that the sanction of separation from service was disproportionate to the offence. The Applicant avers that other staff members have been found in possession of controlled substances in violation of local laws but they are not routinely dismissed for this misconduct. The more normal sanction appears to be demotion of one grade, or written censure. The Applicant argues that because he had the misfortune to have been convicted in Lebanon, where the sentence for this type of crime is relatively high, he has been treated unfairly and unduly harshly by the Administration.

12. Furthermore, the Applicant argues that the mitigating factor or his very good performance record was not taken into account in the taking of the decision. He also argues that the Administration should have considered that he had paid his dues to society by serving nine months in prison and paying a USD 2000 fine.

13. The Respondent argues that the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity was proportionate to the misconduct—which was not denied by the Applicant—which was sufficiently serious as to render the Applicant unfit to remain in service. The Respondent emphasised that 388 grams of hashish is no small quantity.

14. The Respondent argues that he did take into account certain mitigating factors, as set out in the letter of 11 March 2011, which stated that in determining the appropriate sanction, the Respondent took into account "as mitigating factors the time taken in finalizing the disciplinary proceeding, and [the Applicant's] successful completion of a drug rehabilitation program."

15. Indeed, the Respondent argues that it was as a result of taking into account these mitigating factors, that the sanction meted out was not outright dismissal, or separation without termination indemnity, but rather separation from service *with* compensation in lieu of notice *and* termination indemnity.

16. Finally, the Respondent argues that the Applicant's treatment is consistent with the Secretary-General's practice in comparable disciplinary matters. It is not appropriate to compare the Applicant's case with those set out in ST/IC/2009/30 Information Circular (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008-30 June 2009) because the summaries of cases in that document do not provide sufficient information to make such a comparison.

17. The role of the Tribunal in reviewing disciplinary cases is to examine the following:[1]

a. Whether the facts on which the disciplinary measure was based have been established;

b. Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;

c. Whether the disciplinary measure applied is proportionate to the offence; and

d. Whether there was a substantive or procedural irregularity.

18. Clearly in the present case there is no dispute as to the facts. The Applicant does not deny the conduct alleged, nor does he challenge the Respondent's classification of the same as misconduct under the Regulations and Rules of the United Nations. The heart of the matter is, then whether or not the sanction imposed was proportionate, and whether or not there was a substantive or procedural irregularity.

[1] *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; and *Maslamani* 2010-UNAT-028.

19. However, the Respondent does provide some information about the other cases reflected in the Information Circular for the same year (2009). In particular, the Respondent informed the Tribunal that the staff member who was demoted as a result of possessing illegal drugs in violation of local laws "was sentenced by a local court to a one-year term of probation. The Applicant, on the contrary, received the higher sentence of nine months' imprisonment."

20. To obtain further details of that case, and any other similar cases so that the Tribunal can better understand the practice of the Secretary-General, the Tribunal issued Order No. 063 (NBI/2012) which required the Respondent to provide details of other cases of possession and/or use of illegal drugs in violation of local laws which occurred at around the same time as the Applicant's misconduct.

21. In response to Order No. 063, the Respondent informed the Tribunal of six cases where disciplinary sanctions were imposed between 2006 and 2011. This information is instructive. Besides the Applicant, in that period there was one other staff member who was separated from service for possession of illegal drugs. That staff member, in Sudan, was found with two kilograms of marijuana and was sentenced to 20 years' imprisonment by the local courts, having admitted conspiracy to traffic the marijuana. This it seems to the Tribunal is a far more serious case than the present one, yet the sanction is almost the same.

22. A staff member in New York pleaded guilty to possession of khat and was sentenced to a year's probation, and fined USD 1000; he was also found guilty of having used the diplomatic pouch for personal reasons. Because of his long service record, he was not separated from service but was demoted by one grade with a deferral of eligibility for promotion for a period of two years, and a written sentence.

23. Another case in Sudan involved a "small piece" of hashish, for possession which the staff member was sentenced to one month's imprisonment and fined 1000 Sudanese pounds. The staff member was censured.

24. Three of the other cases involved positive drug tests, rather than possession, by staff members in Georgia, and resulted in written censure.

Proportionality of the sanction

25. In disciplinary matters the Secretary-General has a broad discretion to determine what act amounts to misconduct and the appropriate sanction to be imposed if misconduct is established to the required degree and standard of proof. It is not for the Tribunal to decide or consider what sanction or punishment would have been fair or appropriate. The task for the Tribunal is to determine whether the sanction imposed by the Secretary-General was a proper and lawful exercise of the discretion conferred upon him—see UN Administrative Tribunal Judgment No. 1310, *Facchin* (2007)—and whether the sanction was so unfair and disproportionate as to amount to an improper exercise or abuse of the discretion of the Secretary-General. In *Facchin* the former UN Administrative Tribunal stated that "one must also consider matters such as the degree of departure from the norm, whether it was a one-off decision or a course of conduct, and of course, the potential such conduct may have had on the welfare or wealth of the employer organization."

26. Staff Rule 10.3(b) requires that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct. It seems to this Tribunal that assessing the nature and gravity of misconduct necessarily also involves reviewing other cases which bear some similarity and looking for consistency in the exercise of discretion by the Secretary-General.

27. In *Sow* UNDT/2011/086, Judge Izuako reiterated:

> In *Sanwidi*[2], the Tribunal recalled the principle of equality of treatment which should be applied to all UN employees in conformity with the Staff Regulations and Rules, with previous decisions of the Appeals Tribunal and the fact that equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. Simply presented, the principle of equality requires that those in like cases should be treated

[2] UNDT/2010/036.

> alike. In UNDT Judgment No. 171 of 2010, it was held that the proportionality of a disciplinary penalty is a matter of judgment. In exercising such judgement, it would be necessary to ensure that, amongst other matters, the principle of consistency is applied. This means that where staff members commit the same or broadly similar offences, in general, the penalty should be the same; not necessarily identical but within a very narrow range of appropriateness.

28. A comparative study of similar or almost similar cases as the present one indicates that in only one case of conspiracy to traffic in drugs where the staff member was sentenced to 20 years' imprisonment, the sanction was separation from service with compensation in lieu of notice but no termination indemnity—in other words, just a little worse than that imposed upon the Applicant for what seems to be a much, much lesser offence. There is a huge difference between trafficking drugs and simple consumption. The comparators do therefore lend credence to the submissions of the Applicant that the sanction was disproportionate, more particularly as he had a previously unblemished record and after the prison sentence when he returned to work his conduct and performance were of a high standard.

29. The imposing of sanctions is not and has never been a scientific exercise that follows the rules of strict consistency. By analogy, when we compare with what obtains in criminal trials, sentencing is an exercise that has always posed vexed choices and thoughts to both practitioners and academics. This analysis notwithstanding one should and would expect some measure of coherence in the choice of sanctions in similar or almost similar cases of misconduct. This is clearly not the case here, and it is regrettable. The only explanation given by the Respondent is that the Applicant was not dismissed but was terminated with indemnity. In the end the result is that the Applicant is out of a job whereas others in almost similar situations kept their jobs.

30. The Tribunal does not condone the use of illegal drugs but in all the circumstances of the case, it does take the view that the sanction imposed on the Applicant was disproportionate to the misconduct, and did not properly take into account the mitigating factors—namely that the Applicant pleaded guilty and served his time in the Lebanese prison; that he returned to work and performed to a high standard for a

considerable period of time; that he was repentant, and reformed. There was never any suggestion that the Applicant's use of drugs had affected his work and thus, though the quantity found on him was larger and the punishment in Lebanon greater than those in New York or Georgia, the Tribunal finds that the Applicant's case is more akin to those than to the trafficker in Sudan.

Conclusion

31. The Application is granted.

32. The Tribunal orders rescission of the administrative decision to separate the Applicant from service and orders the Respondent to reinstate the Applicant.

33. The Respondent is further ordered to make good all the Applicant's lost earnings from the date of his separation to the date of his reinstatement, or the date of his compensation in accordance with paragraph 34 of this Judgment.

34. Should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to reinstate the Applicant, as an alternative he must pay compensation to the Applicant in the sum of two years' net base salary at the rate in effect at the date of Judgment.

35. 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 Vinod Boolell

Dated this 17th day of May 2012

Entered in the Register on this 17th day of May 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi