



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/058

Judgment No.: UNDT/2013/012

Date: 29 January 2013

Original: English

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**Before:** Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

TOUKOLON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Seth Levine, OSLA

**Counsel for Respondent:**

Susan Maddox, ALS/OHRM

Kevin Browning, ALS/OHRM

## **Introduction**

1. The Applicant was a staff member with the United Nations Mission in Sudan (UNMIS) holding a fixed-term appointment as a Disarmament, Demobilization and Reintegration Officer at the P-3 level.
2. On 6 July 2011, the Applicant was separated from service for having assaulted one Ms. Juliet Marion Oduke on 4 July 2010, verbally abusing a Security Officer with UNMIS and engaging in aggressive and uncooperative behaviour towards him. The Applicant contests the disciplinary measure imposed on him and requests to be reinstated and compensated.
3. The Respondent filed a Reply on 27 October 2011. The case was heard from 21 to 22 May 2011.

## **Facts**

4. The Applicant was employed by UNMIS from 3 January 2009 as a P-2 Associate Disarmament, Demobilization and Reintegration (DDR) Officer. He was promoted to P-3 level in August 2011.
5. On 4 June 2010, the Applicant while under the influence of alcohol became involved in an altercation with a female friend of his, Ms. Oduke, during a “happy hour” event at the UNMIS Log Base where he and other UNMIS staff members resided. During the encounter, the Applicant slapped Ms. Oduke. He was accosted by a Security Officer, Mr. Prasanna Perera, and used abusive language in the course of the ensuing struggle between the two of them. Ultimately, the incident ended when Mr. Gordon Benn, the Field Security Coordination Officer (FSCO), was called from his container and ordered the Applicant to return to his accommodation.
6. The following morning, the Applicant apologised to Ms. Oduke and all those involved in the incident, blaming his drunken state for his shameful conduct.
7. An investigation was carried out into the incident by the Special Investigations Unit of UNMIS. On 29 November 2010, the Applicant received a memorandum, dated 3 August 2010,

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. The Applicant was additionally charged with violating staff regulations 1.2(e) and (f).

9. The Applicant responded with his comments and apologies over the incident by an email dated 8 December 2010. On 6 July 2011, he received a letter dated 23 June 2011 from Ms. Martha Helena Lopez, Officer in Charge, OHRM, advising him that there was sufficient and credible evidence that he committed serious misconduct and that there were no mitigating factors present. The letter further advised that the Under-Secretary-General for Management was imposing the disciplinary measure of separation from service without compensation in lieu of notice and termination indemnity. Finally, the letter stated that the disciplinary measure was proportionate to the gravity of the offence.

10. In his Application to the Tribunal dated 26 September 2011, the Applicant challenged the proportionality of the disciplinary measure and prayed for reinstatement and compensation.

11. The Respondent filed a Reply on 27 October 2011.

12. On 21 May 2012, the matter was heard. During the hearing, the Tribunal received evidence from the following witnesses:

- a. The Applicant;
- b. Ms. Oduke; and
- c. Mr. Perera.

13. Ms. Oduke’s testimony is summarized below:

- a. The Applicant slapped her three times causing her to fall.

- 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 sanction for this kind of misconduct is much less grave than that imposed upon him. The misconduct he engaged in, whilst unpleasant and inappropriate could not reasonably be characterized as serious misconduct. There is no evidence that the victim of the assault was

seriously hurt. No reference was made in her statement or in Mr. Benn's memorandum to OHRM of any lasting injury or bruising to Ms. Oduke. In the circumstances, the assault cannot be said to be of the gravest nature.

20. The Respondent did not take into account any mitigating factors when considering what disciplinary measure to impose upon him. There were mitigating factors, such as his quick and sincere apologies to the parties to the incident, his humility and remorse as shown to both those involved and also in his response to the charges and his good service record. None of these were taken into account by the Under-Secretary-General for Management in taking her decision.

21. The dismissal letter of 23 June 2011 did not state the factual basis on which the decision to dismiss was taken. The Applicant submits that the practice of simply referring to the investigation report when making a finding of misconduct should be deprecated in the strongest terms and that it is an inalienable principle of natural justice that a person subject to criminal or quasi-criminal allegations knows the precise basis on which he stands accused or is convicted. Where that principle is not adhered to, it is impossible to ensure that the punishment fits the crime. In this instance, the Tribunal is left to guess as to the precise facts relied on by the decision-maker in concluding that the sanction imposed was proportional.

22. Ms. Oduke's testimony was so unreliable that no weight at all can be attached to it.

23. The Applicant requests that the Tribunal order his re-instatement and appropriate damages for the period he has remained out of employment as a result of the unlawful decision to separate him from service.

### **Respondent's submissions**

24. The Respondent's case is summarized as follows:

25. The Applicant's acts of misconduct 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.

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.

Accordingly, it was reasonable for the Respondent to conclude that the Applicant's misconduct was serious, rendering him unfit to remain in service. Despite this, the Applicant was paid compensation in the amount of one month's pay for the loss of his job as well as a termination indemnity.

31. The disciplinary measure imposed is similar to those imposed in other recent cases involving violence perpetrated by male staff members against women. For example, ST/IC/2011/20, (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour), for 1 July 2010 to 30 June 2011, contains three other cases in which male staff members who had been found to have physically assaulted women were either dismissed or separated from service with compensation in lieu of notice

32. For the reasons outlined above, the Respondent submits that the gravity of 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 Respondent further submits that the disciplinary measure imposed on the Applicant was consistent with the practice of the Secretary-General in similar cases and that the disciplinary measure imposed was proportionate to the Applicant's misconduct.

### **Considerations**

33. In *Mahdi* 2010-UNAT-018, the Appeals Tribunal held that in reviewing disciplinary cases the Tribunal has to determine the following questions:

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

### ***Have the facts on which the disciplinary measure was based been established?***

34. The Tribunal finds that the following facts have been established in this case:

- 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 directed him to return to his accommodation, which he did.
- g. The Applicant apologized to Ms. Oduke and all those involved in the incident the next day when he had become sober.
- h. Ms. Oduke did not suffer any permanent injury after the assault and forgave the Applicant.

***Do the established facts legally amount to misconduct under the Regulations and Rules?***

35. It cannot be gainsaid that the Secretary-General and the Organization in making Staff Rules, Regulations and Bulletins for the regulation of the behaviour of staff members are primarily concerned with the protection of the Organization's work environment. In particular, in the preamble to the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), it is clearly stated that its object is to ensure that all staff members are treated with dignity and respect and that the workplace is free of abuse, harassment and discrimination.

36. In paragraph 2 of ST/AI/371, (Revised Disciplinary Measures and Procedures)<sup>1</sup>, conduct for which disciplinary measures may be imposed is defined as including, but is not limited to assault upon, harassment of, or threats to other staff members and acts or behaviour that would discredit the United Nations.

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<sup>1</sup> As last amended by ST/AI/371/Amend.1, effective 11 May 2010.



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.<sup>2</sup>

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 workplace<sup>3</sup>.

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

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<sup>2</sup> *Marshall* 2012-UNAT-270 at paras. 44-46.

<sup>3</sup> *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 of General Assembly Resolution 64/110 (Criminal accountability of United Nations officials and experts on mission) of 15 January 2010 provide as follows:

Requests the Secretary-General to bring credible allegations that reveal that a crime may have been committed by United Nations officials or experts on mission to the attention of the States against whose nationals such allegations are made and to request from those States an indication of the status of their efforts to investigate and, as appropriate, prosecute crimes of a serious nature, as well as the types of appropriate assistance that States may wish to receive from the Secretariat for the purposes of such investigations and prosecutions;

Requests the United Nations, when its investigations into allegations suggest that crimes of a serious nature may have been committed by United Nations officials or experts on mission, to consider any appropriate measures that may facilitate the possible use of information and material for purposes of criminal proceedings initiated by States, bearing in mind due process considerations;

42. In view of the preceding, the UNMIS Administration should have brought the matter of the physical assault of Ms. Oduke to the attention of Sudanese authorities. In this respect, it is noteworthy that the UNMIS Conduct and Discipline Unit, in a letter dated 21 June 2010 from the Special Representative of the Secretary-General to the Under-Secretary-General of the Department of Field Support, had concluded that the Applicant's conduct was in violation of section 142(1) of the Sudan Criminal Act. The Administration had no legal basis to arrive at this conclusion which should have been made by a Sudanese Court of competent jurisdiction after a criminal or even civil trial. The conclusions of the local courts could then have formed the basis for any subsequent administrative action against the Applicant. United Nations Managers have no competence to make pronouncements of law on certain legal matters which fall squarely within the province of national courts.

43. The UNMIS Log Base, as far as can be determined by the facts of the case, was not meant to be accessible to non-UN staff members such as Ms. Oduke after certain hours. In a letter dated 10 June 2010 from Mr. Benn, the FSCO to the Chief Security Advisor, he stated that the authority of four female "helpers" (one of whom was Ms. Oduke) requested by the UNMIS Staff Welfare Committee to assist at the Friday "happy hour" events had been revoked. In the

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

and circumstances of individual cases. A conviction by a national court will usually, although not always, be persuasive evidence of the act for which an international civil servant was prosecuted, and acts that are generally recognized as offences by national criminal laws will normally also be violations of the standards of conduct for the international civil service.

46. The Tribunal therefore, whilst condemning in the strongest terms the Applicant's physical assault of Ms. Oduke, finds and holds that the said assault does not amount to "misconduct" as defined by the laws of the Organization since Ms. Oduke is not a UN staff member and since the Applicant had not been tried by a court of competent jurisdiction and his criminal or civil liability determined. The Organization was not discredited in any real or quantifiable way by the Applicant's physical assault of Ms. Oduke.

47. With respect to verbally abusing and engaging in aggressive and uncooperative behaviour directed at Mr. Perera, a staff member who was trying to protect Ms. Oduke and prevent the Applicant from continuing to assault her, the Tribunal finds and holds that the established facts amount to misconduct as defined in ST/AI/371, specifically, they amounted to verbal assault to another staff member as set out at para. 2 of ST/AI/371.

***Was the disciplinary measure applied proportionate to the offence?***

48. Staff rule 10.3 (b) requires that any disciplinary measure imposed on a staff member should be proportionate to the nature and gravity of his or her misconduct. This Tribunal has consistently held that equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. The principle of equality requires that those in like cases should be treated alike.<sup>4</sup> Did the Applicant by his verbal abuse to Mr. Perera and by engaging in aggressive and uncooperative behaviour towards him while in a drunken state warrant separation from service with compensation in lieu of notice and with termination indemnity?

49. ST/IC/2011/20, (Practice of the Secretary-General in disciplinary matters and possible criminal behavior), for the period 1 July 2010 to 30 June 2011, from paragraph 18 onwards, reports actions taken against staff members who were found to have verbally abused other staff members. The analogous cases are summarized below:

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<sup>4</sup> See for example in *Sanwidi* UNDT/2010/036 and *Akello* UNDT/2012/124.

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.

Case No. UNDT/NBI/2011/058

Judgment No. UNDT/2013/012

*(Signed)*

Judge Nkemdilim Izuako

Dated this 29<sup>th</sup> day of January 2013

Entered in the Register on this 29<sup>th</sup> day of January 2013

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi