UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/GVA/2012/012
UNDT/GVA/2012/013
Judgment No.: UNDT/2013/091
Date: 28 June 2013
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

CLARK

&

GILBERT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Kong Leong Toh, UNOPS
Salman Haq, UNOPS

Introduction

1. By applications filed on 30 January 2012 and completed on 30 May 2012, the Applicants, two former staff members of the United Nations Office for Project Services ("UNOPS"), contest the decision to separate them from service effective 1 November 2011 with one month of compensation in lieu of notice together with a termination indemnity as a disciplinary measure. The applications were registered under cases Nos. UNDT/GVA/2012/012 and UNDT/GVA/2012/013.

Facts

2. At the time of the events, the Applicants, Mr. Clark and Mr. Gilbert, were staff members of UNOPS holding appointments at the P-5 and P-4 level respectively.

3. The Applicants were on official mission in Stockholm, Sweden, to participate in the 2011 United Nations Mine Action Rapid Response and Planning Exercise ("MARRPEx").

4. On 6 June 2011, at around 4 a.m., a physical altercation occurred in a hotel in Stockholm, Sweden, between the Applicants and two hotel security guards. As a result of the incident, both Applicants were arrested and held in detention.

5. On 10 June 2011, the Swedish tabloid newspaper "Expressen" published an article reporting on the incident.

6. By judgment dated 6 July 2011 of the Stockholm District Court, the Applicants were convicted of assaulting an officer and sentenced to, *inter alia*, two months imprisonment.

7. On 27 July 2011, the Applicants lodged an appeal against their conviction. On 11 May 2012, the Court of Appeals upheld the District Court's judgment, but reversed some of the relief ordered by increasing the compensation to be paid by the Applicants.

8. By letter dated 1 August 2011 from the Deputy Executive Director, UNOPS, the Applicants were charged with misconduct and were placed on administrative leave with full pay.

9. The following six charges of misconduct were brought forward against the Applicants:

a. Failure to uphold the highest standards of efficiency, competence and integrity, in contradiction with regulation 1.2(b) of the United Nations Staff Regulations and Rules;

b. Acting in a manner that brings the Organization into disrepute, in violation of paragraph 27(r) of UNOPS Organizational Directive No. 36 of 26 August 2010 entitled "UNOPS Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct";

c. Failure to conduct oneself in a manner befitting an international civil servant, in contradiction with paragraph 38 of the Standards of Conduct for the International Civil Service of the International Civil Service Commission ("ICSC");

d. Failure to comply with local laws, in contradiction with staff rule 1.2(b) of the United Nations Staff Regulations and Rules;

e. Failure to refrain from serious criminal activity, in contradiction with paragraph 40 of the Standards of Conduct for the International Civil Service of the ICSC; and

f. Failure to refrain from engaging in unlawful acts, in violation of paragraph 27(c) of UNOPS Organizational Directive No. 36.

10. On 28 and 30 September 2011 respectively, the Applicants submitted their responses to the above charges of misconduct.

11. By letters dated 1 November 2011, the UNOPS Executive Director informed each of the Applicants of their separation from service effective

1 November 2011, with one month compensation in lieu of notice and with termination indemnity pursuant to paragraph (c) of Annex III to the Staff Regulations. The decision was based on the six charges of misconduct listed in the letter dated 1 August 2011.

12. On 30 January 2012, the Applicants filed their applications with the Tribunal contesting the decision to separate them from service.

13. By Orders Nos. 25 and 26 (GVA/2012) of 31 January 2012, the Tribunal granted the Applicants an extension of time until 30 April 2012 to complete their applications on the grounds that they were still awaiting the outcome of their appeal before the Swedish court. By Order No. 74 (GVA/2012), the Tribunal granted the Applicants a further extension of time until 30 May 2012 and the Applicants completed their applications by that date.

14. On 7 June 2012, the Tribunal, at the request of the Applicants, decided to join the two applications.

15. The Respondent submitted his reply in the two cases on 12 July 2012, following Order No. 118 (GVA/2012) of 20 June 2012 by which the Tribunal had granted an extension of time to file it until that date.

16. By Order No. 145 (GVA/2012) of 9 October 2012, the Tribunal ordered the transmittal to the Applicants of annex "R-A" to the Respondent's reply filed by the Respondent confidentially (*under seal*). This annex is the memorandum dated 31 October 2011 from the Human Resources Legal Officer, UNOPS, to the Deputy Executive Director, UNOPS, concluding that the Applicants' actions constituted misconduct.

17. On 24 October 2012, the Applicants submitted their comments on the document transmitted to them by virtue of Order No. 145 (GVA/2012).

18. On 3 and 4 April 2013, pursuant to Order No. 34 (GVA/2013) of 19 February 2013, the Tribunal held an oral hearing on the merits in the two above referenced cases. In the course of the oral hearing, both Applicants testified

and extensive video footage of the incident of 6 June 2011 was examined by the Court as evidence. At the end of the hearing, the Tribunal invited the parties to consider an amicable settlement. The parties subsequently jointly stated that they agreed to pursue informal mediation and the proceedings were suspended until the end of May 2013.

19. On 30 April 2013, the parties submitted a joint update on the status of the informal resolution efforts and informed the Tribunal that they had now sought to engage the Mediation Division in their efforts to achieve an amicable settlement. The parties also stated in their joint status update that they intended to continue exploring informal resolution until, if necessary, the end of May 2013, i.e. the deadline set by the Tribunal for exhausting such efforts.

20. On 1 June 2013, Counsel for the Applicants filed his closing argument on liability.

21. On 3 June 2013, the Respondent submitted a motion for leave to file a statement by the security expert heard as a witness during the above-mentioned hearing, concerning particular segments of the video footage examined as evidence by the Tribunal.

22. On 6 June 2013, pursuant to Order No. 72 (GVA/2013) of 5 June 2013, the Tribunal held a further hearing attended via videoconference from New York by Counsel for the Applicants and Counsel for the Respondent, to ascertain whether the parties were still pursuing a mediated amicable settlement. The parties jointly confirmed that they would no longer seek settling the matter and pleaded jointly for adjudication.

23. On 16 June 2013, the Respondent filed his closing argument on liability.

Parties' submissions

24. The Applicants' principal contentions are:

a. The established facts do not amount to misconduct. Notably, the video footage reflects, *inter alia*, that before either of the Applicants struck either of the security guards, they had thrust and pinned one Applicant (Mr. Gilbert) against a bar, one security guard had drawn a baton and the other one had seized a stool to strike the Applicants. Consequently, there is no clear and convincing evidence that the Applicants were not acting to defend themselves or one another. Thereby, it is submitted that their actions cannot constitute misconduct;

b. Staff members are entitled to defend their own safety and that of others without regard to the image of the Organization. Accordingly, since the Applicants' behaviour cannot constitute misconduct, any bad publicity for the Organization is irrelevant;

c. In the alternative, even if the Applicants were found not having acted in individual or collective self-defence, they could not have been properly disciplined for this incident which had no connection with their employment, as set out in para. 38 of the Standards of Conduct for the International Civil Service: *"The private life of international civil servants is their own concern and organizations should not intrude upon it."* According to case-law, the Organization has no business using its administrative procedures to involve itself in a personal dispute when other appropriate legal channels were available to the parties in the dispute;

d. The failure to consider mitigating factors can vitiate a discretionary decision. In such a case, the factors should all be evaluated by the Tribunal in *de novo* consideration of the measure. The Applicants submit that the following mitigating factors were not taken into account:

i. the disciplinary decision does not reflect the circumstances of how the dispute began and how it escalated;

ii. the disciplinary decision does not reflect the medical consequences of the dispute. The alleged victims suffered only from trivial injuries, whereas the injuries suffered by the Applicants were more serious;

iii. the sentence of the Swedish Criminal Court aggravated the disciplinary measure, while said Court had suggested that evidence of professional disciplinary action might have moderated the criminal sentence;

iv. the consequences of the disciplinary decision for the Applicants, who were previously recognized as outstanding staff members, in terms of damage to their professional reputation;

v. the absence of evidence of reputational and/or financial harm to the Organization as a result of the incident.

e. According to the principle of progressive discipline, the ultimate sanction should not be employed to address a 'first infraction'. The principle of parity of sanction furthermore requires like infractions to be met with like administrative responses. The Applicants submit that in nine out of eleven physical assault cases the staff members were not separated;

f. The Applicants request rescission of the decision, as well as payment of salaries and benefits since the time of separation, or compensation in lieu of the rescission. The Applicants also demand compensation for moral, non-pecuniary damages, namely distress and enduring damage to their reputation and professional employment prospects.

25. The Respondent's principal contentions are:

a. The security camera footage showed that the Applicants were not acting in self-defence or in defence of each other. This was confirmed by

two eyewitnesses before the Swedish First Instance Tribunal who complemented those parts of the fighting that were not caught on the security camera footage;

b. The Applicants were on an official mission to participate in the 2011 MARRPEx and hence, the incident was in connection with their employment. This contradicts the Applicants' claim that they could not have been disciplined in accordance with the Standards of Conduct for the International Civil Service of the ICSC. In addition, the case law invoked by the Applicants involves purely personal arrangements;

c. The Applicants were convicted by a Swedish Criminal Court and the incident was reported in a Swedish newspaper with a headline that translates "UN men in wild bar fight". This caused damage to the reputation of the United Nations;

d. The established facts legally amount to misconduct under the United Nations Staff Rules and Regulations as listed in the contested decision;

e. The disciplinary measures applied were proportional to the offence. Contrary to the Applicants argument, five of the six alleged mitigating factors were unfounded or irrelevant, and the sixth factor was taken into account at the time the disciplinary measure was imposed. Regarding the principle of progressive discipline, case law indicates that depending on the gravity of a staff member's first offence separation or dismissal may be appropriate;

f. The Respondent has considerable latitude in deciding on the appropriate sanction.

Consideration

26. Article X of the United Nations Staff Regulations provides in regulation 10.1(a) that "the Secretary-General may impose disciplinary measures on staff members who engage in misconduct".

27. Staff rule 10.1(a) under Chapter X provides that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

28. Additionally, staff rule 10.1(c) provides that:

> The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

29. In addition, staff regulation 1.2(f) provides that staff members:

> … shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action …. that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

30. Staff regulation 1.1(f) provides:

> The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organizations. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the state in which they are located …

31. According to the established jurisprudence of the United Nations Appeals Tribunal ("UNAT"), the role of the Tribunal in reviewing disciplinary cases is to examine (1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations; and (3) whether the disciplinary measure applied was proportionate to the offence (see *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; *Maslamani* 2010-UNAT-028; *Nasrallah* 2013-UNAT-310).

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

32. In its Judgement *Molari* 2011-UNAT-164, the UNAT held:

> Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt – it means that the truth of the facts asserted is highly probable.

33. It is against the above standard that the present case has to be assessed and the following facts are not disputed by either party. Mr. C. S. ("Mr. S") and Mr. E. M. ("Mr. E") were at the time of the events working as security guards at the hotel where the incident took place. Ms. R. T. C. ("Ms. C.") worked as night manager at the same hotel. The Applicants were guests at the hotel in question and returned to it at around 3-4 a.m. after being out in town. Both had consumed a considerable amount of alcohol; Mr. Gilbert admitted to have drunk more than eight bottles of beer. Upon returning to the hotel, Mr. Clark went to sit at the hotel bar, which was closed. Once he was seated, he was asked by Mr. S. to leave, but he did not do so. Mr. S. left, only to return a few minutes later with the night manager, Ms. C., who continued to ask Mr. Clark to leave, without success. At this point in time, Mr. Gilbert had also joined all of them at the hotel bar. After a long discussion, Mr. E.–who had been called by his colleague Mr. S. over the phone–appeared on the scene.

34. Regarding the scuffle that followed and which constitutes the basis for the disciplinary charges, the persons involved have different perceptions of how it started and what ensued. While the Tribunal understands that the Applicants' perceptions are naturally driven by their own interests, it has to freely form its conviction in assessing the truth of the disputed facts; to do so, the only reliable evidence in the case at hand is several video clips from security camera footage in the hotel.

35. In view of the available evidence, it is the Court's firm conviction that Mr. Gilbert, after a lengthy discussion between the persons on the scene—during which he had already physically touched Mr. S. more than once—attempted to approach Ms. C., who stood at a distance of about one meter in front of him. In the video footage, Mr. Gilbert shows some signs of lack of control over his movements, which might be related to his earlier consumption of alcohol. To approach Ms. C., Mr. Gilbert had to go through Mr. S. and Mr. E. who stood between him and Ms. C. In the video footage, one can also note that Mr. S. and Mr. E. tried to prevent Mr. Gilbert from approaching Ms. C. by blocking his way to her and by trying to hold him respectively by his left and right arms. However, Mr. Gilbert was able to free his right arm and then pushed Mr. E.'s head. It is only after this push that Mr. E. and Mr. S. were able to grasp Mr. Gilbert by his arms and hold him against the bar. At this point, Mr. Clark, who had been sitting on his stool without intervening, got up and turned to Mr. E, Mr. S and Ms. C. From behind, he approached Mr. S., who was holding Mr. Gilbert against the bar, grabbed him by his arm and drew him away from Mr. Gilbert who was by then free and went after Mr. E.; Mr. Clark followed suit, by then being attacked from behind by Mr. S. who threw a stool in the direction of Mr. Clark with no visible effect in the video footage.

Whether the established facts legally amount to misconduct

36. The main question for the Tribunal is to assess whether the actions by the Applicants constituted self-defence or were intended to defend someone else, in which case they might not constitute misconduct under the United Nations Staff Rules and Regulations.

37. At the outset, the Tribunal notes that the Applicants had no reason not to follow the instructions of the hotel staff to leave the bar. Questioned by the Judge about why they failed to do so, neither Applicant had an answer. Although the video footage does not have sound and therefore does not allow the viewer to hear the discussions that took place, it is evident from said footage that the Applicants were asked numerous times and by at least three persons to leave the bar. Nothing

indicates that this was done in an aggressive or otherwise improper way. On the contrary, the footage shows that a lot of effort was made by several hotel staff, namely Mr. S., Ms. C. and Mr. E., to convince the Applicants, verbally, to leave the room and as such to resolve the matter without engaging in a physical altercation. By their unjustified refusal to leave the bar, the Applicants themselves provoked the subsequent escalation of the dispute. Mr. Gilbert moreover started the physical aggression and Mr. Clark subsequently joined him in the scuffle. In sum, the footage shows that the events began in a way that leads the Tribunal to conclude that both Applicants did not act in self-defence, but rather that they were the source of the aggression. Mr. Gilbert first assaulted Mr. E., and Mr. Clark subsequently assaulted Mr. S. while he was retaining Mr. Gilbert against the bar.

38. It is undisputed, though not recorded on any of the videos submitted as evidence, that Mr. E. subsequently used a baton in the course of the fight. It is also proven that both Applicants suffered considerable physical injuries as a result of this.

39. As previously stated, what is crucial to determine whether the Applicants engaged in misconduct for the purpose of the United Nations Staff Rules and Regulations is to assess whether the Applicants acted in self-defence or in defence of others. Based on the available evidence, the Tribunal is fully convinced that the responsibility for the dispute and the *initial* physical violence outbreak lies with both Applicants and that they were not acting in self-defence or in defence of others. What happened after the dispute, and the injuries endured by the Applicants in the subsequent fight, while regrettable, are irrelevant for the assessment of whether the Applicants, as the initiators of the dispute and physical violence, engaged in misconduct.

40. The Tribunal emphasizes that these findings are also in line with the findings of the Stockholm District Court that comprised one professional Judge and three lay assessors and convicted the Applicants in first instance. That conviction was confirmed at the second instance by the Swedish Court of Appeals, composed of three professional Judges and two lay assessors.

41. In this respect, para. 40 of the Standards of Conduct for the International Civil Service of the ICSC (see Annex II of the Report of the International Civil Service Commission for the year 2001 to the United Nations General Assembly, fifty-sixth session, supplement No. 30 (A/56/30), 9 August 2001, New York) provides the following:

> Violations of law can range from serious criminal activities to trivial offences, and organizations may be called upon to exercise judgment 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.

42. Moreover, the Tribunal notes that at the time of the incident, the Applicants were on official mission in Sweden. They furthermore clarified at the oral hearing that at the time the incident occurred, they were at the hotel bar in order to discuss and finalize logistical and other details related to the MARRPEx and to welcome and deliver a briefing to one of the participants who had arrived later that night. Therefore, the Applicants' contention that the dispute and physical assault was a matter concerning their private lives cannot be entertained.

43. Based on the findings above, the Tribunal concludes that the behaviour of both Applicants amounts to misconduct. Their attack on the hotel staff is, at least, a clear breach of the obligation to comply with local laws under staff regulation 1.1(f) quoted above, as well as a failure to refrain from engaging in unlawful acts, as per para. 27(c) of UNOPS Organizational Directive No. 36, and a failure to refrain from criminal activity, as per para. 40 of the Standards of Conduct for the International Civil Service of the ICSC.

44. As such, and taking into account the standard of proof as determined by the UNAT in the above-quoted case law, the Tribunal cannot but conclude that it is established that the actions of both Applicants as described above constitute misconduct for the purpose of the United Nations Staff Rules and Regulations.

Whether the disciplinary measure was proportionate

45. Staff rule 10.3(b) requires that any disciplinary measure imposed on a staff member be proportionate to the nature and gravity of his or her misconduct.

46. According to the established case law of the UNAT in disciplinary matters, if misconduct is established, the Secretary-General has a broad discretion to determine the appropriate sanction. It is not for the Tribunal to decide or consider what sanction or punishment would have been fair or—in the Court's view—more appropriate (see *Sanwidi* 2010-UNAT-084, *Cabrera* 2010-UNAT-089).

47. The Appeals Tribunal also found in *Cabrera* 2010-UNAT-089 that:

> Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences. The UNDT refused to substitute its judgment in this case, and this Tribunal must be deferential not only to the Secretary-General, but also to that Tribunal, which is charged with finding facts.

48. The recent practice of the UN Secretariat indicates that dismissal and separation from service are considered proportionate sanctions in cases of physical assault by staff members (see ST/IC/2011/20 and ST/IC/2012/19). As to the Applicants' contention that progressive discipline must be applied, it is the gravity of the misconduct that is an important factor in determining the appropriateness of the separation or dismissal. While the Applicants' misconduct was of a particularly serious nature and although the practice of the Secretariat seems to indicate that in most instances of physical assault staff members concerned were dismissed, in the instant case, the disciplinary measure imposed did not amount to the maximum possible sanction which would have been dismissal. This further leads the Tribunal to believe that any mitigating factors were appropriately taken into consideration when deciding upon the appropriate disciplinary measure to be imposed on the Applicants.

49. Under the circumstances, given that the misconduct has been established and in light of the seriousness of the incident, the Applicants' separation from service in lieu of notice and with termination indemnity pursuant to paragraph (c) of Annex III to the Staff Regulations cannot be considered disproportionate.

Conclusion

50. In view of the foregoing, the Tribunal DECIDES:

The applications are rejected in their entirety.

(*Signed*)

Judge Thomas Laker

Dated this 28th of June 2013

Entered in the Register on this 28th of June 2013

(Signed)

René M. Vargas M., Registrar, Geneva