



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/010

Judgment No.: UNDT/2014/001

Date: 13 January 2014

Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

IRYUMUGABO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Jerôme Blanchard, UNOG

Introduction

1. The Applicant was granted an appointment of Limited Duration (ALD) in October 2005 with the United Nations Operations in Burundi (ONUB). On 30 June 2009, he was transitioned to a fixed-term appointment at a G-5 level and performed the function of Facilities Management Assistant with the United Nations Integrated Office in Burundi (BINUB).

2. On 9 February 2012, he filed the current Application with the United Nations Dispute Tribunal (UNDT) in Nairobi to contest the decision, dated 3 November 2011, to separate him from service for owning a private company while employed as a United Nations staff member.

Facts

3. In July 2009, BINUB received a request for technical assistance from the Burundian Minister for Tourism for the preparation of an exposition which was to take place in Bujumbura from 14 to 23 August 2009. The BINUB Chief Engineer instructed the Applicant to assist the organizers of the event with technical advice in the field of construction.

4. On 25 July 2009, while providing assistance to the organizers of the event, the Applicant signed a contract on behalf of a company, Iryumugabo Production, with the Chief Executive Officer (CEO) of another company, Up Beat Marketing, for the construction of 83 stands for the exposition.

5. On 19 August 2009, the Applicant filed a complaint with the *Tribunal de Grande Instance of Bujumbura* on behalf of Iryumugabo Production against the CEO of Up Beat Marketing for non-payment of the amount agreed in the contract dated 25 July 2009.

6. On 6 October 2009, the Office of Human Rights and Justice of Bujumbura received a complaint from a relative of the CEO of Up Beat Marketing. It was alleged that the latter had been arrested and detained following a criminal complaint lodged by the Applicant.

7. On 14 October 2009, the Conduct and Discipline Officer, contacted by the BINUB Chief Civilian Personnel Officer (CCPO), requested that the BINUB Special Investigation Unit (SIU) investigate the matter.

8. On 20 October 2009, the Applicant was interviewed by SIU. The SIU Investigation Report stated that the Applicant had been the owner of Iryumugabo Production since 2003. He worked for his company at nights and on weekends and he entered into a service contract with Up Beat Marketing to build stands for the August 2009 exposition without authorization from the BINUB administration. The Applicant denied any conflict of interest in being directed by the BINUB Engineering section to act as a technical adviser for the exposition and later accepting a construction contract for the same event. Further verification confirmed that the Applicant did not use any construction material or employees from the BINUB Engineering section.

9. The matter was then referred to the Department of Field Support (DFS) on 6 April 2010 and then to the Office of Human Resources Management (OHRM) on 4 June 2010 for appropriate disciplinary action.

10. In a memorandum dated 20 October 2010, the Applicant was charged with misconduct for: (a) having engaged in outside activities by owning and running a company, Iryumugabo Production, without the prior approval of the Secretary-General; (b) on the basis of knowledge gained from his position as a staff member of the United Nations, arranging for his company, Iryumugabo Production, to enter into a remunerated contract with a third party for the construction of stands for an event for which he had been asked to provide assistance and advice on behalf of BINUB.

11. On 10 November 2010, the Applicant submitted his comments on the charges. He denied any conflict of interest resulting from the contract signed on behalf of Iryumugabo Production and his position as a BINUB staff member providing services in preparation for the same event.

12. Prior to the completion of the disciplinary process, the Applicant was separated from service on 31 March 2011 due to the downsizing of BINUB. The disciplinary proceeding was left pending. On 1 July 2011, the Applicant was re-appointed to BINUB and the disciplinary process resumed.

13. By letter dated 3 November 2011, the Applicant was informed that the Under-Secretary-General for Management (USG/DM) had decided to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The Applicant acknowledged receipt of the letter on 10 November 2011.

14. On 3 February 2012, the Applicant filed the current Application before the UNDT contesting the disciplinary measure imposed on him by the USG/DM. He submitted that: (a) there were insufficient grounds upon which to base the decision, (b) he was not aware of the relevant United Nations rules, for they were not properly notified to him by the Administration, and (c) the Administration knew that he was the owner of a company as a result of the information contained in his Personal History Profile (PHP). His plea to the Tribunal was to find the decision irregular and award him compensation.

15. On 23 March 2012, the Respondent filed a Reply in which he argued that the Applicant, who was engaged in unauthorized activities, failed to disclose a potential conflict of interest between his position as a staff member of the Organization and his position as the Chief Executive Officer (CEO) of his company, and arranged for his company to enter into a contract while he was performing his functions as a staff member. The Applicant's actions therefore amounted to a conflict of interest.

16. The Respondent also submitted that the sanction of separation from service with compensation and indemnity was proper and proportionate given the Applicant's misconduct and taking into account the mitigating and aggravating circumstances.

17. On 27 May 2013, the Tribunal issued Order No. 125 (NBI/2013) instructing the parties to provide a concise statement of agreed facts, areas of factual dispute and the remedies being sought by 17 June 2013. The parties were also asked to submit their views on the necessity of a hearing, list of witnesses and the submission of additional documents.

18. On 17 June 2013, the Respondent filed a submission detailing the unsuccessful efforts he had made to work with the Applicant on the agreed statement of facts he had drafted. Indeed, the Respondent sent several emails to the Applicant dated 3 June, 6 June and 11 June 2013. On 15 June 2013, the Applicant acknowledged receipt of the Respondent's emails and advised that he had been busy but would reply within thirty (30) days. The Applicant has not yet replied.

19. Having noted that the Applicant had not complied with the instructions set out in Order No. 125, the Tribunal deemed it necessary to hold a case management hearing so as to fairly and expeditiously dispose of the matter. On 3 September 2013, the Tribunal issued Order No. 196 (NBI/2013) scheduling a hearing on 2 October 2013.

20. Although the Order was sent to the Applicant, he did not respond to signify his intention to attend the case management hearing. The Tribunal subsequently cancelled the hearing.

21. As the Applicant did not comply with Order Nos. 125 and 196, the Tribunal decided to determine the matter on the available evidence on file. Though this is a disciplinary matter and article 16.2 of the Tribunal's Rules of Procedure enjoins the Tribunal to "normally" hold a hearing in disciplinary matters, this course of action could not be followed in view of the attitude of the Applicant in not responding to the

Tribunal's requests. In a criminal trial the absence of an accused would have led the trial court to hear the case *in absentia* subject to some exceptions and subject to a rehearing if the convicted person reappears and justifies his absence.

22. Article 16.2 states that a hearing shall "normally" be held. This is the all-important word of the section. There is no mandatory requirement to hold a hearing. However since the establishment of the new system of justice in 2009, the Tribunal has evolved a practice of holding hearings in disciplinary matters. This is justified by the fact that under the new rules relating to disciplinary matters coupled with the rules that obtain in the course of an investigation, an accused staff member does not have the right to confront witnesses and to cross examine them. The only right that such a staff member enjoys is to seek legal or other representation when charges have been filed against him/her and to submit a response. The Administration then processes all the materials including the staff member's response and reaches a conclusion. The only time when a staff member has an opportunity to confront witnesses, if he/she is lucky enough to have the witnesses available, is in the course of a hearing before the Tribunal.

23. It must be emphasized however that a hearing is only possible if a staff member is available and cooperates with the Tribunal. The Tribunal cannot put a case, even one involving a disciplinary sanction, indefinitely on hold. A staff member who seeks a remedy before the Tribunal in any matter is also under an obligation to comply with the Rules of Procedure and the directives of the Tribunal failing which the case may be summarily dismissed or determined otherwise. In the present matter in the light of the silence of the Applicant the case could have been summarily dismissed. However the Tribunal bore in mind that this is a case of a quasi-criminal nature and that the best and more just course is to give a judgment on the merits.

Considerations

24. In disciplinary cases, 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 offence.¹

Have the facts on which the sanction is based been established?

25. The Tribunal notes that during the investigation and in his comments on the charges, the Applicant admitted that since 2003 he was the owner of a private company named Iryumugabo Production, which provides construction services. He also admitted he continued to own this company and work for it during the evening and on weekends without the approval of the Secretary-General even after he was recruited as a United Nations staff member in 2005.

26. The Applicant admitted that he was requested by the Chief Engineer to supervise the BINUB work in the preparation and organization of the exposition.

27. The documentary evidence such as the contract, dated 25 July 2009, signed between the Applicant and the CEO of Up Beat Marketing for the construction of 83 stands and the complaint filed by the Applicant against Up Beat Marketing for non-payment of the fees agreed in the contract show that the Applicant entered into a contract related to an assignment he had been requested to perform as a United Nations staff member.

28. There is also on record an email from the BINUB Chief Engineer asking the Applicant for some clarification about the construction of the stands that he contracted for in view of the fact that he had been asked to provide only technical advice regarding the installations.

29. The Applicant also admitted during the investigation process that he had facilitated the construction of all the stands in a private capacity. His exact words

¹ *Haniya* 2010-UNAT-024; *Maslamani* 2010-UNAT-028; *Masri* 2010-UNAT-098

were: “*J’ai supervisé les travaux du BINUB et j’ai facilité la construction de tous les stands à titre privé*”.

30. The Applicant’s suppliers filed a complaint against him asserting that he approached them under the auspices of BINUB, a “trustworthy organization” (“*organization de confiance*”), to be provided with construction material for the event that he never paid for.

31. In view of the foregoing, the Tribunal concludes that the facts show that the Applicant was engaged in unauthorized outside activities and therefore a conflict of interest has been established.

Do the established facts qualify as misconduct?

32. When the Applicant was recruited in 2005 he had been the owner of a private construction company since 2003. The legal instruments applicable at the time of his recruitment and at the time he entered into the contract with Up Beat Marketing on 25 July 2009, were as follows:

33. Staff regulation 1.2(o)², which provides that:

Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General.

34. Section 3.1 of ST/AI/2000/13, which recalls that:

Under staff regulation 1.2(o), a staff member shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General. For the purposes of the present instruction, the expression “occupation” shall include the exercise of a profession, whether as an employee or an independent contractor.

² ST/SGB/2002/1

35. Section 3.2 of ST/AI/2000/13, which reads:

In accordance with staff regulation 1.2(p), approval of an outside occupation or employment shall be subject to all the following requirements:

(a) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant. In determining whether this requirement is met, special attention shall be paid to the need to ensure that the outside occupation or employment would not in any way interfere with the staff member's ability to perform all of his or her official duties, or call into question the impartiality and independence of the staff member as an international civil servant.

36. Staff regulation 1.2(m)³, which provides that:

Staff members shall not be actively associated with the management of, or hold a financial interest in, any profit-making, business or other concern, if it were possible for the staff member or the profit-making, business or other concern to benefit from such association or financial interest by reason of his or her position with the United Nations.

37. Staff rule 1.2(p)⁴, which reads:

A staff member who has occasion to deal in his or her official capacity with any matter involving a profit-making business or other concern, including a concern in which he or she holds a financial interest, directly or indirectly, shall disclose that interest to the Secretary-General and, except as otherwise authorized by the Secretary-General, either dispose of that financial interest or formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to the conflict of interest situation.

38. The nature and extent of the actions of the Applicant when he was engaged in the work of his private company clearly amounted to an outside activity as specified in staff regulation 1.2(o) and section 3.1 of the Administrative Instruction ST/AI/2000/13.

39. In regard to the contract he entered into with Up Beat Marketing while being a BINUB staff member, the Applicant stated during the investigation that he did not

³ ST/SGB/2009/7.

⁴ Ibid.

seek any approval from his supervisor because he did not see any conflict of interest when he signed the contract on behalf of his company for the construction stands since he did not construct the stands in his capacity as a BINUB staff member and did not use the BINUB name in performing the job. The BINUB CCPO confirmed that there was nothing in the Applicant's file to indicate that he requested authorization to engage in outside activities.

40. The Tribunal finds that the Applicant was aware of the organizers' needs in relation to the construction of the stands as a result of his position with the United Nations. The fact that the Applicant sought to obtain a remunerated contract for his company to undertake the construction of the stands rather than advise the organizers to seek an independent contractor demonstrates the existence of a real conflict of interest between his position as the CEO of a private company and his position as a staff member. Therefore, even though BINUB was not to be involved in the construction of the stands, the Applicant benefited from the association with his company by reason of his position with the United Nations. This is confirmed by the complaint lodged by the Applicant's suppliers against him after he approached them under the auspices of BINUB to be provided with construction material.

41. Staff members have the obligation to disclose any potential conflict of interest that may arise from a specific assignment with the Organization. In the present matter, while noting that the mere fact that the Applicant owned a company may not have led to a separation, the Tribunal is convinced that the Applicant, by failing to disclose a potential conflict of interest when he started to negotiate the construction of the stands and subsequently entered in a remunerated contract for his company, violated these provisions.

42. In light of the foregoing, the Tribunal concludes that the established facts legally amount to misconduct under the Organization's Staff Rules and Regulations and the administrative instruction applicable at the time. The argument of the Applicant that there were insufficient grounds upon which to base the decision is simply preposterous. The Respondent correctly analyzed the facts, the charges and

the response of the Applicant and came to a considered conclusion in both law and fact.

43. The Applicant contended that he had mentioned in his PHP that he owned a company and that this shows that the Secretary-General was aware of his outside activity and still did not request any information related to that fact. After carefully reviewing the Applicant's PHP, the Tribunal notes however that there is no reference to "Iryumugabo Production" in the document. In fact, in one of the job title boxes, the Applicant indicated that he was "*coordinateur des activités*" for the "*société de construction aménagement et décor*". The name of his supervisor was indicated as "*conseil d'administration*". He indicated that the reason for leaving that company was due to "*chômage technique*" ("redundancy").

44. In addition, the Applicant indicated in his PHP that he was "*coordinateur des activités*" of the company from "January 2002 to March 2005". Yet, in his pleadings he indicated he was the owner since 2003 and he signed a contract on behalf of his company in 2009. All these discrepancies in the dates show that the Applicant has been extremely economical with the truth.

45. Nowhere in the Applicant's PHP is it mentioned that he was the owner of a company from 2003 to 2009. Accordingly, the Administration could not have been put on notice that he owned a private company. Even on the assumption that the Organization was aware of such a fact this would not have operated as a waiver for the Applicant not to seek the prior approval of the Secretary-General before embarking on outside activities. An approval requires a formal procedure by the submission of a request and an authoritative confirmation, in response to a prior request. This was not so in the present matter.

46. The Applicant further contended that he was not aware of the United Nations rules, for they were not properly notified to him by the Administration. In criminal law it is an entrenched principle, though highly disputed and debatable now, that ignorance or mistake of the law is no defense to the perpetration of an offence.

Ignorance may be bliss in many circumstances but unfortunately for the Applicant ignorance of the relevant rules and regulations of the Organization, even if it were established, cannot shield him from sanction. Ignorance of rules and regulations in an employment relationship or even of the law is not a defense to non-compliance with the employment rules and regulations under which a person is recruited. In *Diagne et al.*⁵ the United Nations Appeals Tribunal (UNAT) held that “ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the staff rules”.

47. The Tribunal holds however that the Applicant was aware or deemed to be aware of the staff rules and regulations by the very fact of the letter of appointment that he signed where he acknowledged that he had become familiar with these rules and regulations. At any rate even if he was not fully aware of the rules and regulations that he had breached, as a prudent employee he should have sought advice or guidance instead of allowing himself to be guided solely by monetary gain. Accordingly, the Applicant’s alleged unfamiliarity with the United Nations rules and regulations does not provide a justification for his actions.

Was the sanction proportionate to the offence?

48. The Respondent stated that in determining the sanction to be imposed, the Secretary-General took into account an aggravating circumstance such as the effect that the Applicant’s wrongful conduct had on the reputation of the United Nations. According to the Respondent, when the Applicant entered into a contract with Up Beat Marketing, his conduct reflected adversely on the Organization, as shown by the complaint lodged by his suppliers who referred to the Applicant as “a BINUB employee”. They could have reasonably believed that the Applicant was acting in his capacity as a BINUB staff member and they provided him “without apprehension” (“*sans inquiétude*”) the materials that he required. Furthermore, the Tribunal notes that the Applicant did not pay for the materials, and the suppliers treated him as a

⁵ 2010-UNAT-067. See also *Austin* UNDT/2013/080.

criminal who was using his status as a staff member of BINUB to swindle them out of their goods.⁶ These are strong words from the suppliers and they are a strong indication that the Applicant discredited the image and the reputation of the Organization by his conduct.

49. When imposing the disciplinary measure, the Respondent took into account some mitigating circumstances such as the fact that Iryumugabo Production was allegedly created in 2003, prior to the Applicant's joining the Organization. The Applicant's functions were not related to the Organization's procurement processes and the Applicant's actions did not pervert any procurement process involving the Organization. Lastly, the Applicant was separated from service on 31 March 2011, effective 1 April 2011, and was re-appointed on 1 July 2011.

50. The Respondent added:

In light of the above, while the Applicant's conduct warranted a dismissal/separation without termination indemnity because it constituted a serious breach of the Applicant's obligations as a staff member, the Secretary-General decided to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and *with* termination indemnity, being the most lenient of the measures involving a staff member's separation from service.

51. The Tribunal takes the view that the sanction of separation from service with compensation in lieu of notice and with termination indemnity was proper and proportionate given the Applicant's misconduct.

52. The Tribunal concludes that the facts on which the sanction is based have been established, the established facts constitute misconduct and the sanction is proportionate to the offence.

Conclusion

53. In light of the foregoing, the Tribunal rejects the Application in its entirety.

⁶ "...nous le présumons escroc qui a usé de sa casquette du BINUB et de sa ruse pour s'accaparer nos biens".

(Signed)

Judge Vinod Boolell

Dated this 13th day of January 2014

Entered in the Register on this 13th day of January 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi