



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

KOZUL-WRIGHT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Susan Maddox, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Director of Economic Affairs at the D-2 level with the United Nations Conference on Trade and Development (“UNCTAD”) in Geneva, contests the Administration’s decision on 31 October 2017 to impose the disciplinary measure of a written censure and a loss of four steps in grade for failure to honour his private legal obligations.

Facts and procedural history

2. On 14 November 2012, the Secretary-General waived the Applicant’s immunity in the context of civil proceedings regarding a dispute between the Applicant and his spouse and a local real estate agency for an alleged non-payment of rent for an apartment in Geneva.

3. By judgment dated 15 October 2015, a court of the Republic and Canton of Geneva ordered the Applicant and his spouse to pay their former landlord the sum of CHF90,450 with five percent interest from 1 December 2012. This judgment was not appealed.

4. By letter dated 28 April 2016, the Permanent Mission of Switzerland advised the Organization that the Applicant had not honoured his obligation to pay according to the 15 October 2015 judgment and requested that the Applicant’s immunity be waived for the execution of the judgment.

5. On 9 May 2016, the Secretary-General waived the Applicant’s immunity with regard to the execution of the 15 October 2015 judgment.

6. On 14 October 2016, the Applicant filed an application before the Dispute Tribunal to contest the decision to waive his immunity.

7. By memorandum dated 14 March 2017, the United Nations Office at Geneva (“UNOG”) referred this matter to the acting Assistant Secretary-General for Human Resources Management for possible disciplinary action in accordance with ST/AI/2000/12 (Private legal obligations of staff members).

8. By memorandum dated 13 July 2017, OHRM requested the Applicant to provide his comments to the allegations that he failed to honour his private legal obligations relating to the payment of rent for an apartment in Geneva.

9. On 3 August 2017, the Applicant provided his comments stating that the management should respect the process before the Dispute Tribunal and that he would respond to the decision of the Swiss court once the Dispute Tribunal makes a ruling in this matter.

10. On 13 September 2017, the Dispute Tribunal dismissed the Applicant’s application challenging the decision to waive his diplomatic immunity with regard to the execution of the 15 October 2015 judgment (Judgment No. UNDT/2017/076).

11. By memorandum dated 11 September 2017 and delivered to the Applicant on 18 September 2017, OHRM sent the formal allegations of misconduct to the Applicant under ST/AI/371 (Revised disciplinary measures and procedures) and Chapter X of the Staff Rules. In particular, the Applicant was advised that if the allegations that he failed to comply with the terms of the 15 October 2015 judgment were established, his conduct would constitute a violation of staff rule 1.2(b) and sec. 2 of ST/AI/2000/12. For procedural fairness, the Applicant was requested to provide with any written statement or explanations in response to the allegations. He was also advised that he may seek the assistance of the Office of Staff Legal Assistance or any other counsel.

12. On 6 October 2017, the Applicant provided his comments to the formal allegations of misconduct. He argued that whether or not this matter constitutes a private legal matter remained under dispute and that the Administration should respect its own legal processes, including the right of appeal, before taking any action against him and his spouse on this matter.

13. By memorandum dated 31 October 2017, the Applicant was advised that the Under-Secretary-General for Management (“USG/DM”) concluded that the allegations against him were established by clear and convincing evidence and that his actions constituted a violation of staff rule 1.2(b) and sec. 2 of ST/AI/2000/12 and amounted to misconduct. He was further advised that there were no mitigating factors and there were the following aggravating factors: (a) his private legal obligations were in a substantial amount over CHF90,000 and had been outstanding over two years; and (b) his conduct had the potential to harm the reputation of the Organization in the eyes of persons or entities contemplating to rent accommodation to the United Nations employees.

14. Accordingly, upon the consideration of the nature of the Applicant’s actions, the past practice of the Organization in matters of comparable misconduct, as well as any applicable mitigating or aggravating factors, the USG/DM decided to impose on him the disciplinary sanction of a written censure and a loss of four steps in grade in accordance with staff rules 10.2(a)(i) and (ii).

15. On 30 January 2018, the application was filed with the Geneva Registry of the Dispute Tribunal, and the case was assigned to Judge Teresa Bravo under case number UNDT/GVA/2018/010.

16. On 29 June 2018, the Appeals Tribunal vacated the Dispute Tribunal's judgment No. UNDT/2017/076, which dismissed the application on the merits, on the ground that the Applicant's appeal of the decision to waive his diplomatic immunity should have been dismissed as not receivable since it was not an appealable administrative decision.

17. On 20 December 2019, the case was reassigned to the undersigned Judge. By Order No. 120 (GVA/2019) of the same day, the parties were instructed to express their views as to whether the case could be decided without an oral hearing.

18. By joint submission dated 10 January 2020, the parties agreed that the case could be adjudicated without an oral hearing.

19. On 29 January 2020 and 5 February 2020, respectively, the Respondent and the Applicant submitted the closing submissions.

Consideration

20. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537).

21. The Tribunal finds that the facts on which the disciplinary measure is based, namely, the Applicant's failure to comply with the 15 October 2015 judgment issued by a Swiss court, have been established by clear and convincing evidence and are not in dispute between the parties.

22. The sanction letter states that the established facts amount to misconduct as the Applicant's actions violated staff rule 1.2(b) and sec. 2 of ST/AI/2010/12 (Private legal obligations of staff members).

23. Staff rule 1.2(b) provides that "Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, *the obligation to honour orders of competent courts*" (emphasis added).

24. Section 2 of ST/AI/2010/12 reiterates staff rule 1.2(b) and provides that "the privileges and immunities of the United Nations are conferred in the interests of the Organization and *furnish no excuse to staff members who are covered by them for the non-performance of their private legal obligations*" (see sec 2.2) (emphasis added). Section 5.4 further provides that if a staff member does not take action to comply with private legal obligations within three months after receipt of the Organization's request to take prompt action to resolve such matter under sec. 5.3, disciplinary action may be initiated.

25. The Tribunal recalls that a staff member's obligation to honour his or her private legal obligations, including the obligation to honour orders of competent courts, under staff rule 1.2(b) and ST/AI/2010/12, is not dependent on whether or not a staff member has diplomatic immunity and such immunity has been waived by the Organization. To the contrary, sec. 2.2 of ST/AI/2010/12 provides that "the privileges and immunities of the United Nations are conferred in the interests of the Organization and furnish no excuse to staff members who are covered by them for the non-performance of their private legal obligations".

26. Accordingly, regardless of his appeal of the decision to waive his diplomatic immunity, the Applicant's failure to honour his private legal obligations under Swiss law violated staff rule 1.2(b) and ST/AI/2010/12 and thus the established facts amount to misconduct.

27. Having so said, the Tribunal must now assess whether the disciplinary measure applied was proportionate to the offence.

28. The principle of proportionality in a disciplinary matter is set forth in the staff rule 10.3(b), which provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”.

29. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless “the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” (*Portillo Moya* 2015-UNAT-523, paras. 19-21). The Appeals Tribunal held that the Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose (*Toukolon* 2014-UNAT-407, para. 31).

30. In the present case, as stated in the sanction letter, the Administration imposed a sanction of written censure and loss of four steps in grade based on the nature of the conduct, the past practice of the Organization in matters of comparable conduct as well as aggravating factors. The Administration stated that no mitigating factors exist in this case.

31. The Tribunal notes that the past practice of the Organization in cases involving the failure to honour private legal obligations¹ shows that more severe or comparable disciplinary measures have been imposed. In one case, deferment of eligibility for salary increment and written censure was imposed for a staff member who failed to

¹ United Nations Office of Human Resources, *Compendium of disciplinary measures, Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2018* (24 September 2019), <https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%2009-December%202018.pdf>.

comply with a judgment ordering the staff member to pay child support. In three cases, deferment of eligibility for consideration for promotion and written censure was imposed on a staff member for a failure to honour private legal obligations: in each case, the length of time the obligation had been outstanding, the amount of the obligation, and the time period over which the staff member was requested by the Organization to take appropriate action and the involvement of a national government, respectively, have been considered as aggravating factors. In addition, in four cases, demotion with deferment of eligibility for consideration for promotion was imposed on a staff member for a failure to honour private legal obligations: one staff member repeatedly failed to comply with the Organization's instructions regarding settlement of private legal obligations; another staff member failed to honour private legal obligations with respect to the payment of rental arrears and associated legal costs; and in the other two cases a staff member failed to comply with the Organization's instructions relating to previously sanctioned outstanding private legal obligations. Finally, in one case, a staff member was separated from service when he failed to honour his private legal obligations by entering into numerous car rental agreements and did not return the cars nor paid for them.

32. Further, in *Benamar* 2017-UNAT-797, the Appeals Tribunal upheld the disciplinary measure of a written censure, loss of three steps in grade, and deferment, for a period of three years, of eligibility for consideration for promotion, when a staff member failed to comply with a national court order.

33. Therefore, the disciplinary measure imposed in this case is clearly in line with the Organization's past practice and with the UNAT case law.

34. The Administration further found that there were the following aggravating factors: (a) his private legal obligations were in a substantial amount over CHF90,000 and had been outstanding over two years; and (b) his conduct had the potential to harm the reputation of the Organization in the eyes of persons or entities contemplating to rent accommodation to the United Nations employees.

35. The Tribunal does not find any fault with the above reasoning and finds that the Secretary-General reasonably exercised his discretion in finding the above aggravating factors.

36. The Administration states that no mitigating factors exist in this case, which the Applicant does not dispute explicitly. However, the Applicant seems to argue mitigating factors as follows: the fact that he immediately accepted his responsibilities under Swiss law after the Appeals Tribunal's ruling against him in his appeal of the decision to waive his diplomatic immunity shows he acted in good faith. The Tribunal is not persuaded by this argument since, as explained above, ST/AI/2010 makes it clear that the privileges and immunities granted to staff members do not provide any excuse for non-performance of private legal obligations.

37. Therefore, the Tribunal finds that the disciplinary measure imposed in this case was proportionate to the established misconduct.

38. Staff rule 10.3(a) sets forth a staff member's due process rights in the disciplinary process:

No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

39. The evidence shows that the Applicant was informed of the allegations against him and his right to seek legal assistance, he was given the opportunity to comment on the allegations against him, he provided comments on the allegations of misconduct, and he was informed of the reasons for a disciplinary measure imposed on him. The Tribunal also notes that the Applicant does not argue that his due process rights were violated.

40. Therefore, the Tribunal finds that the Applicant's due process rights were respected.

Conclusion

41. In light of the foregoing, the application is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 9th day of March 2020

Entered in the Register on this 9th day of March 2020

(Signed)

René M. Vargas M., Registrar, Geneva