



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Miryoung An, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant served at the United Nations Interim Security Force for Abyei (“UNISFA”) on a continuing appointment and was based in Abyei, Sudan.

Procedural History

2. The Applicant was separated from service of the United Nations for misconduct in violation of staff regulations 1.2(a) and (b), staff rules 1.2(e) and (f), and sections 1 and 3.2(a) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) on 20 December 2018 with compensation *in lieu* of notice but without termination indemnity.

3. The Applicant filed his application to challenge that decision on 14 March 2019 at the United Nations Dispute Tribunal sitting in Nairobi.

4. The Respondent filed his reply to the application on 16 April 2019.

5. The parties attended a case management discussion (“CMD”) before the Tribunal on 4 August 2020.

6. Oral hearings were held over two days in September 2020. Three witnesses testified for the Applicant.

Facts and Submissions

7. On 15 September 2016, following a complaint by the local Dinka Chief of sexual harassment and abuse by the Applicant, the Conduct and Discipline officer to whom this was assigned referred the matter to the Office of Internal Oversight Services (“OIOS”) for investigation. The Chief’s complaint was that a number of local women

who were employed by the Mission's Engineering section had been harassed and/or abused.

8. On 21 October 2016, an OIOS Investigator sought to interview the Chief but he declined on grounds that he did not have first hand information; he gave the investigator nine names and told her that he had instructed them to speak to her. These nine people were interviewed between 21-24 October 2016.

9. The Applicant was interviewed on 8 May 2017 and provided the Investigator further information by email on 9 and 11 May 2017.

10. OIOS issued its Report on 25 August 2017. It found that there were reasonable grounds to conclude that Applicant's behaviour fell short of the conduct expected of an international civil servant, and recommended that the United Nations Department for Field Support take appropriate action.

11. The matter was referred to the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") on 10 January 2018.

12. The Applicant was charged with sexual abuse and exploitation on 24 August 2018. He was invited to respond to those charges.

13. On 2 November 2018, the Applicant responded by denying all the charges. His response stated that he was being retaliated against by the local leader and the independently contracted cleaners for strictly implementing the Mission's policy for the procurement of services.

14. On 20 December 2018, the Applicant received notice that he was being separated from service of the Organization with compensation *in lieu* of notice, but without termination indemnity.

Considerations

15. In reviewing the Secretary-General's exercise of discretion in this matter, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

16. In *Mbaigolmem* 2018-UNAT-819, the United Nations Appeals Tribunal ("Appeals Tribunal/UNAT") explained that in a disciplinary case, what is required is consideration of 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. A *de novo* hearing into the findings on misconduct is not always necessary. It depends on the available evidence and the circumstances of the case.

17. It is the Respondent's case that the Applicant's actions constitute sexual exploitation as defined in sections 1 and 3.2 ST/SGB/2003/13, and that this conduct violated staff regulation 1.2 (a) and (b) and staff rule 1.2 (e) and (f) contrary to Chapter X of the Staff Rules.

18. The Applicant is alleged to have abused two cleaners; one was privately hired, and the other was on the Mission premises as an independent contractor.

19. Section 1 of ST/SGB/2003/13 defines sexual exploitation as,

[A]ny actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not

limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

20. Section 3.2 of the Bulletin further states:

3.2 In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:

(a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;

(b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence;

(c) Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;

(d) Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged;

(e) Where a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms;

(f) United Nations staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a particular responsibility to support and develop systems that maintain this environment.

21. The Tribunal allows the application for rescission of the decision to separate the Applicant.

22. In order to protect the Applicant and the Complainants, the Tribunal will refer to them in this Judgment as the Applicant, Complainant 1 and Complainant 2.

23. The Tribunal's decision to order rescission of the Respondent's decision is based on the following reasons:

- (a) OIOS' failure to follow proper investigation procedures.
- (b) Serious doubt as to the authenticity and accuracy of the Complainants' statements to the investigators.
- (c) Failure of OIOS to account for the accuracy of the translation of the statements attributed to the Complainants.
- (d) The surrounding circumstances of alleged disaffection with the Applicant's enforcement of procurement/recruitment policies relating to the employment of cleaners and payment only for work done.
- (e) The history of conflict between UNISFA staff and local tribal chiefs.
- (f) The circumstances surrounding the Chief's complaint and following up the said complaint with an instruction to encourage witnesses to supply statements.

24. At this juncture, the Tribunal wishes to point out that it would have been appropriate for the Respondent to call those persons whose complaints and testimony formed the basis of their decision to sanction the Applicant to testify and be cross-examined on their testimony. The Respondent took the position that there was "no need" for these witnesses to be heard, that their sworn statements were sufficient. This decision deprived the parties and the Tribunal of the opportunity to hear their account of the events as it transpired and clear up any inconsistencies. It also deprived the Applicant of the opportunity to test the evidence in cross-examination.

25. The Tribunal recalls the Respondent's submission on this point:

Hearing of witnesses in the context of an oral hearing is not required. As affirmed by the UNAT: "[t]he attendance of a witness can be dispensed with so long as the Tribunal is satisfied that the staff member accused of misconduct is given fair and legitimate opportunity to defend his position."¹ In Applicant, the UNAT referred to the former Administrative Tribunal's conclusion in *Hourani* that the right to cross-

¹ See *Majut* 2018-UNAT-862, at para. 74.

examination is not an absolute right “in certain exceptional circumstances, and so long as it is established to the Tribunal’s satisfaction that the Applicant was afforded fair and legitimate opportunities to defend his or her position”.² Similarly, in *Oh*, the UNDT held that the right to cross-examination is not an absolute right and “the requirements of due process rights will [have] been met in relation to witness statements if the witness statements have been provided to the staff member and the staff member has had an opportunity to comment on, and respond to, the statements.”³ In this case, full transcripts of testimony [Complainant 1] and [Complainant 2] were provided to the Applicant, along with a full investigation report. The Applicant had a full and fair opportunity to review the witness statements and submit responses to them, including comments and defenses.

26. The Tribunal agrees that in some cases, the attendance of witnesses “can be dispensed with” and that this can safely be done in cases where the Applicant’s due process rights have been met. The meeting of these due process rights obviously includes adequately addressing the inconsistencies, discrepancies and other deficiencies in the witness statements which were used to form the basis of the sanction. In this case, the Applicant bore the ultimate sanction without those inconsistencies and discrepancies (which he drew attention to) being adequately addressed.

27. The Tribunal notes that evidence which may be sufficient to justify a disciplinary charge may not stand up to scrutiny when tested at trial. Consequently, even though the Respondent claims to have clear and convincing evidence of actions amounting to misconduct, it is imperative that that evidence is capable of surviving the strictures of an oral hearing before the Tribunal.

28. In taking this position, the Tribunal is guided by the Appeals Tribunal’s finding in *Asghar*⁴

Disputes in relation to discipline require factual determinations of misconduct and review of sanctions of a consequential nature. [...] *Articles 17 and 18 of the UNDT Rules of Procedure envisage the calling, examination and cross-examination of witnesses under oath*

² See *Applicant* 2013-UNAT-302.

³ See *Oh* UNDT/2013/131, para. 47 (affirmed by *Oh* 2014-UNAT-480).

⁴ 2020-UNAT-982.

and the proper consideration and determination of the relevance and admissibility of any evidence led during an oral hearing. Article 25 of the UNDT Rules of Procedure requires the UNDT to issue its judgments in writing and to state the reasons, facts and law on which they are based. It is incumbent on the judge in his or her judgment to set out the nature and content of the evidence and to make appropriate factual and legal findings in relation to it. This involves an analysis of its admissibility, its probative value (cogency, sufficiency, reliability and credibility) and its relevance to the issues in dispute (*facta probanda*) and/or the facts relevant to the facts in issue (*facta probantia*) (emphasis added).

29. The Respondent also objected to the calling of the three witnesses on the Applicant's witness list on grounds of relevance and probative value. The Tribunal disagreed with the Respondent and allowed the Applicant to call them. The Tribunal finds that these witnesses gave relevant evidence, which evidence was of probative value to the inquiry in this case. They spoke to the context within which the complaints against the Applicant were made. The witnesses corroborated each other's testimony, and the Applicant's narrative of how the events transpired as they did.

30. These witnesses generally addressed the atmosphere in which UNISFA staff in Abyei functioned, including the reaction of the principal chiefs of the Dinka tribe to policy changes which they did not like. This raised issues to be considered in assessing the complaints of Complainants 1 and 2.

31. The Tribunal therefore accepts the Applicant's witnesses' evidence as relevant and admissible.

The Evidence

32. The witnesses for the Applicant were: Mr C, Mr H, and Mr L.

33. In disciplinary matters, the onus is on the Respondent to demonstrate that there was clear and convincing evidence of the misconduct that is alleged against the Applicant. The Respondent's task in this case is made difficult by the context which points to a history of conflict and lack of trust. In this context, the stories of the accusers is left without corroboration and has not been shown worthy of credibility by standing

up to cross examination.

34. In cases such as this where the Applicant would not only be losing his job but also his reputation and prospect of further employment, and where the Applicant has denied the allegations and brought evidence that is sufficiently cogent as to cast doubt on the veracity of the allegations, it is important that those whose evidence should be subjected to scrutiny based on this factual and historical context come before the Tribunal.

35. While both Complainants recorded sworn statements alleging sexual exploitation, there is also evidence that the Complainants may have had ulterior motives for making the complaints. The latter view is bolstered by the inconsistencies in the evidence which were identified by the Applicant in his submissions based on the interviews of the Complainants.

36. In addition to this, the Applicant's witnesses were consistent in their testimony that the Complainants' allegations were part of a larger conspiratorial scheme by the local leader against the Applicant. The Tribunal notes that this aspect of the Applicant's case was not rebutted by the Respondent; nor was it inquired into by the investigators. The Applicant claims that the leader in question had even confessed to this course of conduct. But since he did not hear the leader make this statement and neither was there direct testimony of this by the leader himself, this aspect of the evidence can only be treated as hearsay.

37. The Applicant's witnesses also gave evidence of the historical nature of tensions between the local leadership and the Mission; the witnesses told the Tribunal that there have been previous examples of the local leadership conspiring to challenge United Nations personnel and programs which do not directly and personally benefit them.

38. At the crux of the Applicant's defence is that his refusal to renew the cleaning company's contract and to pay them for work not done caused him to incur the wrath of the principals of the company and the local leader.

39. The Applicant takes issue with the OIOS investigators for failing to explore exculpatory evidence and for focusing solely on the Complainant's statements to them, without even seeking to have it corroborated. The Applicant submits that facts relied on by the Respondent were not established by clear and convincing evidence; that there were glaring contradictions in the Complainants' statements, which were neither clarified nor corroborated. The Applicant also contends that the OIOS investigator failed to appraise him of the charges against him before beginning an interview as part of investigations of the charges against him.

Assessment of the Evidence

Failure to authenticate statements of Complainants 1 and 2

40. Complainants 1 and 2 did not sign or indicate the veracity of their statements. This failure to authenticate the statements therefore creates doubt as to the veracity of the statements provided especially where they failed to identify the author of the statements or the truthfulness of the statements.

41. A witness whose evidence is being recorded in a language that is foreign to the investigator should be treated with an abundance of caution, so that the evidence in its final form can be reread to the witness and corrected if necessary or compared with oral evidence provided at trial.

42. In this case, it is in evidence that the Applicant and the Complainants did not speak the same language, could barely understand each other, and communicated using gestures.⁵ The Complainants and the investigators also did not speak the same language. The Tribunal therefore finds it curious that the investigators took no steps to authenticate the translation of the statements taken. This means that there is no official record of the accuracy of the translation and therefore some doubt as to whether the

⁵ Investigation Report, para. 19.

translation of the statements can be relied upon.⁶

43. Since Complainants 1 and 2 were not called to give evidence at the oral hearing, the discrepancies in their statements could neither be tested nor resolved. They could not be cross-examined by Counsel for the Applicant and their written statements could not be deemed consistent with their interviews or evidence at trial. Consequently, the Tribunal is left with no other evidence than that provided in written statements by the Complainants 1 and 2 or other supporting witnesses. The Tribunal opines that this approach to a contentious trial is not fair to the Applicant.

44. The Tribunal cannot therefore, without more, find the statements of the two Complainants to be reliable.

The surrounding circumstances of alleged disaffection with the Applicant's enforcement of new policies relating to employment of cleaners and payment only for work done.

45. The Applicant's witnesses testified to the disaffection between the Abyei community and officials of the Mission - in one case forcing the removal/ reassignment of at least one UNISFA official and the review of policies - to make them more favourable to the needs of the rival communities in the Abyei area.

46. The Applicant found himself in a situation where his application of the Mission's policy for the procurement of services incurred the wrath of those whose services could no longer be retained, and the village chief. This situation leads the Tribunal to conclude that some persons with influence in the community had reason to invent charges against the Applicant.

⁶ See *Diabagate* 2104-UNAT-403 where the Appeals Tribunal held: The investigative interview of V01 was conducted in Swahili and subsequently transcribed into an English-language statement. V01 was not placed under oath before giving her interview and she did not sign the transcribed version of her interview statement. As such, V01's transcribed statement, in which she said that Mr. Diabagate had raped her and engaged in sex with her, was neither reliable nor trustworthy; it was solely hearsay and insufficient, by itself, to prove the charge that Mr. Diabagate engaged in sexual activity with a minor. Similarly, the other written documents were replete with hearsay and multiple hearsay and were neither trustworthy nor sufficient to prove that Mr. Diabagate had sex with a minor (V01).

47. When this evidence is juxtaposed with that of the failure to authenticate the Complainants' original statements, the non-authentication of the translation and the Respondent's decision to not make them available for oral testimony and cross-examination, the Tribunal is left with such substantial doubt as to the integrity and veracity of the complaints as to find that the Applicant was sanctioned on the basis of evidence that was neither clear nor convincing.

The history of conflict between mission officials and local leaders

48. Part of the evidence of one of the witnesses for the Applicant was that the local chiefs had a history of conflict with the UNISFA staff having held demonstrations and caused confrontations over various issues arising over the years. This evidence is related to that of the general atmosphere created by the importance of the UNISFA employment to the local community. The evidence also opens the door to the issue of powerful persons being able to manipulate situations relating to disaffection with employment policies at the UNISFA camp.

49. It would be recalled that the complaint against the Applicant first came from a local leader/chief and that the said chief directed the Complainants to make the complaints. While a similar approach could be taken in a case where the evidence of the allegations is true, the fact is that such evidence appearing in the existing circumstances should be supported by all of the reasonable efforts to authenticate and bolster credibility. In this case, the Respondent appeared to make little effort to provide such verification and authentication. As noted by the Tribunal elsewhere in this Judgment, the Respondent's position that the Complainants' sworn statements are sufficient for purposes of these proceedings despite the discrepancies and procedural deficiencies identified by the Applicant has made it impossible for him to meet his burden to establish that "the truth of the facts asserted is highly probable."⁷

50. It is agreed between the parties that the UNISFA employment was of great

⁷ See *Nyambuza* 2013-UNAT-364. "When termination is a possible sanction, the "misconduct must be established by clear and convincing evidence," which "means that the truth of the facts asserted is highly probable"."

importance in the Abyei community. The Applicant was responsible for employment of some of the Cleaners and enforcing employment related policies. He had changed certain policies which caused some objection from the independent contractor cleaners.

51. The evidence of the Respondent also revealed instances of favouritism on the part of the Applicant. While the Applicant may deny any favouritism, it is open to the Tribunal to find that such favouritism could have been a cause for retaliation which cross-examination could have addressed.

Clear and convincing evidence

52. The analysis provided of the evidence above sets the stage for a further assessment of the concept of “clear and convincing evidence.”

53. The Tribunal must embark upon an exercise in weighing the evidence provided to determine whether the evidence against the Applicant is clear and convincing.

54. In *Negussie* 2020-UNAT-1033, the Appeals Tribunal opined as follows:

What is the nature of “clear and convincing” evidence? Clear and convincing evidence of misconduct, including as here, serious misconduct, imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

55. Firstly, the submission that the Applicant was the subject of a previous similar allegation which caused his transfer from another duty station while prejudicial cannot be probative of any of the allegations made against him.

56. It is established that the standard of “clear and convincing” evidence does not rise to that of evidence beyond reasonable doubt but is higher than that of evidence of probability. The jurisprudence consistently states this to mean that the truth of the facts

asserted must be “highly probable”.

57. It is therefore necessary to examine the evidence of Complainants 1 and 2 against the Applicant.

58. The Tribunal notes that Complainant 1’s allegation of requests to come to the Applicant’s room and to provide him with water, coupled with an offer to provide employment if sexual favours are provided would be strong evidence of harassment and sexual abuse.

59. The strength of Complainant 1’s evidence is therefore to be determined having been weighed against the evidence of surrounding circumstances and the totality of the record. I have already outlined those circumstances.

60. Complainant 2’s evidence involves similar circumstances of opportunity being created to place the Complainant in a position where the vulnerability of her employment was juxtaposed against the opportunities offered if the Complainant complied with requests for sexual favours. Again, while the situation may appear to be typical of those clearly displaying instances of sexual harassment or abuse, the circumstances of the complaint must be considered.

61. It is this Tribunal’s finding that the although the Complainants made their statements under oath, neither the statements nor the translations from Dinka to English were signed by the Complainants; the statements were also devoid of any averments by the Complainants as to the truthfulness of its contents.

62. The Tribunal finds that both Complainants’ allegations and statements contained contradictory timelines, and that these contradictions were not resolved despite being pointed out to them by the investigators.

63. The Applicant has consistently said that the Complainants were making good on their threats to retaliate, and to “show” him that he will suffer the consequences of not paying them for work not done and continuing to hire them as cleaners.

64. This aspect of the case appears to have drawn scant attention by the investigators.

65. Following the investigation, sections 8.1 and 8.2 of ST/AI/2017/1 (Unsatisfactory Conduct, Investigations and the Disciplinary Process) required the ASG/OHRM to determine whether to subject the staff member to a disciplinary process, institute managerial action or close the matter. This determination should properly be based on the ASG's assessment of the Report and the evidence upon which it was based.

66. In *Oummih*⁸, the Appeals Tribunal held

The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations.

67. The Tribunal finds that in assessing the Report and determining the sanction in this case, the ASG/OHRM, like the investigators, seems to have paid no attention to the myriad discrepancies and inconsistencies in the Complainants' statements, nor to the Applicant's response to the allegations.

Damages

68. It is self-evident that any person having to face the kinds of allegations levelled at the Applicant and the disciplinary measure of dismissal would suffer serious damage to his/her reputation, loss of employment and prospect of future employment and deprivation of the personal enjoyment and feeling of fulfilment that would be experienced by an individual working for an organisation such as the United Nations or any of the associated agencies. In light of this, the Tribunal holds that the Applicant should be compensated in a manner commensurate with the nature of the damage suffered.

⁸ 2015-UNAT-518.

Conclusion

69. In the circumstances the Tribunal orders rescission of the decision dismissing the Applicant from service with the Organization and further orders that failing reinstatement, the Applicant should be compensated *in lieu* of rescission with two years' net base salary.

(Signed)

Judge Francis Belle

Dated this 8th day of December 2020

Entered in the Register on this 8th day of December 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi