



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SALEM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Esther Shamash, UNDP

Introduction

1. On 17 October 2019, the Applicant, a former Programme Analyst, at the G-7 level, working with the United Nations Development Programme (“UNDP”) in Djibouti, filed an application before the Dispute Tribunal.¹ He contests a disciplinary measure of separation from service with compensation in lieu of notice and with two months’ termination indemnity.²

2. The Respondent filed a reply on 7 November 2019.

3. The Tribunal held a hearing on the merits of the case on 30 and 31 August 2021 where, on the Applicant’s request, it heard the Applicant and two eyewitnesses to the event. The third requested eyewitness, who left the Organization, could not be located.

Facts

4. In his capacity as a Programme Officer, the Applicant served both the UNDP and the United Nations Department of Safety and Security (“UNDSS”) Djibouti. Both UNDP and UNDSS share premises. Among others, the Applicant handled matters relating to networking, cabling and internet related matters.³

5. On 20 March 2016, Mouktar Ahmed Elmi, a staff of UNDSS, sent an email to the Applicant seeking assistance to fix his internet problem.⁴ Mr. Elmi never received a response from the Applicant.⁵ Later in the afternoon of the same day, Mr. Elmi saw the Applicant walking to his office and decided to follow him there to ask about fixing the internet connectivity problem.⁶

6. While in the Applicant’s office, Mr. Elmi demanded that his internet

¹ Application, section II.

² Application, annex 1.

³ Applicant’s witness statement.

⁴ Applicant’s witness statement and Mr. Elmi’s witness statement.

⁵ Ibid.

⁶ Ibid.

connectivity problem be fixed immediately. The Applicant replied that he would fix it, but he had to first respond to the email which Mr. Elmi had sent him earlier. The discussion between the two degenerated into a heated verbal exchange, with Mr. Elmi gravely insulting the Applicant and his parents. The Applicant's office mate, Mr. Artan Said, intervened, calmed the situation down and had Mr. Elmi leave the office.⁷

7. After a while, the Applicant descended on the stairs to the Operations Room. He met Mr. Elmi in the hallway and the verbal altercation continued.⁸ The Applicant followed Mr. Elmi into the Operations Room, called upon him to step outside, and when Elmi did not comply, the two involved in a physical confrontation. The Applicant hit, or slapped, Mr. Elmi and Mr. Elmi returned the blows with his hands. Mr. Gamil Abdo (Radio Operator, UNDP-Djibouti) and Mr. Mohamed Mahyoub (Programme Officer, UNDP-Djibouti) who were in the office at the time confirm that the Applicant hit Mr. Elmi and, thereafter, the two involved in a scuffle and hit each other.⁹ They intervened to separate the Applicant and Mr. Elmi. Mr. Said joined later and helped separate the two men who were fighting.¹⁰

8. After the altercation, upon an order from the supervisor, Mr. Jean-Luc Massart, the Security Advisor, UNDSS, Mr. Elmi was taken to the hospital by Mr. Abdo, where he obtained a medical certificate stating that his wounds were compatible with hits of fists and recommending 21 days of sick leave.¹¹ The certificate, in all probability is not authentic.¹² The Respondent confirms that Mr. Elmi did not request a sick leave.

9. Some days after the altercation, Mr. Hassan Ali, a Programme Manager, UNDP, and the Officer-in-Charge of the Office when the incident occurred, assisted by Mr. Massart, initiated a reconciliation meeting between the Applicant and Mr. Elmi.

⁷ Reply, annex 6 (statement of Mr. Said in the investigation).

⁸ Statements of Mr. Mahyoub and Abdo in the investigation; testimony of the Applicant on 31 August 2021.

⁹ Application, annex 4, para 22 22 (statement of Mr. Mayoub in the investigation) and Application, annex 5, para 21 (statement of Mr. Abdo in the investigation); testimonies of Mr. Mayoub and Mr. Abdo on 31 August 2021.

¹⁰ Application, annex 4 and Annex 5; Reply, annex 10, para.4.

¹¹ Application, annex 7; testimony of Mr. Abdo on 30 August 2021.

¹² Application, annex 9.

The Applicant and Mr. Elmi reconciled and agreed to settle the matter amicably.¹³
There was a harmonious relationship among the participants to the incident thereafter.¹⁴

Investigation and disciplinary process

10. On the next day, 21 March 2016, Mr. Massart reported to the Office of Audit and Investigations (“OAI”) of the serious altercation between the Applicant and Mr. Elmi.¹⁵

11. Following receipt of the allegations, OAI conducted a preliminary assessment. A formal investigation into the matter was conducted from January to August 2017.¹⁶ On 27 June 2017, the Applicant received notification from the OAI informing him that an investigation had been commenced against him on allegations of assault and threat. OAI, accordingly invited the Applicant for an interview on 4 August 2017.¹⁷ The interview took place as had been scheduled and the Applicant admitted having hit Mr. Elmi but maintained that he had done it in self-defence.¹⁸

12. On 1 November 2017, the OAI provided a draft investigation report to the Applicant and requested him to provide his comments by 15 November 2017. On 12 November 2017, instead of providing comments on the investigation report, the Applicant submitted a copy of his interview statement.¹⁹

13. On 14 November 2017, the OAI submitted its investigation report to the Legal Office, Bureau for Management Services, for its review and consideration of disciplinary or administrative proceedings. In the report, OAI concluded that the allegations against the Applicant were substantiated.²⁰

¹³ Mr. Hassan Ali statement; Applicant’s statement and Mr. Elmi’s statement in the investigation.

¹⁴ Mr. Mahyoub and Mr. Abdo testimony on 30 August 2021.

¹⁵ Reply, annex 2.

¹⁶ Reply, annex 1, para. 5.

¹⁷ Ibid, para. 9.

¹⁸ Ibid, para 16.

¹⁹ Reply, annex 5.

²⁰ Reply, annex 1, para 30.

14. On 18 March 2019, Ms. Susan McDade, Assistant Administrator and Director, Bureau for Management Services, UNDP, notified the Applicant of the formal allegations of misconduct against him and invited him to submit a response to the charges and submit exculpatory evidence.²¹ The Applicant provided his comments on 15 May 2019.²²

15. On 16 August 2019, Mr. Mourad Wahba, Acting Associate Administrator, UNDP, decided to impose on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and to grant him two months of termination indemnity in accordance with staff rule 10.1(a)(viii).²³ The Applicant was separated from the service of the Organization on 20 August 2019.²⁴

16. At a certain point, Mr. Massart, the Security Advisor, UNDSS, had removed the Closed-Circuit Television Video (“CCTV”) recording from the stairwell where part of the altercation is alleged to have taken place, and it could not be retrieved. Mr. Massart was not available for the investigation having been disciplined for an unrelated conduct and separated from the Organization in 2017.²⁵

17. As concerns Mr. Elmi, he was disciplined for verbal assault and sanctioned with a censure. He was also investigated for fraud regarding the medical certificate, but the case was not pursued because of difficulties in contacting the physician.²⁶ Mr. Elmi remained in service until December 2020 when his post was abolished.²⁷

²¹ Reply, annex 9.

²² Reply, annex 10.

²³ Application, Annex 1.

²⁴ Ibid.

²⁵ *Massart* UNDT/2020/028.

²⁶ Statement of the Counsel for the Respondent at case management conference on 25 May 2021 and during the hearing on 31 August 2021.

²⁷ Testimony of Mr. Abdo, 30 August 2021, uncontested.

Submissions

Applicant's submissions

18. The Applicant impugns the sanctioning decision based on a five-pronged argument: the UNDP did not consider the reconciliation; unavailability of Mr. Massart's testimony; removal of surveillance videos; tainted testimony of Mr. Abdo and falsification of the medical certificate by Mr. Elmi. UNDP also did not properly consider mitigating factors in his case.

19. On the first argument, the Applicant submits that UNDP strongly encourages amicable settlement of disputes before taking formal legal route. In his case, a reconciliation committee was constituted, Mr. Elmi and himself agreed to settle the matter amicably, and so it happened. Yet, he was sanctioned three years later.

20. With regard to the unavailability of Mr. Massart's testimony, the Applicant believes that Mr. Massart should have been interviewed as the author of the incident report. The Applicant had repeatedly requested for production of any evidence provided by Mr. Massart to the investigators, but in vain.

21. On the third point, the Applicant contends that the recording containing exculpatory evidence, which was in possession of UNDSS, was deleted in order to benefit Mr. Elmi. The investigators' negligence in obtaining the video violated his due process rights. This was done deliberately, to incriminate him, as evidenced by the fact that the investigators also omitted in their report the testimony confirming that the CCTV system had been withheld by UNDSS.

22. Fourthly, the Applicant submits that to sanction him, UNDP relied on the testimony of Mr. Abdo who informed the investigators that he saw the Applicant slap Mr. Elmi. The Applicant explains that Mr. Elmi was the direct supervisor of Mr. Abdo and as such his evidence was tainted by the fact that he could not make an impartial statement against his supervisor.

23. The Applicant further maintains that the medical certificate produced by Mr. Elmi which states that Mr. Elmi underwent a “physical examination” which revealed “a scalp hematoma, trauma to the right eye, trauma to the left eye”, was a forgery. Dr. Abdi Waberi, the signatory of the certificate, never consulted Mr. Elmi or performed a “physical examination”. Investigators did not verify whether Mr. Elmi had indeed consulted Dr. Waberi. Whereas, the Applicant submits that he obtained information that on the date of the certificate, Dr. Waberi had not been present in Djibouti, moreover, on 8 April 2019, he obtained a written statement from Dr. Waberi stating that he had never consulted Mr. Elmi or produced the said medical certificate.

24. Finally, the Applicant contends that in imposing the disciplinary measure, UNDP did not take into consideration his long service to the Organization for over 19 consecutive years, where he maintained an impeccable work record and always maintained the highest level of integrity, both professionally and personally. Even when he became a subject of this investigation, he cooperated fully with the OAI in their investigation.

25. As remedies, the Applicant requests the Tribunal to:

- a. Consider that UNDP should respect its principles of internal justice and therefore, accept the prior use of informal means of settlement before resorting to formal legal action;
- b. Consider that this case has already been the subject of an amicable settlement to resolve any grievance within the UNDP office and a solution satisfactory to the parties has been reached;
- c. Recognize that wilful concealment of evidence, such as deliberately removing a video camera system, CCTV, and producing a forged document, such as a medical certificate, are violations of UNDP regulations; and
- d. Rescind the termination of his appointment by UNDP and order for his reinstatement.

Respondent's submissions

26. The Respondent's position is that there is clear and convincing evidence that the Applicant engaged in the misconduct. The available testimonies, which, in addition to the Applicant's own admissions, uncontestably reflect that the Applicant assaulted Mr. Elmi.

27. On the Applicant's argument that UNDP did not consider the reconciliation efforts, the Respondent submits that even if the Applicant and Mr. Elmi may have agreed to set aside their differences, it cannot be viewed as binding on the Organization and does not prevent the Organization from imposing any disciplinary measure.

28. Regarding unavailability of Mr. Massart's testimony, the Respondent explains that at the time of the investigation, Mr. Massart had left UNDP. In addition, Mr. Massart was not a witness to the assault by the Applicant that took place in the Operations Room.

29. With regard to the Applicant's averment that the investigators did not demand to review the surveillance videos, the Respondent admits that once sought, the recording proved to have been removed by Mr. Massart. The Respondent submits, nevertheless, that the Applicant admitted to OAI investigators during his interview, as well as in his response to the charge letter, that there were two stages to his exchanges with Mr. Elmi after the latter had left his office: in the stairwell area and then in the Operations Room. On his part, the Operations Room, where the relevant stage of altercation took place, was not covered by the referenced CCTV.²⁸

30. On the prong of falsification of a medical certificate, the Respondent contends that the Applicant's claims related thereto were addressed in both the charge letter and the contested decision whereby the Respondent reflected that "the authenticity of the medical certificate as the extent of Elmi's injuries does not alter the analysis, which

²⁸ Reply, para. 18.

shows, that despite knowing the rules, the Applicant chose to physically assault a UN staff member”.

31. The Respondent opines that the available evidence results in an irrefutable conclusion that the Applicant assaulted Mr. Elmi.²⁹

32. With regard to the sanction, the Respondent maintains that the fact of provocation by Mr. Elmi, the Applicant’s long record of service and his forthright admission were all taken into account as mitigating considerations. The Respondent points out that the Applicant was not dismissed without notice, nor was his contract terminated without termination indemnity – he was terminated with the maximum termination indemnity that he could have been given under Annex III (c) to the Staff Regulations. This is three degrees less than the harshest penalty allowed by the legal framework.

33. In conclusion, the Respondent maintains that the charge against the Applicant was proved by clear and convincing evidence, it amounts to misconduct, the sanction imposed was not disproportionate and the Applicant’s due process rights were at all times respected during the investigation and disciplinary processes. Accordingly, the application should be dismissed in its entirety.

Considerations

Scope of judicial review

34. The Appeals Tribunal has held that, in disciplinary matters, the Dispute Tribunal is not conducting a “merit-based review, but a judicial review”, explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.³⁰

²⁹ Ibid., para. 19.

³⁰ Ibid., para. 42.

Consistent with this doctrine, a review carried out by the UNDT in disciplinary cases encompasses the following elements:

- a. Whether facts were established by clear and convincing evidence;
- b. Whether the facts amount to misconduct;
- c. Whether the staff member's due process rights were guaranteed during the entire proceedings and;
- d. Whether the sanction is proportionate to the gravity of the offence.³¹

Whether the facts on which the sanction was based have been established on clear and convincing evidence

35. The Applicant has consistently admitted that he hit (or slapped) Mr. Elmi. In his testimony before the Tribunal he confirmed that all previous altercations had been verbal. The direct witnesses to the incident also testified that the Applicant, while in the radio room, hit Mr. Elmi and Mr. Elmi fired back and the two engaged in a scuffle. There are inconsistencies in the witness recollection of the incident - in the investigation both eyewitnesses, Mr. Abdo and Mr. Mahyoub, stated that before the scuffle they had heard raised voices coming from the corridor; in the hearing before the Tribunal they did not firmly recall it. These inconsistencies are understandably attributable to factors such as that at the time of the incident the witnesses had not been paying attention until the scuffle ensued and the lapse of at least nine months until they were interviewed in the investigation. However, the inconsistencies are not material. The witnesses never deviated from stating that they saw the Applicant follow Mr. Elmi into the room and hit him.

36. Evidence as to the extent of the altercation that took place in the hallway, prior to the Applicant's entry in the Operations Room, is not as clear, given the absence of neutral witnesses and the CCTV recording. The Applicant's statements in the

³¹ *Turkey* 2019-UNAT-955, para. 32; *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

investigation were wavering, including that he claimed that the physical scuffle had been initiated there by Mr. Elmi, after which he would have run away to the radio room. This, however, was not confirmed by him before the Tribunal, where he testified that that stage had only involved verbal dispute with Mr. Elmi. The Tribunal accepts this latter version as proven, based on the statements and testimony of Mr Mahyoub and the Applicant.

37. The Tribunal concludes that based on the Applicant's admission and testimonies of other witnesses during the OAI investigation and at the hearing, it is established by clear and convincing evidence that the Applicant physically assaulted Mr. Elmi on 20 March 2016.

Whether the established facts amount to misconduct

38. The Tribunal recalls that Staff Rule 1.2(g) prohibits, among others, threatening, intimidating or otherwise engaging in any conduct intended directly or indirectly, to interfere with ability of other staff members to discharge their official functions. It also prohibits threatening, retaliating or attempting to retaliate against such individuals or against staff members exercising their rights or duties.

39. Paragraph 25(c) of the UNDP Legal Framework expressly prohibits assault.³²

40. Pursuant to the jurisprudence of the Appeals Tribunal, physical assault amounts to misconduct.³³

41. The Applicant's self-defence argument is based on the established and undisputed fact that he had been provoked by a verbal insult. The Tribunal, while recognizing the gravity of insult suffered by the Applicant, does not accept that his actions constituted a necessary defence. The Applicant had an opportunity to calm down and reflect after Mr. Said had intervened in the initial verbal argument. Yet, he

³² UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct.

³³ See, for example, *Majut* 2018-UNAT-862; *Ouriques* 2017-UNAT-745; *Sall* 2018-UNAT-889.

chose to follow Mr. Elmi downstairs, engaged with him again, and then started a scuffle. His actions amount to retort, not a defence. As such, provocation does not exonerate the Applicant. As rightly stated in the charging letter, the Applicant's actions were furthering the conflict whereas he was under a duty to retreat. This conclusion remains valid even had indeed Mr. Elmi hit the Applicant in the hallway, which has not been proven.

42. In conclusion, the Tribunal finds that the Applicant's action violated Staff Rule 1.2 (g) and constituted workplace harassment, which is prohibited by Staff Rule 1.2(f) and amounts to misconduct.

Whether the staff member's due process rights were guaranteed during the entire proceeding

43. Guarantees of due process in disciplinary proceedings are not too elaborate. In accordance with staff rule 10.3(a) they concern mainly the right to be informed of the charges, the right to be heard, and the right to a formal defence:

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 allegations. The staff member shall also be informed of the right to seek assistance of the counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

44. The Appeals Tribunal held in *Applicant*³⁴, that "the key elements" of a subject's due process rights are met when "he was fully informed of the charges against him, the identity of his accusers and their testimony; as such he was able to mount a defence and to call into question the veracity of their statements".³⁵

45. In the present case, it is not contested that the Applicant was given an opportunity to comment on the allegations against him; nor is it contested that the

³⁴ *Applicant* 2013-UNAT-203, para. 39.

³⁵ *Ibid.*, para. 23.

Applicant was informed of his right to seek assistance of an attorney. Whereas the Applicant challenges appropriateness of the disciplinary measure because of the inability of the investigators to obtain the CCTV footage and the non-authenticity of Mr. Elmi's medical certificate, these concerns, albeit they reflect serious shortcomings of the investigation, do not undermine the relevant findings of fact, do not affect the qualification of the Applicant's acts as serious misconduct nor did they impede his right to a material defence. The Respondent, moreover, explains that the case did not amount to discriminatorily selective prosecution: the question of Mr. Massart's tampering with evidence had been rendered moot in light of his separation for another fraudulent practice; Mr. Elmi had also been disciplined for his part in the incident involving the Applicant.³⁶ All considered, the shortcomings of the investigation did not render the result unfair to the Applicant.

Whether the sanction proportionate to the gravity of the offence.

46. The principle of proportionality in a disciplinary matter is set out in staff rule 10.3(b) which stipulates that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

47. The Tribunal's review of proportionality of disciplinary measures is done with deference to the discretionary powers of the Secretary-General in this field.³⁷ The Tribunal reviews whether the measure in question is legal and remains in a rational connection with the gravity of the offence and the objective of disciplining.³⁸

48. The Tribunal recalls that it is a consistent jurisprudence of the Appeals Tribunal that physical aggression is not to be tolerated among United Nations personnel, no matter the degree of provocation on the part of the victim or personal circumstances of

³⁶ The Tribunal shares a distaste occasioned by the submission of an obviously fake medical certificate and expresses astonishment that it had been left to the Applicant to investigate this matter in order to clear himself from a suspicion of having caused serious bodily injury. Absent evidence to the contrary, it nevertheless accepts the Respondent's explanation that the evidence did not suffice to impugn Mr. Elmi's role in it.

³⁷ *Portillo Moya* 2015-UNAT-523, paras. 20-21.

³⁸ *Samandarov* 2018-UNAT-859, para. 21.

the attacker.³⁹ As a result, physical violence is not a case for progressive discipline in general. Such behaviour does not accord with the goals of the United Nations as enshrined in the Preamble to the Charter, namely the reaffirmation of the dignity and worth of the human person. It also goes against the objective of maintaining a safe and harmonious environment for United Nations staff.

49. The Tribunal finds that the Administration properly identified the mitigating circumstances.

50. The Tribunal further agrees with the Respondent that reconciliation between persons involved in the scuffle does not stop the Administration from imposing an appropriate disciplinary measure where the conduct is incompatible with the core values of the Organizations and the prevalent purpose of disciplining is general prevention. To the extent the Applicant brings up the temporal lag between the event and the imposition of the disciplinary measure, the Tribunal notes that the delay in the process benefited the Applicant in that he remained in service until its conclusion.

51. In view of the above, the Tribunal finds that the disciplinary measure imposed in this case was not disproportionate.

JUDGMENT

52. In light of the aforesaid, the application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 7th day of September 2021

³⁹ See for example *Majut, op. cit.*, at paras. 120-121; *Toukolon* 2014-UNAT-407 at para. 30; *Ouriques* 2017-UNAT-745 para. 20; *Ricks* UNDT/2018/090, at para. 85 (not appealed).

Entered in the Register on this 7th day of September 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi