



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/083

Order No.: 309 (NBI/2015)

Date: 1 October 2015

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ONIFADE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICANT'S MOTION
FOR PRODUCTION OF EVIDENCE**

Counsel for the Applicant:
Monika Bileris

Counsel for the Respondent:
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Mission in South Sudan (UNMISS). He challenges the decision dated 30 July 2014 made by the Under-Secretary-General for Management (USG/DM) on behalf of the Secretary-General to separate him from service following disciplinary action.

2. Pursuant to case management orders the parties submitted a joint statement of facts and issues. The Tribunal has reframed the issues in accordance with the jurisprudence on the standard of review on disciplinary matters to read as follows:

- a) Were the facts established by clear and convincing evidence;
- b) Did the established facts legally amount to misconduct under the staff regulations and rules;
- c) Was the disciplinary sanction proportionate to the offence;
- d) Was the applicant accorded due process and procedural fairness in the investigation.

3. At the Tribunal's request, the parties provided written submissions on the standard operating procedure (SOP) that governed the conduct of the disciplinary investigation and the application of those procedures in this case.

4. In his submissions, the Applicant also requested the Tribunal to make three orders requiring the production of additional evidence.

5. In light of the Tribunal's decisions on these requests the Respondent was not called on to respond.

Considerations

6. Article 18 of the UNDT Rules of Procedure requires the Tribunal to determine the admissibility of any evidence. In addition the Tribunal may order the production of evidence from either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

7. Article 18.5 states that the Dispute Tribunal may exclude evidence which it considers irrelevant, frivolous or lacking in probative value.

8. The Applicant's requests are to be assessed against the test of relevance to the issues in the case and the probative value of the requested evidence. In other words, would the evidence, if admitted, tend to prove or disprove an alleged fact or issue.

9. The first request is for the Tribunal to order the production of evidence from Mr. Michael Stefanovic, Director of Investigation, Investigation Division of the Office of Internal Oversight Services (ID/OIOS) where he requested both Chiefs of the Conduct and Discipline Team (CDT) and OIOS at UNMISS to separately launch an investigation into the Applicant's case.

10. This request is made by the Applicant in the context of his challenge to the operational independence of OIOS and an allegation "that the initiation of the investigation and the entire process, including the gathering of witness testimony, was unnecessary and born out of malice, ill will, and abuse of authority, and that the investigation and findings were tainted by prejudice".

11. The joint statement of facts states, in summary, that OIOS received a complaint of possible misconduct relating to actions by the Applicant and was referred by OIOS to the Department of Field Support (DFS) at United Nations Headquarters. DFS referred the matter to UNMISS and UNMISS CDT referred the matter to the UNMISS Special Investigations Unit (SIU) for investigation. The investigation report was concluded and the Special Representative of the Secretary-General (SRSG) of UNMISS sent the SIU investigation report and the CDT conclusions and recommendations to the Under-Secretary-General of DFS.

12. The Applicant specifically objected to the inclusion of two paragraphs in the joint statement of facts concerning statements allegedly made by him and another witness to the investigator but did not otherwise object to the account of the process.

13. The Tribunal finds that the requested additional evidence is *prima facie* relevant to the issue of the investigation process but has no useful probative value in light of the agreed account of the receipt of the complaint and its transmission by OIOS to DFS for investigation.

14. The second request is for the Tribunal to order the production of documentary evidence from Mr. Stefanovic that he received the SIU report from the “Chief of UNMISS” on ID Case no 0196/13[B] for approval as required by OIOS investigation manual, p 78.

15. This evidence is relevant to the issue of the investigation procedure. As its probative value is unclear the Tribunal will order its production, initially on an *ex parte* basis for the Tribunal to evaluate and make a final decision on its admissibility.

16. The third request before the Tribunal is “[t]o invoke Article 17.1 of the UNDT Rules of procedure calling on the expert opinions of (i) The Director of Investigation, OIOS regarding his knowledge regarding common sanctions on procedural failures on Mops and (ii) the Chiefs of MOVCON in DPKO Missions, including UNMISS regarding their knowledge on the admissibility of Non-UN MOPs not prepared by the traveler, the critical importance of the Endorser section, and other common errors on Non-UN MOPs”.

17. The Tribunal considers that the calling of expert or other evidence on the issue of the proportionality of sanctions is unnecessary in light of the information circulars on the practice of the Secretary-General in disciplinary matters and cases of criminal behaviour which have been produced during the period January 2000 to October 2014. The latest of these was ST/IC/2014/26. It includes a summary of cases in which the Secretary-General imposed disciplinary measures during the period from 1 July 2013 to 30 June 2014.

Orders

18. By 7 October 2015:

a. The Respondent is to file, *ex parte*, documentary evidence from Mr. Stefanovic that he received the SIU report from UNMISS on ID Case no 0196/13[B] for approval; and

b. The Applicant may file submissions on the proportionality of the disciplinary measure imposed on him the light of the information circulars referred to at paragraph 17 above.

(Signed)

Judge Coral Shaw

Dated this 1st day of October 2015

Entered in the Register on this 1st day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi