Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Seth Levine, OSLA

Counsel for respondent:
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Operation in Côte d'Ivoire (UNOCI). On 19 October 2010, he filed the current Application with the United Nations Dispute Tribunal (the Tribunal) to contest the decision of the Under-Secretary-General for the Department of Management (USG/DM) to summarily dismiss him from service for serious misconduct (the Contested Decision).

Procedural history

2. On 8 February 2011, the Applicant filed a motion for summary judgment, which was served on the Respondent on 10 February 2011. On 25 February 2011, the Respondent filed a motion for directions in response to the Applicant's motion for summary judgment. The Respondent's motion included brief submissions on the motion for summary judgment and a request that the Applicant's motion be rejected without the need for further submissions.

3. By Order No. 013 (NBI/2013) dated 17 January 2013, the Tribunal rejected the Applicant's motion for summary judgment on the basis that: (i) there was a dispute as to the material facts of the case; and (ii) summary judgment has no place in disciplinary cases due to the quasi-criminal nature of these matters.

4. Pursuant to art. 16.2 of the Rules of Procedure of the Dispute Tribunal, the Tribunal heard the case on 11 and 12 February 2013 during which time oral evidence was given by the Applicant and on behalf of the Respondent by Ms. SB, a former investigator for the Office of Internal Oversight Services (OIOS).

Facts

5. The Applicant entered into service with UNOCI on 22 June 2004 as an Engineer at the P-3 level. He was then appointed Head of the Electrical and Mechanical Unit of the Engineering Section. Subsequently, he was selected for a

temporary position at United Nations Headquarters in New York as an Engineer at the P-4 level in the Logistic Support Division, Department of Field Support (LSD/DFS). He served in this position until his separation from service on 3 August 2010.

6. Between 21 and 23 February 2007, the *Police criminelle d'Abidjan* in Côte d'Ivoire raided five local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of suspected procurers and a number of women suspected of being prostitutes. Among the women apprehended, four were from a bar called Bar Lido and were identified as VO1, VO2, VO3 and VO4 (Victims) who all claimed to have been trafficked and compelled to work as prostitutes.

7. On 5 March 2007, OIOS received a Code Cable, issued by the Special Representative of the Secretary-General (SRSG), UNOCI, reporting that three of the Victims claimed that UNOCI staff members were among their customers.

8. On 6 March 2007, OIOS initiated an investigation into the report made by the SRSG/UNOCI.

9. On 7 and 8 March 2007, OIOS gained access to the Victims who were at the time housed in an International Organization for Migration (IOM) shelter in Abidjan. IOM advised OIOS that due to the anguished state of the Victims they were to be repatriated to their country of origin at the earliest possible opportunity thus OIOS had a very limited time to conduct the interviews. The four Victims were interviewed separately and they stated that they had been approached by a woman in the Philippines and were offered employment as waitresses in a bar or restaurant in Paris, France, but ended up in Abidjan. The Victims stated that upon their arrival their passports were confiscated and they were taken to Bar Lido where they were housed and required to work as waitresses and prostitutes.

10. VO1, VO3 and VO4 stated to the investigators that they had been paid for sexual services by UNOCI staff. VO3 mentioned one SL whom she identified from a

photo array. She also mentioned another UNOCI staff member who had paid her for sexual services. According to VO3 the man was of half-Japanese and half-Korean ethnicity. The version of VO3 was corroborated by VO4. VO3 identified the half-Japanese and half-Korean individual as the Applicant from a photo spread.

11. On three occasions OIOS interviewed a police officer, AB, working in the Department dealing with human trafficking in Abidjan. AB told the investigators that the raids carried out in the bars were prompted by a report he received from Interpol in February 2007 alleging that women were being trafficked from the Philippines for the purpose of working as prostitutes in Bar Lido and other bars in Abidjan. On 21 and 22 February 2007 he raided five establishments with a view to identifying prostitutes and the owners of these establishments. He was not in a position to provide any evidence leading to the identification of any UNOCI members suspected of using the services of prostitutes.

12. OIOS interviewed the Applicant on 23 July 2007.

13. On the basis of the statements of VO3, VO4 and the Applicant, OIOS concluded in a report dated 15 July 2008 that the Applicant had paid for sexual services, including from VO3 and VO4. In this respect, OIOS concluded that the Applicant paid VO3 for sexual services at his residence on several occasions between

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Were the facts upon which the disciplinary measure based established and if so did the established facts legally amount to misconduct under the United Nations Regulations and Rules?

Applicant's submissions

20. The Applicant submits that the evidence falls short of establishing the acts of misconduct with which he was charged. He denies all the allegations, pointing out that the evidence used to substantiate the charges consisted of: (a) unsigned hearsay statements from OIOS investigators based on alleged interviews with anonymous individuals, and (b) an unsigned hearsay statement of OIOS investigators based on an interview with the Applicant, which he submitted was in substantial part fabricated. These hearsay statements lack any of the common indicia of reliability and are entirely deficient in terms of probative value. Any reasonable person, when presented with the evidence, would have to conclude that even the lowest of standards, that is a *prima facie* case, had not been met.

21. The "interview statements" referred to in the Impugned Decision are no more than unsigned records or summaries of interviews with alleged victims prepared by the OIOS investigators. The "interview statements" are therefore not firsthand accounts of the events they purport to describe; they are an account by the investigators of what was said to him or her by the alleged victims. By definition, a report made by one person of the statements of another person is hearsay evidence.

22. The Applicant asserts that he has not had an opportunity to examine or confront the alleged victims thus there is no means to determine whether or not the information provided by the sources was truthful and accurate. Cross-examining the investigators who compiled these "interview statements" can in no way replace the opportunity to cross-examine the persons who actually made the statements.

23. Given the myriad of deficiencies in the evidence identified above (anonymity, lack of any indication that the writings were adopted by

indicia of reliability to accord the records of interview any probative value and/or weight in judicial proceedings, it is clear that there was no credible basis on which to base the disciplinary sanction imposed. Admitting these statements or giving them any weight whatsoever would be wholly unfair. The Applicant urges the Tribunal to use its discretion to deny the admission of any such evidence in these proceedings, which consequently removes the legal basis of the Impugned Decision.

24. The photo spread from which the Applicant was identified should not be admitted in evidence. No weight whatsoever should be attached to these identifications as they are entirely unauthenticated and therefore without any indicia of reliability. There is no evidence whatsoever to even suggest that a proper procedure was followed.

Respondent's submissions

25. The evidence against the Applicant consists of: (a) the general circumstances of the closure of Bar Lido by local authorities on the grounds of illegal prostitution of Filipino women at the bar; (b) the fact that four of the Filipino women identified the Applicant as a customer of Bar Lido prostitutes; and (c) the statement made by the Applicant to the OIOS investigators in which he specifically stated that he used the services of women from Bar Lido.

26. In his interview, the Applicant stated that in December 2006 he went to Bar Lido with a friend and paid for two prostitutes from the establishment. The Applicant stated that he transported his friend and the two women to a local discotheque in the official United Nations vehicle assigned to him without authorization. The Applicant stated that he then transported one of the women to his apartment, where they watched a movie, consumed beverages and engaged in sexual intercourse. The Applicant stated that he gave the women from Bar Lido CFA 60,000-65,000 (approximately USD 120-130), but claimed that this payment was to show his "appreciation" after "having a good time", and was not specifically for sexual services.

27. The Applicant later sought to recant this statement on the basis that the OIOS investigators allegedly fabricated his statement. There is no indication on the record that the OIOS investigators would, in dir

30. As regards the probative value of the photo spread that was used by the investigators for the purposes of having the victims identify those who were paying them for sexual services, the Respondent submits that the fact that the women identified the Applicant may not be considered dispositive of whether the Applicant committed the conduct, but does raise an allegation that it was proper to put it to him. Furthermore the Applicant responded to this allegation and the Respondent submits that this provided sufficient evidence to proceed with his dismissal.

Considerations

31. In *Molari* 2011-UNAT-164, the United Nations Appeals Tribunal (UNAT) held that:

> When termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

32. In the case of *Masri* 2010-UNAT-098, UNAT held that in disciplinary matters "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" (emphasis added). This would require a scrutiny of the evidence and this Tribunal endorses the approach it took in the case of *Diakite* UNDT/2010/024:

> Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is sufficient to lead to the reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit the conclusion that the burden of proof has been met? The exercise involves a careful scrutiny of the facts, the nature of the charges, the defence put forward and the applicable rules and regulations.

38.

dimensional view of a live person. It is also a material factor whether the witness was previously familiar with the subject of the identification, i.e. whether he is "recognising" someone previously known or "identifying" a stranger. While the Chamber has not been prepared to disregard every identification made using a photo spread of one or more of the Accused in the present case, it has endeavoured to analyse all the circumstances as disclosed in the evidence, and potentially affecting such identifications, conscious of their limitations and potential unreliability, and has assessed the reliability of these identifications with considerable care and caution. Among the matters the Chamber regarded as being of particular relevance to this exercise was whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accuseccused fd t.2(i)-1(lity)ee02 Tc.2239

46. In the same case UNAT makes a distinction between the testimonies of witnesses who are not called but whose identities are known or made known to an accused staff member and the testimony of anonymous witnesses by holding:

> This decision is not inconsistent with *Liyanarachchige*, in which this Tribunal concluded that "a disciplinary measure may not be founded solely on anonymous statements". In the Applicant's case, the statements of the Complainants were neither anonymous nor the only evidence against the Applicant. The Complainants and other witnesses were named in the CRFs and in the signed interview statements they gave the Investigator, as well as in the investigation report and the ad hoc JDC report. Since the Applicant knew the identities of the Complainants and other witnesses, he was able to and did prepare a defence to each of the alleged incidents described by them.

47. It is clear that UNAT makes a distinction between two categories of witnesses, namely those whose identities are disclosed to an accused staff member and those whose identities are not disclosed. This Tribunal holds the view that such a distinction is not warranted because in both situations the witnesses are not available for confrontation by the staff member. This Tribunal considers that the requirements of due process rights will been met in relation to witness statements of both identified and unidentified witnesses if the witnesses statements have been provided to the staff

52. In the course of the interview, the Applicant answered a number of questions and admitted to having used the services of prostitutes. This admission must be viewed not in isolation but in the overall context of all the answers he gave during the interview.

53. The general rule is that an admission is only admissible in a criminal case if it has been made without any inducement, fear or pressure. An admission can also be oral or reduced to writing though an admission that has be

nature. The Tribunal is satisfied that the Applicant's statements, as noted down by Ms. SB in the interview, that "I am paying my appreciation. I was taking care of those poor ladies in a good way […] I was just trying to help them financially […] We drink in [the] bar, we go out, and then I show my appreciation after having a good time" show that he paid for services of the Victims. Even on the assumption that the confession of the Applicant cannot be relied on, the above statement standing alone is sufficient to constitute prohibited conduct irrespective of whether the Applicant actually had sexual intercourse with the Victims.

Additional comments

64. The Tribunal will open a parenthesis to point out that at the stage of the investigation by OIOS there is never any opportunity for a suspect staff member to confront witnesses as this is not permitted by the guidelines of the investigators. The former JDC, where a staff member could challenge a decision and where the Secretary-General could go for advice in disciplinary matters, has been abolished. Before the JDC it would have been possible to confront witnesses prior to a sanction being imposed.

65. Under the present system, following an investigation during which the staff member is bound to cooperate and has no opportunity to confront witnesses, a report is drawn up and the staff member is allowed to comment on it. Depending on the nature of the evidence, the matter may end up at the level of the chief supervisor of the staff member or be transmitted to OHRM in New York for action. Charges may then be drafted on the basis of the report and submitted to the staff member who is allowed an opportunity to respond on paper. A decision as to the guilt or otherwise of the staff member is then taken from all documentary records and evidence. The situation is such that a staff member may face the ultimate sanction of dismissal without having had an opportunity to confront witnesses or be heard by those who decide on his/her fate in New York.

Was the disciplinary measure imposed proportionate to the offence?

66. The disciplinary measure of summary dismissal was proportionate to the Applicant's misconduct, namely resorting to the services of women for sex, women who, as the undisputed evidence has demonstrated, were the victims of human trafficking.

67. In this connection the Tribunal recalls that the United Nations Convention against Transnational Organized Crime came into force on 29 September 2003. This Convention was supplemented by two Protocols, namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000, and the Protocol against the Smuggling of Migrants by Land, Sea, and Air, which came into force on 28 January 2004.

68. Art. 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. J 58n sh Esw[clraffickc33u16.015 matio16.eanttve (i)-1.ng or reimu(i)-1.ceppurp 1 d lac.1 of paym)8.the abuse

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Applicant's submissions

to paragraphs 5 and 6 of ST/AI/371. Up until such time, the staff member is not entitled to counsel and under former staff regulation 1.2(r) is required to "respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse."

79. There is no mention of a right to counsel to assist a staff member until after the matter is referred to the ASG/OHRM pursuant to paragraph 3 of ST/AI/371 and a decision is made on whether to pursue the case by the ASG/OHRM pursuant to paragraphs 5 and 6 of ST/AI/371. Accordingly, the Respondent submits that the due process rights asserted by the Applicant as existing in relation to the investigation undertaken by OIOS do not apply. There is no basis in the employment context to imply higher standards regarding due process rights than those clearly provided by the terms of the employment contract.

Considerations

80. Can the Tribunal rely on the statements of the Applicant taken in the interview given that the Applicant was not assisted by counsel during the interview?

Due process requirements vis-à-vis legal representation

81. One of the issues in this case is whether the Applicant had a right to legal representation when he was interviewed by the investigators. Sec. 49 of the OIOS Manual of Investigation Practices and Policies ("OIOS Manual") provides that an ID/OIOS investigation is not a disciplinary process but a "fact finding exercise." It further states that staff members "cannot refuse to answer and are not entitled to the assistance of counsel during the ID/OIOS fact finding exercise" and that failure to cooperate may be characterized by the Secretary-General as misconduct justifying disciplinary action.

82. At the time of the interview, the investigation was in its preliminary phase and was a fact gathering exercise as provided in ST/AI/371. UNAT has held that at this

the staff member must be made aware of the scope of the possible misconduct and be given an opportunity to explain why his/her action was proper and to present further evidence or witnesses. The Tribunal considers that these rights were respected in this case.

Due process requirements vis-à-vis absence of Applicant's signature on notes of interview containing admission

85. The Applicant is alleged to have admitted to the prohibited conduct. Sec. 54 of the OIOS Manual states that "[a] staff member who wishes to admit to a violation of a United Nations regulation, rule or administrative issuance may be asked to prepare and sign a statement".

86. The question arises whether in light of the admission recorded by Ms. SB the procedure laid down in the OIOS Manual on volunteering statements applies here. The answer, in the Tribunal's view, must be negative given the fact that Ms. SB explained that the interview of the Applicant was being done rather hastily and that she was taking contemporaneous notes of

emerged during the hearing the Tribunal is satisfied that the allegation of fabrication is unsubstantiated.

Admissibility and weight of Applicant's admission

> statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.[15]

92. After an examination of the circumstances of the recording of the admission, the Tribunal holds the Applicant was provided with a full evidentiary hearing before a court of law where he was legally represented, allowed to challenge the investigator, and put his own version. The lack of legal representation was therefore largely mitigated by the subsequent hearing so as to render the admission made during the interview inadmissible. Further supporting the admissibility of the admission is the fact that there is no evidence that it was not made voluntarily.

93. Having ruled that the Applicant's admission is admissible, the Tribunal must determine whether any weight should be placed on the admission. The Tribunal has analysed all the circumstances in which it was made and concludes the confession is true and that there is no compelling evidence or otherwise that would cast any doubt on its reliability. The Tribunal concludes that it can safely rely on it.

Conclusion

94. The application is rejected.

(Signed)

Judge Vinod Boolell
Dated this 29th day of October 2013

[15] See former Administrative Tribunal Judgment No. 494, *Rezene* (1990) and ILOAT Judgment No. 2601 (2007).

Entered in the Register on this 29th day of October 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi