



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/083

Judgment No.: UNDT/2015/101

Date: 29 October 2015

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ONIFADE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Monika Bileris

Counsel for the Respondent:

Susan Maddox, ALS/OHRM

Cristiano Papile, ALS/OHRM

Introduction

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Alliance” without her permission; (iii) she did not know why the Applicant had used the name “Peace Alliance”; and (iv) given her position as a police officer in

a.

(b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

43. The guidelines and instructions on the application of Chapter 10 of the Staff Rules are provided in paragraph 1 of ST/AI/371/Amend.1 (Revised disciplinary measures and procedures):

II. Investigation and fact-finding

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation. [...] Conduct for which disciplinary measures may be imposed includes, but is not limited to (those relevant to this case are):

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the Staff Rules and instructions implementing it;

(c) Misrepresentation, forgery or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;

(f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;

(g) Acts or behaviour that would discredit the United Nations.

44. The Staff Regulations and Rules that the administration alleges were breached in this case are:

a. Staff regulation 1.2(b):

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status".

b. Staff regulation 1.2(g):

Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

c. Former staff rule 1.2(h) from ST/SGB/2013/3:

Staff members shall not intentionally alter, destroy, falsify or misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization

45. General Assembly resolution 59/287 established that investigations into serious misconduct shall be conducted by professional investigators.

46. Chapter 1.2.1 of the OIOS Investigations Manual, dated March 2009, (the Manual) states that the role of OIOS is to assist the Secretary-General in fulfilling his or her internal oversight responsibilities in respect of resources and staff of the Organization. OIOS exercises operational independence under the authority of the Secretary-General

Assistant Secretary-General for Human Resources Management shall decide whether the matter should be pursued as a disciplinary case.

48. Paragraph 7.1.1 of the Manual states:

As the investigation function may be discharged through different offices and departments within the United Nations Secretariat (see Chapter 1), matters received by one unit may be referred, in whole

53. The form of the investigation report is prescribed as is its distribution⁸. Under this SOP, investigation reports are treated as confidential United Nations documents and must not be provided to subjects, witnesses and specified others except under special circumstances.

Was the Applicant accorded due process and procedural fairness in the investigation?

Applicant's submissions:

54. These may be grouped under two headings:

The investigation was ultra vires

55. The Chief of OIOS acted *ultra vires* on 8 July 2013 by requesting SIU to conduct an investigation after the Director of Investigations had already referred the matter to DFS on 5 June 2013.

56. UNMISS Chief of CDT acted *ultra vires* by improperly launching an investigation through SIU on 8 July 2013 on behalf of ID/OIOS. According to ST/AI/371 (Revised disciplinary measures and procedures) and ST/SGB/2011/1 (Staff rules and staff regulations of the United Nations), the SRSG was supposed to authorise and initiate the investigation.

57. SIU conducted an unauthorised new investigation on 10 October 2014

Considerations

Was the investigation *ultra vires*?

60. The OIOS referral of the investigation of the Applicant's alleged misconduct to the USG/DFS was in accordance with the procedures set out in the relevant instruments noted above.

61. Once OIOS completed its referral to DFS on 5 June it closed the case and left the matter to be investigated by the Mission.

62. CDT reports to and advises the Head of Mission, in this case the SRSG,

any breach of the Organization's regulations and rules and to cooperate with duly authorized audits and investigations. The rule further states that staff members shall not be retaliated against for complying with these duties.

67. There is no evidence to support the Applicant's allegation that the OIOS Chief called witnesses and met with the informers, however, if the OIOS Chief had made the enquiries as alleged this did not prejudice the preliminary investigation. In any event, a preliminary investigation is a safeguard against unfounded allegations proceeding to full investigation. It does not result in a final determination. In this case the report of misconduct was justifiably found to have been well founded and sufficient to require an investigation.

68. The Applicant submitted that the SIU Investigator was aware of his personal disclosure and showed prejudice. It is not surprising that the Investigator referred to the Applicant's disclosure as this was a vital piece of evidence that he needed to investigate. The Applicant, who bears the burden of proving his allegations, did not provide any other evidence or example of the investigator's alleged prejudice.

69. The Applicant also alleged that the SIU investigator did not disclose that the investigation might lead to findings of misconduct as required in the OIOS Manual. The Tribunal finds that he was told at the start of each of his interviews that he was being interviewed about possible misconduct.

70. Following the completion of the report, the Applicant was fully and fairly advised of the precise allegations of misconduct and given a full opportunity to comment on those before the final decision was made.

71. The Applicant alleged that the investigator interviewed witnesses who were publically against him and had no knowledge of the case but he neither elaborated on this allegation nor produced any evidence in support of it. The Tribunal finds that the SIU investigation was conducted in accordance with the SIU SOP and with the principles of due process by conducting and recording interviews with the Applicant and relevant witnesses.

72. The Applicant correctly states that the investigator did not report on the reasons proffered by him to explain his misconduct, such as his inexperience, poor living conditions and mental stress. However in his response to the allegations of misconduct the Applicant took the opportunity to set these matters out in detail. They were fully considered by the decision maker. The Tribunal concludes that the Applicant was not prejudiced by this information not appearing in the report.

73. The Applicant alleged that the Chief of UNMISS CDT prevented him from bringing up his claims of racial discrimination and disparaged his claims of mental and emotional stress in the report of the CDT. He failed to submit any evidence to support this allegation.

74. The Applicant's complaint that it took 16 months to conclude the investigation and disciplinary action is not factually correct. SIU started its formal investigation around 8 July 2013 and concluded its report on 10 August 2013. The

77. The Tribunal concludes that the investigation was carried out in accordance with the correct procedures and that the Applicant has not discharged his burden of proving that the procedure was biased against him.

Were the facts established by clear and convincing evidence?

Submissions

78. The Applicant submits that the impugned decision was based upon incomplete consideration of the facts, including the psychological and physical stresses suffered by the Applicant. His mental, emotional and medical state were seriously compromised at the time of the impugned conduct as a direct result of the extremely dissonant working relationship among staff, the stressful work and living environment, which contributed towards his having exercised poor judgment at the time. He was just four months on the job, adjusting to a racially charged, physically and psychologically challenging working environment which makes one prone to mistakes.

79. The Respondent submits that there is clear and convincing evidence that the facts on which the disciplinary measure was based were established.

Considerations

80.

Conclusion

83. The Tribunal finds that the material facts relied on by the decision maker (which did not include the hearsay evidence of statements allegedly made by the Applicant at the Town Hall meeting obtained by the Administration after the decision) were established by clear and convincing evidence.

Did the established facts legally amount to misconduct under the staff regulations and rules?

Submissions

84. The Applicant submits that his actions did not rise to the level of

87. In the decision letter of 30 July 2014, the USG/DM noted that while the measures for a staff member's failure to comply with the provisions of UNMISS Administrative Instruction No 005/2011 may be limited to administrative measures, the misconduct of the Applicant was not limited to a breach of this administrative instruction but was also in breach of staff regulations and a former staff rule.

88. The Tribunal finds that the facts established to a high degree of probability that the Applicant had breached staff regulation 1.2(g). He used his office as a P-5 State Coordinator to obtain a private, albeit non-financial, gain for himself – an

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Considerations

98. The available disciplinary measures in staff rule 10.2(a) for proven cases of misconduct range from written censure to loss in grade, deferment of salary increment or promotion, demotion, separation from service with or without notice and with or without termination indemnity; to the most severe measure of dismissal.

99. The penalty for contravening paragraph 1.2 of UNMISS Administrative Instruction No. 005/2011 is limited to administrative measures such as

Judgment

108. The Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 29th day of October 2015

Entered in the Register on this 29th day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi