

UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. By an application dated 12 December 2022, the Applicant is contesting the disciplinary measure imposed on him of separation from service with compensation *in lieu* of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii) .

2. The Respondent filed a reply on 10 January 2023 urging the Tribunal to reject the and dismiss the application in its entirety.

Facts

3. Between 22 June 2011 and 30 June 2014, the Applicant served with the United Nations Volunteer UNV at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo MONUSCO .¹

4. In September 2011, the Applicant s brother started working as a United Nations Secretariat staff member in the former United Nations Integrated Peacebuilding Office in the Central African Republic (BINUCA), now the United Nations Multidimensional Integrated Stabilizations Mission in the Central African Republic (MINUSCA).²

5. From 12 October 2015 to 14 May 2018, the Applicant was recruited and served at the P-3 level with MONUSCO as an Engineer. He was laterally transferred to the United Nations Support Mission in Libya UNSMIL on 15 May 2018, where he served until his separation on 28 November 2022.³

6. On 31 July 2017, the MONUSCO Conduct

investigations into allegations of misconduct regarding a possible misrepresentation

¹ Application, para. VII(1).

² Reply, para. III(8).

³ Application, para. VII(3); reply, para. 13.

violation of staff regulations 1.2(b) and staff rule 1.5(a) and decided to impose on him the contested decision.⁹

Submissions

The Applicant

11. The case is summarized below.

a. He is the biological half-brother of SRB. They have the same biological father but different biological mothers. SRB joined BINUCA in 2012.

b. The Applicant admits that he failed to disclose in his PHP that SRB was a relative for the 2015 and 2018 job openings he applied for.

c. The relevant issue for determination is whether mother and his biological father ever constituted a family in any substantial understanding of the term, and concurrently whether the Applicant and any of the other children of his father ever formed part of a nuclear or extended concept of a family.

considered a son or a brother. SRB is the son from a legally binding marriage between his father and his mother. As such he has enjoyed unquestioned legal and social recognition from birth. On the other hand, the Applicant is the child of an out-of-wedlock relationship between the biological father he shares with SRB and his mother who never married the father, or had anything resembling a marriage, whether *de facto* or *de jure*. The Applicant has never been issued with a birth certificate confirming his parentage. At the age of 16, he was

f. Until the promulgation of the Nepalese Civil Code (2018), the Applicant had no official status or recognition as a son of his putative biological father, and conversely SRB and the Applicant did not consider each other as brothers in the sense intended in the United Nations Staff Regulations and Rules which take a clearly western concept of the term. SRB confirmed to the investigators that he did not think of the Applicant as his brother and that he also had not included the Applicant as his brother in his own PHP. SRB also confirmed that he was unaware of the Applicant working with the United Nations until SIU investigators approached him to be interviewed.

g. Neither Nepalese society, nor the respective families, or Nepalese law considered them as brothers as generally understood in western terms. This conceptualization is key to the applicability of the intent of staff rule 4.7 which is meant to prevent nepotism within the Organization, and which specifies the kind of family members that are intended to be prevented from working for the Organization simultaneously.

h. Time demands prevented the Applicant from engaging cultural consultants to inform the Tribunal of expert advice. The Administration, however, was not hampered by time constraints but failed to reach out to cultural consultants to get expert advice on this matter. No attempt was made

to verify the veracity of the information provided by the Applicant and SRB as to the status of children born out of wedlock relationships.

i. The Applicant submits that he was not required to disclose SRB as a brother or half-brother on the basis that within the context of Nepal law and customary practice, there was an honestly held belief that SRB was not his brother. Judgment No.:

of the Applicant have also not had any contact whatsoever with the Applicant except during the funeral. None of them considered the Applicant their brother. Nepalese society did not consider the Applicant as brother to the five other children of his putative biological father.

l. Whilst family members are generally aware of the careers of their siblings, this was not the case of the Applicant and any of his biological half-brothers or half-sisters. In fact, the Applicant was not aware of the careers or employment of any of these people, not having had anything resembling a family relationship. There have been no meetings of the half-siblings over their entire lifetimes, except in the context of the 2010 funeral ceremony. This was 12 months before SRB was employed by the United Nations, and one year before the Applicant was engaged as a UNV.

m. The half-siblings did not engage in any communication during the time they were engaged by the United Nations, and the investigators have not uncovered any such exchanges.

n. During exchanges with United Nations investigators and officers from OHR, the Applicant was not assisted by legal counsel. This placed him in a highly prejudicial position vis-à-vis experienced legal officers of the Organization tasked with building a disciplinary case against him. Much of the exchanges seen were clearly intended to entrap him into extracting contradictions. The Applicant submits that OHR officers do not operate with a mandate to obtain a balanced and objective outcome but, on the contrary, seek to obtain basis for disciplinary action. Their enquiries were inquisitorial.

o. Regardless of whether the Applicant and SRB consider themselves as brothers under the United Nations Staff Regulations and Rules, the issue arises whether in fact the Staff Regulations and Rules provide or require the disclosure of half-siblings, and assuming that there is awareness of actual United Nations employment. There is no definition or clarification as to what

is meant to be a brother. This is the case both in the applicable Staff Regulations and Rules, or in the PHP form itself. When applicants seek to complete the United Nations PHP form dealing with family members to be disclosed, an automatic drop-down menu appears which, *inter alia*, includes

possible permutations of the term brother that are not found in other forms of family relationships. In the absence of a specific requirement in the drop-

the Applicant was not required to name SRB

p. This proposition is consistent with the provisions of staff rule 4.7(a) of then applicable ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations)

other possible format such as half-brother, or brother-in-law. If the legislator had intended to include half-brothers in the category under rule 4.7, then it should have done so with clarity, and not leave it to staff members to second guess its intentions in this respect.

q. The absence of a common set of parents brings uncertainty to the question. The Applicant would clearly be required to disclose either of his parents, and vice versa without need for a definition. One cannot be a half-father or mother, or a half-son or daughter; but one can certainly be a half-

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c. It is equally undisputed that when submitting both applications through Inspira, the Applicant certified the completeness and accurateness of both his 2015 and 2018 PHP forms and acknowledged that false or inaccurate information can lead to the termination of his appointment.

d. The fact that SRB commenced employment as a Secretariat staff member before the Applicant is also undisputed. Consequently, the

In his 2015 and 2018 PHP forms were objectively inaccurate, and the corresponding certification incorrect.

e. Where there is undisputed evidence that a staff member has responded

c. Throughout the investigation and the disciplinary process, the Applicant only referred to cultural reasons as to why he did not consider SRB as his relative, even though they are biological half-brothers. The issue of before the Tribunal. Consequently, this is the first instance that the Respondent has been afforded an opportunity to engage with the issue. Notwithstanding the fact that domestic legislation of individual Member towards the Organization, the Respondent notes that the Applicant has not provided any authority to substantiate his arguments about lack of legal time demands prevented him from engaging cultural consultants to inform the Court on this issue is misleading. Pursuant to staff rule 11.4(b), the Applicant had 90 days at his disposal to prepare and file a fully substantiated application. The Applicant chose to file the application, as is, within 14 days from the date of receipt of the Sanction Letter. Consequently, his lack of evidentiary support is the result of his own decision regarding when to file.

d. T promulgation of the Nepalese Civil Code (2018), [the Applicant] had no official status or recognition as a son of his putative published with royal seal on 20 May 1992, which provided in relevant part that c Applicant was not distinguished from any of his biological half-siblings.

e. The Applicant erroneously argues that staff rule 4.7(a) does not apply

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interpretation of the concept of brother, which the Applicant limits only to biological children who-

he wanted to, whether any of his biological half-siblings worked for the United Nations at the time that he was applying for two different positions, before certifying that none did.

k. T nited Nations identification handle, while serving in the United Nations bistra typically provided to distinguish staff members who share the same last name.

in the Secretariat. Even if the Applicant was unaware of SRB with the United Nations, before his 2015 recruitment, a look at his United

Allegations Memorandum. Despite being informed of his right to have legal representation, including by availing himself of the Office of Staff Legal OSLA free-of-charge services, the Applicant elected to proceed through the disciplinary process without being assisted by legal counsel. This does not constitute a due process violation.

b. The Applicant argues that the mandate of the Assistant Secretary-

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reassignment to evade a possible disciplinary process.

18. The sanction imposed by the Respondent was taken in compliance with applicable legal norms. was not unreasonable or disproportionate. The established facts constitute serious misconduct, and the sanction imposed was proportionate. Since the imposition of the disciplinary measure was lawful, its rescission and the reversal of its consequent effects are not warranted. The Respondent requests the Tribunal to reject the application in its entirety.

Considerations

19. In disciplinary cases, this Tribunal is called upon to examine the following: (i) whether the facts on which the disciplinary measure is based have been established (ii) whether the established facts amount to misconduct; (iii) whether the staff

proportionate to the offence. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. Where termination is the possible outcome such as in this case, the standard of proof of clear and convincing evidence meaning that the probability that the misconduct occurred is very high¹⁰. This is captured in *Turkey*, quoting *Mizyed* and others¹¹ that:

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is

¹⁰ *Suleiman* 2020-UNAT-1006, para. 10, also see *Nadasan* 2019-UNAT-918, para.38; *Siddiqi* 2019-UNAT-913, para. 28.

¹¹ *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164.

28. While the Applicant may want to raise his preferred belief that the law of Nepal should apply because he is Nepalese and so is his half-brother SRB, it would not be possible to call upon staff members of the United Nations to adhere to the rules of the Organization if they were permitted to argue that the law of their respective country of birth is different. The Tribunal is, therefore, persuaded that it is presumed that the applicable law in the cases before the Tribunal is the law of the United Nations. The law of the United Nations includes brother and half-brother as HP forms if they happen to be employed by the United Nations.

29. The Tribunal is not persuaded that, if one accepts that the Staff Regulations and Rules of the United Nations apply in these circumstances, that the term brother or half- brother would not apply to a person whose fathers are the same even though they may have different mothers.

Could there be doubt about the status of the Applicant's

31. This brings us back then to the difference between the subjective feelings about the status of the brothers rather than the reality that they may have been both employed by the United Nations at the same time. The United Nations was interested in knowing the latter.

Whether the brothers knew that they were both employed by the United Nations.

32. This issue is of some importance. The Tribunal is called upon to consider whether the evidence is sufficient to lead to the conclusion that the two half-brothers would have known that they were both employed by the United Nations. To determine this the Tribunal would have to consider whether the brothers had any opportunity to exchange the information about their whereabouts and where they worked during the operative period when they were both employed by the United Nations.

33. The facts show that the Applicant became a UNV and SRB became a United Nations employee. Firstly, it was made clear by the evidence that the brother/half-brothers had every opportunity to be in contact with each other and were actually in contact with each other when SRB got married. At the time that SRB got married they were both in contact with each other and would have had every opportunity to speak about the location of their employment and the fact that they were both employed by the United Nations.

34. It is possible also that parties could both have felt that there was no need to disclose the fact they were both employed by the United Nations. But again, the doubts that they had would not affect the requirement and indeed it would mean that they both could have asked for advice on the matter.

35. Neither brother has said that he sought advice and were either refused advice by senior staff or told that they did not have to disclose the presence of a relative as United Nations staff. The Tribunal can, therefore, comfortably conclude that no enquires were made by the brothers about their mutual status in the United Nations.

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Deliberate false statements, misrepresentations and a failure to disclose required information are invariably dishonest. And, importantly, the failure to reply correctly to a prominent and very relevant question in an application form amounts to a false answer from which dishonesty normally may be inferred. Hence, a false answer in an application form is *prima facie* proof of dishonesty, shifting the evidentiary burden to the maker of the false statement to adduce evidence of innocence.¹⁵

40. The imposed sanction is not disproportionate. The false declaration shows a lack of integrity, and disregard for the standards of conduct expected of an international civil servant by the Organization. It is, therefore, appropriate to treat the false declaration as a serious disciplinary breach which in turn requires a strict punishment from the Administration.

41.

The Applicant was given a fair opportunity to explain his action. He was told of his rights at the time of the investigation and was informed of the charge against him. He was given his right to respond to the charges against him and when the investigation had an adverse result, he was given an opportunity to file the application before the Tribunal.

The Regulatory Framework

42. Staff regulation 1.2 (b) stipulates that 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.

43. Staff r
and obligation to supply information .

(a) Staff members shall supply the Secretary-General with relevant information, as required, both during the application process and

¹⁵ 2022-UNAT-1301, para. 63.

on subsequent employment, for the purpose of determining their status under the Staff Regulations and Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.

44. In the latter context staff rule 4.7 states:

Family Relationships

An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

45. Finally, staff rule 10.1 states:

Misconduct.

(a). Failure by a staff member to comply with their obligation under the Charter of United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and imposition of disciplinary measures for misconduct.

Conclusion

46. In light of the facts emerging from the submissions of the parties and the applicable law, the Tribunal is unable to find a reason to deem the disciplinary measure imposed of dismissal unlawful. The dismissal was proportionate, fair and by no means irregular in the circumstances.

47. The Tribunal, therefore, decides to dismiss the application and no remedy is granted in the circumstances.

(Signed)

Judge Francis BelleJudge

Entered in the Register on this 14th day of August 2023

(Signed)

Eric Muli, Officer-in-Charge, Nairobi