



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

NZOKIRISHAKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Jerôme Blanchard, HRMS/UNOG

Introduction

1. The Applicant joined the United Nations Operations in Burundi (ONUB) on 01 October 2004 as a Security Clerk under an appointment of limited duration. Effective 01 January 2007, he held a fixed-term appointment as a Security Assistant with the United Nations Integrated Office in Burundi (BINUB).

2. On 18 January 2012, he filed the current Application before the United Nations Dispute Tribunal (UNDT) challenging the decision, taken on 14 October 2011, to separate him from service for misconduct.

Facts

3. By a letter dated 21 March 2008, the Burundian Ministry of Justice appointed the Applicant as a “*substitut du Procureur de la République*” (Deputy Prosecutor). This letter indicated that the Applicant would follow a “*stage probatoire*” (probationary training) under the authority of the Prosecutor’s Office.

4. On 16 January 2009, the Applicant was allegedly involved in a fight at a local bar in Bujumbura following which the manager of the bar was arrested and detained by the Burundian police on 23 January 2009 on charges of assault upon and obstruction of a Magistrate. The detention of the bar manager was then reported to the Office of Human Rights and Justice (OHR&J)¹. On 27 January 2009, the Applicant was invited to discuss the matter with OHR&J and the bar manager was subsequently released from detention on 28 January 2009.

5. Having noticed that the Applicant was a BINUB staff member, OHR&J reported the matter to the BINUB Conduct and Discipline Officer who requested that

¹ OHR&J of Bujumbura comes under the control of the Office of the High Commissioner for Human Rights (OHCHR). OHR&J is mandated to draft a report on the situation of Human Rights in Burundi. It records/registers complaints from individuals and human rights violations but has no legal standing before the national authorities. It appears from the Investigation Report and the OHR&J report on the incident that OHR&J acted informally as a mediator between the Applicant and the manager of the bar.

the BINUB Security Investigations Unit (SIU) investigate the Applicant's involvement.

6. The Applicant resigned from his position of Deputy Prosecutor by a letter dated 11 February 2009. This resignation was accepted by an Order dated 19 February 2009 from the Ministry of Justice referring to the Applicant as a Magistrate.

7. On 26 March 2009, the Applicant informed his direct supervisor at BINUB about his role in the Ministry of Justice stating that he was an intern there for one year. This information appeared in his 2008-2009 e-PAS.

8. On 9 April 2009, the BINUB SIU started to investigate the circumstances surrounding the incident that occurred on 16 January 2009 in the bar and released a report dated 7 July 2009, followed by a complementary report dated 30 September 2009. The report found that during the period 27 March 2008 to 19 February 2009, while employed at BINUB as a Security Assistant, the Applicant worked as a Deputy Prosecutor with the Ministry of Justice of Burundi for which he was paid an allowance.

9. On 12 May 2009, the Applicant filed a complaint against the Chief Security Advisor (CSA) with the BINUB Chief Mission Support (CMS), alleging continued harassment, victimization and abuse of authority.

10. By memorandum dated 1 December 2009, the Deputy Executive Representative of the Secretary-General in Burundi referred the matter to the Under-Secretary-General of Department of Field Support (USG/DFS) as it appeared to be a case of a staff member engaging in an outside activity.

11. By a memorandum dated 16 February 2010, DFS referred the case to the Office of Human Resources Management (OHRM) for appropriate disciplinary action against the Applicant.

12. By memorandum dated 13 January 2011, the Applicant was charged with misconduct for having worked as a Deputy Prosecutor in the Bujumbura Prosecutor's Office whilst at the same time being employed by the Organization without the prior approval of the Secretary-General.

13. On 5 February 2011, the Applicant submitted his comments on the charges filed against him.

14. By letter dated 14 October 2011, the Applicant was informed that his actions amounted to a violation of staff regulations 1.2(b), (f) and (o) and section 3.1 of ST/AI/2000/13 (Outside activities). He was separated from service with compensation in lieu of notice with termination indemnity. The Applicant acknowledged receipt of the letter on 27 October 2011. His separation was effective from 28 October 2011.

Procedural history

15. On 18 January 2012, the Applicant filed an Application challenging the decision to separate him from service. He denied any wrongdoing and stated the following in support of his defense: (i) he was an intern in the Ministry of Justice and this did not create any conflict of interest with his functions as a Security Assistant with BINUB; (ii) the provisions under which the contested decision was based were not in force at the time of the alleged misconduct; (iii) he was unaware of the rules and regulations regarding outside activities; (iv) these rules and regulations were not applicable to him because they had not been properly notified to him; (v) he always demonstrated the highest standards of efficiency, competence and integrity as evidenced by his Performance Appraisal; and (vi) staff rule 1.2 violates his right to work. He accordingly requested that the Tribunal declare the impugned decision irregular, order his reintegration into the United Nations and to grant him compensation.

16. On 17 February 2012, the Respondent submitted a Reply that stated the following: (i) the facts on which the disciplinary measure was based had been established by clear and convincing evidence; (ii) the established facts legally amounted to misconduct under the regulations and rules applicable at the time; (iii) the disciplinary measure applied was proportionate to the offence, taking into account the mitigating and aggravating circumstances; and (iv) the staff member's due process rights were respected.

17. On 20 March 2013, the Applicant filed a response to the Respondent's Reply, contending that his due process rights were not respected during the investigation and that the Respondent failed to identify the applicable rules and regulations at the time of the his alleged misconduct. He reiterated his claim for compensation.

18. On 28 March 2013, the Respondent submitted a Motion to dismiss the Applicant's response in its entirety as he did not seek leave to submit a new filing and his submissions were a repetition of his Application.

19. On 27 May 2013, the Tribunal issued Order No. 124 (NBI/2013) directing the Parties to advise the Tribunal whether a judgment could be issued on the facts available on file and to submit a concise statement of agreed facts and identify the legal issues for determination by 17 June 2013.

20. On 17 June 2013, the Respondent replied to the Order mentioning that he had forwarded to the Applicant a concise list of "proposed agreed facts" for discussion and approval but the Applicant had not answered. On the same day, the Applicant requested an extension of time until 23 June 2013 to comply with Order No. 124.

21. On 21 June 2013, the Applicant replied to the Order stating what, in his view: what the agreed facts were; the areas of factual dispute; the legal issues for determination; and the remedies sought.

Preliminary matters

22. In their respective responses, both Parties informed the Tribunal that they did not require a hearing in the present case.

23. Under Article 16.2 of the Rules of Procedure a hearing should “normally” be held following an appeal against an administrative decision imposing a disciplinary measure. The use of the word “normally” does not make a hearing mandatory. However given the quasi-criminal nature of a disciplinary matter the practice of this Tribunal has been to hold a hearing if parties are available and cooperate with the Tribunal. In this connection the Tribunal held in *Iryumugabo* UNDT/2014/001 that:

Article 16.2 states that a hearing shall “normally” be held. This is the all-important word of the section. There is no mandatory requirement to hold a hearing. However since the establishment of the new system of justice in 2009, the Tribunal has evolved a practice of holding hearings in disciplinary matters. This is justified by the fact that under the new rules relating to disciplinary matters coupled with the rules that obtain in the course of an investigation, an accused staff member does not have the right to confront witnesses and to cross examine them. The only right that such a staff member enjoys is to seek legal or other representation when charges have been filed against him/her and to submit a response. The Administration then processes all the materials including the staff member’s response and reaches a conclusion. The only time when a staff member has an opportunity to confront witnesses, if he/she is lucky enough to have the witnesses available, is in the course of a hearing before the Tribunal.

24. When an Applicant who appeals a disciplinary sanction submits that a hearing is not necessary or imperative, as in the present case, and Respondent agrees, the Tribunal cannot just agree. It is the duty of the Judge to decide whether the nature of the case is such that a hearing may be dispensed with. The Judge should consider the following factors: (i) the issues raised and their complexity; (ii) the availability and relevance of witnesses; (iii) the stand of the Applicant and that of Respondent; and (iv) the legal issues involved. After an analysis of these factors a decision may be taken on the necessity of holding a hearing or not.

25. In the present matter after considering the above factors, the Tribunal concluded that the Applicant was not challenging the facts giving rise to the misconduct but rather the way the staff rules and regulations were interpreted and applied to his case. He also pleaded ignorance of the staff rules and his obligations on outside activities and employment. The Tribunal determined that in these circumstances a hearing was not necessary and no prejudice would be suffered by the Applicant.

Issues

26. In disciplinary cases, 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.²

Have the facts on which the sanction is based been established?

27. The letter of appointment from the Ministry of Justice, dated 21 March 2008, establishes that the Applicant was working as a Deputy Prosecutor in the Bujumbura Prosecutor's Office. This letter indicated that the Applicant would follow a probationary training under the authority of the Prosecutor's Office. According to article 25 of the Law on Civil Servants' general status, an intern civil servant shall be confirmed in his position after a probationary period.³ It is sufficiently clear from the Burundi legislation that an internship is but the first step towards confirmation in the post. Therefore, the probationary training was not a mere academic internship but a mandatory condition to be appointed as a civil servant on a permanent basis.

28. The Tribunal also notes that the Applicant filed a complaint on 16 January 2009 against the manager of the bar. The Applicant himself indicated then that he was a Magistrate, presumably to boost and aggravate the case against the bar manager. Calling himself a Magistrate is certainly not describing himself as an intern.

² *Haniya* 2010-UNAT-024; *Maslamani* 2010-UNAT-028; *Masri* 2010-UNAT-098

³ *Loi n.1/28 du 23 août 2006 portant statut général des fonctionnaires, article 25: "Le fonctionnaire stagiaire ne peut être titularisé dans un grade qu'après avoir satisfait aux conditions d'un stage probatoire"*

29. There is also the Applicant's letter of resignation from his position of Deputy Prosecutor, dated 11 February 2009, indicating that he resigned from a position of Magistrate. The French term "*Magistrat*" encompasses different types of positions, including, in the present case, the position of Deputy Prosecutor.

30. The Order from the Ministry of Justice, dated 19 February 2009, accepting the Applicant's resignation refers to the Applicant's position as *Magistrat/Substitut du Procureur*⁴.

31. In a separate letter⁵, the Applicant explained that as a BINUB local staff his contract had always been temporary, uncertain and without any guarantee of renewal, depending on the mandate of BINUB. He stated that he feared that after the Mission closed he would lose his job and he had to think about his professional career after the mandate of BINUB ended. He therefore filed an application with the Ministry of Justice and at the end of March 2008 he received a letter of appointment. When he received this letter, and being unaware of the United Nations rules regarding outside employment, he used his free time, and what he perceived to be an absence of conflict of interest between the function of a Security Assistant and a Deputy Prosecutor, to start a probationary internship in the Ministry of Justice. When the BINUB mandate was renewed for one year in 2009, he decided to resign at the beginning of that year and this resignation was accepted by the Ministry of Justice on 19 February 2009.

32. During the investigation, the Applicant stated that he had not requested authorization from the Secretary-General to undertake an internship at the Ministry of Justice as internships or trainings are not forbidden by the United Nations. He added that it is forbidden to have another permanent job with another employer while working for the United Nations. He was never paid as a Magistrate but as an intern he

⁴ *Ordonnance Ministérielle portant acceptation de la démission offerte par un Magistrat du Ministère public.*

⁵ *Note explicative de la période pendant laquelle j'ai travaillé pour le Ministère de la Justice.*

received an allowance from the Ministry of Justice without recalling the amount. This internship was to train him for the position of Magistrate.

33. The SIU mentioned in its report that there was no document to prove that the Applicant sought authorization from the Administration to engage in outside employment.

34. In his comments on the charges, the Applicant admitted that he was doubly employed, a situation prohibited by the staff rules and regulations. He maintained however that he was never involved in a conflict of interest situation given his position as a Security Assistant and his functions in the Prosecutor's office during that period.

35. In view of the foregoing, the Tribunal concludes that in the present matter the facts showing that the Applicant was engaged in unauthorized outside activities have been convincingly established.

Did the established facts constitute misconduct?

The Applicant's submission

36. According to the Applicant, the provisions on which the contested decision were based were not in force at the time of the alleged misconduct. The provisions applicable at that time were contained in ST/SGB/2008/4 and not in ST/SGB/2002/1 as contended by the Respondent.

37. The Applicant also submits that the Secretary-General failed to prove that his outside activities affected the interest and the work of the Organization.

38. The Applicant contended that he was unaware of the rules and regulations regarding outside activities and they were not applicable to him because they were not properly notified to him.

Respondent's submissions

39. According to the Respondent, “ST/SGB/2008/4 referred to by the Applicant is the mere staff regulations where ST/SGB/2002/1 is the consolidated staff regulations and rules. (...) the *regulations* referred to in the Respondent’s Reply, i.e 1.2 (b), (f) and (o) from ST/SGB/2002/1, are in all relevant aspects on the same terms as in ST/SGB/2008/4, in the consolidated text of ST/SGB/2002/1”.

40. The Respondent submits that staff regulation 1.2(o) and section 3.1 of ST/AI/2000/13 provide a clear and express obligation upon staff members.

41. The Respondent avers that nothing in these provisions require the Secretary-General to demonstrate that the outside activities affected the interest or the work of the Organization. The Applicant is misguided in his contention that the Administration must establish that an outside activity must have affected the interest or work of the Organization for a staff member undertaking such activity to be considered to have committed misconduct.

42. The Respondent also submits that as a staff member, staff regulations 1.2(b) and 1.2 (f) formed part of the Applicant’s basic rights and obligations and that the Applicant’s conduct was a breach of staff regulation 1.2(b) in that he accepted a public service position paid by a government while employed as a staff member without the Secretary-General’s prior authorization. He did not inform his supervisor, until after he resigned from the Ministry of Justice, or the BINUB administration of his appointment, hence concealing his dual employment and dual remuneration from the Organization for almost a year until his resignation.

43. According to the Respondent, the Applicant’s conduct was a breach of staff regulation 1.2(f) in that he engaged in an activity that was incompatible with the proper discharge of his duties with the United Nations. Staff members are expected to be impartial and independent and are expected to avoid any action that may adversely reflect on their status or on the integrity, independence and impartiality that are required by their status. Staff members shall not seek or accept instructions from any

government or other source external to the Organization. The Applicant applied for and subsequently accepted a public service position paid by his Government, without requesting authorization of the Secretary-General. The mere nature of the Applicant's position is at odds with the impartiality and independence required from staff members.

44. In regard to any conflict of interest, the Respondent noted that :

It was alleged but not established by sufficient evidence that the Applicant attended and/or participated in meetings regarding BINUB in his capacity as an official of the Ministry of Justice. Such activities would have clearly amounted to an actual conflict of interest. Nevertheless, it was established that the Applicant was working in an institution, the Ministry of Justice, that was conducting investigations concerning BINUB, as evidenced by the statement provided by the Applicant.

Considerations

45. In light of the forgoing and after reviewing the documentary evidence, the Tribunal considers that the Applicant did not suffer any prejudice by the use of the provisions of ST/SGB/2002/1 applicable at the time as the substantive content of the provisions are the same as in ST/SGB/2008/4 but were consolidated. Further, the Tribunal considers that by working as a Deputy Prosecutor at the Ministry of Justice from 27 March 2008 to 19 February 2009, without the approval of the Secretary-General, the Applicant failed to comply with staff regulations 1.2(b), (f), (o) and section 3.1 of ST/AI/2000/13 which legally amount to misconduct.

46. Outside activities or employment consists of two strands. First, under section 3.1 of ST/AI/2000/13 a staff member cannot undertake any outside activities or employment without the authorization of the Secretary-General. Secondly, the Secretary-General may authorize a staff member to take up outside activities or employment. But this is subject to an important condition: that outside activity or employment must not conflict with the duties of the staff member and the interest of the Organization. A reading of section 1.2(p) makes it clear that a staff member who has been granted authorization by the Secretary-General does not have a free license.

He/she must be careful not to put him/herself in a situation of conflict. If the staff member is found to be in a situation of conflict notwithstanding the authorization of the Secretary-General, the latter would be at liberty to revoke the authorization and even start disciplinary action against that staff member.

47. In the present case, there was no need to canvass the issue of conflict of interest as the Applicant breached section 3.1 of ST/AI/2000/13 by engaging in an outside activity or employment without the authorization of the Secretary-General.

48. Ignorance of rules and regulations in an employment relationship or even of the law is not a defense to non-compliance with the employment rules and regulations under which a person is recruited. In *Diagne et al.*⁶ the UNAT held that “ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the staff rules”. The Tribunal however holds that the Applicant was aware or deemed to be aware of the staff rules and regulations by the very fact of the letter of appointment that he signed where he acknowledged that he had become familiar with these provisions. At any rate, even if he was not fully aware of the rules and regulations that he had breached, as a prudent employee having served with the United Nations for 5 years, especially planning to be a Magistrate, he should have sought advice or guidance. Accordingly, the Applicant’s unfamiliarity with the United Nations rules and regulations does not provide justification for his misconduct.

Was the sanction proportionate to the offence?

49. The Applicant relied on his Performance Appraisals to claim that he always met the highest standards of efficiency, competence and integrity. This Tribunal⁷ has previously determined that:

(...) an unblemished record is not in itself a gateway to breaching the rules of the Organization. Nor does an unblemished record

⁶ 2010-UNAT-067. See also *Austin* UNDT/2013/080

⁷ *Diakite* UNDT/2010/024

automatically qualify for mitigating factors to be applied. The mitigating issue must be analyzed in the light of the evidence establishing the misconduct, the manner in which the act was perpetrated, the attitude of the wrongdoer and the need to protect the integrity of the Organization.

50. In the present matter, as the Respondent submitted, the Secretary-General had no obligation to take into account, as a mitigating circumstance, the Applicant's performance appraisal. He could even have chosen to summarily dismiss him or separate him from service without indemnity or compensation.

51. The Respondent stated that in determining the sanction to be imposed, the Secretary-General took into account aggravating circumstances such as the highly sensitive nature of the Applicant's outside activities and the fact that the Applicant concealed his dual employment from the Organization for almost a year until his resignation and received, during this period, remuneration. The Secretary-General also took into account a mitigating circumstance as well as the delay of over a year in bringing the matter to a close.

52. Further, the Tribunal is not convinced that the "*stage probatoire*" was a mere internship. Indeed, the terms, referred to in the letter of appointment, in the letter of resignation and then in the "*Ordonnance*" accepting the resignation, such as "*Substitut du Procureur*" and "*Magistrat*", show that he occupied a position for which he was being remunerated.

53. The Tribunal takes the view that the sanction of separation from service with compensation in lieu of notice and with termination indemnity was proper and proportionate given the Applicant's misconduct.

Other issues

54. On 12 May 2009, the Applicant filed a complaint against the CSA addressed to the BINUB Chief Mission Support, alleging continued harassment, victimization and abuse of authority toward him. The Applicant contended that the CSA started an

investigation into his alleged misconduct after he had been informed that the Applicant had lodged a complaint against him for harassment and abuse of authority. Moreover, that the CSA had falsified the SIU records with a view to ensuring that the investigation would not be deemed as a measure of retaliation.

55. The Tribunal notes that the investigation was launched in April 2009, the first witnesses having been interviewed on 15 April 2009, almost one month before the Applicant submitted his complaint against the CSA. Therefore, the contention that the investigation was started as a retaliatory measure is a pure invention and without merit. Moreover, the Applicant's contention that the CSA was biased against him does not provide a satisfactory explanation to justify the fact that he worked as a Deputy Prosecutor while employed as a United Nations staff member.

56. The Applicant contended that staff rule 1.2(o) violated his human rights, in particular the right to work. Because staff members are not certain of their contract renewal with the Organization, they are entitled to seek and engage in other employment outside the United Nations. The Tribunal takes the view that staff rule 1.2(o) merely prohibits a staff member from engaging in outside activities without the approval of the Secretary-General. The staff rule does not in any way violate a person's right to work. In any employment relationship there are rules, obligations and restrictions. These cannot be interpreted as a violation of the right to work. If an individual who joins the Organization feels uncomfortable about the tenure of his/her job then there is nothing that prevents that individual from leaving to take up a more secure position elsewhere. As the Respondent clearly stated "staff members are free to resign and to seek another position if they wish to or if they disagree with the Organization's policy. The liberty of the Applicant is not at stake".

57. The Applicant referred to the DPKO Human Resources Handbook to contend that outside activity is not listed as serious misconduct leading to dismissal or separation. The Respondent submitted that this document merely provides internal guidelines for Personnel Officers and Assistants in field mission. As a result it is not a

legally binding document for the Administration. In case of any discrepancy, the staff rules, regulations and administrative instructions will prevail.

Decision

58. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signed)

Judge Vinod Boolell

Dated this 4th day of February 2014

Entered in the Register on this 4th day of February 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi