



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

KASHALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Adrien Meubus, ALS/OHRM

Introduction

1. The Applicant was a staff member of the former United Nations Organization Mission in the Democratic Republic of the Congo (MONUC, now the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)). He was employed as a Camp Manager Clerk at the GL-3 level.

2. On 17 April 2012, he filed the current Application before the United Nations Dispute Tribunal (UNDT) challenging the decision, taken on 27 May 2008, to summarily dismiss him for serious misconduct.

Facts

3. On 6 March 2006, the Special Investigation Unit (SIU) of MONUC released a report alleging that the Applicant had solicited money from local citizens in exchange for their employment as casual daily workers.

4. On 30 August 2007, the case was referred to the Office of Human Resources Management (OHRM) by the Department of Field Support (DFS). In a memorandum dated 12 November 2007, OHRM charged the Applicant with misconduct for having improperly solicited and received monies from local citizens in exchange for their recruitment. The Applicant acknowledged receipt of the charges on 19 November 2007.

5. By emails dated 12 and 26 February 2008, the Applicant responded to the allegations of wrong doing and denied the charges.

6. By letter dated 27 May 2008, OHRM informed the Applicant that the Secretary-General had decided to summarily dismiss him for serious misconduct without compensation in lieu of notice or any termination indemnity. The Applicant acknowledged receipt of that letter on 12 June 2008 and was separated from service effective the same day.

7. The Applicant sent a letter to Ms. Catherine Pollard, then Assistant Secretary-General (ASG), OHRM, dated 14 June 2008, to challenge the decision. Stamps entitled “RECEIVED” at the top and “ADMINISTRATIVE LAW UNIT” (ALU), now Administrative Law Section, at the bottom indicated that ALU received the letter on 8 July 2008.

8. On 11 July 2008, a letter emanating from the then Officer-in-Charge (OiC) of ALU/OHRM, was forwarded to the Chairperson of the New York Joint Disciplinary Committee (JDC). The letter reads:

Please find attached a letter dated 14 June 2008, from [the Applicant], a former staff member of the United Nations Mission in the Democratic Republic of the Congo. We are forwarding these materials to the JDC as it appears that [the Applicant] presumes to appeal the decision to summarily dismiss him on account of his acts of misconduct.

I would be grateful if you would inform the ALU on whether the JDC decides to treat the attached correspondence as an appeal so that we may have an opportunity to prepare a response on behalf of the Secretary-General.

9. The same day, the OiC, ALU/OHRM informed the Applicant that his case had been transmitted to the JDC. The letter reads:

We refer to your letter of 14 June 2008 to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management, which was received by our office on 8 July 2008. Given that you contest the decision to summarily dismiss you on account of acts of misconduct, your letter and the supporting documentation attached to it have been forwarded to the Joint Disciplinary Committee (JDC), the office charged with dealing with such appeals. The JDC will contact you directly about any further developments in your case.

10. On 14 May 2012, the Respondent filed a motion requesting that the Tribunal determine the receivability of the Application as a preliminary matter. On the same date the Respondent reiterated the receivability issue by submitting further pleadings. On 16 May 2012, the Applicant was directed by the Tribunal in an email to respond

to the Respondent's submissions on receivability by 30 May 2012, which he did. His submissions were solely on the merits of the Application with no reference to the issue of receivability.

11. On 28 February 2013, the Tribunal issued a judgment¹ holding that the matter was receivable.

12. The matter was heard on 15 and 16 June 2015. The Applicant did not testify and did not call any witnesses. The Respondent called four witnesses stationed at the material time in MONUC, namely Mr. Jacinto Bala and Mr. Manfred Gruber both Security Officers/Investigators; Mr. Joel Bahati, Assistant Camp Manager; and Mr. Tsivun Tite, Camp Manager.

Issues

13. The issues the Tribunal examines in a disciplinary matter are as follows²:

- a. Whether the facts on which the disciplinary measures were based have been established;
- b. Whether the established facts legally amount to misconduct under the United Nations Regulations and Rules;
- c. Whether the disciplinary measures imposed are proportionate to the offence; and
- d. Whether there were any substantive or procedural irregularities.

Statement of the Applicant

14. The Applicant was interviewed by Security Officer Jacinto Bala on the allegations that he had asked for money to recruit workers in the section where he

¹ UNDT/2014/023.

² *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098.

was posted. He was informed that daily workers had complained that he had asked them for money. When he asked Mr. Bala how many workers had filed complaints against him Mr. Bala told him “The number of complainants does not matter. Can you answer me with regard to the question”. The Applicant stated that he instructed one Mr. Katumbele Kajiramugabe to recruit six daily workers to lift stones. He denied that he ever instructed Mr. Kajiramugabe to collect money and he was unaware whether Mr. Kajiramugabe collected any money from daily casual workers on his behalf and added that the allegation was a plot against him.

15. The Applicant was contacted on three occasions by Mr. Tite who requested him to give back the money. He told Mr. Tite that the casual workers had agreed to write a “letter of reconciliation”. This letter³ which was signed by the workers who alleged they remitted money to Mr. Kajiramugabe states that the workers had no problems with the Applicant. The workers went on to say “if we arrived to say anything about chief Kashala it was according to the problem we had with Mr. Bosco Katumbele”.

Statement of Mr. Katumbele Kajiramugabe

16. The statement of Mr. Katumbele Kajiramugabe was recorded by a security assistant in Swahili and an English translation was provided. He was asked the following questions at the beginning of the interview.

Q. Is it correct that you have been sent to Kavumu city by somebody to offer jobs in MONUC-FCM to local population for advanced payment (commission-“money for job”)?

A. (After 15 minutes of discussion with the national S/O, the interviewed person, Mr. K. Kajiramugabe confirmed that he understood the question and answered with) YES.

Q. Who was the person(s) who sent you to offer jobs in MONUC-FCM for advanced payment (commission)?

A. (Obviously afraid to reveal the identity of the person it took 10 minutes to provide the name) Laurent Kashala.

³ The letter is in Swahili and the Tribunal relied on the translation provided.

17. He was also asked the following question:

Q. Did Mr. Kashala force you to request and collect the advanced payment?

A. No, but I was afraid of loosing (sic) my job, if I would not have enforced the order of my direct supervisor.

18. Mr. Kajiramugabe also told the investigators that he had requested USD30 from each of the persons he had contacted and he did so only once.

19. At the end of the interview the investigators wrote, “[i]t should be mentioned that Mr. Kajiramugabe is very simple-minded and therefore easily accessible for manipulation through a third party. Nevertheless he was not really cooperative during the interview”.

Statements of the five individuals who allegedly gave money to Mr. Kajiramugabe

20. Messrs. Mirindi Mubangwa Pascal, Nzibonera Badhera, Mateso Mirindi, Mudumbi Kanyagala and Brahabaza Lushugushu stated that they had been asked to pay USD50 to secure a job under the supervision of the Applicant. They remitted that amount to Mr. Kajiramugabe. After a few days Mr. Kajiramugabe asked for an additional USD50 from them and that if they would not pay they would lose their job.

21. They reported the matter to Mr. Joel Bahati who, according to Mr. Nzibonera Badhera, encouraged them to file a complaint against the Applicant. Mr. Joel Bahati in his testimony denied that he was ever contacted by any casual worker.

22. Mr. Mateso Mirindi stated that they were threatened by Mr. Kajira Mugabe and the Applicant and they had no choice but to write the “reconciliation note”.

23. None of the complainants testified at the hearing and the two witnesses. Joel Bahati and Tsivun Tite, who testified, did not witness any money being handed over to Mr. Kajira Mugabe or to the Applicant.

Considerations

Were the facts relied on by the Respondent established and did the established facts legally amount to misconduct under the United Nations Regulations and Rules?

24. In *Liyanarachchige* 2010-UNAT-087, the United Nations Appeals Tribunal (UNAT) held that “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. Additionally, UNAT has held that when termination is a possible sanction, the misconduct must be established by “clear and convincing evidence”.⁴

25. The situation in the present case is identical to that obtaining in *Nyambuza* 2013-UNAT-364. Ms. Nyambuza, a former staff member of MONUC, was separated from service for allegedly soliciting and receiving payments from three casual daily workers in exchange for recruitment and continued employment. The SIU investigation in the Nyambuza case was carried out by the same SIU investigators, Messrs. Bala and Gruber, who carried out the investigation in the present case. Similar to the Nyambuza case, the two investigators concluded that:

Although, **the proof and evidence of the personal receipt of the money collected cannot be established on [the Applicant]**, the quorum of the six (6) casual daily workers who readily and voluntarily stated in their complaint letters cannot be ruled out. Also said complaints cannot be appraised as fabricated story lies because those workers were so afraid of losing their jobs and just appealed for an exemption on the additional payment requested from them in the amount of fifty dollars (\$50) on job retention (emphasis added).⁵

26. UNAT subsequently concluded in *Nyambuza* that the Administration did not establish by clear and convincing evidence that Ms. Nyambuza “solicited and received payments from the three CDWs in exchange for recruitment and continued employment” and affirmed the UNDT judgment, *Nyambuza* UNDT/2012/139.

⁴ *Molari* 2011-UNAT-164.

⁵ See paragraph 6 of *Nyambuza* 2013-UNAT-364.

27. Notwithstanding the investigators' conclusion that the evidence did not establish that the Applicant personally collected any money from the casual daily workers and that none of the complainants stated they remitted any money to the Applicant, the Administration, paradoxically, accepted the Investigators' recommendation that "administrative action" be instituted against the Applicant because "[a]lleged money extortion by said local staff member cannot be tolerated and must serve as an example to all staff members that nobody is above the law and that all must abide by the present UN Rules and Regulations being enforced". The Applicant was then summarily dismissed from service with MONUC.

28. No doubt the Administration relied on the testimony of Mr. Kajiramugabe to come to that conclusion, notwithstanding the fact that the investigators observed that this witness was "simple-minded" and not very cooperative. The Administration must, no doubt, also have relied on the testimony of some of the complainants that the Applicant reproached them for not paying additional money.

29. The issue that now arises is whether the written statements of the casual daily workers should even have been used as the foundation for the Applicant's dismissal in the first instance.

30. In *Diabagate* 2014-UNAT-403, UNAT held that statements of witnesses who were not placed on oath before being interviewed and which were not signed were considered as untrustworthy and unreliable. The relevant part of the judgment reads:

The documentary evidence before the UNDT included various police and other reports, the OIOS Report and the typed statements of the witnesses' interviews taken during the OIOS investigation. The investigative interview of V01 was conducted in Swahili and subsequently transcribed into an English-language statement. V01 was not placed under oath before giving her interview and she did not sign the transcribed version of her interview statement. As such, V01's transcribed statement, in which she said that Mr. Diabagate had raped her and engaged in sex with her, was neither reliable nor trustworthy; it was solely hearsay and insufficient, by itself, to prove the charge that Mr. Diabagate engaged in sexual activity with a minor. Similarly, the other written documents were replete with hearsay and multiple

hearsay and were neither trustworthy nor sufficient to prove that Mr. Diabagate had sex with a minor (V01).

31. In *Nyambuza*, UNAT held:

Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.

32. In that case, UNAT found that the statements did not have any probative value and therefore could not constitute proof of misconduct. The operative part of the judgment reads:

The written statements signed by Mssrs. Mahudi and Lievain during the SIU investigation are lacking indicia of reliability or truthfulness. First, the statements were written in French; but the averment of truthfulness was in English, and the witnesses may not have been able to read English. Second, under the English averment of truthfulness, each witness merely made the representations that the statement was “true to the best of [his] knowledge” and “if [he] intentionally reveal[ed] false information, [he] may become liable to administrative or disciplinary action”. These representations are significantly different than those required under Article 17(3) of the UNDT Rules of Procedure (UNDT Rules)⁶. The phrase “to the best of my knowledge” is problematic and, since neither Mr. Mahudi nor Mr. Lievain was a staff member at the time he gave the written statement, the possibility of administrative or disciplinary action offered little assurance of the witness’s truthfulness.

33. The witnesses gave their statements in either Swahili or French and they were translated into English. In *Nyambuza* the averment of truthfulness was in English. In the present case there is not even such averment. The statements of the witnesses cannot therefore constitute clear and convincing evidence that the Applicant solicited and obtained money from the five complainants in return for them to be recruited.

⁶ Article 17(3) requires that each witness state: “I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.”

34. The oral evidence of witnesses Joel Bahati and Tsivun Tite is of no value and does not in any way constitute proof that money was remitted to the Applicant. These two witnesses did not give any evidence that money was effectively handed to the Applicant. Their evidence related solely to complaints having been made to them by the casual workers. The only other evidence comes from the written statements of the five complainants and that of Mr. Kajiramugabe.

35. In light of the striking similarity of *Nyambuza*, as set out in Judgment No. UNDT/2012/139, and the current Application, this Tribunal sees no reason for it to deviate from the reasoning and judgment in *Nyambuza* 2013-UNAT-364.

Findings

36. The Tribunal finds that the facts on which the sanction is based have not been established and that the facts which have been established do not legally amount to misconduct under the Regulations and Rules of the United Nations.

37. Since the established facts in this case do not legally amount to misconduct, the Tribunal concludes that the disciplinary measure imposed on the Applicant was unlawful *ab initio* and therefore a violation of his rights.

Judgment

38. The Tribunal, having taken note of the judgment in *Nyambuza* UNDT/2012/139 and UNAT's affirmation of it in Judgment No. 2013-UNAT-364, orders the following:

- a. Rescission of the Applicant's summary dismissal and his reinstatement in service with MONUSCO with retroactive effect.
- b. Since the Applicant's dismissal is a termination within the meaning of art. 10.5(a) of the Statute of the Dispute Tribunal, the Tribunal must set an amount of compensation that the Respondent may elect to pay as an

alternative to the reinstatement of the Applicant. An appropriate compensation in lieu of reinstatement is the payment of two years' net base salary at the Applicant's grade and level as of the time he was summarily dismissed from service.

c. All materials relating to the Applicant's dismissal should be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

(Signed)

Judge Vinod Boolell

Dated this 5th day of October 2015

Entered in the Register on this 5th day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi