



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ANYETEI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Sam Okudzeto
Sam Okudzeto & Associates
Accra, Ghana.

Counsel for the Respondent:
Federica Midiri, UNFPA

Introduction

1. The Applicant is a former staff member of the United Nations Population Fund (UNFPA). She was serving as the HIV Prevention Adviser on a fixed term appointment at the P5 level at the UNFPA Regional Office in Johannesburg, South Africa.

Procedural History

2. On 11 May 2015, she filed an application with the United Nations Dispute Tribunal in Nairobi challenging the Respondent's decision to separate her from service.

3. The Respondent filed his reply to the application on 15 June 2015.

4. On 23 October 2015, the matter was transferred to the docket of Judge Coral Shaw by way of Order No. 337 (NBI/2015).

5. On 3 November 2015, the Tribunal issued Order No. 350 (NBI/2015) for the purposes of case management.

6. Order No. 384(NBI/2015) was issued on 3 December 2015 setting down the matter for a case management discussion (CMD).

7. On 13 January 2016, the Tribunal issued Order No. 004 (NBI/2016) vacating the previous order and setting down the matter for a case management discussion in March 2016 to be followed by a substantive hearing in April 2016.

8. Order No. 177 (NBI/2016) was issued on 4 April 2016 for further management of the matter prior to the substantive hearing.

9. On 7 April 2016, the Registry received notice from counsel for the Applicant indicating that he was no longer representing the Applicant.

10. This notice was followed, on the same day, by a motion for extension of time to comply with the requirements of Order No. 177 (NBI/2016). The motion,

which was filed by the Applicant's newly retained counsel, sought an extension of 2 months.

11. The Tribunal issued Order No. 189 (NBI/2016) on 8 April 2016 denying the motion for extension of time so that the hearing could proceed as previously scheduled. The parties were informed that if the Applicant was unable to comply with the Tribunal's timeline for the hearing, the scheduling order would be vacated and the matter transferred to another judge since Judge Shaw's term of office was about to expire.

12. On 11 April 2016, the Registry received a communication from counsel acting for the Applicant indicating his inability to comply with the terms stated in Order No. 189 (NBI/2016) and moving for the matter to be assigned to another judge.

13. On 11 April 2016, the Tribunal issued Order No. 192 (NBI/2016) indicating that this matter would be transferred to the docket of a different judge.

14. The matter was subsequently assigned to Judge Alexander W. Hunter, Jr.

15. On 13 January 2017, the Tribunal issued Order No. 008 (NBI/2017) directing the parties to attend a CMD on 31 January 2017. The parties were also directed to file a paginated bundle of documents, as well as statements of any witnesses they wished the Tribunal to hear.

16. The CMD took place on 31 January 2017 by teleconference in the presence of counsel for both parties. The Applicant was not present.

17. The Tribunal noted the Applicant's position that this matter can be decided on the papers given that she does not intend to call any witnesses.

18. On 1 February 2017, the Tribunal issued Order No. 022 (NBI/2017) directing the parties to file their closing submissions.

19. Both parties filed their closing submissions on 13 February 2017.

Facts

20. The applicant was entitled to and applied for a rental subsidy appropriate for her grade.

21. During the rental cycles of 2009-2011, the applicant was unmarried.

22. In August 2011, the Applicant married Dr Gilbert Anyetei. She duly notified UNFPA of the marriage and the fact that she now had three step children in addition to her own two children. She was requested to provide the Organization with a copy of her husband's passport, marriage certificate and a copy of his payslip, which she did.

23. On 23 November 2011, the Applicant submitted a request for rental subsidy for the period 1 November 2011 through 31 October 2012 to the UNFPA East and Southern African Regional Office (ESARO) for her accommodation at 21 Monte Pollino, 69 Fountain Road, Johannesburg, South Africa. The Applicant attached her lease for the property to this request. Rent was declared at ZAR25,000 for which amount she received a subsidy of USD10,651.65.

24. The lease was between the Applicant and a company called Kudiabor Investment Ltd. Mr Anyetei was part owner and a director of Kudiabor Investment Ltd. The lease indicated a monthly rent of ZAR28,000 payable to an account with the First National Bank and bearing the notation "DRM001" as a tenant reference.

25. On 15 October 2012, the Applicant submitted another request for rental subsidy for a lease at Stand 332 Eco Estate in Meyersdal, Johannesburg from 1 November 2012 to 31 October 2013. This property was also owned by Kudiabor Investment Ltd. The Applicant received USD27,792.47 in subsidy for her tenancy at that property. The lease indicated a monthly rent of ZAR45,000 payable to an account with the First National Bank and bearing "DRM001" as a tenant reference.

26. On 10 May 2013, the UNFPA Office of Audit and Investigation Services (OAIS) received allegations of potential fraud by the Applicant in respect of a claim she submitted for reimbursement of security related costs.

27. The investigation into the Applicant's claims for the reimbursement of security related costs also revealed that the Applicant had been receiving a rental subsidy for property owned by a company belonging to her husband.

28. The Applicant was formally notified that she was a subject of an investigation on 25 July 2013.

29. On 10 October 2013, at the request of OAIS, the Applicant submitted a number of tax invoices for the period November 2011 through August 2013 as proof of payment of rent. These invoices were not dated, nor on a letterhead but were stamped "paid" for the relevant amounts listed on the lease.

30. On 27 January 2014, the Applicant was provided with the Investigation Report and the exhibits attached to it. A subsequent finding of the investigation was disclosed to the Applicant on 24 July 2014. The Applicant was given the opportunity to respond on both occasions.

31. The Applicant responded on 6 August 2014. She took the position that she had no comments on or insights into her husband's business interests.

32. On 23 September 2014, the Applicant was charged with three counts of misconduct and given the opportunity to respond to each of those charges.

33. Counsel for the Applicant submitted her response to those charges on 16 October 2014.

34. On 5 February 2015, the Applicant was separated from service with compensation *in lieu* of notice but without termination indemnity.

35. In July 2015, UNFPA recovered a rental subsidy in the amount of USD38,444.12 from the Applicant. A further sum of USD7,500 drawn by the Applicant as "salary advances" was recovered.

36. The Respondent submits that the Applicant would have been entitled to USD47,888.04 as termination indemnity had the Secretary-General decided that she should be separated with termination indemnity.

Submissions

Applicant

37. It is the Applicant's contention that the decision to separate her from service for violation of ST/AI/2013/2 was unlawful because both her applications for rental subsidy precede the promulgation of that piece of legislation.

38. There was undue delay in respect of the investigation against her, which contravened UNFPA's Disciplinary Framework. The Applicant was notified that she was the subject of investigation on 25 July 2013 but was not formally charged until 23 September 2014.

39. The rental receipts submitted by the Applicant were of probative value, and constituted the "best evidence" of payments having been made. The Staff Regulations and Rental Subsidy Circular do not specify the format which rental receipts must take. The tax invoices submitted by the Applicant should, therefore, be accepted as substantive proof that rent was in fact paid to the landlord.

40. The Applicant argues that the Respondent should have contacted Kudibaor Investments Ltd to verify if rent was indeed paid. The Applicant cannot be penalised for the Respondent's failure to verify payment.

41. The rent for the 2011-2012 cycles was initially paid using the Applicant's UNFCU-United Nations Federal Credit Union account. There were challenges with this method of payment which resulted in delayed payments or inaccurate payments because of fluctuating currency exchange rates. The Applicant, therefore, arranged for payment to be made by her husband on her behalf.

42. The investigation led to a strained relationship between the Applicant and her husband. They are now separated. As such, it is not possible for the Applicant

to obtain copies of her estranged husband's bank account statements to show that she was paying him the rent to pay to the landlord.

43. The Applicant contends that the "Rules and Regulations governing her service with the United Nations" did not oblige her to disclose her husband's interests in Kudiabor Investments Ltd.

44. The Applicant also submits that, in any event, the disciplinary measure of separation from service without termination indemnity was unduly harsh and disproportionate to the alleged misconduct.

The Respondent

45. The Respondent contends that there is clear and convincing evidence that the Applicant's actions, as established by the investigation, were tantamount to misconduct.

46. Procedurally, the process was concluded in full compliance with the staff member's right to due process.

47. The disciplinary measure eventually imposed on the Applicant was both proportionate and lawful given the gravity of the established misconduct.

Deliberations

48. The Applicant is challenging the Secretary-General's decision to separate her from service with the United Nations for misconduct. She is, in the alternative, also challenging the Secretary-General's decision imposing the sanction without the payment of termination indemnity.

49. The role of the Tribunal in cases such as this is to examine whether the facts on which the sanction is based have been established, whether the facts qualify as misconduct, and whether the sanction is proportionate to the offence.¹

50. In *Molari*, the Appeals Tribunal held:

¹ *Masri* UNAT-2010-98; *Molari* 2011-UNAT-164.

Disciplinary cases are not criminal. Liberty is not at stake. But 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.

Whether the facts on which the charges and sanction were based established?

51. The Appeals Tribunal has held in several cases² that:

In a system of administration of justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

52. The Applicant was not able to properly and conclusively show that she actually paid rent on both the premises for which she was receiving a rental subsidy. The “tax invoices” she submitted are of little probative value in that they show only that Kudiabor Investments Ltd has provided the Applicant with receipts of purported payments which cannot be shown to have been actually made. There are no bank statements from which account payments were made, nor receipts of payment into the account at the First National Bank bearing “DRM001” as a tenant reference.

53. The investigation further found that the Applicant had applied for a loan in the amount of USD105,000 for the property at 332 Mayersdal Eco Estate. This was the property on which she later applied for a rental subsidy. The Applicant has not refuted the fact of the loan. Her explanation, it seems, was that she was unaware of the extent of her husband’s dealings in Kudiabor Investments Ltd.

54. The Tribunal finds the Applicant’s explanations implausible. It must have been clear to the Applicant that she cannot apply for and receive rental subsidy on a property which she owns, solely or jointly. It must also have been clear to her that she was signing a lease with a company to rent a property she clearly has an

² *Liyanarachchige* 2010-UNAT-087; *Diabagate* 2014-UNAT-403; *Hallal* 2012-UNAT-207.

interest, indeed a fiduciary interest, in. Even if the Tribunal accepts that she was largely unaware of her husband's business dealings, the fact of the loan makes it clear that she was at least aware of his interest in that particular property.

55. It seems to the Tribunal that the Applicant could not substantively prove payment of rent on this particular property because she was not in fact paying any rent because she owned all or a part of it.

56. Based on the facts and submissions of the Respondent, and after having carefully examined the Applicant's responses to those submissions, the Tribunal finds that there was clear and convincing evidence to form the basis of, and substantiate, the charges that were filed against the Applicant.

Do the facts qualify as misconduct?

57. Staff regulation 1.2(b) on the basic rights and obligations of staff requires staff members of the United Nations to:

[U]phold 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;

58. Staff rule 10.1 applies in respect of misconduct. The rule defines misconduct and sets the parameters for the Secretary-General's decision to launch an investigation, in the following terms:

Rule 10.1

Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff 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 the imposition of disciplinary measures for misconduct.

(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.

59. The Respondent argues that the Applicant's conduct contravened staff regulation 1.2(b) in that it was not compatible with "the highest standards of integrity" required of a staff member.

60. Based on the facts available before it, the Tribunal is satisfied that the Applicant did not conduct herself with the "honesty and truthfulness" that was expected of her.

61. The Tribunal further finds that the Applicant placed herself in a position in which her interests conflicted with those of the Organization. In respect of conflict of interest, the Appeals Tribunal has held that the Standards of Conduct for the International Civil Service provide that:

[C]onflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the Organization.³

62. By the Applicant receiving a United Nations rental subsidy for Kudiabor Investment Ltd., a real estate investment property partly owned and directed by her husband, the Applicant was benefiting financially by essentially putting this money into her own company or by otherwise diverting it to her own personal use.

³ *Akelo* 2013-UNAT-336; *Koutang* 2013-UNAT-374.

Was the sanction proportionate to the offence?

63. The Applicant contends that the sanction meted out against her was disproportionate and that the Secretary-General could have chosen to separate her from service with the payment of termination indemnity.

64. At the outset, it is worth noting that the amount recovered from the Applicant for the wrongfully claimed rental subsidy and salary advances is USD1943.92 less than what would have been paid to her as termination indemnity.⁴

65. While the Secretary-General has wide discretion in applying sanctions for misconduct, he “must adhere to the principle of proportionality.”⁵ In reviewing the exercise of his discretion, the court has been urged to show “due deference” to the Secretary-General’s obligation to “hold staff members to the highest standards of integrity.”⁶

66. As a general rule, courts do not interfere with the “exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.”⁷

67. On the facts before the Tribunal, the Applicant has not adduced any evidence to give the Tribunal a basis for reviewing the Secretary-General’s exercise of discretion in this case, nor has she shown that his discretion was improperly exercised.

Conclusion

68. The Applicant’s claim is dismissed in its entirety.

⁴ The Respondent submits that had that been the chosen disciplinary measure, the Applicant would have been entitled to USD47,888.04 as termination indemnity. The recovery of USD38,444.12 as payment of rental subsidy that she was not entitled to, coupled with a further recovery of USD7,500 for salary advances paid out to the Applicant brings the total amount owed to the Organisation to USD45,944.12.

⁵ *Applicant* 2013-UNAT-280. See also *Lauritzen* 2013-UNAT-282; *Hersh* 2014-UNAT-282.

⁶ *Sanwidi* 2010-UNAT-084.

⁷ *Abu Hamda v Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* 2010 UNAT-027.

(signed)

Judge Alexander W. Hunter, Jr.

Dated this 8th day of May 2017

Entered in the Register on this this 8th day of May 2017

(signed)

Abena Kwakye-Berko, Registrar, Nairobi