

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

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.

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 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

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 *Liyanarachchi* (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

27. Notwithstanding the investigators' conclusion that the evidence did not

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

31. In Nyambuza

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.

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