

Introduction

1. The Applicant is a former staff member of the United Nations Mission in South Sudan (UNMISS). At the time of his separation from service on 4 October 2016, he was working as an Administrative Assistant at the GL-4/5 level with the Regional Service Centre in Entebbe, Uganda (RSCE).
2. The Applicant filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 18 December 2016 contesting the decision of the Under-Secretary-General for Management (USG/DM) to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity, in accordance with staff rule 10.2(a)(viii).
3. The application was served on the Respondent on 9 January 2017¹ and he submitted a reply on 4 February 2017.
4. The Tribunal held a case management discussion with the parties on 13 April 2017 and an oral hearing on 6 June 2017.

Relevant facts

5. During the relevant period, the Applicant worked in the Finance Unit at the RSCE. He was responsible for processing financial transactions for several United Nations Peacekeeping Missions, including UNMISS, and Offices in Africa. The Applicant was responsible for: validating payroll documents; processing advances and F-10 claims for UNMISS International Individual Contractors (IICs) and United Nations Volunteers (UNVs); maintaining payroll records, journals and ledgers; reviewing arithmetic calculation; validating figures

¹ The Applicant initially filed his application with the Registry via email on 18 December 2016. The Registry advised him on 19 December 2016 to create an account and resubmit his submission in the Tribunal's electronic Court Case Management System (CCMS). He resubmitted his application via CCMS on 7 January 2017.

and data on payroll documents; and making corrections and deductions when necessary.²

6. In early 2014, there were delays in payment of IICs in South Sudan. Consequently, RSCE staff members, including the Applicant, visited Juba, South Sudan, in 2014 on official mission to assist in resolving F-10 claim issues. During this visit, the Applicant met personally with Ms. Julie Mutumba, a Training Officer with UNMISS in Juba, to assist her with an F-10 claim issue.

7. On 14 August 2015, Ms. Mutumba reported to the UNMISS Special Investigations Unit (SIU) that the Applicant had assisted her with an F-10 claim submission and then, in February and March 2015, he demanded 50% of the value of the claim. She did not accede to his demand.

8. On 27 August 2015, Ms. Mutumba sent an email to SIU alleging that the

12. After considering the conclusions in the joint investigation report, the Chief of the RSCE referred the matter to the Department of Field Support (DFS) on 22 February 2016 for action to be taken against the Applicant. DFS in turn referred the matter to the Office of Human Resources Management (OHRM) for action on 2 May 2016.

13. By memorandum dated 27 July 2016, the Assistant Secretary-General (ASG), OHRM, informed the Applicant of the allegations of misconduct against him, namely that in 2014 and/or 2015, he improperly used his position with the Organization for his own financial gain and solicited and/or accepted payments from one or more individual contractors. The ASG/OHRM provided the Applicant with a two-week deadline within which to provide a response to the allegations of misconduct.

14. A short time after he received the memorandum detailing the allegations of misconduct against him, the Applicant informed the RSCE that he was unable to access all the annexes to the said memorandum. Consequently, on 11 August 2016, the OHRM resent all the annexes to the Applicant by email.

15. On 22 August 2016, the Applicant requested and received an extension of time until 12 September 2016 to provide his responses to the allegations of misconduct. The Applicant submitted his response to the OHRM on 12 September 2016.

16. After a review of the entire dossier, the USG/DM concluded that the allegations of misconduct against the Applicant had been established by clear and convincing evidence and that his actions violated staff regulations 1.2(b) and (g) and staff rule 1.2(k). Consequently, the USG/DM informed the Applicant, by a memorandum dated 4 October 2016, of his decision to impose on the Applicant the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity, in accordance with staff rule 10.2(a)(viii).

17. The Applicant was separated from service effective 4 October 2016.

Submissions

Applicant

18. The Applicant asserts that the contested decision was unlawful and that the allegations of misconduct (i.e. bribery, extortion of funds and abuse of authority) are unfounded because he performed his duties with good faith, due diligence and goodwill and that he went above and beyond his assigned duties to assist his clients with their problems.

19. Further, it is the Applicant's case that the following administrative and procedural errors materially tainted the entire disciplinary process:

- a. His placement on ALWOP was unreasonably lengthy, misconceived and without a proper basis;
- b. He was not provided with notice when UNMISS SIU commenced the preliminary investigation on 3 October 2015;
- c. The investigation team handled his interrogation improperly and inhumanely because the investigators failed to consider the fact that he was in poor health after collapsing at work and being hospitalized some months before the investigation began;
- d. The investigation team coerced him into agreeing to certain statements that the team claimed would bolster his defense;
- e. The investigation team did not give him the opportunity to explain events and he was not given time to properly read through the statement that was prepared by one of the investigators;
- f. The Respondent failed to grant him access to his official emails/correspondence and supporting documents for 2014/2015, thus he was denied the opportunity to fully respond to the allegations against him;

- g. He did not have access to legal representation and this affected his right to a fair hearing;
- h. There was collusion among the witnesses; and
- i. The allegations against him were ambiguous and kept on changing.

20. The Applicant seeks the following remedies: (i) reinstatement to his position as an administrative assistant with UNMISS; (ii) payment of all salaries for the time that he was placed on ALWOP; (iii) payment of two months' annual leave that he had accumulated before his placement on ALWOP; and (iv) compensation for all inconveniences he suffered during the disciplinary process.

Respondent

21. The Respondent's case is as follows:

- a. The facts have been established by clear and convincing evidence from the Applicant, Ms. Mutumba and the IICs who were affected by the Applicant's actions. The facts show that: (i) the Applicant unsuccessfully solicited money from Ms. Mutumba; (ii) some of the IICs paid the Applicant money so that he would process their delayed payments; and (iii) one IIC transferred money to another staff member for payment to be made to the Applicant.
- b. Although the Applicant denied having solicited payments from the IICs, the evidence shows that he received payments from them. The act of receiving money because of the assistance he was providing to the IICs based on his position within the Organization is prohibited by staff regulation 1.2(g) and staff rule 1.2(k).
- c. The evidence shows that the Applicant actively sought payments from Ms. Mutumba and at least one other IIC. Due to the Applicant's position at the RSCE, the IICs believed that he could influence the timely payment of their emoluments and for this reason, they made payments to

him. Consequently, the Applicant was not a beneficiary of donations or gifts

d. Contrary to the Applicant's contention, the RSCE provided him with an internal link through which he could access emails, including but not limited to, archived emails. He was also provided with information to assist him in retrieving his emails.

e. The Applicant has not provided any particulars as to how the insufficient notice he alleges hindered his ability to provide his account of events. He only alleges that he was under stress and that this affected his state of mind and health.

f. The Applicant's challenge against his placement on ALWOP is time barred since he failed to submit a request for management evaluation within 60 days of 2 February 2016.

Issues

23. The Tribunal will interrogate the issues under the following headings³:

a. Were the allegations upon which the Applicant's separation was based proven sufficiently as to warrant disciplinary action against him?

b. Can the Applicant in the present application challenge the administrative leave without pay upon which he was placed before his eventual separation?

c. Were there any substantive or procedural irregularities or any flaws that tainted the investigative findings or disciplinary processes? In particular, the Tribunal will review whether there existed:

- i. Inadequate notice of investigation;
- ii. Denial of access to evidence needed for his defense (i.e. official emails and other correspondence for 2014-2015);
- iii. Applicant's inability to obtain legal assistance/representation.

³ *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098.

Mutumwa was one of the IIAs who requested assistance from the Applicant. Upon his request, the Applicant provided her personal contact information to the IIAs.

29. The investigators questioned Mutumwa about emails he sent from his personal email account to Ms. Njoroge in January 2015 in which he wanted to know if she would be interested in a business opportunity. Ms. Njoroge questioned him also as to why when she responded with possible interest, he did not follow up. In a follow-up email that he sent, he stated that he was 'badly needed' but that he would be there when she came. He was further questioned about another email he sent to Ms. Njoroge in March 2015 stating that when she cashed her check, he

this other friend. The Tribunal finds as a fact that the Applicant demanded financial gratification from Ms. Mutumba for performing his official duty of assisting her with F-10 claims. His emails to her dated 16 February 2015 and 5 March 2015 are proof of his expectations of and demand for money.

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41. In his statement to investigators, Mr. Maganga stated that he and other IICs in Juba whose delayed payments were processed by the Applicant agreed to send money to the said Applicant to thank him. In May 2014, sums of mone

Lee-Brapoh and Mr. Jean Claude Pierre but stated that he did not know what the monies were meant for.

46. While being cross-examined, the Applicant denied receiving any money from Mr. Maganga, Mr. Mukuba, Mr. Jean Claude Pierre or Ms. Lee-Brapoh. He first said he knew Mr. Mukuba and that they were both Ugandans. Later in his answer to another question, he said he did not know Mr. Mukuba.

47. After thorough review of the evidence before it, the Tribunal observes that in total the statements of about nine individuals to investigators and the sworn oral testimonies of two of them are consistent that the Applicant received various sums of money from some IICs in the years 2014 and 2015. The evidence is clear that the sums of money were received by the Applicant in order to process the overdue payments of the affected IICs or as gratification for having processed the said payments.

48. In particular, the Tribunal believes the sworn oral testimonies of Messrs. Lumanisha and Lubanjwa. Their testimonies were further materially corroborated by the UNFCU bank statements of Mr. Lubanjwa for the relevant periods in 2014 and the email exchanges between them showing that the monies which were sent to Mr. Lubanjwa by Mr. Lumanisha were to be paid to the Applicant.

49. As already stated, the Tribunal believes the statements of Ms. Mutumba which are materially corroborated by the Applicant's emails to her showing his anticipation of receiving part of her legitimate earnings and further making demands for an equal sharing of the said earnings.

50. Mr. Maganga's statement to investigators that he sent various sums of money to the Applicant on behalf of himself and other IICs is also materially corroborated by the email sent to Mr. Maganga by the Applicant himself on 4 November 2015 following the Applicant's initial questioning by the investigators.

51. During his testimony, the Tribunal observed the Applicant closely as he stumbled from one lie to another. As he made efforts in his answers, while being cross-examined, to deny the admissions he made in his statements to

investigators, it was apparent that he was desperately attempting to clutch at straws.

52. The only witness who testified for the Applicant, Ms. Ndagire could not provide relevant evidence to support the Applicant's case. Her sworn testimony, which was irrelevant to the Applicant's case, was that she was in the team that worked on the payment claims of staff members in 2014 and that Ms. Mutumba was closer to the Applicant than to the other members of the finance team who were helping staff members.

53. In conclusion, the Tribunal makes no hesitation in finding that in the years 2014 and 2015, the Applicant corruptly received various sums of money from Mr. Maganga, Mr. Lumanisha, Mr. Mukuba, Mr. Jean Claude Pierre and Ms. Lee-Brapoh in abuse of his position as a finance assistant at the RSCE.

54. The Tribunal also finds and holds that the allegations of soliciting and receiving money from certain named IICs made against the Applicant were

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evaluation within 60 days from 2 February 2016 when he was first placed on ALWOP. But the Tribunal has held in earlier decisions that an Administrative leave upon which an Applicant is placed can be challenged at any time during the pendency of the said Administrative leave.⁵

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69. The records also show that the Applicant was interviewed by investigators on 3, 4, 6 and 9 November 2015. It would appear that the Applicant's last epileptic seizure before he was interviewed by investigators was nearly eight months prior in March 2015. The letter from Nakasero hospital did not show that the Applicant could not have been in his right mind at the time he met with investigators. The Applicant did not tell investigators at any of his four interviews with them that he was ill, confused or not in a right state of mind to answer questions or provide statements. There is also nothing to show that the Applicant was on certified or uncertified sick leave at the time of his interviews.

70. Again, the Tribunal finds that the Applicant did not plead neither did he lead evidence to show that the fact that he may have suffered from epileptic seizures or fits at certain times made him in any way not responsible for his actions when he solicited or took gratification for carrying out his legitimate duties within the Organization; or that the condition of being epileptic brought about a loss of mem(1)37(o)-2(d)] TJ ET Q2(i)37(o)-20(n)19()-170(o) ET Q17(z)3(ur)- woer9.0 C

Inability to obtain legal assistance/representation

73. The Applicant stated that upon receiving the charges against him, he was advised to seek legal assistance from the Office of Staff Legal Assistance (OSLA) or from private counsel at his own expense. He stated further that OSLA denied him representation or advice in responding to the charges against him and that he could not afford to pay for legal assistance against him.

allowed to read them through. He also p0()-e 0

Conclusions

82. The Tribunal finds and holds as follows:

- a. The case against the Applicant was established by clear and convincing evidence and that disciplinary action was warranted in the circumstances.
- b. In this application, the Applicant cannot challenge his placement on ALWOP which preceded his separation from the Organization.
- c. The investigative and disciplinary processes which led to the Applicant's separation were not shown to be tainted by any irregularities.

Judgment

83. In the light of the foregoing, this Application fails and is accordingly dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of November 2017

Entered in the Register on this 28th day of November 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi