
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/015

Judgment No.: UNDT/2018/090

Date: 19 September 2018

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

 Nairobi

Introduction

1. The Applicant is a former staff member of the United Nations Mission in Liberia (UNMIL), based in Monrovia.
2. On 13 February 2016, he filed an application contesting a decision dated 24 November 2015 to impose on him the disciplinary sanction of termination from service for serious misconduct, consisting of verbally and physically abusing Mr. Fedrick Jarbah, a security guard employed by an UNMIL contracted company, Executive Security Consultancy (EXSECON). The Applicant prays that the Tribunal rescind the contested decision, order his reinstatement without loss of salary from the date of separation, and, if reinstatement were no longer possible, payment of compensation in lieu of reinstatement.
3. The Respondent filed a reply to the application on 11 March 2016.

Procedure

a. Investigation

4. On 24 October 2014, _____ received a report that the Applicant assaulted Mr. Jarbah during a routine security inspection at the UNMIL compound entrance.¹
5. SIU

and did not know his security guard functions; that Mr. Jarbah was not qualified to serve as a security guard; that all

Counsel, he had demanded to be paid for giving testimony in an amount exceeding by far what would have been a reasonable cost of appearance, including any attendant loss of wages.⁹ The Applicant did not request any witness to be heard.

13. The Applicant and Respondent were afforded time to file their closing submissions which they did on 24 October 2017 and 2 November 2017 respectively.

Cons

i. Whether acts attributed to the applicant qualify as misconduct under the Staff Regulations and Rules.

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a.

- a. He has been a Civil Affairs Officer in UNMIL since 6 January 2006.
- b. He is aware of the Applicant being under the influence of alcohol and being insulting and disrespectful on a number of occasions. In those instances the Applicant was usually aggressive, loud, uncontrollable and disruptive.

42. The Applicant gave a voluntary sworn statement on 27 October 2014 and submitted his comments on the allegations of misconduct on 20 July 2015. He denied all the allegations and stated, *inter alia*
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On October 24/10/14, Human Rights Officer assigned in Gbarpolu County celebrated UN day in Gbarpolu County along with some youths of Farwenta, Gbarpolu County. Stephen Ricks, Human Rights Officer return to UNMIL compound around 8.30 PM. At the entry of the UN Compound, an Exsecon security officer whom has just ended his daily duty approached me and asked me where I came from at about 8.30. I said to him, I came from the field. Then

I said to him if you are the one on duty then just log me in with the time I am

Testimonies before the Tribunal are summarised below:

43. Mr. Jusu:

a. On the material day, as he approached the gate, he saw Mr. Jarbah and the Applicant arguing. He asked the Applicant what was happening but the Applicant did not answer him. He went to the gate but elsewhere, he went to the gate. When he saw Mr. Jarbah he inquired about what was going on with him. Mr. Jarbah did not say anything but he was not in a happy mood.

b. He recalled that there was a lady standing close to the gate; he understood that Mr. Jarbah had not allowed her to enter into the UNMIL compound.

It was on the material day that he saw the Applicant with a bottle in his hand. The Applicant and Mr. Jarbah were exchanging bitter words. Mr. Jarbah was shouting. There was a supervisor there. It was Mr. Victor Walley

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investigation. There are numerous inconsistencies and implausibility in the testimony before the Tribunal, moreover, the witnesses were markedly reticent in answering questions from the Respondent and the Tribunal.

Considerations

57. As the starting point the Tribunal recalls that as per the UNAT full bench holding in *Applicant*, judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.²⁸ The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.²⁹ In its jurisprudence since *Applicant*, the UNAT has maintained that this is not the role of the UNDT to conduct a *de novo* review of the evidence and place itself in the shoes of the decision-maker³⁰,

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retains actuality in disciplinary cases:

During [its] process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the

example from municipal settings, in the case of opposition against a judgment *in absentia* or an administrative fine in petty offence cases, while in the judicial process so triggered the case would be examined *de novo* with all the consequences stemming from the new determination. Thus, for example, instead of separating a disciplined staff member, pending UNDT proceedings he or she could only be suspended, with full or partial pay. However, any redesigning of the model would need to be based on an informed decision whether the Secretary-General is trusted to competently decide disciplinary measures which are thus presumed regular³⁴ and, as such, are immediately enforceable³⁵, or is not. Second, as the other side of the coin, practical considerations regarding capability on the part of UNDT would cengwould ap1.9TJETB1 0 0 1 518.38 603.34 Tm1 236.69 603.342-(wou)] TJETor

standard of review. This specifically includes the question of unavailability of witnesses, with respect to which it said:

It proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and

70. The testimonies are also incoherent. While Mr. Fahnbulleh testified to the Tribunal that he could recall that the Applicant and Mr. Jarbah had had a conversation on the night of 24 October 2014, Mr. Fahnbulleh could not explain what stood out about the conversation that would have been noteworthy in any way. It was only when specifically pressed by the Tribunal that Mr. Fahnbulleh conceded that Mr. Jarbah had felt disrespected by the Applicant. Mr. Jarbah, notably, gives a version incoherent even with those of the Applicant and Mr. Fahnbulleh, by entirely eliminating from the story that there had been an argument between him and the Applicant, maintaining that it was a jovial encounter and denying that he had complained to Mr. Kamara. This is belied by the totality of evidence which, leaving aside _____, includes also the Applicant and the neutral witness, Mr. Tom Karmala Jnr, who on the night in question was present when Mr. Jarbah reported the assault to Mr. Kamara and who accompanied them as Kamara went to intervene with the Applicant.

71. The Tribunal observed that both Mr. Fahnbulleh and Mr. Jarbah were markedly reticent in answering questions from the Respondent and the Tribunal. Both witnesses suggested that they were stalling rather than genuinely seeking to truthfully respond to the questions. To most of the questions, no matter the substance, Mr. Jarbah kept repeating that he had falsely attested because he needed his job. On the other hand, both witnesses strangely insisted on certain details. As the Respondent rightly points out, both Mr. Fahnbulleh and Mr. Jarbah volunteered to the Tribunal that the Applicant was in possession of a bottle of water on the night of the incident. When asked by the Tribunal to explain why he had remembered that the Applicant had a bottle of water with him, Mr. Fahnbulleh offered that he recalled that detail because the Applicant had always brought water with him on trips. Mr. Jarbah offered the implausible explanation that the Applicant had a bottle of water with him because he had been exercising. Neither could explain what had been noteworthy about the bottle of water that would warrant bringing up that detail during their testimonies.

72. As concerns their prior statements, Mr. Fahnbulleh at one point stated that he had signed and at another point that he had not signed the statement authored by him. Mr. Jarbah maintains that Kamara signed for him but confirms that he had written the statement and that he had posed for a photo taken by Mr. Kamara. The Tribunal has noted that statements which have not been signed by the witnesses but rather signed and stamped by the investigator, are

75. onfirms what he had stated in the investigation and the

beer on Mr. Jarbah, is quite unusual and must have been humiliating; it is thus rather unlikely for Mr. Jarbah to have concocted it as such. The guards present on the site described it in a similar fashion, there is no discrepancy as to hitting with the head or a hand and there is

The only one who spoke Ms. Massa Sheriff, but her statement is admittedly a hearsay taken months after the incident, so details of what she had been told could have escaped her easily. In this connection, the Tribunal was mindful that, as noted by UNAT, at some duty stations the conduct of investigations is more challenging than at others due to the local conditions and the circumstances and these factors ought to be borne in mind when due consideration is given to the conduct of investigations and the evidence gathered.⁴¹ In this instance, the Tribunal considered that all the direct evidence originates from persons who are anything but eloquent as may be ascertained by the formulation of the hand-written statements and the testimony that the Tribunal heard itself and that it accounts for the relative paucity of their narration. It is moreover rightly noted by the Respondent that the incident consisted of acts happening in a quick sequence, difficult to notice and memorize. The Tribunal, however, did not find it safe to rely on the statement of Mr. Fahnbulleh as eye-witness, given that his statement is exceptionally lacking in detail and, given that Mr. Fahn questionable, could have been all, or in part, hearsay, notwithstanding his unquestioned presence on site.

79. As concerns the evidence from the Applicant, he consistently admitted that when he arrived at the gate of the compound, he was not allowed to enter and that he got into an argument with Mr. Jarbah. H

Kamara sought to intervene with the Applicant regarding the incident soon thereafter. Details

bearing for the principal question. Mr. Antony Yorker, who saw the Applicant after the incident also described the Applicant as angry due to, on the words the security. Clearly, there would be no reason for these facts had the exchange between the Applicant and Mr. Jarbah been just a banal verbal altercation as the Applicant presently maintains.

80. Moreover, credibility is undermined by the nonchalance with which he utters statements which, albeit not directly related to the incident, are presumably aimed at putting him in a better light and which are contradicted by reliable evidence. Regarding his whereabouts before the incident, in the investigation he maintained that prior to the incident he had been working, namely attending a United Nations Human Rights Day celebration, which was refuted by information from his supervisor that no such celebration had been organized and no use of service vehicle had been authorized for the Applicant outside office hours. It was moreover belied by Mr. Yorker friend who stated that prior to the incident the Applicant had been with him and other persons and they enjoyed drinks. Before this Tribunal, when parties were asked about their recent contacts with the witnesses who recanted their previous statements

however, his responses in the investigation mention Mr. Fahnbulleh, including by his first name, as present on the site of the incident. Finally, he also stated that he had never received an addendum to the investigation report, although the file contains his response to that addendum.

81. In total, the Tribunal concludes that the direct evidence from writtdsm[(fir)4(st [268.8s)] TJfr

iii. Whether the sanction is proportionate

The Applicant's case

82. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.⁴² In *Yisma* UNDT/2011/061, the Dispute Tribunal held that a disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence.

Respondent's case

83. The Secretary-General has wide discretion in determining the appropriate disciplinary measure. It is only if the sanction appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence by imposing a different one. In the present case, the Applicant assaulted and verbally abused United Nations personnel acting in line with his duties. Such behaviour does not accord with the goals of the United Nations as enshrined in the Preamble to the Charter, namely the reaffirmation of the dignity and worth of the human person.

84. As set out in the decision letter, the Respondent properly considered that the fact that Mr. Jarbah was exercising his functions as an EXSECON guard, when the Applicant verbally

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whereas the Tribunal