
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/064

Judgment No.: UNDT/2020/006

Date: 16 January 2020

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NSENGIYUMVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former Security Officer who served with the United Nations Multidimensional Integrated Stabilization Mission (MINUSCA) in Bossangoa, Central African Republic (CAR). He filed the current application on 25 July 2017 challenging the Respondent's decision 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) ("Contested Decision"). The Applicant seeks: reinstatement, a continuous appointment, a promotion and an award of USD5,000,000.

2. The Respondent filed his reply on 23 August 2017.

3. Pursuant to Order No. 153 (NBI/2017), the Applicant provided a response to the Respondent's reply, and additional documentary evidence on 27 September 2017.

4. The Tribunal held a hearing from 7 to 9 January 2020 and took evidence from

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Starting at around 13.00 at the latest¹, he was served several alcoholic beverages until about 1700 hours.²

town.⁸ He then proceeded to another bar within the same area and continued drinking.⁹ The Applicant acknowledged that he had a few beers at the second bar but did not consider himself to be drunk.¹⁰

9. At approximately 2030 hours the MINUSCA Security Duty Officer (“SDO”) Eugenio was informed by the MINUSCA Radio room that UN-27282 had been left unattended on Avenue David Dacko. He patrolled the area but could not find the vehicle. The Radio room called him again at 2225 hours to report that UN-27282 was

involved in a fight the day before and had disappeared after leaving his car close to a bar in an unsecured area. Messrs. Zerouali and Eugenio were unable to locate the Applicant at his residence or reach him by phone.¹⁴

12.

confirmed the revocation via email at 2104 hours on 17 July 2016.²⁰ Mr. Zerouali obtained a spare key to the UN-27282 from the MINUSCA Chief Transport Officer in order to recover the car when found.²¹

15. The Applicant was nowhere to be found until past curfew which started at 2200 hrs. Mr. Zerouali found UN-27282 in the bar's parking lot at approximately 2215 hours and called Mr. Headington, who advised he would be coming over. Soon after Mr. Headington's arrival, they noticed that the Applicant had exited the bar and had the car running. Mr. Zerouali attempted to stop the Applicant: he displayed his badge and raised his arm in a gesture used in traffic regulation, but the Applicant ignored this and drove off, nearly hitting him.²² Messrs. Headington and Zerouali followed the Applicant in their cars, with Mr. Headington's siren and blue and red strobe lights on. The Applicant did not stop but drove away erratically at high speed.

Applicant on the other side. Mr. Zerouali unlocked the passenger's door and managed to turn off the engine. The Applicant was then moved to Mr. Zerouali's vehicle. The incident attracted a lot of attention from the police that manned the checkpoint.²⁵

17. Mr. Headington and Mr. Zerouali describe the Applicant's poise at this point as "catatonic" or "resigned". Mr. Headington, moreover, supplied that the Applicant was drunk because he smelled very strongly of alcohol, his speech was slurred and he was unsteady on his feet.²⁶ Mr. Zerouali does not confirm this; he, however reports the Applicant addressing him to the effect of "help me brother as I am finished".²⁷

18. Mr. Headington and Mr. Zerouali first drove the Applicant to his residence but then Mr. Headington decided to take him to the MINUSCA Level II Hospital to prevent him from being a risk to himself and others. On arrival, the Applicant refused to take any tests or treatment. The Doctor's opinion was that the Applicant was drunk but since he was refusing treatment, he asked them to leave. When Mr. Headington told the Applicant that they had been asked to leave, he became "bellicose and verbally aggressive". Mr. Zerouali confirms that the Applicant refused to take tests or treatment and that his behavior changed into quarrelsome and verbally aggressive toward Mr. Headington. While Mr. Headington did not explain to Mr. Zerouali the reason for bringing the Applicant in the hospital, in Mr. Zerouali's opinion testing the blood alcohol content ("BAC") would have been appropriate under the circumstances.²⁸

19. After consultations between Mr. Headington and the United Nations Deputy Police Commissioner regarding suitable holding facilities for the Applicant so he would not harm himself or others, the Cameroonian Formed Police Unit ("FPU") was called upon to house the Applicant overnight. The Applicant refused to go. Mr. Headington told him that "he could walk through the hospital exit or be c 0.0 rg 0T Q q BT /F1 1

Applicant was “a big and powerfully built man”, Mr. Headington requested more manpower in the event that non-deadly force was needed to move him. Four additional FPU members arrived at midnight with an Armoured Personnel Carrier (“APC”). Since the Applicant refused to move, the nine FPU members picked up the plastic chair he was sitting in and carried it to the APC. He was kicking, screaming, shouting and resisting strongly. Mr. Headington’s evidence was that the FPU members were not violent with the Applicant nor did they use any restraining devices on him.²⁹

Facts relating to Monday, 18 and 19 July 2016

20. Mr. Headington was informed by the Chief of SIU at 0742 hours that the Applicant had not been placed in a cell by the FPU but had been provided with a bed and a chair. He was informed at 0751 hours that the Applicant had been released by the FPU and had left on a moto-taxi. Three security officers subsequently went to the Applicant’s residence and transported him to the MINUSCA logistics base and then to the Headquarters. The Applicant called Mr. Headington at 1715 hours but Mr. Headington refused to talk to him and hung up. The Applicant then sent three text messages at 1720 hours to Mr. Headington that read “*Sir, as I am very sick in the body and psychologically very sick and hurt due to physical brutalization done on me last night in the clinic in HQ by FPUS in your presence. I officially request medical leave back home in Kigali. I have spoken to medical clinic as well and I will speak with if you give me a chance*”. Mr. Headington did not respond.³⁰

21. The Applicant was placed on Administrative Leave with Full Pay (“ALWFP”) and sent home on 19 July 2016.

SUBMISSIONS

Respondent’s case

²⁹ See also Ibid. pages 94-95 and pages 121-122 (statement of Oyono Mendoula, Commander FPU).

³⁰ Ibid.

22. The Respondent's case is that the Applicant engaged in disorderly conduct at the Nouvel

hours and left around 1900/1930 hours. During this time, he acknowledged having consumed one carton of wine and some beers. The Nouvel Horizon was busy but there was no “heated discussion” at any point. He claims he was arrested by the police only when he was leaving the second bar. Only in their detention did he learn that some boys had been fighting and one stabbed the other.³³ In his supplementary statement on 26 July 2016, the Applicant admits that a fight ensued, but it was behind his back, where one boy hit the other with something sharp, maybe trying to attack the Applicant or maybe they were gendarmes in civilian attires who wanted to provoke him, as they often act against MINUSCA personnel.³⁴

26. Before the Tribunal, the Applicant confirmed having driven UN-27282 to the vicinity of Nouvel Horizon, with the aim of drinking alcohol. He then spent several hours doing so; he, however, maintains that he was not drunk, i.e., “was in control”. Regarding the altercation, he commenced by presenting his role as passive in the face of aggression, subsequently admitted though that he had entered a verbal altercation with a drunk client of the bar and had made hand gestures suggesting that his adversary should leave, which agitated the latter. The Applicant maintains that it was his attacker who had knocked over the table and reached for a broken beer bottle and thus needed to be restrained. The Applicant admitted that he had been escorted out of the bar by others but claims that it was for his protection. The Applicant claims that all witnesses who accused him of aggressive behavior should be denied credence; only the waiters are credible. He nevertheless concedes that, to the extent of the admitted facts, his behavior constituted misconduct, as he should not have acted in an antagonizing manner, either verbally or by gestures.

27. According to the Applicant, he was arrested by the FICU at approximately 1930 hours and detained until morning. He denies that the FICU detained him initially at 1745 hours; released him; arrested him again at 2311 hours and released him the next

³³ Respondent’s reply, annex 3, (transcript of the Applicant’s statement of 18 July 2016) pages 123-126.

³⁴ Ibid., (Applicant’s email to Marc Etienney of 26 July 2016) p.158

morning.³⁵ In his supplementary statement on 26 July 2016, in relation to this earlier incident, the Applicant admits

whereabouts: according to his testimony, after exercising at the stadium he had a meal and consumed one bottle of alcoholic drink, although he did not remember of what sort. Subsequently, he went to a local guest house where he rested and pondered about how to proceed regarding the incident from the night before. He did not go to his residence because he did not want to be found by the Chief Security Adviser, Mr. Headington. He went there only briefly after 2100 hours, but then decided to go out to a restaurant “SICA 1” to get something to eat. At SICA he instantly became alerted that Mr. Headington could be after him, so he rushed out to the vehicle. He does not even remember whether he consumed any food or drinks.

30. The Applicant’s testimony is inconsistent regarding the reason for not stopping at Mr. Zeroulai’s signs to stop. He first stated that he “had thought” that there were many United Nations cars, which made him scared. Then, he maintained that he drove off because the two officers had not set up a formal checkpoint and he feared Mr. Headington would mistreat or even kill him, while Mr. Zerouali was following the latter’s instructions at all times. Hence, he kept escaping them until he encountered law enforcement officials, i.e., the Gendarmerie checkpoint, where he felt safe. The Applicant denies that he drove in a dangerous manner. Before the Tribunal he admitted he may have bumped into Mr. Headington’s car when reversing, in his closing statement his version is that it was his vehicle that was bumped. The Applicant insists that he opened his car window, as such Mr. Zerouali could reach inside and turn it off. He, however, admitted that in order to get into the car it was necessary to use the spare key and open the door at the passenger’s side.

31. The Applicant denies that he drove without a driver’s permit, as at the time he was not aware of the withdrawal. He also disputes that at that time he was drunk. He denies that he was aggressive and disturbing others when at the medical facility. He confirms that he refused treatment or blood tests, the reason for it having been that he was not sick and he feared that he would be killed. He confirmed that at the time MINUSCA had a zero-tolerance alcohol policy when it comes to driving United Nations vehicles.

32. The Applicant contends that the CSA allowed the Cameroonian FPU to attack

35. In light of the existing evidence and the difficulties and resources involved in locating the eye-witnesses more than three years after the incident, the Tribunal concurred with the Respondent that their testimony was not required and that the Tribunal could place reliance on the record before it.³⁹ This consideration was especially valid given the initial admission of the Applicant to the core facts in his multiple responses to the allegations of misconduct, where the only circumstance that he questioned was that he had been the one attacked and not the attacker. The Applicant did not request the hearing of any of the witnesses.

36. The investigative record consists of sworn statements of eye-witnesses who, notwithstanding different details noticed, all confirmed that the Applicant, having been severely

adversaries. Other witnesses confirm a much more aggressive stance taken by the Applicant, including that he knocked the table over and reached for a piece of a broken bottle.

37. Similarly, the Applicant's insistence on the fact that he had been detained by the police only once, late in the evening, whereas after exiting the Nouvel Horizon bar he had only got a ride from the gendarmerie, is not credible in light of the record on

for qualifying it as lack of integrity, in violation of Staff Regulation 1.2(b)⁴⁰, which, however, has no impact on the extent and seriousness of the misconduct.

Was the disciplinary measure imposed proportionate to the offence?

43. The Tribunal recalls that, as elaborated by the Appeals Tribunal, proportionality is a jural postulate or ordering principle requiring teleological application, which derives from the postulate of reasonableness of all administrative decisions. In other words, it is necessary that the sanction bear a rational connection or suitable

45. The Applicant's conduct over the course of two days displayed, moreover, a

