

Counsel for the Respondent:
Esther Shamash, UNDP

Introduction

1. On 17 October 2019, the Applicant, a former Programme Analyst, at the G-7 level, working with the United Nations Development Programme (“UNDP”) in Djibouti, filed an application before the Dispute Tribunal¹ He requested a DT/99/F1012.3(Tf 0

14. On 18 March 2019, Ms. Susan McDade, Assistant Administrator and Director, Bureau for Management Services, UNDP, notified the Applicant of the formal allegations of misconduct against him and invited him to submit a response to the charges and submit exculpatory evidence.²¹ The Applicant provided his comments on 15 May 2019.²²

15. On 16 August 2019, Mr. Mourad Wahba, Acting Associate Administrator, UNDP, decided to impose on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and to grant him two months of termination indemnity in accordance with staff rule 10.1(a)(viii).²³ The Applicant was separated from the service of the Organization on 20 August 2019.²⁴

16. At a certain point, Mr. Massart, the Security Advisor, UNDSS, had removed the Closed-Circuit Television Video (“CCTV”) recording from the stairwell where part of the altercation is alleged to have taken place, and it could not be retrieved. Mr. Massart was not available for the investigation having been disciplined for an unrelated conduct and separated from the Organization in 2017.²⁵

17. As concerns Mr. Elmi, he was disciplined for verbal assault and sanctioned with a censure. He was also investigated for fraud regarding the medical certificate, but the case was not pursued because of difficulties in contacting the physician.²⁶ Mr. Elmi remained in service until December 2020 when his post was abolished.²⁷

²¹ Reply, annex 9.

²² Reply, annex 10.

²³ Application, Annex 1.

²⁴ Ibid.

²⁵ *Massart* UNDT/2020/028.

²⁶ Statement of the Counsel for the Respondent at case management conference on 25 May 2021 and during the hearing on 31 August 2021.

²⁷ Testimony of Mr. Abdo, 30 August 2021, uncontested.

Submissions

Applicant's submissions

18. The Applicant impugns the sanctioning decision based on a five-pronged argument: the UNDP did not consider the reconciliation; unavailability of Mr. Massart's testimony; removal of surveillance videos; tainted testimony of Mr. Abdo and falsification of the medical certificate by Mr. Elmi. UNDP also did not properly consider mitigating factors in his case.

19. On the first argument, the Applicant submits that UNDP strongly encourages amicable settlement of disputes before taking formal legal route. In his case, a reconciliation committee was constituted, Mr. Elmi and himself agreed to settle the matter amicably, and so it happened. Yet, he was sanctioned three years later.

20. With regard to the unavailability of Mr. Massart's testimony, the Applicant believes that Mr. Massart should have been interviewed as the author of the incident report. The Applicant had repeatedly requested for production of any evidence provided by Mr. Massart to the investigators, but in vain.

21. On the third point, the Applicant contends that the recording containing exculpatory evidence, which was in possession of UNDSS, was deleted in order to benefit Mr. Elmi. The investigators' negligence in obtaining the video violated his due process rights. This was done deliberately, to incriminate him, as evidenced by the fact that the investigators also omitted in their report the testimony confirming that the CCTV system had been withheld by UNDSS.

22. Fourthly, the Applicant submits that to sanction him, UNDP relied on the testimony of Mr. Abdo who informed the investigators that he saw the Applicant slap Mr. Elmi. The Applicant explains that Mr. Elmi was the direct supervisor of Mr. Abdo and as such his evidence was tainted by the fact that he could not make an impartial statement against his supervisor.

Case No. UNDT/NBI/2019/145

Judgment No.: UNDT/2021/104

shows, that despite knowing the rules, the Applicant chose to physically assault a UN staff member”.

31. The Respondent opines that the available evidence results in an irrefutable conclusion that the Applicant assaulted Mr. Elmi.²⁹

32. With regard to the sanction, the Respondent maintains that the

Consistent with this doctrine, a

investigation were wavering, including that he claimed that the physical scuffle had been initiated there by Mr. Elmi, after which he would have run away to the radio room. This, however, was not confirmed by him before the Tribunal, where he testified that that stage had only involved verbal dispute with Mr. Elmi. The Tribunal accepts this latter version as proven, based on the statements and testimony of Mr Mahyoub and the Applicant.

37. The Tribunal concludes that based on the Applicant's admission and testimonies of other witnesses du

Applicant was informed of his right to seek assistance of an attorney. Whereas the Applicant challenges appropriateness of the disciplinary measure because of the inability of the investigators to obtain the CCTV footage and the non-authenticity of Mr. Elmi's medical certificate, these concerns, albeit they reflect serious shortcomings of the investigation, do not undermine the relevant findings of fact, do not affect the qualification of the Applicant's acts as serious misconduct nor did they impede his right to a material defence. The Respondent, moreover, explains that the case did not amount to discriminatorily selective prosecution: the question of Mr. Massart's tampering with evidence had been rendered moot in light of his separation for another fraudulent practice; Mr. Elmi had also been disciplined for his part in the incident involving the Applicant.³⁶ All considered, the shortcomings of the investigation did not render the result unfair to the Applicant.

Whether the sanction proportionate to the gravity of the offence.

46. The principle of proportionality in a disciplinary matter is set out in staff rule 10.3(b) which stipulates that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

47. The Tribunal's review of proportionality of disciplinary measures is done with deference to the discretionary powers of the Secretary-General in this field.³⁷ The Tribunal reviews whether the measure in question is legal and remains in a rational connection with the gravity of the offence and the objective of disciplining.³⁸

48. The Tribunal recalls that it is a consistent jurisprudence of the Appeals Tribunal that physical aggression is not to be tolerated among United Nations personnel, no matter the degree of provocation on the part of the victim or personal circumstances of

³⁶ The Tribunal shares a distaste occasioned by the submission of an obviously fake medical certificate and expresses astonishment that it had been left to the Applicant to investigate this matter in order to clear himself from a suspicion of having caused serious bodily injury. Absent evidence to the contrary, it nevertheless accepts the Respondent's explanation that the evidence did not suffice to impugn Mr. Elmi's role in it.

³⁷ *Portillo Moya* 2015-UNAT-523, paras. 20-21.

³⁸ *Samandarov* 2018-UNAT-859, para. 21.

the attacker.³⁹ As a result, p

Entered in the Register on this 7th day of September 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi