



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

NZOKIRISHAKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Jerôme Blanchard, HRMS/UNOG

Introduction

1. The Applicant joined the United Nations Operations in Burundi (ONUB) on 01 October 2004 as a Security Clerk under appointment of limited duration. Effective 01 January 2007, he held a fixed-term appointment as a Security Assistant with the United Nations Integrated Office in Burundi (BINUB).

2. On 18 January 2012, he filed the current application before the United Nations Dispute Tribunal (UNDT) challenging the decision, taken on 14 October 2011, to separate him from service for misconduct.

Facts

3. By a letter dated 21 March 2008, the Burundian Minister of Justice appointed the Applicant as a *substitut du Procureur de la République* (Deputy Prosecutor). This letter indicated that the Applicant would follow a *stage probatoire* (probationary training) under the authority of the Prosecutor's Office.

4. On 16 January 2009, the Applicant was allegedly involved in a fight at a local bar in Bujumbura following which the manager of the bar was arrested and detained by the Burundian police on 23 January 2009 on charges of assault upon and obstruction of a Magistrate. The detention of the bar manager was then reported to the Office of Human Rights and Justice (OHR&J).¹ On 27 January 2009, the Applicant was invited to discuss the matter with OHR&J and the bar manager was subsequently released from detention on 28 January 2009.

5. Having noticed that the Applicant was a BINUB staff member, OHR&J reported the matter to the BINUB Conduct and Discipline Officer who requested that

¹ OHR&J of Bujumbura comes under the control of the Office of the High Commissioner for Human Rights (OHCHR). OHR&J is mandated to draft a report on the situation of Human Rights in Burundi. It records/registers complaints from individuals and human rights violations but has no legal standing before the national authorities. It appears from the Investigation Report and the OHR&J report on the incident that OHR&J acted informally as a mediator.

the BINUB Security Investigations Unit (SIU) investigate the Applicant's involvement.

6. The Applicant resigned from his position of Deputy Prosecutor by a letter dated 11 February 2009. This resignation was accepted by an Order dated 19 February 2009 from the Ministry of Justice referring to the Applicant as a Magistrate.

12. By memorandum dated 13 January 2011, Applicant was charged with

16. On 17 February 2012, the Respondent submitted a Reply that stated the following: (i) the facts on which the disciplinary measure was based had been established by clear and convincing evidence; (ii) the established facts legally amounted to misconduct under the regulations and rules applicable at the time; (iii) the disciplinary measure applied was proportionate to the offence, taking into account the mitigating and aggravating circumstances; and (iv) the staff member's due process rights were respected.

17. On 20 March 2013, the Applicant filed a response to the Respondent's Reply, contending that his due process rights were not respected during the investigation and that the Respondent failed to identify the applicable rules and regulations at the time of his alleged misconduct. He asserted his claim for compensation.

18. On 28 March 2013, the Respondent submitted a Motion to dismiss the

Preliminary matters

22. In their respective responses both Parties informed the Tribunal that they did not require a hearing in the present case.

23. Under Article 16.2 of the Rules of Procedure a hearing should “normally” be held following an appeal against an administrative decision imposing a disciplinary measure. The use of the word “normally” does not make a hearing mandatory.

29. There is also the Applicant's letter of resignation from his position of Deputy Prosecutor, dated 11 February 2009, indicating that he signed from a position of Magistrate. The French term "Magistrat" encompasses different types of positions, including, in the present case, the position of Deputy Prosecutor.

30. The Order from the Ministry of Justice, dated 19 February 2009, accepting the Applicant's resignation refers to the Applicant's position as *Magistrat/Substitut du Procureur*⁴.

31. In a separate letter⁵, the Applicant explained that as a BINUB local staff his contract had always been temporary, unsecured without any guarantee of renewal, depending on the mandate of BINUB. He stated he feared that after the Mission closed he would lose his job and he had to think about his professional career after the mandate of BINUB ended. He therefore filed an application with the Ministry of Justice and at the end of March 2008 he received a letter of appointment. When he received this letter, and being unaware of the United Nations rules regarding outside employment, he used his free time, and at what he perceived to be an absence of conflict of interest between the functions of a Security Assistant and a Deputy Prosecutor, to start a probationary internship in the Ministry of Justice. When the BINUB mandate was renewed for one year in 2009, he decided to resign at the beginning of that year and this resignation was accepted by the Ministry of Justice on 19 February 2009.

32. During the investigation, the Applicant stated that he had not requested authorization from the Secretary-General to undertake an internship at the Ministry of Justice as internships or trainings are forbidden by the United Nations. He added that it is forbidden to have another permanent job with another employer while working for the United Nations. He was never paid as a Magistrate but as an intern he

⁴ *Ordonnance Ministérielle portant acceptation de la démission offerte par un Magistrat du Ministère public.*

⁵ *Note explicative de la période pendant laquelle j'ai travaillé pour le Ministère de la Justice.*

received an allowance from the Ministry of Justice without recalling the amount. This internship was to train him for the position of Magistrate.

33. The SIU mentioned in its report that there was no document to prove that the Applicant sought authorization from the Administration to engage in outside employment.

34. In his comments on the charges, the Applicant admitted that he was doubly employed, a situation prohibited by the statutes and regulations. He maintained however that he was never involved in a conflict of interest situation given his position as a Security Assistant and his duties in the Prosecutor's office during that period.

35. In view of the foregoing, the Tribunal concludes that in the present matter the facts showing that the Applicant was engaged in unauthorized outside activities have been convincingly established.

Did the established facts constitute misconduct?

The Applicant's submission

36. According to the Applicant, the provisions on which the contested decision were based were not in force at the time of the alleged misconduct. The provisions applicable at that time were contained in ST/SGB/2008/4 and not in ST/SGB/2002/1 as contended by the Respondent.

37. The Applicant also submits that the Secretary-General failed to prove that his outside activities affected the interest and the work of the Organization.

38. The Applicant contended that he was unaware of the rules and regulations regarding outside activities and they were not applicable to him because they were not properly notified to him.

government or other source external to the Organization. The Applicant applied for and subsequently accepted a public service position paid by his Government, without requesting authorization of the Secretary-General. The mere nature of the Applicant's position is at odds with the impartiality and independence required from staff members.

44. In regard to any conflict of interest, the Respondent noted that :

It was alleged but not established by sufficient evidence that the Applicant attended and/or participated in meetings regarding BINUB in his capacity as an official of the Ministry of Justice. Such activities would have clearly amounted to an actual conflict of interest. Nevertheless, it was established that the Applicant was working in an institution, the Ministry of Justice, that was conducting investigations concerning BINUB, as evidenced by the statement provided by the Applicant.

Considerations

45. In light of the forgoing and after viewing the documentary evidence, the Tribunal considers that the Applicant did not suffer any prejudice by the use of the provisions of ST/SGB/2002/1 applicable at the time as the substantive content of the provisions are the same as in ST/SGB/2008/1 which were consolidated. Further, the Tribunal considers that by working as a Deputy Prosecutor at the Ministry of Justice from 27 March 2008 to 19 February 2009, without the approval of the Secretary-General, the Applicant failed to comply with staff regulations 1.2(b), (f), (o) and section 3.1 of ST/AI/2000/13 which legally amount to misconduct.

46. Outside activities or employment consists of two strands. First, under section 3.1 of ST/AI/2000/13 a staff member cannot undertake any outside activities or employment without the authorization of the Secretary-General. Secondly, the Secretary-General may authorize a staff member to take up outside activities or employment. But this is subject to an important condition: that outside activity or employment must not conflict with the duties of the staff member and the interest of the Organization. A reading of section 1.2(p) makes it clear that a staff member who has been granted authorization by the Secretary-General does not have a free license.

He/she must be careful not to put him/herself in a situation of conflict. If the staff member is found to be in a situation of conflict notwithstanding the authorization of the Secretary-General, the latter would have the liberty to revoke the authorization and even start disciplinary action against that staff member.

47. In the present case, there was no need to pass the issue of conflict of interest as the Applicant breached section 3.1 of ST/AI/2000/13 by engaging in an outside activity or employment without the authorization of the Secretary-General.

48. Ignorance of rules and regulations in an employment relationship or even of the law is not a defense to non-compliance with the employment rules and regulations under which a person is recruited. *Duagne et al.*⁶ the UNAT held that “ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the staff rules”. The Tribunal however holds that the Applicant was aware or deemed to be aware of the staff rules and regulations by the very fact of the letter of appointment that he signed where he acknowledged that he had become familiar with these provisions. At any rate, even if he was not fully aware of the rules and regulations that he had breached, as a prudent employee having served with the United Nations for 5 years, especially planning to be a Magistrate, he should have sought advice or guidance. Accordingly, the Applicant's unfamiliarity with the United Nations rules and regulations does not provide justification for his misconduct.

Was the sanction proportionate to the offence?

49. The Applicant relied on his Performance Appraisals to claim that he always met the highest standards of efficiency, competence and integrity. This Tribunal has previously determined that:

(...) an unblemished record is not in itself a gateway to breaching the rules of the Organization. Nor does an unblemished record

⁶ 2010-UNAT-067. See also *Austin* UNDT/2013/080

⁷ *Diakite* UNDT/2010/024

automatically qualify for mitigating factors to be applied. The mitigating issue must be analyzed in the light of the evidence establishing the misconduct, the manner in which the act was perpetrated, the attitude of the wrongdoer and the need to protect the integrity of the Organization

50. In the present matter, as the Respondent submitted, the Secretary-General had no obligation to take into account, as a mitigating circumstance, the Applicant's performance appraisal. He could even have chosen to summarily dismiss him or separate him from service without indemnity or compensation.

51. The Respondent stated that in determining the sanction to be imposed, the Secretary-General took into account aggravating circumstances such as the highly sensitive nature of the Applicant's outside activities and the fact that the Applicant concealed his dual employment from the Organization for almost a year until his resignation and received, during this period, remuneration. The Secretary-General also took into account a mitigating circumstance as the delay of over a year in bringing the matter to a close.

52. Further, the Tribunal is not convinced that the "*stage probatoire*" was a mere internship. Indeed, the terms, referred to in the letter of appointment, in the letter of resignation and then in the "*Ordonnance*" accepting the resignation, such as "*Substitut du Procureur*" and "*Magistrat*", show that he occupied a position for which he was being remunerated.

53. The Tribunal takes the view that the sanction of separation from service with compensation in lieu of notice and with termination indemnity was proper and proportionate given the Applicant's misconduct.

Other issues

54. On 12 May 2009, the Applicant filed a complaint against the CSA addressed to the BINUB Chief Mission Support, alleging continued harassment, victimization and abuse of authority toward him. The Applicant contended that the CSA started an

legally binding document for the Administration. In case of any discrepancy, the staff rules, regulations and administrative instructions will prevail.

Decision

58. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signed)

Judge Vinod Boolell

Dated this 4th day of February 2014

Entered in the Register on this 4th day of February 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi