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Introduction

1. On 12 December 2018, the Applicant, a former Security Officer at the F3 level, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO") in Kinshasa, filed an application before the Dispute Tribunal. He contests

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asking him to check and confirm if all the details were well captured.⁶

12. On 8 January 2016, the Applicant learnt from one "OK", a Judicial Police Officer ("OPJ"), that JT had been in the Office of the Military Prosecutor and they were hatching a plan to arrest him. According to OK, the arrest was to be effected on 11 January 2016 and that the Military Prosecutor was of the view that nothing was to stop the arrest since MONUSCO had not replied to his letter of 2 January 2016. The Military prosecutor interpreted MONUSCO's silence as a positive response to that letter.⁷

13. On 9 January 2016, the Applicant contacted a colleague and asked him to check if the LAO had finalized the reply and whether it had been submitted to the Military Prosecutor. The colleague, informed the Applicant that Mr. Levan had decided to halt the reply.⁸

14. On 10 January 2016, the Applicant retrieved the draft reply he had received from Mr. Al Habib and decided to sign it in the name of Mr. Ian Sinclair and went on to hand deliver it to the Military Prosecutor's private residence.⁹

15. On 21 January 2016, the Military Prosecutor sent another letter to Mr. Sinclair and expressed the fact that based on MONUSCO's letter of 10 January 2016, he had decided not to pursue the prosecution of the Applicant.

17. On 29 May 2016, the Applicant received notification from the Office of Internal Oversight Services (“OIOS”) informing him that an investigation had been commenced against him on an allegation that he may have failed to observe the standards of conduct expected of an international civil servant. OIOS, accordingly invited the Applicant for an interview on 30 May 2016. The interview took place as had been scheduled and the Applicant admitted that he had signed the document without authorization; but indicated that he did so to save his life that was at risk.¹³

18. On 31 July 2017, the OIOS produced a report and concluded that the Applicant had forged the signature of Mr. Ian Sinclair. The OIOS recommended to the Department of Field Support (“DFS”), among others, take appropriate action in relation to the Applicant’s conduct.¹⁴

19. On 17 August 2017, the Assistant Secretary General for Field Support referred the Applicant’s case file to the Office of Human Resources Management (“OHRM”) for appropriate action. On 28 March 2018, the OHRM notified the Applicant of the formal allegations of misconduct against him and invited him to submit his comments on the allegations.¹⁵ The Applicant provided his comments on 27 August 2018.

20. On 25 October 2018, the Under-Secretary General for Management (“USG/DM”), decided to impose on the Applicant the disciplinary measure of dismissal, in accordance with staff rule 10.21(ix).¹⁷ The Applicant was separated from the service of the Organization on 31 October 2018.

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Applicant’s submissions

21. The Applicant submits that in imposing the sanction, the Administration did not consider the mitigating circumstances of his case. Applicant presents his case based on a twofold argument. First, that he was threatened with an arrest and a request for the waiver of his diplomatic immunity was submitted to MONUSCO. However, MONUSCO failed in its obligation to protect him. Therefore, MONUSCO's failure to act constitutes a mitigating circumstance in his favour.

22. Second, the Applicant maintains that he signed the letter addressed to the Military Prosecutor to save his life especially since MONUSCO had failed to do the needful to protect him. The offence was committed because he had to protect himself from the imminent arrest by the Military Prosecutor.

23. The Applicant explains that the contested decision placed him in a dire socioeconomic situation. He has lost his salary due to the separation from service. Accordingly, he is not able to finance the projects he had conceived when he was still in service. Equally, he is no longer able to support his children to attend good schools as he lost the education grant entitlement. The decision has destroyed his life and that of his family. The family is comprised of eight members including three who are of young age.

24. As a remedy, the Applicant requests the Tribunal to find that mitigating circumstances exist in his case and do favour him. Accordingly, the Tribunal should order his reinstatement.

Respondent's submissions

25. The Respondent contends that the facts in this case are not disputed. There is clear and convincing evidence that, in January 2016, the Applicant dated and falsely signed a memorandum purporting to originate with the Organization, dated the falsified document to member state authorities and presented the falsified document as a genuine United Nations document. Accordingly, the Applicant's action amounted to serious misconduct in violation of staff regulations 1.2(b), and 1.2(g), and staff rule 1.2(i), warranting his dismissal from service.

26. All relevant circumstances were considered in imposing the disciplinary measure, and the Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process. In this respect, the Applicant's argument pertaining to purported mitigating circumstances, were fully considered.

27. Contrary to the Applicant's claim that he committed the misconduct to save his life, there is no evidence on the record that the Applicant's life was in danger, as he alleged. The record only contains evidence of an employment-related dispute between the Applicant and [redacted]. In addition, if the Applicant felt threatened by the Military Prosecutor's actions, he had an obligation to report the matter to the

Accordingly, the Applicant's falsification of an official document pertaining to privileges and immunities is particularly grave due to the potential negative impact on the reputation of the Organization, the relationship between the Mission and the host government, and the Organization's obligations under international law.

30. With regard to the sanction, the Respondent contends that it was proportionate and properly decided. Relying on *Portillo Moya and Sall*,¹⁹ the Respondent submits that in determining the appropriateness of a disciplinary measure, the Tribunal establishes if the sanction appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, or discriminatory or absurd in its severity. In the present case, none of the listed items do apply. The sanction adequately reflected the serious nature of the Applicant's misconduct.

31. The Respondent contends that the established facts constitute misconduct and the sanction imposed was not disproportionate. The question of reinstatement, therefore, does not arise.

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Scope of judicial review

32. It is well-established case law that the role of the UNDT in disciplinary cases is to perform judicial review of the case and assess the following elements:

- a. Whether there is clear and convincing evidence that the facts have occurred in cases where dismissal is at stake;
- b. Whether the facts amount to misconduct;
- c. Whether the sanction is proportionate to the gravity of the offence and;

¹⁹ *Portillo Moya* 2015-UNAT-523, paras 19-21; *Sall* 2018-UNAT-889, para 41.

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44. In *Samandarov*²², UNAT has held that:

Our jurisprudence has expressed the standard for interference variously as requiring the sanction to be “blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” to be obviously absurd or flagrantly arbitrary. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking effective remedial power

Administrative precedents

45. The Tribunal

47. A staff member created a false *note verbale* on official letterhead on their United Nations computer. The staff member forged the signature of a staff member and sold the *note verbale* to another staff member in order for the latter to obtain a nonimmigrant visa. Several false documents, such as fake diplomas, were found on the staff member's United Nations computer. Mitigating factors were taken into account in determining the disciplinary measure, including flaws in the investigation process and the time taken to complete the disciplinary process. Disposition: Separation from service with compensation in lieu of notice but without termination indemnity.

48. In the case at hand, there is evidence on file that the Applicant was threatened with an arrest and a request for the waiver of diplomatic immunity was submitted to MONUSCO.

49. There is also evidence that MONUSCO failed to answer, in due time, to the request made by the Military Prosecution, therefore, delaying the adoption of any protective measures.

50. The Tribunal underlines that, on 5 January 2016, the MONUSCO Legal Affairs Office received a letter dated 2 January 2016 from the the Militiaived a letter (e)3(c)3(ut

Legal Officer; exchanged views on how to respond to the Military Prosecutor's letter.

53. Thereafter, Mr. Levine sent an email to Mr. Sinclair and Ms. Sohier, requesting that they "hold off" on an official response to the Military Prosecutor. However, Mr. Sinclair instructed Ms. Sohier to prepare an official response to the Military Prosecutor, so it would be ready to be sent quickly if necessary.²⁵

54. Around the same period, the Applicant contacted Mr. Hamad Al Habib, MONUSCO Legal Assistant, LAO, by telephone to inform him of his possible arrest and asked him whether their office had received the correspondence from the Military Prosecutor requesting the waiver of his diplomatic immunity.

55. This sequence of events shows that the Applicant was seeking help from MONUSCO as he was afraid of being arrested at any time.

56. Mr. Al Habib confirmed that the said letter had been received and that they were in the process of drafting a reply to it. Thereafter, Mr. Al Habib asked the Applicant to give him the chronology of events. Mr. Al Habib then prepared a draft reply which he shared with the Applicant asking him to check and confirm if all the details were well captured.²⁶

57. Finally, on 8 January 2016, the Applicant learnt from OKFp fromd learnt

59. On 9 January 2016, the Applicant contacted a colleague and asked him to check if the LAO had finalized the reply and whether it had been submitted to the Military Prosecutor.

60. The colleague, informed the Applicant that Mr. Levine had decided to halt the reply.²⁸

61. The Respondent has not clarified why Mr. Levine took the decision to halt the reply to the Military Prosecutor and the Tribunal is of the view that this delay had an impact on the Applicant's decision to act on his own volition.

62. The hesitations and delays caused by MONUSCO in handling this threat to the Applicant in a timely manner contributed to the fact that, on 10 January 2016, the Applicant retrieved the draft reply he had received from Mr. Al Habib and decided to sign it in the name of Milan Sinclair and went on to hand deliver it to the Military Prosecutor's private residence.²⁹

63. On 21 January 2016, the Military Prosecutor sent the letter to Mr. Sinclair and expressed the fact that based on MONUSCO's letter of 10 January 2016, he had decided not pursue the prosecution of the Applicant.³⁰

64. The Tribunal agrees that, in the specific context of DRC (which is at the epicenter of a civil war) it is reasonable to infer that the Applicant was afraid of what could happen to him if he was, indeed, arrested by the local authorities.

65. By failing to immediately clarify the situation with the local authorities and the Applicant himself, MONUSCO's failure constitutes a mitigating circumstance in his favour.

66. The Tribunal is of the view that it is reasonable to believe the Applicant acted under pressure, in an exceptionally difficult context in which he feared for his life and

²⁸ Ibid, para 10.

²⁹ Application, annex 3.

³⁰ Reply, R/5, para 13.

