



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 668

Case No.711: COULIBALY SY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas, on 22 May and 30 July 1991, Coulibaly Sy, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF) filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant and with the agreement of the Respondent, the President of the Tribunal, in accordance with article 7, paragraph 5, of the Statute of the Tribunal, suspended until 31 October 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 January 1993 the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 January 1993, the Applicant's counsel again filed an application in which he requested the Tribunal, inter alia:

" ...

(c) To declare the decision to dismiss the Applicant based on these false

accusations invalid;

(d) To order the reinstatement of the Applicant in UNICEF with retroactive effect of payment of his salary, allowances and benefits;

(e) Alternatively, to order the payment of termination allowances in accordance with the provisions of the 100 Series of the Staff Rules ...

(f) Irrespective of the final decision, to order the payment to the Applicant of compensation in respect of the damage suffered (the Applicant leaves it to the Tribunal to decide the amount of this compensation)."

Whereas the Respondent filed his answer on 7 February 1994;

Whereas the Applicant's counsel filed written observations on 11 March 1994;

Whereas, on 26 May 1994, the Respondent informed the Secretary of the Tribunal that the Applicant had died on 26 January 1993;

Whereas, on 5 July 1994, the Secretary of the Tribunal asked the Applicant's heirs whether they wished to pursue the case before the Tribunal and on 18 July 1994, the Applicant's eldest daughter replied in the affirmative;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 3 September 1979, as a Clerk/Typist at the GS-3 level and remained with UNICEF until 3 September 1990, the date on which he was dismissed for misconduct. At the time of his dismissal, he was employed as an Administrative Assistant at the GS-6 level.

In a letter dated 7 October 1987, the Regional Supply Officer of the UNICEF Office at Abidjan (the Regional Officer) informed the Chief of the Freight Centre at Abidjan Airport that all documents relating to air freight intended for UNICEF at Abidjan should in future be delivered to the clearing agent MORY & CIE.

In two memoranda dated 3 March and 7 April 1989, the Administration Officer asked the Regional Officer to transfer the records of administrative purchases from the Supply

Section to the Administration Section.

In a letter dated 22 June 1989, MORY & CIE informed the Regional Officer that it had often happened that the documents which it had gone to collect at the airport, on the instructions of the Regional Officer, had already been collected by the Applicant or by another clearing agent on the instructions of the Applicant. It cited specifically the case of eight packages of audiovisual equipment collected by a certain Mr. Niang Brahim on the Applicant's instructions. It also indicated that Air Afrique had given it to understand that it had received instructions from the Applicant to deliver the documents only to him or to his representative. Lastly, MORY & Cie invited the Regional Officer to write a letter to Air Afrique designating the company as clearing agent for UNICEF, in order to avoid any confusion in the future.

In a memorandum dated 1 August 1989, the Regional Officer informed the Regional Director of UNICEF of the contents of the letter from MORY & CIE. He also mentioned that officials of the Air Afrique Freight Centre had brought to his attention the fact that the Director-General of Air Afrique had received from the UNICEF Office a note verbale dated 21 July 1989, bearing neither the name of the author nor a signature, informing him of "the decision taken by UNICEF that it wished in future to receive directly all air freight documents intended for it", and explaining that the reason for this decision was to avoid the "considerable collection delays" resulting from the previous procedure followed, which was to deliver the freight documents to a clearing agent which would, in turn, send UNICEF a notice of the arrival of supplies.

In a letter dated 1 August 1989, the Officer-in-Charge of the Regional Office confirmed to the Director of the Air Afrique Freight Centre, on behalf of the Regional Director of UNICEF, that MORY & CIE remained the UNICEF clearing agent at Abidjan Airport.

In a memorandum dated 11 December 1989, the Deputy Regional Director of UNICEF asked the Applicant to submit to him immediately a written explanation of his "intervention vis-à-vis Air Afrique to change the Office's well-established procedures in

clearing UNICEF project supplies" and, in particular: (1) to explain what authorization he had had to issue the note verbale of 21 July 1989 to the Director-General of Air Afrique, and (2) to specify the name of the clearing agent which had cleared the supplies through customs and provide copies of the transactions conducted with that clearing agent during the current year".

The Applicant provided the explanations requested in a memorandum dated 12 December 1989.

With regard to the note verbale addressed to Air Afrique, the Applicant stated that it had been sent in good faith, after consultations with a staff member in the Supply Section. He gave the following reason for not having consulted the Regional Officer, who was the Chief of that Section: "[The Regional Officer] has not spoken to me for almost two (2) years and it was therefore difficult for me to have a conversation with him."

In reply to the questions put by the Deputy Regional Director concerning the clearing agent which had cleared UNICEF supplies through customs, he stated: "As soon as it had been decided to transfer the records to the Administration Section following very considerable and repeated collection delays, which had been brought to your attention by my supervisor, he had wished to try out a clearing agent which had previously had nothing to do with UNICEF ... and thus TRANSCOSIT, through its intermediary (E.I.T.C.F.), was designated. I think that the matter of project supplies was the first to be entrusted to that agent prior to the final departure of [the Administration Officer] and my own departure on leave. While I was on leave, the Administration Section entrusted to the same clearing agent the clearance of liquor and the clearance of the personal effects [of a staff member]. Lastly, I entrusted the clearance of a car [belonging to another staff member] to the same clearing agent."

He added that the customs clearance of the eight packages intended for the programme had been the result of an error on the part of the Administration Section and the Supply Section, that the shipping documents had been sent to the Administration Section by a staff member in the Supply Section, that there was no evidence which could identify the recipient, that the Administration had been awaiting a consignment from the UNICEF Greeting Card Operation in Copenhagen, and that the error had been discovered only at the

time of the delivery of the packages by E.I.T.C.F.

The Administration Officer submitted his comments on the explanations provided by the Applicant in two memoranda dated 13 December 1989 and 31 January 1990. In those memoranda he explained that the Administration Section had indeed issued notes verbales to government authorities with regard to matters of protocol, but that it had never issued them to third parties or in respect of matters relating to customs clearance. He asserted that he had never asked the Applicant to select a new clearing agent or to carry out transit operations which were normally the responsibility of the Supply Section. He stated that he had signed the franchise relating to the eight packages intended for the programme following a misunderstanding as to their content, but that he had never asked the Administration Section to clear them through customs and that he had only ever requested the Applicant to clear through customs private liquor and other personal effects of the international staff.

The Regional Officer also submitted his comments on the Applicant's explanations in a memorandum dated 14 December 1989. In that memorandum he stated, in essence, that the note verbale addressed to Air Afrique had not been discussed by the Applicant either with him or with any other staff member of the Supply Section, and that no staff member of the Supply Section had handed over to the Applicant, as the latter had affirmed, the air transport letter concerning the eight packages, but only the telex announcing the arrival of the packages which, inter alia, provided details which enabled the Applicant to identify the nature of the said packages.

In a memorandum dated 6 March 1990, the Director of the Personnel Division asked the Regional Director of UNICEF to constitute a Joint Disciplinary Committee to investigate the Applicant's case.

The Joint Disciplinary Committee submitted its report on 27 July 1990. Its conclusions and recommendations were as follows:

"1. General impression

During its interviews with [the Applicant] and in the light of the facts, the Joint

Disciplinary Committee noted that [the Applicant] had on several occasions demonstrated evident bad faith. A few examples will illustrate this point:

- (a) [The Applicant] strongly maintained that he had had no contact with the Director of E.I.T.C.F. and yet he had endorsed a cheque in the amount of 449,848 CFA francs for the said company (...). We would point out that one must be authorized in order to endorse a cheque.
- (b) [The Applicant] always asserted that UNICEF was working with TRANSCOSIT and not with E.I.T.C.F., when the facts and the statements of the directors of TRANSCOSIT and SITI have demonstrated that, in fact, the contrary was the case.
- (c) [The Applicant] indicated that the clearance of the eight (8) packages was the first transaction carried out with E.I.T.C.F., when in reality he himself had conducted six (6) previous transactions.

2. Issuance of the note verbale of 21.7.89

The facts show that there was neither any justification nor any urgent need for the issuance of a note verbale to change the procedures for customs clearance without preliminary consultation. In case of doubt, [the Applicant] could and should have consulted the person responsible in the Office or waited for the results of the survey while making the person responsible in the Office aware of the need to clarify the situation without delay.

The Committee is of the opinion that [the Applicant] exceeded his authority, whereas he could have consulted the Office of the Regional Director before issuing the note verbale.

3. Customs clearance at the airport of eight (8) packages intended for the Côte d'Ivoire programme

- (a) [The Applicant] could clearly identify the nature of the eight (8) packages intended for the Côte d'Ivoire programme and he had probably been informed of their destination.
- (b) It is very unlikely that the franchise was requested on 16.6.89 on the basis of the copy of the long-term agreement (LTA) sent by Copenhagen since that copy did not reach the Abidjan Office until 22.6.89. The franchise must have been issued on the basis of the LTA collected at the airport by [the Applicant] as a result of advance information obtained from Copenhagen by

telex.

- (c) The fact that equipment relating to the Greeting Card Operation was expected cannot be accepted as a valid reason for the customs clearance in view of the information available regarding the nature of the eight (8) packages.
 - (d) [The Administration Officer] signed the franchise which was required for customs clearance without apparently ascertaining that the clearance was to be carried out by the Supply Section.
4. Operations carried out with E.I.T.C.F.
- (a) The Administration Section, in this case on the proposal of [the Applicant], chose as clearing agent E.I.T.C.F., an unauthorized company whose Director was never seen by anyone and disappeared towards the end of 1989 without leaving any address. The Supply Section was not consulted with regard to this choice.

This choice did not meet the concerns expressed on several occasions by [the Applicant], who claimed to wish to protect UNICEF against any misappropriation of funds by clearing agents. The choice of E.I.T.C.F. as an intermediary - in effect, the Administration did not deal directly with TRANSCOSIT or SITI - led to an increase in the risk and the cost to UNICEF but was in the personal interests of [the Applicant]. Moreover, it has been established that the invoicing of E.I.T.C.F. does not correspond to the official standards either in the wording used or in the tariffs applied.

[The Administration Officer] denies having asked [the Applicant] to designate a new clearing agent. The fact is that, prior to the departure of [the Administration Officer] from Abidjan, seven operations were carried out with E.I.T.C.F, three of them with his implicit agreement in view of the order forms signed. This fact reveals a very serious flaw in the system of supervision. Moreover, it appears that there was no control of the E.I.T.C.F. invoices before they were paid, which undoubtedly resulted in damage to the Organization.

- (b) The fact that [the Applicant] endorsed a cheque for E.I.T.C.F. after having denied any connection with the management of the company shows that he had close relations with E.I.T.C.F., and this represents a serious conflict of interest.

5. Role of the Regional Finance and Administration Officer

...

In his capacity as Chief of the Administration and Finance Section, it was his job, and certainly his responsibility, to establish the necessary controls and to say who should carry out which control.

While not seeking to play down the actions of [the Applicant], the Committee believes that the total absence of control over customs clearance operations at the Section level favoured the misappropriation of funds which took place.

In view of the foregoing, the Joint Disciplinary Committee has decided to allow [UNICEF] headquarters to take the necessary disciplinary action in [the Applicant]'s case."

The Deputy Executive Director of UNICEF addressed a letter dated 22 August 1990 to the Applicant in which she informed him, in the following terms, of her decision to terminate his services:

"... I have concluded that on the basis of:

- (a) Your issuance, without prior authorization from your supervisors, of the note verbale dated 21 July 1989 for the purpose of changing well established procedures in clearing UNICEF supplies;
- (b) Your arranging for E.I.T.C.F., which is not a duly recognized clearing agent, to act as 'intermediary' for clearing UNICEF supplies; and
- (c) Your signature on the back of UNICEF's cheque dated 6 June 1989 (made payable to E.I.T.C.F. in the amount of CFAF 477.848) endorsing it on behalf of E.I.T.C.F., against the company's seal, which reads 'Entreprise Ivoirienne de Transport - Coulibaly et Filles'.

It is clear that you have taken advantage of your position in UNICEF to design a scheme whereby the clearance of UNICEF supplies was made through an intermediary E.I.T.C.F., which was in no way in UNICEF's interests, in order to serve your own interests and illicitly obtain financial gains. Such action is, obviously, incompatible with the responsibility and conduct befitting your status as an international civil servant under staff regulation 1.4.

Moreover your actions, coming after you had already been warned by your Regional Director on 5 March 1988 that any similar irregularities in the future will lead to your dismissal from UNICEF's service, have led me to now decide, on behalf of the Executive Director, to separate you from service for misconduct in accordance with UN staff regulation 10.2 and staff rule 110.3. The effective date of your separation will be the c.o.b. [close of business] on which you receive this letter. I have also decided, in accordance with annex III to the Staff Regulations, para. (c), as well as staff rule 110.3 (a) (viii), that you will not receive any termination indemnity payment nor compensation in lieu of notice. However, you will receive payment of any accrued annual leave balance, as well as any salary or allowances due to you up to the date of separation."

On 31 January 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The false accusations levelled against the Applicant are totally unfounded.
2. The decision to dismiss him based on those false accusations is invalid.

Whereas the Respondent's principal contention is:

The contested decision was taken by the Respondent in the proper exercise of the discretionary power conferred on him under staff regulation 10.2 and staff rule 110.3 (b) regarding disciplinary measures.

The Tribunal, having deliberated from 20 October to 4 November 1994, pronounces the following judgement:

I. The Applicant entered the service of UNICEF at Abidjan (Côte d'Ivoire) in September 1979 and was employed as a Clerk/Typist at the GS-3 level. He was subsequently promoted to the GS-6 level. On 3 September 1990, he was dismissed for misconduct. He died on 26 January 1993.

II. On 5 July 1994, the Secretary of the Tribunal sent a letter to the Applicant's counsel

asking whether the deceased's heirs wished to pursue the case. On 18 July 1994, the deceased's eldest daughter indicated that that was her intention.

III. The Tribunal takes into consideration the resumption of the case by the deceased's eldest daughter in accordance with article 7, paragraph 9, of its Rules (Cf. Judgement No. 386, Cooper (1987)). The Tribunal will therefore consider the merits of the case.

IV. It is established that, following several disciplinary irregularities which the Applicant was accused of committing, the Joint Disciplinary Committee, constituted to deal with the matter, proposed that the Administration should take all appropriate measures in accordance with the Staff Regulations and Rules. The Applicant was then dismissed on 3 September 1990 without receiving any termination indemnity.

V. The Applicant filed this application to the Tribunal against the decision to dismiss him. He had sought retroactive reinstatement together with the payment of his salary and other allowances.

VI. The Respondent asks that this request be rejected on the grounds that the contested decision was taken in the normal exercise of the discretionary authority conferred on him in accordance with staff regulation 10.2 and staff rule 110.3. He adds that the facts giving rise to the dismissal of the Applicant were established following an inquiry in which the Applicant enjoyed all the requisite procedural guarantees. Lastly, the Respondent observes that the Applicant had previously been warned, in a letter from his Regional Director dated 3 February 1988, that he would be penalized if he committed any further breaches of the rules of conduct applicable to staff members.

VII. With regard to the dismissal of the Applicant without payment of allowances, the

Tribunal notes that, in accordance with paragraph (c) of annex III to the Staff Regulations and staff rule 110.3 (a)(viii), the Executive Director decided that the Applicant would not receive any termination indemnity or compensation in lieu of notice. In this connection, the Tribunal notes, and reaffirms, its earlier decisions whereby, in disciplinary matters, the Administration has discretionary authority both with regard to the evaluation of the conduct with which a staff member is charged and in determining the disciplinary measures to be imposed. It is therefore not for the Tribunal to question the decision of the Secretary-General unless it is proved that the decision was motivated by considerations external to the interests of the service, such as prejudice or discrimination, or unless the staff member did not enjoy all the requisite procedural guarantees.

VIII. The Tribunal notes that the Applicant has not proved that he was deprived of the requisite guarantees in the disciplinary proceedings relating to his case or that he suffered any damage therefrom. On the contrary, it appears from the report of the Joint Disciplinary Committee that all the investigations were conducted with due hearing of both parties.

IX. The Tribunal notes, lastly, that the Applicant has also failed to provide any proof that his dismissal was based on considerations external to the interests of the service.

X. Based on the foregoing, the Tribunal concludes that, in deciding in this case to terminate the services of the Applicant without payment of allowances, the Administration was acting in the legitimate exercise of its discretionary authority. The application therefore has no merit and should be rejected.

XI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary