



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No 976

Case No. 1078 : LIKUYANI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President;

Mr. Victor Yenyi Olungu;

Whereas, on 8 Decembre 1998, Aineah Likuyani, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 26 April 1999, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"(a) The Tribunal is respectfully requested to order the review of the decision of the United Nations Office at Nairobi (...) taken on behalf of the United Nations Organization to suspend me from duty without pay effective 3 April 1997 (...) because this decision was reached prior to the establishment of an ad hoc Joint Disciplinary Committee, ...

(b) The Tribunal is also respectfully requested to note some irregularities in the way the ad hoc Joint Disciplinary Committee conducted its business. ...

...

(d) ... the Tribunal is respectfully requested to order the Secretary-General ... to revoke his approval of the recommendation of the ad hoc Joint Disciplinary Committee and

to reinstate me with immediate effect as a full-fledged staff member thus automatically cancelling the decision taken earlier on the basis of which I was unfairly suspended from duty without pay. In this connection and for the reasons outlined above, the Tribunal may wish to note my refusal to sign the Personnel Payroll Clearance Action (P.35) when it was presented to me (...).

(e) As regard reimbursement of telephone bills, the Tribunal is respectfully requested to order the Secretary-General to revoke his approval of the findings, conclusions and recommendation of the ad hoc Joint Disciplinary Committee that two months of my gross salary be deducted ...

(f) If the above is not possible, the Tribunal is respectfully requested to order payment of compensation in accordance with article 9, paragraph 1 of its Statute.

(g) In addition to payment of compensation as described in paragraph (f) above, the Tribunal is requested respectfully to order payment of Kenya Shillings 300,000.- as compensation due to the long delay in finalizing my case, delay which has placed me in a situation where I cannot even seek gainful employment elsewhere. Furthermore, this long delay has resulted in my experiencing severe financial hardship and rendered me totally incapable to provide financial support to my family composed of my wife ... and two children ..."

Whereas the Respondent filed his answer on 24 March 2000;

Whereas the Applicant filed written observations on 13 May 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Centre for Human Settlements (UNCHS) as an Assembler/Hand Collator on 13 February 1986 in Nairobi, Kenya, on a short-term three-month contract under the 300 Series. The Applicant's contract was thereafter extended on a short term basis periodically until 7 April 1988 when he received a fixed-term one-year contract as a Distribution Clerk at the G-3 level. Nevertheless, the Applicant's contract was renewed at various times at the G-3 and then the G-2 level until 3 April 1997 when he was placed on suspension without pay.

On 29 September 1995, the Applicant was charged with the cost of personal telephone calls in the amount of \$8.42 by the Chief Finance Officer, UNCHS, Nairobi. The amount was deducted from the Applicant's salary.

On 12, 14 and 20 August 1996, the Applicant submitted claims to the United Nations Medical Insurance Plan totalling 36,500 Kenyan shillings or approximately 667 United States dollars for expenses allegedly incurred by him and his family at the Aga Khan Hospital in Nairobi. On 13 September 1996, the Chief, Human Resources Management Service, Nairobi, advised the Applicant that the hospital denied that the Applicant's family had received the treatment set forth in the claims submitted by the Applicant, and requested an explanation.

On 19 September 1996, the Applicant submitted his reply, insisting that his family had in fact received the treatment set forth in his medical claims, blaming the hospital system for the confusion.

On 17 October 1996, the Head, Staff Administration, Nairobi, informed the Applicant that his explanation was not satisfactory and gave him the hospital letter denying the Applicant's family visit to the hospital dental clinic.

On 24 October 1996, the Applicant responded to the Head, Staff Administration, informing him that the hospital told him that the records were missing.

On 3 April 1997, the Applicant was suspended without pay and was advised that an ad hoc Joint Disciplinary Committee (JDC) would be convened in accordance with the provisions of ST/AI/371 on disciplinary procedures.

On 11 April 1997, the Applicant wrote to the Assistant Secretary-General, UNCHS, protesting his suspension without pay as contrary to staff rule 110.2 (a), alleging the negligence of the hospital as the cause of the problem and requesting that the issue be closed. He again stated that the Chief Executive of the Aga Khan Hospital told him that the patient's records had been stolen the previous year.

On 27 June 1997, the Applicant wrote to the Head, Staff Administration, Nairobi, again protesting his suspension without pay, requesting a review of his suspension and challenging the procedure applied in his case as improper.

The ad hoc JDC submitted its report on 28 October 1998. Its findings and recommendation read as follows:

"[With respect to the telephone calls:]

(e) *The Committee's findings*

Taking into consideration the above as well as the fact that [the] staff member did not keep a log of the calls made as well as circular ADM-14 of 20 July 1993 (...), the Committee found that the allegations on making unauthorized international calls are correct. The staff member in fact so admitted, and offered to settle the costs that he incurred.

...

(g) ...

In the circumstances, the Committee recommends that the Secretary-General applies the following sanction:

'That the staff member ... be fined an amount equal to two months gross salary in accordance with staff rule 110.3 (a) (v).'

The above recommendation was unanimous.

[With respect to the medical claims:]

(e) *The Committee's findings*

The allegation that the medical claims pertaining to dental treatment and hepatitis injections during August 1996 are false, is correct. This is reinforced by the inability of [the Applicant] to provide to the Committee his Visa card and/or bank statement showing the payment of the invoices in question. If he had a debt at the hospital, on basis of which he was making a claim he should have paid it.

...

(g) ...

In the circumstances, the Committee recommends that the Secretary-General applies the following sanction:

'That the staff member ... be separated from service, without notice in accordance with staff rule 110.3 (a) (vii).'

The above recommendation was unanimous."

On 28 October 1998, the Under-Secretary-General for Management transmitted a copy of

the JDC report to the Applicant and informed him as follows:

“... [The Secretary-General] has carefully reviewed the charges made against you, namely, that you had submitted false claims for reimbursement for medical bills and that you had fraudulently used the Organization’s property for personal gain by making unauthorized international calls from a telephone line belonging to the Organization during the period October 1994 through August 1995, as well as your responses to those charges.

With respect to the first charge, the Secretary-General has taken note of the Committee’s finding that your claims for reimbursement for dental treatment and hepatitis injections during August 1996 were false. With respect to the second charge, the Secretary-General has taken note of the Committee’s finding that you have admitted making personal international telephone calls from an official line without authorization and that you have offered to pay the cost of the calls you admitted having made.

The Secretary-General has given careful consideration to the findings of the Committee in respect of both charges against you and he is in agreement with those findings. He has concluded that your behaviour was in violation of Article 101 of the UN Charter, Article 4 of the Report on the Standards of Conduct in the International Civil Service, as well as staff regulation 1.1 and that it constituted serious misconduct incompatible with the basic requirements to be met by an international civil servant. Based on these findings and conclusion, the Secretary-General has decided to accept the unanimous recommendations of the Committee that you be separated from service without notice in accordance with staff rule 110.3 (a) (vii) and that you be fined an amount equal to two months gross salary in accordance with staff rule 110.3 (a) (v).

...”

On 13 November 1998, the Officer-in-Charge, Division of Administrative Services, Nairobi, sent a memorandum to the Under-Secretary-General for Management which stated in part that "we assume that we can first restore [the Applicant’s] full pay status as of 3 April 1997 and implement his separation as of 28 October 1998, when the decision of the Secretary-General was conveyed to [the Applicant]."

On 17 December 1998, the Applicant was restored to full pay status from 3 April 1997 to 27 October 1998 and separated from service on 28 October 1998.

On 26 April 1999, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant was improperly suspended in violation of staff rule 110.2 (a) and staff rule 110.3 (b) (iii).
2. The Applicant was neither advised of the allegations against him nor permitted a reasonable opportunity to respond, in violation of the Applicant's due process rights to a fair hearing.
3. The conclusions and recommendations of the JDC were not objective and impartial and were based upon insufficient evidence.

Whereas the Respondent's principal contentions are:

1. The issue of the Applicant's suspension without pay is moot.
2. There were no irregularities in the Applicant's suspension.
3. There were no irregularities in the JDC's handling of the Applicant's case.
4. The Applicant has submitted no evidence to justify overturning the JDC's findings and recommendations for separation from service.
5. The Secretary-General has the authority to impose a fine despite restitution.
6. The Applicant has no grounds to request compensation.

The Tribunal, having deliberated from 31 October to 17 November 2000, now pronounces the following judgement:

I. The Applicant's main plea is that the Tribunal overturn the Respondent's decision ordering his separation without notice and the withholding of two months' salary or, failing that, award him compensation of 300,000 Kenyan shillings.

II. The Tribunal notes that the Applicant was subjected to disciplinary action for having made telephone calls from an office telephone in violation of the instructions given in a circular of 20 July 1993. The Applicant does not contest the facts but alleges that, having paid the bill, he should not have been subjected to disciplinary action. In addition, disciplinary action was taken against the Applicant for having claimed reimbursement, without any proof of payment, for medical costs which he allegedly incurred at Aga Khan Hospital in Nairobi for treatment of members of his family. The

hospital does not acknowledge having provided such treatment or receiving payment, but the Applicant maintains that proof of payment cannot be obtained since records were stolen from Aga Khan Hospital. The Tribunal also notes that the Applicant attributes the excessive delay in considering his case to the negligence of the Administration.

III. The Tribunal must therefore determine whether there has been an abuse of power by the Respondent in imposing disciplinary measures and whether, through its negligence, the Applicant was subjected to unjustified hardship.

In order to avoid entering into useless detail (*de minimis non curat praetor*), the Tribunal recalls that, in exercising his disciplinary authority, the Secretary-General possesses wide discretion as regards both the evaluation of the facts and the disciplinary measure to be imposed (Judgement No. 429, *Beyele* (1988)).

In this case, the Tribunal considers that the conduct of the Applicant regarding the unauthorized telephone calls constitutes disciplinary misconduct, because the Applicant knowingly violated the rule laid down by his supervisors. It follows that the penalty ordered by the Respondent of withholding two months' salary, while not in proportion to the gravity of the offence, was imposed by the Secretary-General in exercise of his discretionary authority. As no extraneous factors were noted in the adoption of this decision, the Tribunal declares it in order and states that paying the bill for the telephone calls does not preclude disciplinary action.

Furthermore, concerning the requests for reimbursement for medical treatment provided to members of the Applicant's family for which he provided no proof of payment, it goes without saying that the burden of proof falls on the Applicant (*actori incumbit probatio*). In the absence of such proof, the Tribunal considers this to be an attempt at fraud, which was prevented by the vigilance and careful analysis of the facts by the Administration. The Tribunal believes, therefore, that the Applicant committed serious misconduct and that his separation without notice constitutes disciplinary action taken by the Secretary-General within the reasonable limits of his discretionary authority (Judgement No. 424, *Ying* (1988)).

As for the excessive delay in considering the case, attributed by the Applicant to negligence on the part of the Administration, the Tribunal draws the attention of the Administration to the need to settle cases within a satisfactory time frame.

IV. For these reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary