



Administrative Tribunal

Distr.
LIMITED

AT/DEC/1050
23 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1050

Case No. 1122: OGALLE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Mr.
Spyridon Flogaitis;

Whereas, on 19 July 1999, Anaclet Juma Ogalle, 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 23 November 1999, the Applicant, after making the necessary corrections, again filed an Application containing the following pleas:

"Section II: Pleas

1. The Tribunal is respectfully requested to order the rescission of the decision of the [S]ecretary-[G]eneral ...

...

(vii) The Tribunal is also respectfully requested to order my reinstatement as a Jr. Clerk/Driver[/Messenger at the G-3, step IV level]. ...

(viii) If my reinstatement is not possible the Tribunal is respectfully requested to order payment of compensation ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 May 2000 and periodically thereafter until 30 November 2001;

Whereas the Respondent filed his Answer on 21 September 2001;

Whereas the Applicant filed Written Observations on 31 May 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Information Centre (UNIC), Nairobi, on a fixed-term appointment, on 1 June 1983, as a junior Clerk/Driver, at the G-2 level. At the time of the events which gave rise to the present Application, the Applicant was serving as a Junior Clerk/Driver/Messenger at the G-3, step IV level.

In August 1997, Kenya Breweries Ltd. issued a cheque in the amount of Kenya shillings (Kshs.) 1,484,000 to pay its water bill with the Nairobi City Commission. The cheque was stolen in transit. On 22 August, the Applicant or a third party deposited a cheque drawn on Kenya Breweries Ltd. in the amount of Kshs. 1,484,000 in his personal account at the Kenya Commercial Bank, Nairobi. On 25 August, the cheque was sent for clearing to Kenya Breweries Ltd.'s Bank, Barclays Bank. On 28 August, Barclays Bank requested confirmation that a cheque in the amount of Kshs. 1,484,000 had been cleared in the name of the Nairobi City Commission. On the same day, Kenya Commercial Bank replied that a cheque in that amount had been cleared in the name of the Applicant. The next day, when the Applicant attempted to withdraw Kshs. 350,000, from the account containing the Kshs. 1,484,000, the Branch Manager of the Kenya Commercial Bank alerted the Security and Safety Section, UNON, and the Applicant was detained for questioning.

In his written statement on the matter, the Applicant denied having endorsed or deposited the cheque in his account. According to the Applicant, he was the owner of a shop called "Boma Construction", which manufactured furniture and did construction work. A certain Mr. Kanyi of Kanyi Systems and Co. had placed an order with him for Kshs. 1 million and had deposited Kshs. 1,484,000 in the Applicant's account, stating that the Applicant should keep the extra

money for future orders. The Applicant went on to state that he had gone to the Bank to withdraw an amount of Kshs. 350,000 to begin work on the order. He stated that he did not know where Mr. Kanyi lived, where his business was located, or his telephone number. He could not produce any documentation to substantiate the alleged furniture order.

The Applicant was arrested by the local authorities on 29 August 1997, arraigned on 5 September and charged with three offences: theft, handling stolen property and attempting to obtain money by false pretences. He was subsequently released on bail.

On 29 September 1997, the Applicant was suspended from duty with pay "pending investigation of this matter and completion of disciplinary proceedings", with immediate effect, for a probable duration of three months. On 15 December 1997, the Applicant wrote to the Secretary-General, requesting review of the administrative decision to suspend him from duty.

On 9 March 1998, the Applicant was interviewed by an Investigator, Office of Internal Oversight Services (OIOS). The Applicant stated that he had assisted his son in setting up a small business, allowing money to be deposited in his account. A big order had been received, and the Applicant agreed to have the money transferred to his account. He did not know that the cheque was stolen or who deposited it into his account.

On 9 April 1998, the Applicant was presented with allegations of misconduct and invited to submit written comments or explanations within two weeks. He was also advised that as disciplinary proceedings were still continuing, his suspension would be extended through 30 April or "through completion of disciplinary proceedings, whichever is earlier". In his reply of 14 May, the Applicant stated, inter alia, that he had been acquitted of all charges by the local court and requested that suspension be lifted.

On 25 August 1998, the case was referred to the Joint Disciplinary Committee (JDC), and on 3 September, his suspension was extended through completion of the disciplinary proceedings.

The JDC submitted its report on 26 February 1999. Its facts, conclusions and recommendation read, in part, as follows:

"6. Facts to consider:

...

(e) The Committee found [that] ... [i]t is not normal business practice for a customer to not only pay 100 % of the cost of undelivered goods upfront but furthermore to pay so much in excess of the required cost, for future transaction.

(f) [The Applicant's] testimony regarding the person whom he claimed to have given his personal account for the purpose of transferring a deposit, on his son's behalf, for an order for furniture, contains several contradictions which leaves doubt as to its honesty.

...

...

6[7]. Conclusions:

The Joint Disciplinary Committee ... is of the view that the evidence weighs heavily against [the Applicant]. We therefore conclude that [the Applicant] is guilty of misconduct and put his employer, the United Nations, in danger of suffering disrepute. This is in consequence of a failure to observe the standards of conduct expected of an international civil servant (rule 110.1).

7[8]. Recommendation:

..., [T]he Committee makes the following recommendation to the Secretary-General:

Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3 (rule 110.3 (vii)) of the Staff Rules.

..."

On 11 June 1999, the Under Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him that the Secretary-General agreed with the recommendation of the JDC and had decided that his separation would be "without notice or compensation in lieu thereof" as he was presently, and had been for some time, on suspension with pay.

On 23 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The charge of attempted fraud was the subject of judicial proceedings against the Applicant in the local courts. Subjecting the Applicant to a quasi-judicial process (the JDC), after his acquittal, amounts to double jeopardy.
2. The evidence brought before the JDC was inadequate, insufficient and, at best, circumstantial.
3. The Applicant is entitled to a termination benefit of 12 months, in accordance with Annex III of the Staff Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to separate the Applicant from service was a proper exercise of his discretion. The Applicant's acquittal from criminal liability is not relevant to the determination of whether his conduct met the required standards.
2. The Applicant has not provided any substantiation for his claim that the Secretary-General's decision was vitiated by prejudice or other extraneous factors.
3. The request for termination indemnity has no merit, as the Secretary-General decided not to grant such compensation in accordance with the provisions of Annex III of the Staff Regulations and Rules.

The Tribunal, having deliberated from 4 to 23 July 2002, now pronounces the following Judgement:

- I. The Applicant appeals the Respondent's decision of 11 June 1999, accepting the ad hoc JDC's recommendation to summarily dismiss him from service on the grounds of serious misconduct incompatible with the basic requirements to be met by a United Nations staff member. The Applicant claims that his summary dismissal was based on insufficient evidence.
- II. The case concerns the imposition of a disciplinary sanction. There is long-standing jurisprudence on the issue of disciplinary measures handled by the Tribunal. In its jurisprudence, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in

disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g., in cases of failure to accord due process to the affected staff member before reaching a decision". (See Judgement No. 941, *Kiwanuka* (1999) and see generally Judgements No. 815, *Calin* (1997) and No. 849, *von Seth* (1997).)

III. On 1 June 1983, the Applicant joined the UNIC, Nairobi. On 29 September 1997, when the Applicant was suspended from service, he was a Junior Clerk at the G-3 level, on a fixed-term appointment.

In August 1997, Kenya Breweries Ltd. issued a check drawn on Barclays Bank, Nairobi, to the Nairobi City Council in the amount of Kshs. 1,484,000 for payment of its water bill. Apparently, the cheque in question (No. 002980) was stolen while in transit. On 22 August 1997, the Applicant or a third party deposited a cheque in the same amount in his personal account at the Kenya Commercial Bank Nairobi, Gigiri branch. Having been alerted by Barclays Bank, Kenya Commercial Bank started investigations on possible bank fraud against the Applicant.

The Kenya Commercial Bank contacted the United Nations Security and Safety Section, UNON; and during the ensuing interrogation, the Applicant explained that the large deposit into his account had been made by a certain Mr. Kanyi in connection with an order to manufacture beds and wardrobes. The Applicant stated that he did not know where Mr. Kanyi lived, where his business was located, or his telephone number. Moreover, he could not produce any documentation to substantiate the alleged furniture order.

On 4 September 1997, the Applicant was arraigned before a local criminal court and charged with theft, handling stolen property and attempting to obtain money by false pretences. On 29 September 1997, the Applicant was suspended from service with pay pending investigation of the matter and completion of disciplinary proceedings. During his interview with OIOS, 9 March 1998, the Applicant stated that he had assisted his son in setting up a small furniture business in early 1997. The Applicant alleged that it was his son's business that had received the large order from Mr. Kanyi. Since his son did not have a bank account, the Applicant had had agreed to deposit the money into his account and to withdraw the amount his son needed to fulfill the order.

On 9 April 1998, the Applicant was requested to submit his comments to the Office of Human Resources Management (OHRM), which he did on 14 May 1998. On 29 April 1998, the local criminal court dismissed the charges brought against the Applicant on the grounds that the prosecutor failed to bring the witness and the police file to the court hearings. On 25 August 1998, the JDC was requested to advise OHRM on the matter. In its report, the JDC found the following: (i) the Applicant had put the United Nations in danger of suffering disrepute; and (ii) the Applicant failed to observe the standards of conduct expected of an international civil servant. The JDC recommended that the Applicant be separated from service.

In light of the JDC recommendation, the Secretary-General separated the Applicant from service without notice or compensation in lieu thereof and this Application followed.

IV. The Applicant claims that the charges of fraud brought against him have been subject to jurisdiction of a local criminal court and that his acquittal by the local court is conclusive evidence of his innocence. He further argues that his acquittal by a judicial process made the United Nations disciplinary proceedings against him "double jeopardy", which is unjust. The Respondent argues that the Applicant's acquittal from criminal liability is irrelevant to the determination of the Applicant's conduct to meet the "highest standards of integrity" required of an international civil servant.

Further, the Respondent states that the Secretary-General has the discretionary power to appraise a staff member's conduct and, if he reasonably concludes that the above standard has not been met, he may dismiss that staff member. After reviewing the JDC's recommendations, and the totality of the circumstances, the Respondent separated the Applicant from service for conduct, which failed to meet the standards of conduct and integrity expected of each staff member of the Organization.

The Tribunal has consistently held that the Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes misconduct warranting dismissal. Article 100, paragraph 1 and Article 101, paragraph 1 of the United Nations Charter set forth the basic obligations of the Secretary-General and the staff to the Organization and the Secretary-General's responsibility for appointment of staff. Furthermore, the Tribunal has repeatedly affirmed that the Charter and the Staff Regulations vest in the Secretary-General the authority to determine whether a staff member has met the required

standards of conduct. The choice of disciplinary measure to be imposed pursuant to staff regulation 10.2 falls within the Secretary-General's discretionary powers. (Judgements No. 479, *Caine* (1990); No. 515, *Khan* (1991); No. 542, *Pennacchi* (1991); No. 941, *Kiwanuka* (1999).)

V. The Applicant seeks to rescind Respondent's decision to dismiss him for serious misconduct. The Applicant claims that the Organization's evidence against him was inadequate and insufficient to warrant a dismissal. The Respondent claims that the evidential standards of establishing a *prima facie* case of serious misconduct are sufficient to warrant Applicant's separation from service in the absence of a satisfactory explanation by the Applicant. The Respondent claims that the Applicant provided contradicting allegations that are not supported by evidence that could explain why Kshs. 1,484,000 had been deposited into his personal bank account.

The Tribunal has held in *Caine* that the Secretary-General is not required to establish beyond a reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal has held that once a *prima facie* case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question. (See Judgements No. 484, *Omosola* (1990) and No. 850, *Patel* (1997).) The Tribunal finds that the Secretary-General's dismissal of the Applicant for serious misconduct was a valid exercise of that discretionary power.

VI. The Tribunal has consistently maintained that its competence to review the Secretary-General's discretionary powers to discipline staff is confined to determining whether the Secretary-General's actions were vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact, amongst additional criteria. (See Judgements No. 490, *Liu* (1990) and No. 616, *Sirakyan* (1993).)

The Tribunal has held in *Kiwanuka* that:

"In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct;

(iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. This listing is not intended to be exhaustive."

The Applicant has not alleged any procedural irregularities, and the Tribunal finds that all appropriate procedures were followed in this case. The Tribunal finds that the Applicant committed a serious violation of the United Nations standards of conduct and that his conduct was incompatible with continued service with the Organization.

VII. In conclusion, the Tribunal holds that the Respondent had sufficient justification to conclude that there had been serious misconduct and summarily to dismiss the Applicant.

VIII. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Spyridon FLOGAITIS
Member

Geneva, 23 July 2002

Maritza STRUYVENBERG
Executive Secretary