



Administrative Tribunal

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LIMITED

AT/DEC/1083
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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1083

Case No. 1151: CHINSMAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha Echols; Mr. Omer Yousif
Bireedo;

Whereas at the request of Babashola Chinsman, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 August 2000, the Applicant filed an Application containing pleas which read, in part, as follows:

" II. Pleas

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...;

8. On the merits, the Applicant respectfully requests the Tribunal:
- (a) *to rescind* the decision of the UNDP Administrator [(the Administrator)] that the Applicant be separated from service as of 1 March 2000;
 - (b) *to order* that the Applicant be reinstated in service with retroactive effect from 1 March 2000;
 - (c) *to find and rule* that the ... Disciplinary Committee erred in matters of fact and of law ...;
 - (d) *to award* the Applicant appropriate and adequate compensation in the amount of three years' net base pay ...;
 - (e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay ...;
 - (f) *to award* the Applicant as cost[s], the sum of US\$ 10,000.00 in legal fees and US\$ 500.00 in expenses and disbursements;
 - (g) *to order* that a letter exonerating the Applicant of any wrongdoing be published and that all prejudicial materials relating to this case be removed from the Applicant's records."

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 January 2001 and periodically thereafter until 28 February 2002;

Whereas the Respondent filed his Answer on 27 February 2002;

Whereas, on 18 April 2002, the Applicant filed Written Observations and amended his pleas as follows;

"Paragraph 7:

Following subparagraph (c) add the following:

- '(d) *to order* the production of the Report of the Ad Hoc Financial Recovery Committee constituted by UNDP in December 2000.'

Whereas, on 7 November 2002, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 6 May 1987, on a one-year fixed-term contract as a Senior Program Development Adviser at the P-5 level. From 14 August 1994 until 9 September 1998, during which time the events that gave rise to this Application occurred, the Applicant held the D-1 level position of Resident Representative of the UNDP Country Office in Nigeria. Effective 10 September 1998, the Applicant was appointed Resident Representative in the Democratic Republic of the Congo.

In late 1998, a management audit of the Country Office in Nigeria was performed. The subsequent report, which was submitted to the Director, Office of Human Resources (OHR), on 15 December 1998, concluded that the management of the Country Office was "seriously deficient", "mainly because of the actions of the former Resident Representative". The report alleged procurement abuses as well as serious managerial and administrative misconduct on the part of the Applicant and recommended that he and the Deputy Resident Representative (Operations) be "held accountable in the most exemplary way"; that their approval authority be withdrawn for a minimum of five years until they demonstrated "substantial and exceptional improvements" in managerial capacity; and, that they be subjected to disciplinary action. The Director, OHR, transmitted a copy of the report to the Applicant the same day and informed him that he had been placed on special leave with full pay, with immediate effect, pending completion of the review process. In response to a request from the Director, OHR, the Applicant submitted his comments on the audit report on 18 January 1999, stating, inter alia, that the investigation was prejudiced and the allegations were "trumped-up".

On 23 April 1999, the Advisory Committee on Procurement reviewed a number of procurement transactions dating from the Applicant's tenure as Resident Representative, which had never been submitted to the Committee on Procurement. The Advisory Committee "expressed its astonishment at the extent to which the most basic and elementary principles and procedures for procurement had been breached" and noted that the Organization had been exposed to - and, indeed, had suffered - significant financial loss as a result of "negligence of the Country Office".

On 24 June 1999, the Applicant was charged with seven counts of authorizing overpayments and/or procedural irregularities, and informed that they constituted misconduct

and mismanagement for which he was accountable, and that his case would be submitted to the UNDP/UNFPA/UNOPS Disciplinary Committee. He submitted a detailed response to the charges on 9 November 1999.

On 22 November 1999, the case was referred to the Disciplinary Committee. On 20 January 2000, the Disciplinary Committee submitted its report. Its conclusion reads, in part, as follows:

"Conclusion

Although there is no basis for concluding that the staff member had any specific intent to benefit from the acts for which he was charged, the facts presented to the Committee reveal that the [Applicant] acted with reckless indifference to the consequences of his conduct where a serious risk of loss or damage to the Organization existed.

The Committee unanimously agreed that the [Applicant's] conduct was incompatible with the discharge of his responsibility as Resident Representative and inconsistent with the highest standards of integrity expected of international civil servants as set forth in Article 101 of the United Nations Charter and staff regulation 1.2 (b).

Accordingly, it is hereby recommended that the [Applicant] be separated from service with notice or compensation in lieu thereof.

..."

On 1 March 2000, the Administrator transmitted a copy of the report to the Applicant and informed the latter that he had decided to accept the Committee's recommendation that the Applicant be separated from service with compensation in lieu of notice.

On 30 August 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent's discretionary authority was vitiated by arbitrariness, mistake, prejudice, disproportionality and a lack of due process.
2. The Disciplinary Committee failed to distinguish misconduct from questions of performance, judgement and good management. It failed to consider fully the Applicant's submissions and, unable to verify the financial conclusions of the Respondent, relied upon

perceptions of procedural irregularities to infer negligence. Its conclusions differed considerably from the original charges, amounting to a shift in grounds.

3. The Applicant had an excellent performance record and prior audits, which had reviewed some of the same transactions, found no evidence of wrongdoing or need to adjust practices.

Whereas the Respondent's principal contentions are:

1. The Applicant's termination constitutes a proper exercise of the Respondent's authority.

2. The Applicant failed to meet the standards of conduct required of international civil servants.

3. The Applicant's dismissal was based on established facts and did not violate his rights of due process.

4. The Applicant failed to provide any evidence whatsoever of prejudice or other extraneous considerations.

The Tribunal, having deliberated from 7 to 25 November 2002, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 1 March 2000, accepting the recommendation of the Disciplinary Committee to separate the Applicant from service. The Applicant claims that his termination was procedurally deficient, discriminatory in nature and taken in disregard of his rights of due process and the procedures set out in the Staff Rules.

II. On 6 May 1987, the Applicant joined UNDP in New York as a Senior Program Development Advisor at the P-5 level. On 1 January 1992, he was promoted to the D-1 level and, on 14 August 1994, he was appointed Resident Representative in Nigeria, in which capacity he served for four years. Thereafter, on 10 September 1998, the Applicant was appointed Resident Representative in the Democratic Republic of the Congo. On 15 December 1998, the Applicant was placed on special leave with full pay pending review of serious allegations made against him in a management audit of the Nigerian Country Office. On 20 January 2000, the

Disciplinary Committee recommended that the Applicant be separated from service with notice or compensation in lieu thereof and, on 1 March, the Administrator informed the Applicant that he had decided to accept the Committee's recommendation that the Applicant be separated from service with compensation in lieu of notice. On 30 August 2000, this Application was filed.

III. The case thus concerns the imposition of a disciplinary sanction. There is longstanding 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 case of failure to accord due process to the affected staff member before reaching a decision". (Judgements No. 300, *Sheye* (1982); and No. 210, *Reid* (1976).)

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. Article 100, paragraph 1, and Article 101, paragraph 1, of the Charter of the United Nations set forth the basic obligation of both the Secretary-General and the staff to the Organization and the Secretary-General's responsibility for appointment of staff. 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 Tribunal has also acknowledged that the Administration exercises broad authority and discretion in defining "serious misconduct" under the Staff Regulations and Rules and in determining proper punishment for such conduct. (See Judgements No. 479, *Caine* (1990); No. 582, *Neuman* (1992); and, No. 815, *Calin* (1997).) The Secretary-General's broad disciplinary powers are not without limitation, however. The Tribunal reviews the exercise of such discretion in determining whether his actions were vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact, amongst additional criteria. (See *Caine*, *ibid.*, and Judgements No. 490, *Liu* (1990); and No. 616, *Sirakyan* (1993).)

IV. In the instant case, the Applicant contends that the Respondent's decision to separate him from service was not a proper exercise of his authority. The Respondent argues that the decision

constituted a valid exercise of the discretionary powers available to the Administrator to deal with serious misconduct.

In disciplinary cases, the Tribunal will generally examine:

- (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;
- (iv) whether there has been any procedural irregularity;
- (v) whether there was an improper motive or abuse of purpose;
- (vi) whether the sanction was 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. (See Judgements No. 898, *Uggla* (1998); and No. 941, *Kiwanuka* (1999).)

In this case, the issue of proportionality is raised by the Applicant, who maintains that the punishment imposed upon him was disproportionate in the circumstances of his case and that the Respondent's discretionary authority was thus vitiated. It is well established in the jurisprudence of the Tribunal that the choice of disciplinary measure to be imposed pursuant to staff regulation 10.2 falls within the Secretary-General's discretionary powers. (See *Caine* and *Kiwanuka*, *ibid.*, and Judgements No. 424, *Ying* (1988); No. 425, *Bruzual* (1988); No. 515, *Khan* (1991); and, No. 542, *Pennacchi* (1991).) The Tribunal finds that, in the case of UNDP, this authority is delegated to the Administrator who may impose disciplinary measures on staff members whose conduct is unsatisfactory, which power includes the right to terminate a staff member for misconduct.

The Disciplinary Committee unanimously concluded that the Applicant's conduct was "incompatible with the discharge of his responsibility as Resident Representative and inconsistent with the highest standards of integrity expected of international civil servants". The Committee stated that the Applicant acted with "reckless indifference to the consequences of his conduct where serious risk of loss or damage to the Organization existed". The disciplinary sanction was imposed pursuant to this report.

The Respondent maintains that the Applicant, who had eleven years of experience and a highly responsible and visible position at UNDP, was expected to exercise the greatest prudence

and integrity in fulfilling his position as Resident Representative. Further, the Respondent claims that the Applicant systematically ignored instructions from Headquarters; violated basic UNDP procurement procedures; and, disregarded fundamental principles of accountability such as competitive bidding, price verification, and submitting contracts for review to the Advisory Committee on Procurement.

In view of the circumstances of this case and, in particular, the seriousness of the conduct of the Applicant, a high-ranking staff member, the Tribunal finds the decision to separate the Applicant from service was not disproportionate but was a valid exercise of the Respondent's discretionary power. Staff members have a duty to maintain a high standard of conduct and the Respondent has the responsibility to enforce those standards.

V. The Applicant contends that his rights of due process were not respected in the proceedings against him. The Respondent counters that in accordance with staff rule 110.4(a), the Applicant was notified of the charges against him; provided a reasonable opportunity to respond to the allegations, both in writing and orally, before the Disciplinary Committee; and, informed of his rights to seek legal assistance.

The Applicant claims before the Tribunal that the process was tainted by prejudice and that the facts do not justify the findings against him. He contends that the Disciplinary Committee erred in matters of law and fact in reaching its conclusion that the Applicant was guilty of misconduct within the meaning of staff rule 110. The Tribunal has consistently held that the Applicant has the burden of proving prejudice or other improper motive. (See *Caine* and *Khan*, *ibid.*, and Judgements No. 336, *Maqueda Sanchez* (1984); No. 448, *Large* (1989); and, No. 465, *Safavi* (1989).) The Respondent maintains that the Applicant has not submitted any proof that the review process was vitiated and therefore, did not meet his burden. The Tribunal agrees.

VI. The Applicant further contends that the conclusions of the Disciplinary Committee differed considerably from the charges with which he was originally presented, amounting to a shift in grounds. Staff rule 110.4 provides that staff members should be given a reasonable opportunity to respond to allegations made against them, and this primary tenet of due process has been upheld in the jurisprudence of the Tribunal.

In Judgement No. 744, *Eren* (1995), the Tribunal ordered the rescission of a decision of the Secretary-General in which he accepted a Joint Disciplinary Committee (JDC) finding of not guilty on charges lodged against the staff members in question but nevertheless imposed disciplinary measures for substandard performance. The staff members had not been notified that their performance was under review as the performance issues were only discovered during the JDC investigation and, therefore, the imposition of the disciplinary measures raised due process concerns. In Judgement No. 997, *Van der Graaf* (2001), the Tribunal held that "[t]he rationale of *Eren* is that being informed of the charges against oneself is fundamental to the right to make a defense".

The Tribunal has considered whether the Applicant was sufficiently informed of the charges against him to permit him to make a defense. It concludes that as the findings of the Disciplinary Committee (that the Applicant "acted with reckless indifference to the consequences of his conduct where a serious risk of loss or damage to the Organization existed" and that his conduct was incompatible with that expected of his rank and of an international civil servant) were specifically related to the charges of misconduct and mismanagement arising from seven counts of authorizing uncompetitive procurements that resulted in overpayment and procedural irregularities with which he was presented, the Applicant had full and fair opportunity to defend himself. Accordingly, the Tribunal finds that the Applicant was sufficiently informed of the charges against him to permit him to respond, and that his rights of due process were fully respected.

VII. The Applicant presents the Tribunal with an additional contention regarding the Disciplinary Committee: he alleges that the Committee failed to distinguish misconduct from questions of performance, judgement and good management in making its recommendation. While recognizing the distinctions between matters of performance and misconduct, the Tribunal is of the opinion that the dividing line between these may become blurred. The Tribunal is satisfied that where, as in the instant case, a Disciplinary Committee finds "reckless indifference to the consequences of [the Applicant's] conduct", it is within the discretion of the Respondent to view the matter as one of misconduct justifying disciplinary sanction.

VIII. In conclusion, the Tribunal holds that the Respondent exercised reasonable discretion under the Staff Regulations and Rules. Further, the Tribunal holds that the Applicant's rights of due process have not been violated.

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

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Omer Yousif BIREEDO
Member

New York, 25 November 2002

Maritza STRUYVENBERG
Executive Secretary