

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL**Judgement No. 1242**

Cases No. 1329
No. 1330

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Ms. Brigitte Stern;
Mr. Dayendra Sena Wijewardane;

Whereas at the request of 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, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2003 and periodically thereafter until 31 January 2004;

Whereas, on 5 March 2003, another former staff member of UNDP, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal; whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for resubmitting the corrected application with the Tribunal until 30 April 2003 and periodically thereafter until 31 January 2004;

Whereas, on 27 and 30 January 2004, the Applicants filed Applications requesting the Tribunal, *inter alia*, to find:

“8. ...

(a) that the Applicant[s'] right[s] to due process were violated by the failure to be notified the charges levied against [them], the denial of access to the investigation reports, the inability to properly defend [themselves] by not being fully appraised of all the claims and claimants against [them], and the excessive amount of time the Applicant[s] had to wait for an appeal;

(b) that the Respondent violated [his] own procedures ... in the investigation and treatment of the Applicant[s];

(c) that the Applicant[s] be cleared of all wrongdoing regarding the sexual harassment and abuse of power charges, considering that ... no witnesses were ever disclosed to [them], preventing [them] from being able to question [the witnesses] and get an opportunity to properly reply to the accusations;

(d) that the [Applicants] should be cleared of all wrongdoing regarding the procurement fraud charge, since the facts used to establish the culpability of the Applicant[s] rest on the unsubstantiated and insufficient evidence made by one witness with questionable motives;

9. [and] *to order*:

(a) that the Applicant[s] be retroactively reinstated to July 1999;

(b) that the Applicant[s] be compensated in the amount of two years' net base salary for the denial of due process and the abusive manner in which [their cases were] handled.

Should retroactive reinstatement not be implemented:

(c) that the Applicant[s] be paid the sum of money ... due [them had] such implementation taken place."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing Respondent's answers until 15 May 2004 and periodically thereafter until 30 September 2004;

Whereas the Respondent filed Answers in both cases on 30 September 2004;

Whereas the Applicants filed Written Observations on 31 January 2005;

Whereas the statement of facts, including the employment record, contained in the reports of the UNDP/United Nations Populations Fund/United Nations Office for Project Services Disciplinary Committee ("DC") read, in part, as follows:

"Employment history [of the Applicant] ...

[The Applicant joined UNDP/World Food Programme (WFP) on 1 April 1995, as an Accounts Clerk on a special service agreement (SSA). At the time of the contested decision, the Applicant was serving on a fixed-term contract as a Finance Clerk at the G-4 level, WFP Tanzania Country Office, Dar es Salaam, Tanzania.]

Employment history of the [Applicant]:

[The Applicant joined UNDP/World Food Programme (WFP) on 2 May 1983, as a Clerk/Typist on a fixed-term contract. At the time of the contested decision, the Applicant was serving on a permanent contract as a Finance Examiner at the G-6 level, WFP Tanzania Country Office, Dar es Salaam, Tanzania.]

The events leading to the disciplinary charges ...

On 8 February 1999, following a request for clarification in relation to excessive and expensive amounts of fumigation being purchased, Mr. [K.], a WFP Logistics Assistant under SSA contract, confessed to the Administrative Officer and the WFP Country Director that two of the pro forma invoices submitted were collected from Tyunda Fumigation and Maintenance Company [(Tyunda)] and not from the companies whose names appear on them. He confirmed [that] he did not know where these companies were located or their existence but that he collected the proformas from Tyunda based on the instructions of [the Applicant]

A preliminary investigation undertaken by WFP's [Office of the Inspector and Investigations (OEDI)] in February 1999 led to findings of evidence that procurement fraud had taken place and in conjunction with the investigation several allegations of sexual harassment by [both Applicants came to light]. A second investigation undertaken by the Inspector General of WFP in April of the same year revealed additional allegations of abuse of power. ...

[On 9 February 1999, the WFP Representative and Country Director of the WFP Country Office, Tanzania, informed WFP Headquarters, Rome, of suspected procurement fraud.] A preliminary investigation undertaken by WFP's OEDI from 21-25 February 1999 led to findings of evidence that procurement fraud had taken place and in conjunction with the investigation several allegations of sexual harassment by [the Applicants] came to light.

[By letters dated 23 and 24 February 1999, respectively, the Applicants were informed that the 'Headquarters Inspection Mission ... requested that they stay away from the office premises until further notice'. They were further informed that they would continue to receive their salaries and that they were required to be available whenever needed during this period.]

A second investigation, undertaken by the Inspector General[, OEDI and the Inspection Officer who had conducted the preliminary investigation, from 18-26 April 1999] revealed additional allegations of abuse of power by [the Applicants]"

On 27 May 1999, the Inspector General, OEDI, issued a confidential memorandum entitled "Investigation of Allegations of Procurement Fraud, Sexual Harassment and Abuse of Power - Country Office Tanzania" (OEDI Report) which stated, inter alia:

"Procurement Fraud

OEDI confirmed the initial suspicions of the Country Office that false pro forma invoices and non-existent companies had been used to ensure awarding

contracts to Tyunda Company. ... The WFP perpetrators of this fraud were [the Applicants] and Mr. [K.].

...

Mr. Luther [the owner of Tyunda Company] confirmed that he was aware of the false pro forma invoice scheme and confirmed that he paid money to [the Applicant] and Mr. [K.] on the understanding that a share would be handed over to [the Applicant]. Mr. Luther confirmed to OEDI that [the Applicant] had personally thanked him for the receipt of his share of the money during a visit to the Office. The three WFP staff performed important procurement-related functions in these transactions which, when conspiring together (and with the supplier), enabled them to carry out the procurement fraud scheme.

...

...

Sexual Harassment

...

Eight women employees made formal complaints during the investigation of being sexually harassed by [the Applicant] and two by [the Applicant]. ... All of the women staff and two male staff who were eyewitnesses to some of the sexual harassment and subject of present complaints requested that their identity be kept confidential. Accordingly the complainants will be referred to by number. The common theme throughout the complaints is that women who were new employees of the Office and potentially vulnerable in the organisation were targeted by the harassers.

...

The complainants, prior to the investigation mission, did not file formal complaints, some due to the perception that SSA holders had no rights, but most due to the fact that they perceived [the Applicant]'s influence in the office would override their report. ...

Conclusion

OEDI finds that [the Applicant] sexually harassed 7 staff, and [the Applicant] 2 staff, numerous times and that the pattern of harassment was egregious. Further that employment related retaliation was threatened and frequently implied ...

...

OEDI finds that [the Applicants] pose a threat to security of staff and that retaliation is likely if they resume WFP functions.

...

Abuse of Power

...

The inspection team determined that [the Applicants] commanded such influence in the Office that almost all junior staff, especially SSA holders, were wary or frightened of them due to the belief that they could influence the prolongation of their contracts, access to transport, retaliate against them by detrimentally affecting their work.

...

[A number of drivers for UNDP reported that the Applicants requested money and food under the threat of non-renewal of contract; that the Applicant did not process receipts for petrol reimbursement; and, that the Applicant threatened one of the drivers when he failed to pick up a pro forma invoice from a shop which the driver could not find and believed to be suspect.]

Conclusion

[The Applicants] abused their power in relation to their colleagues.

Recommendation

OEDI recommends that appropriate action be taken with respect to [the Applicants].”

On 18 June 1999, the Officer-in-Charge, UNDP, forwarded to the Applicants a copy of the OEDI Report and informed them that, having determined that the allegations against them regarding procurement fraud, sexual harassment and abuse of power were all supported by the evidence, the OEDI Report and the conclusions contained therein constituted prima facie evidence of serious misconduct and that they were therefore summarily dismissed with immediate effect. The Applicants subsequently requested that their cases be reviewed by a DC.

On 11 June 2002, the DC submitted its reports, in the Applicants’ cases. Its findings, conclusion and recommendation read, in part, as follows:

“Procurement Fraud

... The committee found that the invoices were fake and that the statements of both Mr. Luther [who was not a UNDP staff member and Mr. K.] were sufficient corroborative evidence of procurement fraud undertaken by [the Applicants].

Sexual Harassment

... The committee ... found that ... the allegations were serious enough to warrant consideration within the totality of the evidence which the administration had to consider in summarily dismissing [the Applicants].

Abuse of Power

... The committee found that the evidence of [the drivers] corroborate[s] the allegation of abuse of power by [the Applicants].

Due Process

... The committee noted that even though the allegation[s] of sexual harassment [were] not investigated according to the sexual harassment policy, it is satisfied that in view of the fact that the allegation[s] came up during the investigation of the procurement fraud, [this] did not amount to a violation of due process.

... The committee also agreed with Counsel for the Administration that in cases of summary dismissal the Administration has discretion to summarily dismiss a staff member without bringing formal charges.

Conclusion

... The committee unanimously reached the conclusion that there was not sufficient evidence to recommend the overturn of the decision[s] of the Administration.

Recommendations as to what sanction, if any, should be applied

... The committee unanimously recommends that the decision[s] of the Administration should be maintained.”

On 11 July 2002, the Officer-in-Charge, UNDP, transmitted copies of the reports to the Applicants and informed them that he had decided to accept the DC’s unanimous recommendations and to take no further action on their appeals.

On 27 January 2004, the Applicants filed the above-referenced Applications with the Tribunal.

Whereas the Applicants’ principal contentions are:

1. The Applicants’ rights of due process were violated and the Respondent violated his own procedures throughout the investigations and the disciplinary process. Despite the fact that it has been more than five years since the Applicants’ dismissal, they have still not had access to the identities of the complainants, nor to their statements, thus depriving them of the opportunity to properly defend themselves.
2. The facts in the Applicants’ cases have not been established. The evidence may indicate that fraud had been committed by someone, but it does not link the Applicants to it. Moreover, the Applicants’ work functions did not involve the procurement or bidding process in any way. Mr. K. and Mr. Luther falsely implicated the Applicants.
3. For an abuse of power claim to be established, the Applicants had to be in a position of power. The Applicants were low-level G-4 and G-6 staff members, with no powers.
4. The flagrant breaches of due process coupled with insufficient evidence against the Applicants, point firmly at an attempt by management to deflect blame from where it truly lies and use the Applicants as scapegoats for a weakness within the management.
5. The disciplinary process was unduly delayed.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicants for serious misconduct was a valid exercise of the Secretary-General's discretionary authority based on facts adduced during the investigations and substantiated in proceedings before the DC.

2. The facts concerning the Applicants' misconduct were established. The Applicants failed to meet the standards of conduct required of staff members as international civil servants.

3. The Applicant was accorded due process. Initial procedural error was subsequently cured and did not violate the Applicants' due process rights; the Applicants had access to pertinent documentation and the withholding of certain witnesses' names did not deny the Applicants their due process rights; the decision of summary dismissal was thoroughly reviewed by the DC which recommended no change in that decision.

4. The contested decision was not vitiated by bias, prejudice, improper motive, abuse of discretion or other extraneous factors.

5. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated from 28 June to 22 July 2005, now pronounces the following Judgement:

I. The two Applicants have filed Applications concerning similar alleged wrongs arising from similar decisions sufficiently related to each other to be considered jointly. The Tribunal will therefore deal with both of them in the same Judgement.

II. This is a case in which some principles of central concern to this Tribunal have been overlooked. Even a cursory examination of the Tribunal's judgements will reveal that much of its jurisprudence has been devoted to ensuring that what is generally termed as due process is safeguarded in respect of staff at all levels and locations. Concern for, and principles of, due process as a basic requirement is reflected in every system of law and constitutes a theme which runs through the whole of the United Nations system from General Assembly resolutions, Declarations and Covenants at the highest level, through the Staff Regulations and Rules which set out the standards to be observed in an international civil service, to the more particular and focused policy statements and administrative issuances which lay down the procedures to be observed within individual organizations. This case reveals how easy it is, nonetheless, to

overlook the application of even the most critical requirements of due process in day-to-day management.

III. At the time material to this case, both Applicants were in the service of UNDP/WFP, at the WFP Tanzania Country Office in Dar es Salaam, Tanzania. The Applicant, who had joined the Office in February 1995, was serving as a G-4 Finance Clerk on a fixed-term appointment, ending on 23 February 2000; the Applicant, who had joined the Office in May 1993, was serving on a permanent appointment as a Finance Examiner at the G-6 level. After being suspended with pay for a period of four months, the Applicants were summarily dismissed from service on 18 June 1999.

The bare events which led up to the separation of the Applicants from service may be summarized briefly as follows: the WFP Tanzania Country Office had purchased fumigation materials from a company known as the Tyunda Fumigation and Maintenance Company. It would seem that on 8 February 1999, the WFP Representative and Country Director of the WFP Country Office in Tanzania sought clarification on what appeared to her as purchases which were excessively expensive, which inquiry resulted in a staff member who was on an SSA contract making a “confession” and implicating the Applicants in a conspiracy to commit fraud.

This gave rise to a preliminary investigation conducted between 21 and 25 February 1999 by the Inspector General’s Office, which, in turn, led to a second investigation by the Inspector General himself which was conducted between 18 and 26 April 1999.

In the middle of the first investigation, the Applicants were suspended from service with full pay and, two months after the second investigation had been completed, they were summarily dismissed. The report of the second investigation, dated 27 May 1999, was sent to the Applicants together with the letters dated 18 June 1999 which conveyed the news of their summary dismissal.

The report of the first, preliminary investigation is not a part of the record but the report of the second investigation states that the preliminary investigation, in addition to finding fraud, “brought to light multiple allegations of sexual harassment”. The allegations of abuse of power were made during the second investigation.

The letters of summary dismissal are based on all three sets of “allegations”: (a) allegations of procurement fraud; (b) allegations of sexual harassment on numerous instances and over a long period of time; and, (c) allegations of abuse of power against

each of the Applicants, which involved requesting payment in the form of a commission from a number of drivers in the office for having granted them overtime.

IV. An examination of the second investigation report reveals that apart from the staff member on SSA, an official of the Tyunda Company made a “statement” to the investigator incriminating the Applicants. The fraud case appears to be based on the testimony of these two individuals. During the investigation, sexual harassment allegations were made by eight women employees and these are described as “formal complaints”. Two of the complainants incriminated the Applicant , many more the Applicant . In addition, the complainants make reference to three persons mentioned by name in the investigation report - two former staff members and one current one - all of whom were allegedly made aware of the “distraught state of the women” in relation to the sexual harassment incidents complained of. The investigator was unable to contact one of the former employees but met the other and the current staff member. With regard to the third set of allegations, three drivers were interviewed by the investigator. One driver allegedly incriminated the Applicant and two drivers allegedly implicated the Applicant .

The record shows that the Applicants were interviewed in the course of the investigations that took place. There is no evidence, however, that they were provided with written notification of the charges against them let alone any specificity as to detail said to be connected with these charges or with any of the evidence alleged to implicate the Applicants. As far as can be gathered, the first time the Applicants came to know of these matters was when they received copies of the report of the second investigation as an attachment to their letters of summary dismissal. There is no evidence on record that, prior to their dismissal, they were given any meaningful opportunity to present their cases or to question the credibility of the evidence that had been collected. In fact, one of the Applicants says that when interviewed by the investigator, he believed that he was being interviewed as a possible witness regarding the complaint against his colleague (the other Applicant) rather than as a suspect or accused in relation to a complaint made against him. The critical evidence against the Applicants on the fraud charge was that “kick backs” were paid to them. This is based on a statement of a “Mr. Luther”. This statement is not to be found in the record except as an account of an oral statement made to the investigator and included in the investigation report itself. The Tribunal is left with little else except the report of this statement and the denial of the Applicants. The record does not reflect that the

Applicants were afforded an opportunity to confront Mr. Luther or challenge his version of events, nor were they given an opportunity to negate a statement with pertinent contextual details included in it. Thus it is difficult for the Tribunal to see on what basis the statement of Mr. Luther was preferred. The failure to provide an opportunity for the Applicants to be meaningfully involved, and to participate, in these proceedings results in a fundamental defect which must vitiate the decision of summary dismissal based thereon.

In the opinion of the Tribunal, this fundamental unfairness was not capable of being rectified by the DC having regard to the circumstances in which its review was eventually carried out. That was an exercise merely of reviewing the record of the earlier investigation so that the opportunity which had been denied to the Applicants was never made good. In the view of the Tribunal, other criticisms of the DC review are merited. It did not take place until three years afterwards; it took place in New York where the Applicants themselves were not present; and, it made findings which were essentially ones of credibility when the Applicants had never enjoyed a proper opportunity of putting their case forward.

In fairness to the second investigation report it must be observed that the recommendation it made was that “appropriate action” be taken in regard to the parties implicated. The intention may have been that it was now appropriate to establish a DC with a view to having a full inquiry rather than to proceed immediately to a summary dismissal on the basis of a *prima facie* case. Unfortunately, such an inquiry into the facts never took place. The action which followed on the basis of the investigation described above was to summarily dismiss the Applicants. The report was wholly inadequate to form any definitive opinion on the substantive aspects of the issues involved and to take a decision for summary dismissal based thereon. As indicated above, the DC inquiry as eventually carried out did not cure that basic defect.

V. According to the Respondent, the reason why the Applicants did not get the opportunity to confront witnesses in regard to the allegations of sexual harassment and abuse of power was because it was judged that the Applicants posed a threat to the security of those witnesses. Therefore, in view of his concern for the safety of the witnesses, the Respondent withheld their identity. The Tribunal is not persuaded that its Judgement No. 983, *Idriss* (2000) is applicable here. That case concerned the special circumstances and the generally dangerous situation prevailing in South Lebanon at the time. In that case, the Tribunal was satisfied from the record that the Applicant was

given a “reasonable opportunity of refuting the charges against him”, and that this did not unreasonably deny the Applicant due process. Such is not the case here. In *Idriss*, the identities of the witnesses were not known to the Applicant but in this case, if the allegations of sexual harassment were true, the witnesses must have been known to the Applicants and so there was no additional protection that ensued by refusing to give names. It would only have protected those who falsely made such charges. Furthermore, the Tribunal notes that the investigation report did in fact record the names of two former employees and a current one to whom the sexual harassment complaints were allegedly reported and that these names were made available to the Applicants. It is clear to the Tribunal that there are no countervailing circumstances in this case to justify the exceptional waiver of such a fundamental requirement such as to be given the chance to test the credibility of incriminating evidence.

VI. The letters of 18 June 1999 warrant some examination. They set out each of the allegations as a “conclusion” or “finding” of the investigation and the report and the conclusions are treated as evidence. Each letter proceeds to state that

“[t]his report and the *conclusions contained therein constitute prima facie evidence* of serious misconduct within the meaning of [United Nations staff regulation 10.2 and United Nations staff rule 110.1]. ... Consequently, in accordance with [United Nations staff regulation] 10.2 and paragraph 5 of Circular [UNDP/ADM/97/17, dated 12 March 1997, entitled ‘Accountability, Disciplinary Measures and Procedures’] (...) and in view of the fact that this report *contains sufficient corroborative evidence* of serious misconduct on your part, I have no choice but to summarily dismiss you with immediate effect.” (Emphasis added by the Tribunal.)

The Applicants were advised that they could seek to have the decision to summarily dismiss them reviewed by a DC. This certainly was possible had it been effectively done.

This is an appropriate point to refer to UNDP/ADM/97/17 to which the letter rightly makes reference and copies of which were quite correctly provided to the Applicants. It contains the guidelines and procedures adopted by UNDP on the application of disciplinary measures and procedures, such as the issues under discussion, including an outline of the basic requirements of due process to be afforded to a staff member who is the subject of allegations of unsatisfactory conduct. Let us, for sake of completeness, put to rest first the matter of the suspension which is less important: paragraph 2.7.1 of the Circular requires that a staff member “shall be

informed of the reason for the suspension”. The Applicants were given no information whatsoever at the time they were suspended or the reasons why, even though the preliminary investigation was well under way. If such crucial information was lacking on 23/24 February 1999, it might have been appropriate to wait another day or two until the investigation had been concluded so that available reasons could have been formulated.

The Circular recognizes the need to guarantee due process and balances this with the need of the Administration to keep itself informed on any matter of impropriety or unsatisfactory conduct and to gather information in this regard as needed. Paragraph 2.1.a distinguishes investigations which are administrative in nature from disciplinary investigations. When in regard to accusations of misconduct, a particular staff member or staff members become identifiable, disciplinary investigations should be initiated by a formal letter setting out the specific allegation or allegations and the staff involved has to be accorded “necessary due process protections”. This the Organization failed to do in this case. At paragraph 2.2 the whole issue of due process is further spelt out. The paragraph reads as follows:

“All procedures and actions relating to investigation must respect the rights and interest of the Organization and potential victims, as well as of any staff member subject to or implicated by an allegation of misconduct. Allegations, investigative activities and all documents relating to the action shall be handled in a confidential manner. If an allegation of misconduct is made, an affected staff member shall be notified in writing of all allegations and of his/her right to respond, provided with copies of all documentary evidence of the alleged misconduct and advised of his/her right to the advice of another staff member or retired staff member as counsel to assist in preparing his or her responses.”

These basic requirements of due process apply to all investigations of a disciplinary nature. In the instant case, the second investigation report appears to be a mixture of an audit investigation, a type of management evaluation, and a disciplinary inquiry rolled into one. Conclusions and findings are made without allegations being crystallized, or with the staff members accused being properly put on notice of their right to challenge the credibility of witnesses as well as to lead evidence which they may wish to provide. The evidence has not been gathered and weighed to enable supportable findings to be made as required in cases such as these.

The Tribunal must make clear that on the available evidence, it is not in a position to come to any conclusions on the serious allegations that have been made

against the Applicants. The Tribunal's findings are based solely on the inadequacy of the procedures which have been adopted.

VII. Finally, the Tribunal notes that the Applicants' cases were never referred for review to the Grievance Panel on Sexual Harassment as provided by ADM/93/26 of 18 May 1993.

VIII. In view of the foregoing, the Tribunal:

1. Orders the rescission of the decisions dated 18 June 1999 to summarily dismiss the Applicants;
2. Should the Secretary-General, within 30 days of the notification of this Judgement decide, in the interest of the United Nations, that the Applicants shall be compensated without further action being taken in their case, fixes the compensation to be paid to each of the Applicants at one year net base salary with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and
3. Rejects all other pleas.

(Signatures)

Kevin Haugh
Vice-President, presiding

Brigitte Stern
Member

Dayendra Sena Wijewardane
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary