



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1246

Case No. 1338

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, Vice-President, presiding, Ms.
Jacqueline R. Scott, Mr. Dayendra Sena Wijewardane;

Whereas, on 28 January 2004, a former staff member of the United Nations
filed an Application containing pleas which read as follows:

“Pleas of the Applicant

MAY IT PLEASE the presiding member to agree to the holding of oral
proceedings in the present case.

MAY IT FURTHER PLEASE the Tribunal:

...

3. To rescind the final decision, dated 3 November 2003, of the United
Nations Development Programme (UNDP) Administrator and to draw the legal
consequences therefrom, specifically:

3.1. To order the Applicant's reinstatement, the resumption of his
career, and the payment, from 7 November 2003 to the date of his actual
reinstatement, of all monthly emoluments to which he was entitled at the time
of the decision contested;

3.2. Failing this, to award the Applicant compensation equal to the
amount of his net base salary for a period of three years, as compensation for
all damages;

3.3. To order that the Judgement be inserted in the Applicant's
personnel file;

4. To award the Applicant, as costs, a sum payable by the Respondent to be determined at the conclusion of proceedings.”

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 30 June 2004 and twice thereafter until 31 August;

Whereas the Respondent filed his Answer on 31 August 2004;

Whereas the Applicant filed Written Observations on 27 October 2004;

Whereas, on 8 July 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the UNDP/ United Nations Population Fund (UNFPA)/ United Nations Office for Project Services (UNOPS) Disciplinary Committee (DC) reads, in part, as follows:

“II. EMPLOYMENT HISTORY

... [The Applicant transferred to] UNFPA on a [one-year] fixed-term appointment at the P-5 level on 1 March 1999. He was made the UNFPA Representative of Uzbekistan and concurrent Country Director for the five Kattuk countries. He held this combined position for a period of two years. In addition to covering the six Kattuk countries he was also responsible for redesigning ‘some 35 component projects distributed among the six countries’. Prior to that [the Applicant] had worked in the [United Nations] ..., primarily at [the United Nations High Commissioner for Refugees] for 15 years. ...

[The Applicant’s fixed-term contract with UNFPA was renewed a number of times.]

III. EVENTS LEADING TO DISCIPLINARY CHARGES

[On 10 October 2000, four female United Nations employees signed a ‘Note for the file’ in which they alleged that, at a party held during an official trip to Kazakhstan on 28 August 1999, the Applicant had conducted himself inappropriately. The women claimed that they had not mentioned this matter earlier as they thought the Applicant had been unable to control himself due to intoxication, but that they had realized that he remembered the incident and was ‘avenge[ing]’ them. In October 2001, the Chief, Office of Human Resources (OHR), UNFPA, visited the Country Office in Kazakhstan and prepared a report containing a ‘plan of action’. He made several recommendations including the need for team-building exercises but did not mention inappropriate behaviour on the part of the Applicant or the ‘Note for the file’.]

[In November 2001, the Applicant received his performance appraisal review (PAR) for the year 2000. His overall evaluation was 'Excellent Representative and Programme Manager'.]

[Following an alleged theft from the UNFPA office safe in Uzbekistan, in December 2001 an 'informal panel' was sent to investigate. Appended to its subsequent report was an 'Addendum' which made reference to 'a widespread atmosphere of intimidation', possible sexual harassment, and open conflicts between staff. Upon his request, on 29 January 2002 the Applicant was provided with a copy of the report, but not the Addendum.]

[On 5 March 2002, the Chief, OHR, wrote to the Applicant regarding a ruling from the Office of Legal Affairs concerning the theft:

'Reference was ... made ... to unrelated instances that were noted by the Panel concerning possible intimidation and sexual harassment in the Tashkent Office. As these concerns had been addressed earlier by OHR no further action is required.']

... [Thereafter, however, the Applicant was] summoned to New York on 5 June 2002, to discuss the [allegations contained in the Addendum] with the Executive Director, senior management and the Ombudsman. ... [The Applicant was formally offered an agreed separation package but, after unsuccessful negotiations regarding the terms and conditions, declined the offer. On 21 June, he was informed that he was being suspended with full pay pending an investigation into allegations of 'sexual and other harassment' and insubordination. On 22 July, the Applicant was advised that he had 48 hours to leave Uzbekistan.]

... In September 2002, a fact-finding team was constituted to investigate the matter. ... The Team was in Tashkent from 16-21 September 2002. ... The Team then traveled to Paris to interview [the Applicant]. The Team alleged that [the Applicant] refused to cooperate [The Applicant] maintained that his *due process* rights had been skirted by the Team; he demanded to see any written 'allegations' drawn up by the UNFPA management. On returning to New York, the Team interviewed four former colleagues of [the Applicant] ...

... The Team explained its *modus operandi* with the caveat that '... all the statements and incidents described in this report were verified by at least one other staff member and usually more than one'; and further, that all the three members 'were present and witnessed most of the statements that were made to the Team'. It was also explained that for cultural reasons 'several' of the young female staff members who were quoted in the report feared [retribution] and requested anonymity instead; this was duly respected.

...

... The Team's report *concluded* with the finding that [the Applicant] had '... created an intimidating, hostile or offensive work environment as defined in the Sexual Harassment Policy and Procedures for UNDP/UNFPA; that this behaviour both in and out of the office was completely inappropriate in a professional environment, constituted an abuse of authority, and tended to bring the Organization into disrepute, contrary to the requirements of the Staff Regulations and the United Nations Standards of Conduct for the International Civil Service'.

... A copy of the report was duly sent to [the Applicant] ... on 26 November for his comments thereon. He submitted his comments by a letter dated 26 November 2002 ...

...

... After reviewing [the Applicant's] response to the Team's Report, the Officer-in-Charge, Bureau of Management, [(OiC)] decided that [he] had failed to satisfactorily answer the *prima facie* case raised against him by the report. The OiC therefore proceeded to formally charge [him] with four counts of misconduct in a letter dated 10 February 2003[, as follows:

- harassment, including sexual harassment, of three female colleagues;
- creating a hostile work environment;
- conduct unbecoming a senior international official;
- insubordination.]

[The Applicant] replied to the formal charges by a letter dated 26 February 2003 ... [denying all accusations, and contending] ... that the Administration had relied on 'defamatory, slanderous [and] oral accusations' and had disregarded his proffered defense based on 'documentary evidence'. The burden of proof, he concluded rested on the Administration.

... [UNDP] referred [the] case to the Disciplinary Committee as a matter of serious misconduct on 22 April 2003. In the letter of referral, it was pointed out that [the Applicant's] case differed from other sexual harassment cases in that there was no 'victim's written testimonial', but that the evidence of misconduct was drawn from a 'series of extensive interviews with the entire UNFPA staff'. ..."

On 9 June 2003, the Applicant was formally advised that his case had been submitted to the DC.

On 24 October 2003, the DC submitted its report. Its conclusions and recommendation read as follows:

"CONCLUSIONS AND RECOMMENDATION

38. The Disciplinary Committee determined that the Administrator had provided sufficient corroborated evidence to support three of the four charges, but not on the charge of insubordination. Although the proffered evidence on the charge of conduct unbecoming an international civil servant was considered to be weak for lacking signed statements, it was still upheld by the Committee because the acts of sexual harassment which he was found to have committed are considered by the Committee to also represent conduct unbecoming a senior international civil servant. The variety (and number) of witnesses attesting to [the Applicant's] behaviour was impressive enough to make the charge credible. The Committee agreed that the sensitivity of the charges and solidity of the supporting evidence confirmed their decision that [the Applicant] should no longer be retained by the Organization. It was noted that [the Applicant] bore responsibility for his own acts of serious misconduct

despite the fact that he frequently performed those objectionable acts under the influence of alcohol. The Committee did not see any combination of circumstances and actions that could be offered in mitigation of [the Applicant's] actions. To this end, the Committee was concerned by the apparent failure of the UNFPA management to take immediate action on the Note for [the] File (10 October 2000) in view of the sensitive nature of the subject-matter and the fact that the note was signed by four identifiable women.

39. In conclusion, the Disciplinary Committee finds that the charges against [the Applicant] of sexual harassment, creating an intimidating and hostile work environment, and conduct unbecoming an international civil servant are well founded. It finds that the charges of insubordination cannot be upheld.

40. In light of the above, the Disciplinary Committee unanimously recommends that [the Applicant] be separated from the service of UNFPA in accordance with staff rule 110.3 (vii), without notice or compensation in lieu thereof."

On 3 November 2003, the Administrator, UNDP, transmitted a copy of the report to the Applicant and informed him that he found the Applicant's "actions and attitudes" to constitute misconduct and that he had decided to accept the DC's recommendation and to separate the Applicant from service without notice or compensation in lieu thereof, or termination indemnity.

On 28 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's rights of due process were repeatedly violated.
2. The DC made factual, procedural and legal errors in its consideration of the case and its report is tainted by bias.
3. The Applicant sustained harm to his dignity and reputation, as well as serious moral and financial injury.

Whereas the Respondent's principal contentions are:

1. The decision of the UNDP Administrator to separate the Applicant from service for misconduct was a valid exercise of his discretionary authority.
2. The facts concerning the Applicant's misconduct were established and legally supported the finding that the Applicant had engaged in misconduct.
3. There was no bias against the Applicant and his rights to due process were fully respected.

4. The disciplinary measures imposed were not disproportionate or excessive.

The Tribunal, having deliberated from 29 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant joined UNFPA on a fixed-term appointment at the P-5 level on 1 March 1999. He was made, concurrently, the UNFPA Representative of Uzbekistan and Country Director for the five other Kattuk countries.

On 28 August 1999, the Applicant attended a party. On 10 October 2000, more than a year later, four female employees decided to write a “Note for the file” which they duly signed. In this note they stated that, during the party on 28 August, the Applicant had become intoxicated and had behaved in an inappropriate manner, which included acts of sexual harassment directed towards one of the four women.

Another year later, in October 2001, the Chief, OHR, visited the Country Office in Kazakhstan and prepared a “plan of action” for the Office in which he made several recommendations including the need for team-building exercises. No reference was made to the “Note for the file” and no inappropriate behavior on the part of the Applicant was noted. Rather, a month later, in November 2001, the Applicant received his PAR with the overall evaluation of “Excellent Representative and Programme Manager”.

Around the same time, a staff member from the UNFPA office in Uzbekistan complained that his personal funds had been stolen from the office safe. In December 2001, an “informal panel” was sent to investigate the incident. In the course of their investigation, the panel received information to the effect that there was “a widespread atmosphere of intimidation”, possible sexual harassment and open conflicts between staff in the office. These matters were noted in a document signed by one of the panel members and appended as an “Addendum” to its report. Although the Applicant was not specifically named in the Addendum, he is identified in all but name.

The Applicant was provided with the panel’s report on 29 January 2002 only upon his formal request, but the Addendum, which contained adverse material concerning him, was not communicated to him. It was not until some months later, on 5 March, when the Chief, OHR, wrote to him about the alleged theft that he was alerted to the fact that the panel had noted “unrelated instances ... concerning possible

intimidation and sexual harassment”. The Chief indicated, however, that “[a]s these concerns had been addressed earlier by OHR, no further action is required”.

However, only three months later, the situation was reversed and, apparently, further action was deemed necessary: on 5 June 2002, the Applicant was summoned to New York to discuss the allegations made in the Addendum, at which time he was offered a separation package. His refusal to take the package was followed by a letter informing him that he was being suspended with full pay pending an investigation of “sexual and other harassment”. On 22 July, two months before a fact-finding team was constituted to formally investigate the allegations, he was given 48 hours to leave Uzbekistan. At that time, he chose to go to Paris.

Two months later, in September 2002, a fact-finding team was sent to Tashkent where it interviewed a number of people, investigating, pursuant to its Terms of Reference, allegations that the Applicant was responsible for a hostile working environment that included incidents of sexual harassment. Thereafter, the Team went to Paris where it met with the Applicant. The Team would subsequently report that the Applicant had refused to cooperate and tell his side of the story. By letter dated 12 September 2002, the Applicant asserted that his rights of due process required that he be provided with any written allegations drawn up by UNFPA and also asked that he be permitted to have the assistance of legal counsel. The Executive Director, UNFPA, responded on the same date, refusing his requests on the basis that he had not been formally charged with any wrongdoing.

On 26 November 2002, the report of the fact-finding team was sent to the Applicant. The report contained several accounts of alleged impropriety on the part of the Applicant and concluded that he had

“created an intimidating, hostile or offensive work environment ... [and] ... that this behaviour both in and out of the office was completely inappropriate in a professional environment, constituted an abuse of authority, and tended to bring the Organization into disrepute”.

It is noteworthy that several of the young female staff members who were quoted in the report had requested and obtained anonymity, citing cultural grounds and fear of “attribution”. The Applicant responded to the report, defending himself and raising various due process concerns, in particular that the team had failed to follow the procedures contained in UNDP/ADM/97/17 of 12 March 1997, entitled “Accountability, Disciplinary Measures and Procedures”. He stated that as he had not

been shown any documentary evidence, he was not in a position to properly defend himself.

On 10 February 2003, the Applicant was charged with harassment, including sexual harassment, of three female colleagues; creating a hostile work environment; conduct unbecoming a senior international officer; and, insubordination. On 26 February, the Applicant sent a letter insisting that his due process rights were violated; that no documentary evidence against him had been produced; and, that, therefore, the Administration had not constructed a *prima facie* case and continued to bear the burden of proof.

The case was referred to a DC as a matter of serious misconduct on 22 April 2003, and, on 9 June, the Applicant was formally so advised. The DC proceeded to consider the case *in camera*, on the basis that it had sufficient documentation before it and no official request had been made for it to hear witnesses to introduce new information. The DC found all charges other than insubordination to be well-founded, and unanimously recommended that the Applicant be separated from the service of UNFPA in accordance with staff rule 110.3 (vii), without notice or compensation in lieu thereof. The recommendation was accepted in its entirety by the Administrator, UNDP.

The Tribunal wishes to note that a Grievance Panel was never established to hear the allegations of sexual harassment, which appears to run counter to the UNDP policy on sexual harassment (UNDP/ADM/93/26 of 18 May 1993).

II. The Tribunal now turns its attention to the law pertaining to this case. General Assembly resolution 48/218 B requests the Secretary-General, *inter alia*, “to ensure that procedures are ... in place that protect ... due process for all parties concerned and fairness during any investigations[, and] that falsely accused staff members are fully cleared”. In accordance with paragraph 49 of the Manual of Investigation Practices and Policies, produced by the Investigation Division of the Office of Internal Oversight Services (OIOS), “[t]he General Assembly has mandated that staff must cooperate with OIOS. They cannot refuse to answer and are not entitled to the assistance of counsel during the ... fact finding exercise”.

This apparent contradiction between the Resolution and the Manual is resolved in the instant case under the UNDP rules which governed every aspect of the investigation in the Applicant’s case. Paragraph 2.1.a of UNDP/ADM/97/17 states

“The Organization shall investigate the circumstances of any losses, damage or apparent impropriety where no specific allegation of misconduct is reported or individual staff member(s) identified. ... Such investigations are administrative in nature and distinguished from disciplinary investigations initiated by a formal letter of allegation and where staff participating in or otherwise involved shall be accorded necessary due process protections.”

Thereafter, under paragraph 2.3, the circular provides:

“All procedures and actions relating to investigation must respect the rights and interest of the Organization and potential victims as of any staff member subject to or implicated by an allegation of misconduct. ... 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.”

III. The Tribunal has repeatedly demonstrated its concern about procedure, due process and fairness to all.

In its Judgement No. 1022, *Araim* (2001), the Tribunal stated that it “cannot accept that investigations could be conducted without rules and guarantees of due process and without giving due respect to inalienable rights proclaimed by the Organization itself in the Declaration on Human Rights”. In Judgement No. 983, *Idriss* (2000), the Tribunal found:

“Obviously there are cases in which it is essential for the accused person to know the source of the allegation against him in order to enable him to challenge the honesty, reputation or reliability of a witness. There are cases in which a witness must be identified so as to afford ‘due process’ to a person with an alibi or a similar defense. In such cases the Tribunal is satisfied that the rights of an accused person to a fair hearing are superior to those of a person seeking anonymity. Under those circumstances the matter should not proceed unless there is disclosure of the identity of the accuser or witness as the case may be.”

Furthermore, the Tribunal decided as follows in its Judgment No. 1058, *Ch’ng* (2002):

“The Tribunal does not agree with the position ... that the lack of due process during the period leading to the decision of summary dismissal was ‘cured’ by the ‘full due process’ the Applicant received in the [Joint Disciplinary Committee] proceedings. This is one of those cases where the lack of due process at an early stage has an inevitable direct impact on the decisions in the following stages.”

IV. Having given due consideration to the foregoing, the Tribunal will next state its decision. First, it wishes to underline the importance that procedure has, an importance which has been emphasized in recent years throughout developed legal systems, under the title of due process and otherwise known as the principle of no punishment *sine processu*. That importance has been repeatedly highlighted in the various decisions of appropriate organs of the United Nations system and has been further emphasized and developed by the case law of this Tribunal.

In the present case, allegations regarding the Applicant's behavior started as early as the "Note for the file" was signed, i.e., 10 October 2000. Thereafter, the "informal panel" which investigated the possible theft in late 2001 turned its investigation to other matters, in particular, it would appear, to the behavior of the Applicant, without him being so advised. Moreover, when it reported its concerns in the afore-mentioned Addendum, this was kept from him. Subsequently, before organizing any further investigation, the Respondent offered the Applicant a separation package, which he ultimately refused, and later gave him only 48 hours to leave Tashkent. It was only after all this that a formal investigation into his possible misconduct commenced and, whilst he *was* asked to participate from that point onwards, the Applicant was denied the rights of due process he had requested. Under the circumstances, the Tribunal finds it very strange that the Applicant was pressed to leave office before the investigation (which ultimately led to his separation from service) was ever conducted and, more generally, finds that the Applicant was deprived of his rights of due process.

The Tribunal considers that the Applicant was probably identified as a possible wrongdoer once the "Note for the file" was filed, but, in any event, was certainly so considered upon the release of the Addendum to the investigation report. It finds, therefore, that from that point on he was protected by the provisions of UNDP/ADM/97/17, which states that investigations are administrative - and thus no due process is given - only when no specific allegation of misconduct is reported or individual staff member identified. In consequence, in accordance with paragraph 2.2 of that circular, as soon as the Applicant was identified as a possible wrongdoer, he should have been accorded due process, which includes being notified of the allegations in writing, provided with all documentary evidence, and permitted to have counsel. As the Tribunal decided in *Ch'ng, ibid.*, there are cases, and this is one of

them, where procedural irregularities at an early stage have an inevitable direct impact on the decisions in the following stages and may not be retroactively cured.

V. In conclusion, the Tribunal is of the opinion that the assurances of due process and fairness, as outlined by the General Assembly and further developed in the rules of UNDP, mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees. Moreover, the Tribunal finds that there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, *sine processu*.

Furthermore, the Tribunal wishes to reiterate its jurisprudence in *Idriss, ibid.*, and reaffirms that, under normal circumstances, no accusation may be made on the basis of anonymous testimony, when the accused person requires identification in order to better prepare his defense. Moreover, the Tribunal notes that, in all cases, testimony must be gathered in such a way and contain the necessary elements in order to allow the Tribunal to dispose of a case with comprehensive knowledge of the facts, as well as statements and their credibility. Finally, even in those rare cases where the Tribunal may accept that the non-disclosure of the names of witnesses to the accused person was proper, it is the Tribunal's province to make that decision and, in order to do so, *nothing* should be hidden from the Tribunal.

VI. In determining the appropriate outcome of this case, the Tribunal recalls its order in *Ch'ng, ibid.*, and finds that

“procedural irregularities under the particular circumstances of this case should not lead to quashing the decision taken against the Applicant ... mainly because quashing the decision altogether and ordering reinstatement would have no practical effect for the Applicant, [who] had a fixed-term contract ... The Tribunal, therefore, decides not to reopen the case on its merits, but to order compensation in view of its findings on procedure.”

Similarly, in this case, the Tribunal is not in a position to address the substance of the allegations against the Applicant.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation of six months' net base salary at the rate in effect at the time of his separation from service, 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,
2. Rejects all other pleas.

(Signatures)

Spyridon **Flogaitis**
Vice-President, presiding

Jacqueline R. **Scott**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary