United Nations AT/DEC/1262

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1262

Case No. 1345 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Brigitte Stern; Ms. Jacqueline R. Scott;

Whereas at the request of a former staff member of the United Nations, 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 October 2003 and periodically thereafter until 31 March 2004;

Whereas, on 30 March 2004, the Applicant filed an Application containing pleas which read, in part, as follows:

"**II. PLEAS**

…

12. Whereafter the Applicant most respectfully requests the Administrative Tribunal *to order:*

(a) That the Applicant be reinstated retroactively to the date of his summary dismissal; or, failing that:

(b) That the Applicant be paid a sum equal to his full salary from the date of his summary dismissal up to the normal retirement age of 60, inclusive of all entitlements including dependency allowance for his son … as well as the applicable separation and pension benefits."

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 July 2004 and periodically thereafter until 31 October;

Whereas the Respondent filed his Answer on 19 November 2004;

Whereas the Applicant filed Written Observations on 28 February 2005;

Whereas, on 27 October 2005, the Respondent submitted comments on the Written Observations and, on 7 November, the Applicant commented thereon;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Disciplinary Committee (JDC) reads, in part, as follows:

> "***Employment history***
>
> … [The Applicant] was recruited on 30 October 1982 from Ghana [to the United Nations Truce Supervision Organization (UNTSO)], Jerusalem, as a Secretary, FS-3, on a one year fixed-term appointment. … His [appointment] was extended until September 1985, when he was reassigned to [the United Nations Interim Force in Lebanon (UNIFIL)]. His [contract] was regularly extended, usually for one-year periods, until 1 October 1988 when he was promoted to FS-4. … His functional title was changed to Administrative Assistant in September 1997. … [After several temporary assignments with other missions, on 4 February 1999, the Applicant returned to UNIFIL.] His [appointment] continued to be extended - the last for six months, effective 1 July 2002.
>
> ***Proceedings***
>
> … On 16 October 2001, the Office of Internal Oversight [Services] (OIOS) Investigation Section issued a report of an investigation, which had been initiated by the decision of the management of UNIFIL to monitor the [Applicant's e-mail account. According to the Respondent, this decision was prompted by the accidental discovery of an e-mail printout which raised suspicions that the Applicant might be involved in behaviour which may constitute serious misconduct.]
>
> … The monitoring revealed an e-mail correspondence running from late January to early September 2000 [between three individuals: the Applicant; a staff member with the United Nations Disengagement Observer Force (UNDOF) (Mr. A)]; and, a woman residing in Ghana [(Ms. A)] … In his statement made to the OIOS investigators signed on 28 June 2001, [the Applicant] acknowledged that he had engaged in this correspondence with a view to getting [Ms. A] into Israel using a passport issued in the name of his estranged wife or daughter, but noted that his plan [had] not been carried out. [The OIOS report also described additional schemes, suggesting the Applicant's 'systematic involvement in illegal activity against Israel's immigration laws'. OIOS concluded, inter alia, that 'the staff members' actions can be described as a conspiracy … [demonstrating] fraudulent intent'.
>
> … On 22 March 2002, [the Office of Human Resources Management (OHRM)], presented the Applicant with allegations of misconduct and forwarded to him a copy of the OIOS report, as well as other documentation. In addition to the allegations concerning the violations of Israeli immigration laws, the Applicant was informed of, and provided with, documentation in support of his estranged wife's claims that, in September 2000, he had presented the Administration with 'a passport of [his

estranged wife] ... but that her photograph in this document had been glued over the picture of another woman'. [OHRM] referred to [administrative instruction] ST/AI/371 [of 2 August 1991] on disciplinary measures and procedures and requested that he respond to the allegations of misconduct made against him. [The Applicant] responded [on] 13 May. ...

… On 9 July [the Applicant was informed that the Secretary-General had decided that he be summarily dismissed for serious misconduct. The decision was based on OIOS findings that he schemed, together with Mr. A, to illegally bring Ms. A into Israel, constituting a conspiracy to violate local laws. The decision was also based on the finding that he had submitted to the Administration falsified documentation relating to the mother of his son 'with fraudulent intent'. On 6 August [the Applicant] requested a review of the decision by [the JDC]. …

…"

On 29 March 2003, the JDC in New York submitted its report. Its considerations, conclusion and recommendation read, in part, as follows:

"***Considerations***

…

29. The Panel noted that the facts as presented by the Administration had been acknowledged by [the Appellant] and his counsel and were thus established. …

30. While the Panel found no substantive irregularity, it was troubled by two procedural aspects of the case, both related to the investigation. …

…

31. The Panel also observed that this case revealed a serious lacuna in the due process rights of staff members. ST/AI/371 recognizes the right to counsel 'if the case is to be pursued,' but does not explicitly deny it at an earlier stage. However, paragraph A.1 of Operating Procedure F of the Investigations Section Manual says:

> 'Consistent with existing UN practice, and reaffirming the jurisdiction of IS/OIOS as providing pre-investigatory and not disciplinary or adjudicative functions, no staff member or other person has a right to legal assistance or any other representation including panel of counsel … when interacting with the IS investigator.'

This refusal of right to counsel … is not protective of the individual rights of staff. The Panel had difficulty reconciling the accounts of the manner in which the interview was conducted, as given by [the investigator] and [the Appellant].

32. The Panel did have some cause to speculate whether there was an improper motive or abuse of purpose. From its first discussion of the case, the Panel had sought a further explanation of the statement … that '[i]n May 2000, UNIFIL management decided to monitor the e-mail account of [the Appellant] . . . on a well-founded suspicion that he was using his [United Nations] electronic mail account for acts that could amount to serious misconduct.' The Panel was not satisfied with the written response of the Representative of the Secretary-General that 'it was a printout relating to the scheme lying on his computer found by his supervisor that prompted UNIFIL to proceed with a search.' …

…

Conclusion and Recommendation

> 35. The Panel has noted procedural problems in its review of the investigation leading to the decision for summary dismissal. While the panel hopes that the Secretary-General will address these concerns, it is not convinced that the irregularities constitute a denial of due process. Counsel for [the Appellant] has not cast doubts on the facts alleged by the Administration, but has only argued that the penalty is too severe. The Panel decided that Counsel had failed to provide evidence or argumentation that would justify mitigation of the decision for summary dismissal."

On 6 June 2003, the Officer-in-Charge, Department of Management, transmitted a copy of the JDC report to the Applicant and informed him as follows:

> "The Secretary-General has examined your case in the light of the JDC's findings and conclusions, as well as the entire record and the totality of the circumstances. Though he does not share the JDC's views that there were procedural problems in the investigation of your case, he agrees with the JDC that the facts of this case are not in dispute and that, accordingly, your misconduct is well established. He also agrees with the JDC that your due process rights were respected. In accordance with the JDC's unanimous conclusion, the Secretary-General has decided to take no further action on your case."

On 30 March 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to summarily dismiss him was based on a series of procedural and substantive irregularities that led to a distorted view of the facts. This distortion deprived the Applicant of his rights to a fair evaluation of his claims.

2. The Applicant was erroneously accused of facilitating the entry into Israel of Ms. A.

3. The Applicant was falsely accused of seeking a dependency allowance to which he was not entitled, as he did not possess the fraudulent intent necessary to have committed the accused act.

4. The Applicant was denied his rights of due process and there were undue delays in the resolution of his case. The OIOS investigators' behaviour while interrogating the Applicant amounted to gross intimidation in violation of OIOS Operating Procedures and therefore the statement signed by the Applicant at that time cannot be accepted as admissible evidence.

5. OIOS did not conduct a full investigation into the facts of the case, in accordance with the OIOS Investigations Sections Manual. In particular, OIOS overlooked important leads that, if explored, could have exonerated the Applicant.

Whereas the Respondent's principal contentions are:

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

2. The sanction imposed on the Applicant was warranted and was not disproportionate to the offences committed. The Respondent has complied with the criteria established in the Tribunal's jurisprudence for the review of disciplinary measures.

3. The facts on which the disciplinary measures were based have been established and they amount to serious misconduct. There is no evidence of substantive irregularities in this case.

4. The investigation in this case was not tainted by procedural irregularities.

5. The decision to summarily dismiss the Applicant was legal. There is no evidence of an improper motive or abuse of discretion.

The Tribunal, having deliberated from 1 to 23 November 2005, now pronounces the following Judgement:

I. The Applicant was recruited on 30 October 1982 on a one-year fixed-term appointment as a Secretary at the FS-3 level with UNTSO. His appointment was regularly extended and, in September 1995, he was assigned to UNIFIL. After several temporary assignments with other missions, on 4 February 1999, the Applicant returned to UNIFIL, where he served until his separation from service. His last fixed-term contract was for a six-month period, effective 1 July 2002.

II. In May 2000, the UNIFIL Administration, on the advice of ID/OIOS, decided to monitor the Applicant's e-mail account. This decision was apparently taken following the finding of a printout by the Applicant's supervisor, which led to the suspicion that the Applicant was involved in acts that could amount to serious misconduct. Subsequently, OIOS proceeded to conduct an investigation, which included the continuance of monitoring of the Applicant's e-mail account. This monitoring revealed that the Applicant was involved in e-mail discussions with two people, one of whom was an UNDOF staff member and the other a woman from Ghana. The subject of these e-mail discussions was the possibility of bringing the woman illegally into Israel, posing as the Applicant's wife or daughter, since the latter were eligible to receive entry visas into Israel.

Ultimately, the woman from Ghana did enter Israel, under assumed identity, using the passport of the UNDOF staff member's wife rather than assuming the identity of the Applicant's wife or daughter, as was initially discussed in the exchange of e-mails.

In addition to the above, the monitoring of the Applicant's e-mail account also uncovered other e-mail discussions between the Applicant and third parties, which likewise involved the possible commitment of illegal acts, specifically in violation of Israeli immigration laws.

As part of its investigation, OIOS interviewed the Applicant and, subsequently, the Applicant signed a statement in which he admitted to sending and receiving the subject e-mails, using his United Nations e-mail account, which e-mails were produced as evidence.

The findings of the OIOS investigation are included in its report of 16 October 2001.

III. Meanwhile, in September 2000, the Administration was made aware of another matter, which was brought to its attention by the Applicant's estranged wife: the Applicant had a son through an extra-marital relationship. Apparently, the Applicant wanted to have his son's dependency status established in his wife's name. The Applicant had presented the UNIFIL authorities with a falsified passport, containing a photograph of his wife which was glued over a photograph of another woman, apparently that of the child's mother, thus inducing the UNIFIL authorities to believe that this was his and his wife's son. When denounced by his wife, the Applicant admitted the above.

IV. On 22 March 2002, the Director, Special Services Division, OHRM, advised the Applicant of the allegations against him and provided him with the OIOS report and other supporting documentation. The Applicant responded in writing on 13 May 2002. In his statement, the Applicant did not deny either of the alleged acts but rather, having admitted to performing them, only gave his point of view thereon, as well as his reasons for acting in a way which brought him to the difficult situation of having to respond to allegations of misconduct.

On 9 July 2002, the Officer-in-Charge, OHRM, informed the Applicant that the Secretary-General had decided that he be summarily dismissed for serious misconduct. To that effect, she produced two grounds: (i) that the Applicant had conspired with another staff member to violate Israeli laws by bringing into the country, illegally, a foreigner under a false identity and with a false passport; and (ii) that the Applicant falsified and submitted to the Administration documentation relating to the mother of his son, with fraudulent intent. The Applicant was further informed that this behaviour was inconsistent with the standards of conduct expected of an international civil servant and that its gravity warranted immediate separation from service.

On 6 August 2002, the Applicant requested that this matter be submitted to the JDC, which issued its report on 29 March 2003. In its report, the JDC, while noting "procedural problems in its review of the investigation leading to the decision for summary dismissal … is not convinced that the irregularities constitute a denial of due process". The JDC endorsed the decision of the Secretary-General to summarily dismiss the Applicant.

V. The Tribunal notes that the Applicant was summarily dismissed on two grounds, one which was discovered through the monitoring of his e-mail account and the OIOS investigation that followed, and the second which was brought up by his estranged wife. The Tribunal further notes that all the concerns and discussions which took place at the JDC level, particularly regarding procedural irregularities, relate exclusively to the first ground. The Tribunal, however, is of the opinion that the second ground is neither less important nor negligible. No Administration, especially one with the importance and prestige of the leading international organization of the world, the United Nations, would like to count among its personnel staff members who forge passports and then produce them to the Administration, regardless of the reason for or the effects of such action. For this reason and based on this charge alone, the Tribunal would find that the Secretary-General's decision was a valid exercise of his discretionary authority in disciplinary cases. The Tribunal reiterates its jurisprudence, which has consistently recognized that

> "The Tribunal … respects the Secretary-General's authority to exercise his discretion in defining serious misconduct and in determining appropriate penalties. However, the Tribunal will affirm the Respondent's exercise of discretionary authority only when satisfied that the underlying allegation of misconduct has been proven through a procedure that respects due process and that is not tainted by prejudice, arbitrariness, or other extraneous factors." (See Judgement No. 815, *Calin* (1997).)

See also Judgement No. 1182, *Njuki* (2004) where the Tribunal recalled Judgement No. 1143, *Said* (2003), which stated that

> "In its jurisprudence, the Tribunal has consistently held that the Secretary-General … has considerable discretion in taking disciplinary decisions (see Judgements No. 300, *Sheye* (1982), and No. 987, *Edongo* (2000).) That discretion extends to the characterization of the alleged conduct and the choice of the appropriate sanction."

Having determined the above, the Tribunal would not normally need to address the other issue, namely the potential procedural irregularities which might have contributed to the implication of the Applicant in the conspiracy, leading to the first ground of the serious misconduct with which he was charged and, as a result of which, he was summarily dismissed.

Nonetheless, the Tribunal will discuss that matter for the sake of the consolidation of its jurisprudence, and also because the alleged act with which the Applicant was charged would be considered very serious by any international organization operating in a sovereign country, when faced with staff members who violate such important laws as those on immigration.

VI. In the present case, the JDC raised concerns regarding the monitoring of the staff members' computers, especially in light of Judgement No. 1023, *Sergienko* (2001), and with the way in which OIOS investigations are conducted, particularly the denial to the suspected staff members of the right to be represented by counsel. In addition, the Applicant claimed that he was coerced during the interview with the OIOS investigator and that he signed the statement only as a result of this coercion.

Regarding the first concern, the Tribunal finds that its Judgement in the *Sergienko* case (*ibid*.), which it reaffirms, has no relation whatsoever to the present case. In that decision, the Tribunal was faced with a situation of a *private* intrusion by another staff member into the Applicant's computer, the product of which was later used as evidence by OIOS. This is not the case here.

Furthermore, in its decision No. 1246 (2005), the Tribunal decided as follows:

> "[T]he 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 … 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*."

However, in the present case, it is clear from the OIOS report that the Applicant was identified as a wrongdoer right from the beginning of the interview with the investigator, that this was made known also to the Applicant at that time, and he admitted everything. Having reviewed the file, the Tribunal did not find any sign of coercion. Should he have been coerced or denied any of his due process rights, for example, if he had requested to seek counsel and had been denied that request, he could and would have come later to denounce the situation in any possible manner, as very often happens. The Tribunal is bound to take into consideration the fact that, not only did he not question the procedure of OIOS, but also, and more importantly, when, on 13 May 2002, he responded in writing to the

Administration's allegations of misconduct, he once again repeated more or less the same arguments and did not question the procedures followed.

The Tribunal cannot but give the Applicant's above-mentioned response of 13 May 2002 the importance and weight that it deserves, being a document which was written by the Applicant of his own free will, at a critical stage of the whole process. Any objection to the procedure, such as claims of coercion, could and would have been brought up in this document. This would have been the moment for this to be done - a point of time when the Applicant was not in the presence of any intimidating person and obviously in possession of "his free will". However, the Applicant failed to do so and, on the contrary, re-admitted everything that he was accused of, in sharp contrast with the case cited above, where the Applicant insisted from a very early stage on his rights of due process. The Applicant's explanation, that he had hoped that this response, which does not mention any of his later claims regarding various violations of his rights, would bring an amicable resolution to the matter, is not convincing.

VII. In view of the foregoing, the Application is rejected it its entirety.

(*Signatures*)

Spyridon **Flogaitis**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 23 November 2005

Maritza **Struyvenberg**
Executive Secretary