United Nations AT/DEC/1266

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1266

Case No. 1349 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 2 October 2003 and periodically thereafter until 31 March 2004;

Whereas, on 31 March 2004, the Applicant filed an Application requesting the Tribunal, inter alia:

> "(e) [*T*]*o order* the Secretary-General to treat the period between 9 July 2002 and 1 April 2003 as Special Leave Without Pay; and
>
> (f) [*T*]*o order* the Secretary-General to reinstate the Applicant with full salary and emoluments as of 1 April 2003, in accordance with the [Joint Disciplinary Committee (JDC)]'s recommendation."

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, on 31 March 2005, the Applicant filed Written Observations and, on 27 October, the Respondent commented thereon;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

> "***Employment history***
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> … [The Applicant] was recruited from Ghana on 21 December 1982 on a six-month fixed-term appointment … as a Vehicle Mechanic, FS-3, [with the United Nations Interim Force in Lebanon (UNIFIL)], Naqoura. His appointment was several times extended … [and] he was promoted, effective 1 October 1988, to FS-4. On … 1 July 1993 [the Applicant] was promoted to [the FS-5] level. … Effective 6 February 1999, [the Applicant] was reassigned to [the United Nations Disengagement Observer Force (UNDOF)], Damascus. The last extension of his [fixed-term appointment] … was to run until 31 December 2002.
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> ***Proceedings***
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> … 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 e-mail account of [a UNIFIL staff member (Mr. M-D)].
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> … The monitoring revealed an e-mail correspondence running from late January to early September 2000 [between Mr. M-D, the Applicant, 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 [Mr. M-D's] wife or daughter, but that this plan [had] not been carried out. Instead, [the Applicant] stated that he had arranged for an Israeli visa to be issued in the name of his wife and that he had sent his wife's passport to Ms. [A] who, with the Israeli visa issued in Abidjan, used it to enter Israel.
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> … 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.] …
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> … 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. M-D], 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 sent his wife's passport, which contained a visa to enter Israel, to Ms. [A], enabling her to illegally enter Israel while posing as his wife. On] 19 August 2002, [the Applicant] requested a review of the decision by [the JDC].
>
> …"

On 25 March 2003, the JDC in New York submitted its report. Its considerations and recommendation read, in part, as follows:

"***Considerations***

…

18. … [T]he Panel agreed that there was no dispute as to the facts of the case. The Panel noted that Counsel for [the Appellant] had not questioned the propriety of the OIOS interrogation, about which the Panel had some reservations. … [T]he Panel noted that [the Appellant] had been charged as a result of a questionable search into another staff member's computer. …

19. In the absence of clear guidance in [administrative instruction ST/AI/371 of 2 August 1991 entitled 'Revised Disciplinary Measures and Procedures'], the Staff Rules or the Rules of Procedure of the [JDC] as to the distinction between misconduct and serious misconduct, the Panel felt it had to adopt a common sense standard. The [response] from the Representative of the Secretary-General on this question … confirmed that there were no set criteria …. In the absence of such guidelines - eleven years after the issuance of [ST/AI/371] and in the absence of any argument justifying the 'seriousness' of the transgression, the Panel felt that the decision of summary dismissal, rather than following paragraph 9 (b) of [ST/AI/371], should be considered arbitrary. The case has now been brought to a Panel of the JDC, and the Panel feels justified in the view that it would have been better had the case been so directed before the decision of summary dismissal had been made, rather than after.

Recommendation

20. The Panel, had it been given that opportunity, would not have recommended that [the Appellant] be dismissed. … [The Appellant] was guilty of misconduct, but 20 years of exemplary service should have been taken into account. Had the case been referred to the Panel *ab initio*, it feels that the disciplinary measures it would have recommended were demotion in grade and an appropriate fine. As a result of this review, the Panel unanimously recommends to the Secretary-General

(a) that [the Appellant] be reinstated at level FS-4 (a demotion of one grade), and

(b) that the period between 9 July 2002 and the date of the Secretary-General's decision to reinstate him be treated as special leave without pay - resulting in a loss in emoluments equivalent to a substantial fine.

21. The Panel makes no further recommendation with respect to this case."

On 1 April 2003, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

> "The Secretary-General … agrees with the JDC that the facts of this case are not in dispute and that, accordingly, your misconduct is well established. However, the Secretary-General disagrees with the JDC that the determination of your misconduct as 'serious', warranting summary dismissal, was arbitrary. The Secretary-General has broad discretion in disciplinary matters, which include the determination of what constitutes serious misconduct as well as the choice of disciplinary measures, and the Administrative Tribunal has consistently upheld his discretionary power. Summary dismissal for serious misconduct is appropriate in those cases where the misconduct is patent and obviously incompatible with continued service. As for your misconduct, it was determined to be serious not only because it consisted of dishonesty in an attempt to deceive the host country of Israel by facilitating the illegal entry of your friend with a false passport, but also because it jeopardized or was likely to jeopardize the reputation of the Organization and its staff in the host country. The Secretary-General therefore considers that the sanction of summary dismissal is fully in keeping with and proportionate to the gravity of your misconduct.
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> In the light of his conclusion, the Secretary-General has decided not to accept the JDC's recommendation and to take no further action in your case."

On 31 March 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The determination that the Applicant's action amounted to "serious" misconduct was arbitrary.

2. The Applicant's infraction is considered by the Israeli authorities as a misdemeanour. Following the OIOS definition of conspiracy, i.e. "two or more persons agreeing or planning to commit a crime", and since the Applicant's infraction was only a misdemeanour and not a crime, there was no conspiracy.

3. The penalty of summary dismissal was excessive.

4. The Applicant's actions were not motivated by monetary gain but by his wish to help an ailing friend (Ms. A), who needed medical attention which she could not receive in Ghana. His motivation was wholly humanitarian and altruistic.

5. The Israeli authorities never knew of the Applicant's misconduct, thus no jeopardy did or could arise to the Organization's reputation.

Whereas the Respondent's principal contentions are:

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

2. The facts in this case are well established. The Applicant's actions constituted serious misconduct.

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

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

5. The decision of summary dismissal was not arbitrary.

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

I. The Applicant joined UNIFIL, Naqoura, on a six-month fixed-term appointment as a Vehicle Mechanic at the FS-3 level, on 21 December 1982. His appointment was extended several times and he was promoted to FS-4 level, effective October 1988, and to FS-5 level, effective July 1993. After several temporary assignments with other missions, the Applicant was reassigned to UNDOF, Damascus, effective 6 February 1999. The last extension of the Applicant's fixed-term appointment was due to expire on 31 December 2002.

II. On 16 October 2001, OIOS issued a report of an investigation which focused on the activities of a UNIFIL staff member and which had unveiled e-mail correspondence with the Applicant, implicating him in a conspiracy. As part of the OIOS investigation, on 28 June 2001, the Applicant submitted a written statement to the investigators concerning his involvement in the case. In that statement he admitted to have obtained a visa from the Israeli Ministry of Foreign Affairs in the name of his wife, which was sent along with his wife's passport to Ghana in order to be used by a female friend for illegal entry into Israel, which is what ultimately transpired.

On 22 March 2002, OHRM presented the Applicant with allegations of misconduct and forwarded to him the OIOS report and relevant documentation. On 10 May, the Applicant, through his counsel, formally responded to the allegations, essentially repeating the explanations included in his statement to the OIOS investigators, admitting the wrongdoing and asking for leniency.

On 9 July 2002, the Applicant was informed of the Secretary-General's decision to summarily dismiss him for serious misconduct, as he had conspired to illegally bring into Israel a foreigner with a false passport under an assumed identity.

On 19 August 2002, the Applicant requested that the decision be referred to a JDC, which submitted its report on 25 March 2003. The Panel was sympathetic with the Applicant who, for 20 years, had an exemplary service. The JDC was of the view that a demotion of one grade, together with an appropriate fine, would constitute adequate punishment. Consequently, the JDC recommended that the Applicant be reinstated at the FS-4 level, and that the period between 9 July 2002 and the date of the Secretary-General's decision to reinstate him, be considered as special leave without pay, amounting to an appropriate fine.

On 1 April 2003, the Applicant was informed that the Secretary-General had considered the JDC's report and recommendation but had decided that "the sanction of summary dismissal is fully in keeping with and proportionate to the gravity of [his] misconduct."

III. In his Application, the Applicant primarily argues that his actions should not have been characterized as "serious misconduct" and, consequently, the disciplinary measure of summary dismissal was excessive.

As a general principle, the Tribunal has repeatedly stated its position regarding disciplinary measures. In Judgement No. 897, *Jhuthi* (1998), the Tribunal, referring to previous jurisprudence, stated:

> "… [T]he taking of disciplinary measures involves the exercise of a discretion by the Administration but it is also the exercise of a quasi-judicial power. In disciplinary cases, the Tribunal examines (i) whether the facts on which the disciplinary measures were based have been established, (ii) whether they legally amount to serious misconduct or 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 discretion, (vi) whether the sanction is legal, and (vii) whether the sanction imposed was disproportionate to the offence."

At the same time, the Tribunal has consistently recognized that the Secretary-General has broad discretion in determining the conduct that is expected of an international civil servant, what constitutes misconduct, and, the appropriate disciplinary sanction to be imposed. As stated in Judgement No. 1103, *Dilleyta* (2003)

> "It has been the longstanding jurisprudence of the Tribunal that the Secretary-General … has broad discretion with regard to disciplinary matters. (See Judgments No. 300, *Sheye*, (1982) and No. 987, *Edongo* (2000).) This includes the determination of what constitutes 'serious misconduct' under the Staff Regulations and Rules and what is the proper punishment for such conduct. (See Judgments No. 815, *Calin* (1997), No. 890, *Augustine* (1998) and No. 1050, *Ogalle* (2002).)
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> …
>
> The decision to summarily dismiss the Applicant was a proper exercise of the [Respondent's] authority and did not violate the Applicant's rights. The choice of disciplinary measure to be imposed, pursuant to staff regulation 10.2, falls within the Secretary-General's discretionary powers (Judgments No. 479, *Caine* (1990); No. 542, *Pennacchi* (1991); and, [No. 941, *Kiwanuka* (1999)].) Staff members have a duty to maintain the highest standards of conduct and the Respondent has the responsibility to enforce those standards."

In the present case, the Tribunal finds that the substantial facts which formed the basis for the contested decision have been clearly established and are not in dispute. In fact, the Applicant has admitted at all stages that he used his wife's passport to obtain a visa into Israel in order to facilitate the illegal entry into that country of another Ghanaian national, which is what ultimately happened. The Applicant orchestrated the deception of the local authorities of a Member State and the violation of its immigration laws in a matter of immense importance – that of illegal entry of a foreign national into that host country. The Tribunal shares the Secretary-General's view, that the acts alleged by the Administration and admitted to by the Applicant are extremely serious. They are among those which objectively risk jeopardizing the relations of the United Nations with a host country, especially when the point at issue is the violation of local immigration laws, which in turn are interconnected with matters of national security. The sanction imposed on the Applicant cannot, therefore, be characterized as "arbitrary" or "excessive", as the Applicant claims and as the JDC erroneously found.

IV. As for the Applicant's argument, attempting to rely on Israeli law - the Tribunal wishes to reiterate that the laws governing its jurisprudence are the laws of the United Nations and not of any national jurisdiction. As stated in its Judgement No. 1256, (rendered during this session):

"The laws governing the Tribunal's decisions are the laws of the United Nations, as adopted by the General Assembly or by other bodies to which the authority for promulgating rules has been delegated. … Thus, the references made by the Applicant to other jurisdictions are irrelevant."

V. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Spyridon **Flogaitis**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 23 November 2005

Maritza **Struyvenberg**
Executive Secretary