



United Nations

Administrative Tribunal

AT/DEC/1289

Distr.: Limited
29 September 2006

Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1289

Case No. 1371

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas, on 15 August 2004, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR) filed an Application containing pleas which read as follows:

“II. PLEAS

... [I] formally contest the decision to maintain the one remaining charge of misconduct against me, that is, the allegation that I used UNHCR to obtain a benefit for my companion ...

I therefore request the rescission of this decision ...

I request rescission of the decision of the Secretary-General not to follow the recommendation of the [Joint Disciplinary Committee (JDC)] but to separate me from the Organization ...

I request payment of compensation ... equal ... [to] ... two years' salary and the reconstruction of my pension ...”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2005 and once thereafter until 28 February;

Whereas the Respondent filed his Answer on 28 February 2005;

Whereas, on 18 May 2005, the Applicant submitted a communication;

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

“Employment History ...

... [The Applicant] entered the service of the United Nations on 19 February 1992 as a Logistics Officer at the P-3 level on a short-term contract of three months (under the 300 Series of the staff rules) at ... UNHCR in Kinshasa, Democratic Republic of the Congo (formerly Zaire).

...

... As of 1 May 1999, he was assigned to the UNHCR regional office in Kinshasa, ..., where he performed the duties of Senior Liaison Officer (for the Brazzaville Office). On 1 July 1999, he was officially promoted to the L-4 level.

... As of 1 April 2000, his post was moved to Brazzaville where the UNHCR liaison office had moved. From 27 September to 31 December 2000 he was transferred to Brussels to fill the post of First Officer while he was on special leave with pay. This period was extended for another six months.

... On 28 April 2002, he was sent on mission as Logistics Officer to Tehran, where he remained until 3 September 2002, when he was summarily dismissed.

Summary of the facts:

...

2000

... On 27 March 2000, following the attack on the UNICEF Representative in Brazzaville, the Resident/Humanitarian Coordinator and Resident Representative of UNDP, Brazzaville ... [(the Resident Coordinator)], issues new security measures.

...

... In a memorandum dated 12 April 2000, the [Applicant] informs the Human Resources Officer ..., Great Lakes Unit, UNHCR, Geneva [(the HR Officer)], of security conditions in Brazzaville. Based on the difficulty he is having finding a decent place to stay, he asks for an extension of the [daily subsistence allowance (DSA)] ‘like [his] colleagues in the Olympic Hotel until he finds a more comfortable solution’. ...

...

[Given the situation, provision is made by UNDP in a circular dated 25 April 2000, confirmed on 5 July, for an exception to the rule for staff members that are forced to stay in a hotel because they cannot find a private residence. Following further exchange of correspondence between the Resident Coordinator and the HR Officer,

the Resident Coordinator advises her 'that the [Applicant] continues to have to stay in a hotel for reasons related to security and the lack of decent housing'.]

... In a note verbale dated 16 August 2000 to the Ministry of Foreign Affairs, Cooperation and Francophonie, Republic of the Congo, the staff member requests a six (6)-month residence permit for his companion.

...

... [Following extensive exchange of correspondence on the subject], on 6 October 2000, the [Resident Coordinator is advised] ... that Brazzaville is to be subject to Special Operations Approach (SOA). Accordingly, as from 1 September 2000, the staff of United Nations' agencies will therefore receive a Special Operations Living Allowance (SOLA).

...

... From 17 to 19 September 2000, [the Applicant] is evacuated for health reasons from Brazzaville to the Guerin clinic in Pointe-Noire. The travel authorization (PT8) is signed by the [Applicant] on 17 September.

... On 19 September 2000, ... a payment voucher [is approved] for two plane tickets from Pointe-Noire to Brazzaville ... and the [Applicant] signs a travel authorization ... for travel Brazzaville/Kinshasa/Brazzaville from 20 to 21 September 2000.

... In a memorandum dated 28 September 2000, the [Resident Coordinator] informs the United Nations agency heads in Brazzaville of various measures, amongst which authorization for staff members who have found a house, to obtain reimbursement from their agency of the costs needed to render it secure, up to a maximum of \$5,000.

... On 16 October 2000, the [Applicant] allegedly submitted to the Congolese Ministry of Foreign Affairs, Cooperation and Francophonie, a Note Verbale, dated 16 August, requesting a six-month residence permit for his companion.

...

... In an e-mail of 22 December 2000 ... the [Applicant] is informed that, as from 1 January 2001, he will be receiving a flat monthly sum instead of DSA.

... From 23 December 2000 to 3 January 2001, the [Applicant] is on home leave. [The travel authorization was approved on 26 December 2000, and the payment voucher on 31 December.]

...

2001

...

... On 2 January 2001, the UNHCR administrative services in Pointe-Noire cancel payment of the tickets (...) for the [Applicant]'s companion.

... On 10 January 2001, Société STHIC in Brazzaville sends the UNHCR liaison office two bills for the supply and installation of an air-conditioning unit and a generator.

...

... On 31 January 2001, the UNHCR liaison office in Brazzaville approves a voucher for the bills from Société STHIC for a 'generator' for the [Applicant]'s residence.

...

... In a note for the file dated 7 March 2001, the [Applicant] states that the purchase of an air-conditioner and a generator for his private residence was done in accordance with the memorandum of 28 September 2000.

... On 18 April 2001, the Brazzaville office approves a payment voucher for the [Applicant] for reimbursement of the STHIC bill in the amount of FCFA 1,408,000.

[On 8 August 2001, the Applicant sends a taxi equipped with a radio, in agreement with the head of security, to pick up a colleague. This colleague accuses him, in an e-mail dated 14 August, of not having taken all the necessary measures concerning her safety and generally reproaches him for his hostile attitude towards her. In a memorandum dated 27 August to UNHCR, Kinshasa, the Applicant transmits his views stating that there has been a misunderstanding relating to 'a lack of communication' and pointing out that the reception arrangements at Maya-Maya airport were discussed first with the Security Officer.]

... In response to a series of allegations of misconduct against the Applicant for the period that he was in charge of the UNHCR office in Brazzaville, the UNHCR Inspector-General sent a team of inspectors to Brazzaville who verify the allegations during the month of October 2001. The [Applicant] is heard by the investigators at UNHCR Headquarters in Geneva on 6 and 7 November 2001.

...

2002

... In a memorandum dated 15 January 2002, the UNHCR Inspector-General sends the High Commissioner the report on the preliminary investigation into allegations that the [Applicant] engaged in 'actions or omissions inconsistent with the general obligations of the staff regulations and rules of the United Nations', outlining a series of allegations concerning his behaviour as Officer-in-Charge of the UNHCR liaison office in Brazzaville, Republic of the Congo.

... On 23 January 2002, the Head of the Human Resources Service, UNHCR, Geneva, sends the [Applicant] the Inspector-General's report on the preliminary investigation and the list of allegations against him[: sending, in the name of the Organization, a note verbale to the Ministry of Foreign Affairs, Republic of the Congo, to obtain a six-month residence permit for his companion; omitting to refund a plane ticket acquired at the expense of the Organization for his companion; making an unjustified claim for DSA, false representation and the submission of fake documents to justify those demands, and continuing to make such demands in spite of moving into a private residence; purchasing, at the expense of the Organization, a generator and an air conditioner for his private residence, without prior authorization, while trying to bypass purchase

procedures to gain undue enjoyment of those devices; going on home leave in business class, despite not being authorized to do so according to the applicable rules and regulations; treating a fellow staff member of UNHCR unprofessionally; and, damaging the Organization's reputation by omitting to pay his hotel bills].

... In a memorandum of 4 March 2002, the [Applicant] transmits his rebuttal of the allegations ...

...

[On 2 September 2002, UNHCR, Geneva, transmits the decision of the Secretary-General to summarily dismiss the Applicant to the head of mission, UNHCR, Tehran, where the Applicant is then posted.]

... On 3 September 2002, the [Applicant] signs the recommendation approved by the Secretary-General constituting the decision regarding summary dismissal."

On 1 October 2002, the Applicant wrote simultaneously to the Under-Secretary-General, Department of Management, New York, and to the Secretary JDC, New York requesting that the disciplinary measure of summary dismissal be submitted to a disciplinary committee. Specifically, he requested that it be submitted to the JDC in Geneva.

The JDC in Geneva adopted its report on 27 November 2003. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

125 The panel reviewed, one after the other, the various allegations ... formulated in support of the recommendation concerning summary dismissal, since these were the basis for the final decision.

...

128 ... [I]t looked at the case in the particular context prevailing in the region - as described by the various witnesses - which, although it cannot be used to justify the [Applicant's] actions or conduct, did enable the panel to understand the situation and therefore to formulate a clearer opinion.

...

Conclusion and recommendation

173 Taking into account the foregoing considerations, and with regard to the allegation concerning DSA, the Panel **concludes** that only sending to UNHCR Headquarters the chart containing incorrect information on the situation of DSA in Brazzaville constitutes an offence. Although the Panel did not find any fraudulent intent, it believes, nonetheless, that the [Applicant] should have verified the validity of the information.

174 With regard to the allegation concerning the note verbale, the Panel considers that the [Applicant] apparently did send a note verbale to the Congolese authorities in order to obtain a visa for his companion. It had been able to prove that this note verbale was indeed drafted, signed and stamped, and that the [Applicant] at the very least intended to send it. The Panel **concludes**, therefore, that the [Applicant] committed an offence.

175 Finally, with regard to the series of allegations, the Panel is not only surprised at their anecdotal nature, but believes, furthermore, that they represent administrative dysfunction, for which the responsibility is shared.

176 Consequently, the Panel **concludes** that the disciplinary measure of summary dismissal imposed on the [Applicant] is disproportionate in relation to the offence committed, and that he should receive compensation for the injury sustained.

177 In view of the foregoing, the Panel unanimously **recommends** that the Secretary-General should:

(a) reinstate the [Applicant] in UNHCR, to the extent that this would be feasible and acceptable to both parties;

(b) failing which, the [Applicant] should be paid the equivalent of 12 months' net base salary as compensation, along with the separation allowance to which every staff member is entitled."

On 24 April 2004, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant, informing him as follows;

"The Secretary-General has examined your case in the light of the JDC's report, as well as the entire record and the totality of the circumstances. He notes that the JDC found that you did commit an offence in connection with the allegation of using your office in order to benefit a person close to you, but did not recommend a disciplinary measure for your offence. In respect of the other allegations, he has noted and has decided to accept the JDC's findings and conclusions, especially that there was no fraudulent intent on your part, but rather poor administrative practices for which you are also partly responsible. The Secretary-General emphasizes, however, that the above conclusions concerning the other allegations do not detract from the seriousness of the offence you were found to have committed. The Secretary-General considers that, in that regard, your misconduct is well-established and that it entailed not only the abuse of your office in order to benefit someone close to you, but also tainted the reputation of the Organization in the host country. As a result, the Secretary-General considers that your conduct amounted to a serious violation of the standards of conduct and integrity expected of staff members of the Organization, and that this misconduct is incompatible with your continued service with the Organization. In view of the seriousness of your misconduct, the Secretary-General has decided not to accept the JDC's recommendation that you should be reinstated or compensated but, pursuant to his discretionary authority to impose appropriate disciplinary measures, to separate you from service with compensation in lieu of notice pursuant to staff rule 110.3 (a) (vii), with effect from the date that you were separated from service."

On 15 August 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contention is:

The only remaining charge of misconduct against him has not been proven.

Whereas the Respondent's principal contentions are:

1. The Applicant has not demonstrated the standards of conduct required of an international civil servant.
2. The facts on which the disciplinary measure was based have been established.
3. The conduct of the Applicant amounts to serious misconduct; the disciplinary measure imposed is not disproportionate to the offence.

The Tribunal, having deliberated from 3 to 28 July 2006, now pronounces the following Judgement:

I. The Applicant entered the service of the United Nations on 19 February 1991 as a Logistics Officer at the P-3 level at UNHCR, Kinshasa. His contract was then renewed several times and he was transferred to Kampala (Uganda), Bujumbura, Ngozi (Burundi) and Nairobi (Kenya) before being promoted to the L-4 level. The Applicant began working in the Brazzaville liaison office on 1 April 2000 and was later transferred to Brussels and to Tehran, where he worked until 3 September 2002, the date of his summary dismissal.

II. No less than seven different charges were formulated against the Applicant as grounds for his summary dismissal. While they vary in nature, they can nonetheless be divided into three categories. First, the Applicant is accused of having improperly received, on the basis of false statements and incorrect information, DSA intended for staff members who had not found private housing. The Applicant was subsequently accused of writing a note verbale for personal purposes on UNHCR letterhead and sending it in an official envelope - giving it the appearance of official correspondence - to the Congolese administrative authorities to request a visa for his female companion. Lastly, a series of allegations of professional misconduct were made against the Applicant, including failure to reimburse the Organization for airline tickets, fraudulent acquisition through the Organization of an air conditioner for his personal use, putting a colleague in danger, flying business class to take unauthorized leave and failure to pay hotel bills.

III. On 29 August 2002, the Secretary-General accepted the recommendation of the Head of the Human Resources Service calling for the Applicant's summary dismissal. On 1 October, the Applicant requested the JDC to rescind this decision. On 27 November 2003, the JDC issued

a report concluding that the disciplinary measures were disproportionate in relation to the offence and recommending the Applicant's reinstatement in UNHCR or, failing that, payment of compensation equivalent to 12 months' net base salary in addition to separation allowance. In a letter of 24 April 2004, the Applicant was informed that the Secretary-General had decided not to follow the recommendation contained in the report of the JDC, as the mere possibility that the note verbale might have been sent was sufficient grounds in itself to justify termination.

IV. On 15 August 2004, the Applicant sent the Tribunal a request to rescind the Secretary-General's decision to reject the JDC's finding that the disciplinary measure imposed was disproportionate. He also requested payment of compensation equivalent to two years' salary, and the reconstruction of his pension.

V. The Tribunal must now consider the merits of the allegations formulated against the Applicant. In so doing, it will carefully analyse the report of the JDC, which has already closely examined the charges against the Applicant and believes that most of them are unfounded. The Tribunal is competent to carry out its own analysis of the facts on which the contested decision is based in order to determine whether it was erroneous. In this case, and upon examination of the entire case file, the Tribunal agrees, for the most part, with the JDC. Only "half of one" of the seven accusations against the Applicant holds up in the light of the evidence provided in the documents reviewed. Therefore, the Tribunal will now focus, in turn, on the three categories of accusations set out above.

VI. First, with regard to the allegation that the Applicant acted fraudulently in order to receive DSA when he was not entitled to it, the Tribunal believes that the JDC is correct in determining that:

"[N]o tangible evidence has been provided by either the inspectors or the UNHCR Administration to establish the facts with certainty. While [the Applicant] himself has not produced any evidence that would make it possible to dismiss this allegation once and for all, he cannot be held accountable for something which has not been definitely established."

The Tribunal has come to the same conclusion. Owing to the complexity of the facts in the case, at no time has the Administration succeeded in proving bad faith and fraudulent intent on the part of the Applicant. The Tribunal further notes that, in this case, special rules had been established for a certain period of time and were later rescinded, adding to the opacity of the circumstances of the case. Given the confusion prevailing in this case, the Tribunal does not share the view of the JDC that the Applicant's failure to verify the accuracy of the information he sent to the Administration with the aim of receiving the full DSA constitutes misconduct. Hence, the only conclusion to be drawn is that the Applicant did nothing more than attempt to

use the applicable rules and relevant procedures to his advantage with respect to the allowance paid to him.

Consequently, the Tribunal does not see how the Applicant's conduct with regard to this allegation would constitute a violation of the standards of conduct expected in the service of the Organization, justifying his dismissal without compensation.

VII. As for the above-referenced series of allegations of misconduct, the Tribunal will not revisit each of the five charges in detail, as it believes they were already correctly analysed by the JDC. The JDC not only highlighted the contradictions in the Administration's allegations and even their anecdotal nature, but also mentioned administrative dysfunction in the Organization which might have played an important role in the Applicant's alleged misconduct. Thus, like the JDC before it, the Tribunal concludes that

“such allegations should be considered in relation to a dangerous and unstable [context], in an office probably overburdened with work, which became clear through the testimony, and that such allegations seemed to have mainly to do with negligence, and lack of attention or administrative dysfunction, of which the staff member was aware”.

The Tribunal therefore believes that the evidence in the file does not show that the Applicant had any intention of committing fraud to evade the Administration's rules but rather that, as explained above, what happened was the result of lack of attention on the Applicant's part coupled with administrative dysfunction, implying that the Applicant cannot be held accountable for the alleged incidents by the imposition of disproportionate disciplinary measures on him.

VIII. Lastly, the Tribunal will review the allegation concerning the Applicant's note verbale addressed to the Congolese authorities requesting a visa for his companion, and his use of the Organization's official letterhead and envelope for that purpose, which, in the Administration's view, constituted an abuse of office. Here, too, the Tribunal has sided with the JDC in noting that the facts are extremely confusing. Nonetheless, the Tribunal is not in complete disagreement with the finding of the JDC that, even if intent to commit fraud would be difficult to establish, mere utilization of the Organization's letterhead for personal gain and the intention behind such conduct are in themselves sufficient to constitute abuse of office, despite the lack of any real proof that the letter was actually dispatched, or any report of actual use of the note verbale. Furthermore, even if the note verbale had been sent, the Tribunal is not convinced that that act would have constituted misconduct serious enough to justify the imposition of the severe penalties imposed upon the Applicant, for three reasons.

IX. First, the Tribunal believes, by virtue of the fundamental principle of the presumption of innocence, that, in the absence of convincing evidence, the Applicant should be given the benefit of the doubt. As there is nothing in this case to conclusively substantiate the hypothesis that the note verbale was dispatched, the Tribunal cannot find the Applicant guilty of such misconduct.

X. Second, it seems that, in this case, the Applicant's companion did not need a visa to join him in the country to which he had been assigned. Obtaining the visa would thus not have involved a violation similar to crossing a border where a visa is ordinarily required. This situation is very much akin to what is known in domestic penal systems as "the impossible crime", i.e., an act that has the appearance of wrongdoing but in no way constitutes a violation of the rule of law.

XI. Lastly, even if the Applicant's companion had needed a visa, and there was potential for a crime to be committed, the Tribunal doubts that such use of the Organization's supplies could in itself constitute misconduct of such serious proportions. In this case, such conduct would amount, at the very most, to an act of dishonesty that did not attain the level of fraud. The Tribunal might have taken another decision had the facts revealed substantial fraud, for example, if the Applicant had attempted to lie about his companion's status by claiming in his letter that she was a staff member of the Organization.

However, nothing of the sort occurred. The Tribunal, therefore, does not agree with the JDC's conclusion that the Applicant is guilty of misconduct; rather, at the very worst, he might be guilty of a minor irregularity.

XII. In conclusion, the Tribunal has found nothing to suggest that the JDC's decision was erroneous and declares that it in no way underestimated the seriousness of the Applicant's misconduct but, on the contrary, overestimated it at times. Therefore, the Secretary-General should not have refused to follow the JDC's recommendation of 27 November 2003 by not agreeing to recognize that the disciplinary measure imposed was disproportionate in relation to the offence.

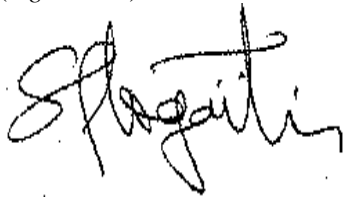
XIII. For the foregoing reasons, the Tribunal:

1. Orders that the Applicant be reinstated;
2. In the alternative, should the Secretary-General, within 30 days of the notification of this Judgement decide, in the interest of the United Nations, that the

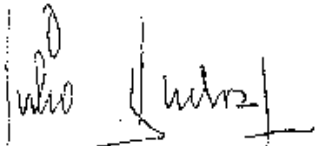
Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at 12 months' net base salary at the rate in effect on the date of the present Judgement as well as the termination indemnity he should have received at the time 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

3. Rejects all other pleas.

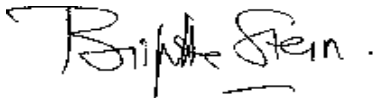
(Signatures)



Spyridon Flogaitis
President

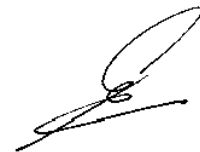


Julio Barboza
Member



Brigitte Stern
Member

Geneva, 28 July 2005



Maritza Struyvenberg
Executive Secretary