



ADMINISTRATIVE TRIBUNAL

Judgement No. 1404

Case No. 1474

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas at the request of a member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 April 2006;

Whereas, on 27 April 2006, the Applicant filed an Application, requesting the Tribunal, *inter alia*:

“7. With respect to competence and procedure, ...

...

(c) *to decide* to hold oral proceedings ...

8. On the merits ...

(a) *to rescind the* decision of the Secretary-General reprimanding the Applicant for unbecoming conduct;

(b) *to rescind* the decision of the Secretary-General rejecting the majority recommendation of the Joint Disciplinary Committee [(JDC)] for the award of compensation;

(c) ...

(d) *to order* that the written reprimand imposed on the Applicant be rescinded, that all adverse material dealing with this matter be

removed from his official file; and that a letter of apology confirming the Applicant's complete exoneration from any wrongdoing be provided by the Respondent and publicly disseminated;

- (e) *to order* that the Applicant be fully reinstated in service and placed against his former post or against a similar post commensurate with his qualifications and experience;
- (f) *to order* that the Respondent undertake appropriate administrative action to rectify the irregularities of past investigations and hold accountable those officials responsible for abridging the Applicant's right to due process and fair treatment;
- (g) *to award* the Applicant compensation in the amount of three years' net base pay for the violations of the Applicant's rights including the use of special leave without pay for an extended period and without justification;
- (h) *to award* the Applicant compensation in the amount of three years' net base pay for the damage to his career and professional reputation and for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- [(i)]* *to award* the Applicant as cost, the sum of \$10,000.00 in legal fees and \$1,000.00 in expenses and disbursements."

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 1 October 2006, and once thereafter until 1 November;

Whereas the Respondent filed his Answer on 31 October 2006;

Whereas the Applicant filed Written Observations on 21 May 2007;

Whereas, on 1 July 2008, 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 JDC reads, in part, as follows:

“Employment History

... According to the Administration, the staff member joined the United Nations on 4 August 1976 and holds a 100-series appointment. He was deployed to the United Nations Organization Mission in [Bunia,] the Democratic Republic of Congo [(DRC,)] (MONUC), as a Procurement Officer at the FS-6 level. ...

Background

[In the course of 2000-2001, allegations of sexual exploitation and abuse against refugee women and girls by humanitarian aid workers and United Nations peacekeepers in West Africa surfaced. As a result, the Secretary-General's bulletin on 'Special measures for protection from exploitation

and sexual abuse' (ST/SGB/2003/13 of 9 October 2003) was adopted. The SEA policy, as set out in ST/SGB/2003/13, provides, in particular, that fraternization with local women is strongly discouraged. Section 1 of the bulletin defines 'sexual exploitation' as 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes ...' 'Sexual abuse' is defined as 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions'.]

... In Bunia[, DRC,] on 7 October 2004, the staff member received [two women], cousins and Congolese nationals, travelling from Entebbe, Uganda. ... The staff member claim[ed] that [one of them was] his girlfriend, and that he invited the two women to visit him in Bunia.

... On 12-13 October 2004, [two officers of the] MONUC Military Police (MPs), arrived at a roadside scene in Bunia, DRC, at about 12:00 a.m. where the staff member was attempting to break-up a dispute between his two female guests and two other women. The staff member exchanged angry words with the MPs, apparently attempting to elicit their help in dealing with the dispute. MONUC Security was called and [a] Security Officer arrived at the scene a few minutes later. [The MPs] filed separate Voluntary Statement Forms and [the] Security Officer ... filed an Incident Report the following day.

... On 14 October 2004, the staff member filed a Voluntary Statement Form [with an] ... Investigator, Special Investigations Unit, MONUC, who was tasked with investigating the incident.

... According to [the Investigator's Report, she] obtained the staff member's consent to verify his guests' identities, ages and nationalities. On 15 October 2004, [she] interviewed the two women, as well as ... the staff member's housemate.

... Nearly three months later, on 13 January 2005, [the Investigator] submitted a 'Report of Alleged Improper Comportment of MONUC Staff Member' ... [In the report, the Investigator noted, inter alia, that the MPs' statements referred to one of the four women involved in the incident as a 'known' or 'well-known' prostitute, but failed to identify which woman it was; that the MONUC Security Officer who was called to the incident stated that there were 'three prostitutes and a local witness' present; that the MPs and MONUC Officer asserted that the Applicant smelled of alcohol and acted 'abnormally' at the time of the incident; and, concluded, with regard to the Applicant's actions during the incident, that the Applicant 'has proved himself to be disrespectful to the persons who are assisting in ensuring that MONUC personnel, both Military and Civilian, abide by the United Nations Code of Conduct'.]

... On 7 February 2005, a ... SEA Investigation Report (...) was submitted to the Under-Secretary-General for Peacekeeping Operations by [the] SEA Team Leader. ... The Report found that there was sufficient evidence to substantiate the allegations of misconduct by the [Applicant] and recommended administrative and disciplinary action.

...

... On 1 March 2005, the [Applicant] was formally charged [with misconduct. According to the allegations, the Applicant had 'acted in a manner unbecoming of a senior officer of the United Nations in using foul, abusive and offensive language against MONUC military police officers during the incident'; appeared to be 'under the influence of alcohol'; failed to 'comply with the curfew imposed in Bunia'; and, offered 'housing and other remuneration in exchange for sexual favours from two young Congolese women, in violation of United Nations directives against sexual abuse and sexual exploitation'.]

... On 5 March 2005 the [Applicant] was suspended from duty without pay for a period of three months or until the completion of the matter.

... After receiving an extension of time to respond, the [Applicant] submitted a response to the charges against him on 15 March 2005. He submitted additional comments on 18 and 26 March ...”

On 20 May 2005, the case was referred to the JDC in New York. The JDC adopted its report on 27 November. The conclusions and recommendations of the JDC read, in part, as follows:

“Conclusions and Recommendations

70. The Panel *unanimously finds* that the Administration has not presented a *prima facie* case that the staff member violated the Secretary-General’s Bulletin [on special measures to prevent SEA, ST/SGB/2003/13, which entered into force on 15 October 2003,] and therefore *unanimously recommends* that no disciplinary measure be taken in this regard. The Panel *unanimously finds* furthermore that, given the significant lapses in the investigations and in the managerial oversight thereof, the Administration negligently failed to observe the standard of care due to any staff member in such circumstances. *A majority of the Panel considers* that this failure merited compensation to the staff member in the amount of one month’s salary ...

71. In addition, the Panel considers that the decision to suspend without pay - as opposed to with pay - was unwarranted under the specific facts of the case. ...

72. With regard to the charge of verbal harassment, and the charge of conduct unbecoming insofar as it relates to it, the Panel *unanimously finds* no basis for the imposition of a disciplinary sanction, but *unanimously recommends* ... that he receive a written reprimand ... With regard to curfew violation, the Panel *unanimously finds* no basis for the imposition of a disciplinary sanction ...”

One member of the JDC, while concurring with his Panel colleagues on all conclusions and recommendations, dissented with respect to

“the recommendation that the staff member should receive one month’s salary based on the Administration negligently failing to observe the standard of care due any staff member being investigated for sexual exploitation and sexual abuse. [He did] not believe that the negligence involved [rose] to a level where, under the unique circumstances and facts of this case, compensation [was] warranted. [He] was also dissuaded from joining [his] colleagues on their recommendation because of the staff member’s aggressive conduct during the altercation, and the Panel’s implicit finding that the staff member was less than truthful about his drinking alcohol that evening.”

On 20 December 2005, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

“The Secretary-General ... has decided to accept the JDC’s findings and conclusions, as well as its recommendation that no disciplinary measures be taken against you but that you should be reprimanded in writing for your unbecoming conduct in accordance with staff rule 110.3 (b). For the reasons set out in the minority’s opinion, he has decided not to accept the majority’s recommendation for compensation in the amount of one month’s salary.

On 27 April 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He was suspended for an unusually long period of time.
2. His due process rights were violated.
3. The decision to reprimand him was an invalid exercise of discretionary power, and tainted by bias, prejudice and extraneous factors.

Whereas the Respondent's principal contentions are:

1. The decision to reprimand the Applicant was a valid exercise of the Secretary-General's discretionary authority to ensure that staff members conduct themselves in a manner becoming of international civil servants. The Applicant's claim for compensation is anomalous.
2. Investigating the allegations against the Applicant and referring them to a JDC for advice was proper, as was suspending the Applicant from service during the investigation and pending the completion of his case. The Applicant's due process rights were respected.

The Tribunal, having deliberated from 1 to 25 July 2008, now pronounces the following Judgement:

I. The first issue in this case is whether the JDC's recommendation, accepted by the Secretary-General, to impose a written reprimand on the Applicant was a violation of his rights. It must be noted that the wording of the JDC's recommendation was that the Applicant receive a written reprimand pursuant to staff rule 110.3 (b) "in order to underline the seriousness of such inappropriate behaviour and to place the staff member on notice of the need to manage frustration more prudently in the future". The JDC had decided that the charges in relation to the incident on 13 October 2004 were "exaggerated by the [Sexual Exploitation and Abuse] aspects of the case and probably brought to bolster the SEA charge"; that the incident on 13 October was of an isolated nature; and, that his immediate supervisor had cautioned the Applicant about his conduct and warned him to avoid future altercations. The JDC said that "if taken separately from the charges of sexual exploitation and abuse" the Applicant's conduct on the night of 13 October "would probably have been handled differently by the Organisation".

The Secretary-General's letter of 20 December 2005 does not exactly follow the terms of the JDC's recommendation, but imposes the written reprimand "for your unbecoming conduct". As the Applicant points out, this wording reflects the original charge of 1 March 2005 of "acting in a manner unbecoming of a senior officer of the United Nations". Although the JDC found that there was "no reason to recommend imposition of a disciplinary penalty on this charge", the Secretary-General appears to have concluded that the Applicant was found guilty of "unbecoming conduct", a charge which the JDC had dismissed.

II. The JDC's recommendation was inconsistent with and disproportionate to the following findings of fact which it made. It was inconsistent to reject the allegations of intoxication in the report of the MPs, and at the same time to find that the Applicant's drinking had influenced his behaviour, particularly since it is undisputed that he was told by the MONUC Security Officer, who arrived in response to his call, to drive home. The JDC also failed to have regard to the undisputed evidence that the Applicant suffers from hypertension for which he is being treated, and which could have accounted for his behaviour. The JDC referred to the Applicant's conduct towards the MPs and said that his "frustration was perhaps understandable" because of the MPs' failure to assist him in subduing the conflict between his guests and the other women. The JDC failed to attach any weight to other undisputed facts: the Applicant was unable to intervene in the dispute himself, and had summoned the help of a MONUC Security Officer, because he had lost a leg due to a land mine; the MPs were off duty at the time and wearing civilian clothing; he became understandably angry when the MPs refused to intervene and made unfounded accusations against his friends; he remained seated in his car; and, the MP aggressively projected his head and headgear into the vehicle.

III. Although a written reprimand is not considered a disciplinary measure within the meaning of staff rule 110.3, a reprimand can have legal consequences to the detriment of the staff member, particularly when it is placed and kept on his file (see Judgements No. 941, *Kiwanuka* (1999) and No. 1176, *Parra* (2004)). The Tribunal has stated in its Judgement No. 1167, *Olenja* (2004), that the issuance of reprimands is subject to the same principles of fairness and due process as apply to disciplinary decisions. In the present case, the JDC's recommendation is based on significant inconsistencies, and is disproportionate to the circumstances of an isolated incident on 13 October in which the Applicant was provoked by the unwarranted actions of the MPs. The JDC's error has been compounded by the misinterpretation of the recommendation by the Secretary-General, the wording of whose reprimand wrongly implies that the Applicant was guilty of the very misconduct for which he had been acquitted. In the context of the wholly unfounded allegations of SEA made against him, the written reprimand could be construed by outside observers as implying that he had been engaged in wrongful conduct of some kind. Accordingly, the written reprimand must be rescinded, and all adverse material dealing with this matter should be removed from his Official Status file.

IV. The second issue is whether the Applicant has been adequately compensated in respect of the JDC's finding that, given the significant lapses in the investigations and in the managerial oversight thereof, the Administration negligently failed to observe the standard of care due to any staff member in such circumstances. A majority of the JDC recommended that this failure merited payment of compensation in the amount of one month's salary. The dissenter, on this point, "[did] not believe that the negligence involved [rose] to a level where, under the unique circumstances and facts of this case,

compensation [was] warranted". The Secretary-General accepted the minority opinion and has declined to pay any compensation.

V. The minority opinion, and the majority's recommendation to award the relatively low level of one month's salary, are at odds with the unanimous findings of fact by the JDC. These findings included the following: the Administration failed to put forward a *prima facie* case; the investigation relied on "rumours and gossip"; the allegations were "unsupported by credible evidence"; one statement was "incredulous"; the claim about the Applicant's relationship with the women was "without evidentiary merit"; there was a *bona fide* relationship between the Applicant and one of the women, who were still living together; there was no exchange of the type envisaged by the Secretary-General's Bulletin on SEA; the staff member's legitimate expectation of privacy in connection with a *bona fide* relationship had been denied; the allegations in this case did not warrant investigation; there were "significant oversights" in due process; findings were made on "supposition and conjecture" without corroborating evidence; and, the Applicant "was never interviewed in the course of the investigation". The JDC found that the basic standards of fact-finding had been violated and correctly pointed out that "such standards are necessary to protect the staff member's reputation, particularly when the allegations involve very serious misconduct charges". It also observed that "the decision to pursue disciplinary action based on uncorroborated statements by witnesses begins to resemble a moral judgment based on personal behaviour". The JDC was also, rightly, extremely critical of the decision to suspend the Applicant without pay, in effect for seven months, when there was no evidence whatsoever of "exceptional circumstances" to justify this.

VI. In the light of these unanimous findings of the JDC, accepted by the Secretary-General, the Tribunal finds it extraordinary that the dissenting member of the JDC and the Secretary-General considered that the "negligence involved" did not "rise ... to a level" where compensation is appropriate. The Tribunal also considers that one month's net base salary, recommended by the majority, goes nowhere near far enough to recognize the serious intrusion into the Applicant's private life, the damage to his reputation, and the gross violation of his rights. He appears to have been the innocent victim of an over-zealous application of the new policy, conducted in the glare of media publicity, when the Organisation appears to have been in a state of moral panic. The investigators, in the Tribunal's judgement, behaved not merely "negligently" but showed reckless disregard for the rights of the Applicant. In those circumstances, the Tribunal considers that compensation in the amount of one year's net base salary would be appropriate, and it so orders.

VII. The Applicant also makes an application for costs. The practice of the Tribunal is to award costs only in exceptional circumstances. In Judgement No. 237, *Powell*, para. XXVIII (1979), the Tribunal held:

"As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the

Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal.”

In this case, disciplinary charges should never have been brought against the Applicant, who has reasonably incurred legal expenses. The Tribunal thus awards the sum of US\$ 5,000 by way of costs.

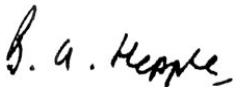
VIII. In view of the foregoing, the Tribunal:

1. Orders that the written reprimand be rescinded and that all adverse material dealing with this matter be removed from the Applicant’s Official Status file;
2. Orders the Respondent to pay to the Applicant compensation in the amount of one year’s net base salary at the rate in effect at the date of this Judgement, 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;
3. Orders the Respondent to pay to the Applicant costs in the amount of US\$ 5,000, 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,
4. Rejects all other pleas.

(Signatures)



Jacqueline R. **Scott**
Vice-President

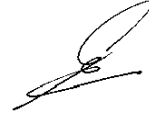


Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary