



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1415

Case No. 1485

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas at the request of a former staff 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 June 2006;

Whereas, on 30 June 2006, the Applicant filed an Application requesting the Tribunal, inter alia:

“8. *[T]o find:*

(a) That the evidence proffered by the Respondent does not support the conclusion of misconduct reached by the Joint Disciplinary Committee [JDC] and;

(b) [That the] Respondent in overruling the JDC’s majority recommendation and imposing the ultimate penalty - separation from the Organization - ... [excessively punished the Applicant] for a charge that had not been proven beyond a reasonable doubt.

9. *... [And]:*

(a) [To decide that] the evidence proffered by the Respondent does not support the charge made against the Applicant [and that he was therefore] ... unjustifiably separated from the Organization; and,

(b) [To] ... order the reinstatement of the Applicant or grant him compensatory damages in the amount of four and one half years’ salary (the total period of his employment with the Organization).”

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 20 December 2006, and once thereafter until 20 January 2007;

Whereas the Respondent filed his Answer on 2 January 2007;

Whereas the Applicant filed Written Observations on 24 January 2007;

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] joined the service of the United Nations on 7 August 2001 under a 300 Series contract at the FS/2 level, assigned to the United Nations Mission in the Democratic Republic of the Congo (MONUC), as a Transportation Assistant. ...

Background

... In June 2002, [the Applicant] sold to his landlord [a number of] ... items ... for a total amount of US\$ 2,000, to be incrementally deducted from [his] rent. The last installment of the agreed rent deduction was in January 2003, at which point the landlord became the lawful owner of the above items.

...

... On 22 April 2003, [the Applicant] filed a [United Nations] form entitled 'Inventories of furniture, household effects, private automobiles and valuables' for Kisangani, inter alia, containing all the items sold to the landlord, reflecting June 2002 as date of purchase.

... On 3 June 2004, during protests and riots in the Kisangani area, a number of residences of MONUC staff were looted, including that of [the Applicant] ...

... On 4 June 2004, ... [MONUC] ... staff members in Kisangani, [were advised] ... that the proper procedure [for filing a claim] was to submit a claim on an F.10 form, attach an inventory of personal effects, and attach a confirmatory report from the Security Officer.

... On 4 June 2004 [the Applicant] completed and submitted to the Security-MONUC an 'incident report' stating [that] ... 'During the last mob action in Kisangani my house was completely destroyed and all my personal effects were looted and burnt'. [The Applicant] listed his lost property in the amount of [US]\$ 13,520, of which [US]\$ 2,630 was attributed to the items sold to the landlord. That document was reviewed and signed by [a] Security Officer, MONUC.

...

... On 8 June 2004, a Security Guard at [the Applicant]'s house returned a stolen air conditioner to [the Applicant] at his MONUC office.

... On 18 June 2004, the individual declared by the local court to be lawful owner of the disputed property, now [the Applicant]'s landlord, reported to MONUC Security that in June 2002, [the Applicant] had entered into an agreement to have the cost of [certain] items ... deducted on an installment basis from his monthly rent payments. As the final installment was deducted in January 2003, the listed items were no longer the property of [the Applicant]. The

landlord also reported that a stolen air conditioner had been returned to [the Applicant], but that [the Applicant] failed to make it available to him.

... In view of these events, [the Security Officer] conducted an investigation into the matter. The investigation focused on [the Applicant]'s incident report.

... On 19 June 2004, [the Applicant] wrote an e-mail to [the Security Officer] requesting advice on whether the items sold to his landlord should be kept on the incident report.

... [Also on] 19 June 2004, [the Security Officer] interviewed [the Applicant] for a second time. The interview focused on [the Applicant]'s property inventory.

... On 20 June 2004, [the Security Officer] issued a report ... The investigation concluded that [the Applicant] expected to be compensated by the [United Nations] for items that did not belong to him anymore and moreover he had inflated the cost of these items. The investigation established that [the Applicant] had recovered one of the stolen air conditioners and had returned it to the owner sixteen days later, after he had sought advice and had been encouraged to do so by both MONUC's Security and the local police. The investigation further established that [the Applicant] failed to inform MONUC's Claims Unit/ Administration of the recovery and he did not revise his incident report accordingly. Therefore, the investigation concluded that [the Applicant] had attempted to defraud the Organization.

...

... In a memorandum dated 23 February 2005, [the Applicant was advised by the Office of Human Resources Management (OHRM)] that he had been charged with 'submitting a false claim for reimbursement to the United Nations'. [He was also advised] ... that his conduct, if established, would fall short of the standards of integrity and conduct expected of staff members of the United Nations, in accordance with staff regulations 1.2 (b) and 1.2 (r). [He was requested] to provide any written statement or explanation he might wish to make ...

... [In his reply of] 3 March 2005, [the Applicant] ... denied the allegation that he had attempted to defraud the Organization ...

...”

On 20 April 2005, the case was referred to the JDC in New York. The JDC issued its report on 29 November 2005. Its conclusions and recommendations read, in part, as follows:

“Conclusions and Recommendations

52. [T]he Panel *unanimously agreed* that [the Applicant], from a technical point of view, had not filed a formal claim as stipulated by the relevant rules. However, the Panel *unanimously agreed* that he had misrepresented the facts as contained in his incident report, which was not consistent with the standards of integrity and conduct expected of staff members of the United Nations.

53. In so doing, the Panel *unanimously agreed* that [the Applicant] had engaged in misconduct for which disciplinary measure was warranted, bearing in mind the mitigating circumstances.

54. The majority of the Panel therefore *recommends* the loss of one step in grade.

55. The Panel *unanimously recommends* that [the Applicant] be reprimanded both orally and in writing to the effect that he should always maintain the highest standards of conduct and integrity in the future.

56. The Panel *unanimously recommends* that [the Applicant] be allowed to submit a formal claim for compensation to the Claims Board in strict compliance with the relevant rules governing the process for all property which he owned and was lost/damaged during the riots.

...”

On 5 January 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that:

“The Secretary-General agrees with the JDC that your misrepresentation amounted to misconduct. The Secretary-General does not consider credible or persuasive your explanation that you included the disputed items in the list because you considered yourself responsible for them, even though they no longer belonged to you. Should that have been the case, then you would have included in the list every other item in the premises that belonged to the landlord. As your misconduct involved dishonesty for potential financial gain, the Secretary-General considers that it amounted to a serious violation of the standards of conduct and integrity expected of staff members of the Organization, which is incompatible with continued service with the Organization. In the light of this conclusion, the Secretary-General cannot accept the JDC’s recommendation that you should be reprimanded, or the majority’s recommendation for a lenient disciplinary measure. Pursuant to his discretionary authority to impose appropriate disciplinary measures, as consistently upheld by the United Nations Administrative Tribunal, the Secretary-General has decided to separate you from service with compensation in lieu of notice pursuant to staff rule 110.3 (a) (vii), with effect from close of business on the day you receive this letter. This disciplinary measure is consistent with sanctions imposed for similar misconduct and is proportionate to the offence of attempting to defraud the Organization (...). Notwithstanding the foregoing, the Secretary-General accepts the JDC’s recommendation that you should be allowed to submit a claim for compensation for the loss of your personal effects.”

On 30 June 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The evidence proffered by the Respondent does not support the conclusion of misconduct reached by the JDC.
2. The decision to separate him from service was excessive punishment for a charge that had not been proven beyond a reasonable doubt.

Whereas the Respondent’s principal contention is:

1. The Applicant failed to meet the standards of conduct required of an international civil servant and the disciplinary measure imposed was proportionate to the misconduct.

The Tribunal, having deliberated from 11 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant joined the service of the United Nations on 7 August 2001 under a 300 Series contract at the FS/2 level and was assigned to MONUC as a Transportation Assistant.

In June 2002, the Applicant sold to his landlord certain items for a total amount of US\$ 2,000, to be incrementally set off against his rent. The last installment of the agreed rent deduction was in January 2003, at which point the landlord became the lawful owner of the items.

On 22 April 2003, the Applicant filed a inventory form listing all the items sold to his landlord.

On 3 June 2004, during protests and riots in the Kisangani area, the Applicant's residence, amongst others, was looted. On 4 June, the Applicant submitted an "incident report" to MONUC, stating that his house was completely destroyed and that he had lost all his personal effects. The Applicant listed his lost property in the amount of US\$ 13,520, of which the sum of US\$ 2,630 was attributed to the items sold to his landlord. As ensuing investigation concluded that the Applicant expected to be compensated by the United Nations for items that no longer belonged to him and that he had inflated the cost of these items.

On 23 February 2005, the Applicant was charged with "submitting a false claim for reimbursement to the United Nations" and, on 20 April his case was referred to the JDC. The JDC found that the Applicant had misrepresented the facts, and had engaged in misconduct. The majority of the Panel recommended the loss of one step in grade and, the panel as whole recommended an oral and written reprimand. However, the Secretary-General decided that his conduct amounted to a serious violation of the standards of conduct and integrity expected of staff members of the Organization incompatible with further service and, therefore, separated him from service with compensation lieu of notice.

The Applicant filed his Application on 30 June 2006, requesting the Tribunal to order his reinstatement.

II. The Tribunal first recalls the dispositions of Chapter X of the Staff Regulations and Rules and, in particular, the disciplinary measures provided in staff rule 110.3 (a) which may take one or more of the following forms:

- “(i) Written censure by the Secretary-General;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for within-grade increment;
- (iv) Suspension without pay;
- (v) Fine;
- (vi) Demotion;
- (vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;
- (viii) Summary dismissal.”

The Tribunal has repeatedly been asked to review decisions of the Secretary-General to impose disciplinary measures and reiterates its position that, in disciplinary matters, the Secretary-General has broad powers of discretion, on the understanding that his decisions do not suffer from arbitrariness or fail to respect the principle of proportionality (see Judgement No. 583, *Djimbaye* (1992)). It also recalls in this regard Judgement No. 941, *Kiwanuka* (1999):

“In its jurisprudence, the Tribunal has ‘consistently recognized the Secretary-General’s authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision’. (Judgements No. 300, *Sheye*, para. IX (1982); and No. 210, *Reid*, para. III (1976).)”

At the same time, the Tribunal has consistently held that the Respondent is not “required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them” and that it will intervene only when the administrative action “was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact”. (See Judgement No. 641, *Farid* (1994), para. IV.) Thus, what the Tribunal must examine is

“whether the findings of fact against the Applicant made by the Administration can be supported by the evidence on the record. Without substituting its own judgement for that of the Administration (cf. Judgements No. 490, *Liu* (1990), and No. 616, *Sirakyan* (1993)), it makes a judgement on whether the findings of fact are reasonably justifiable and supported by the evidence. If the Tribunal judges that the material findings of fact cannot be supported by the evidence, it may disagree with the conclusions of the Administration based on the evidence. Needless to say, the Tribunal examines the facts and the evidence critically and fully and reviews the Administration’s decision.” (See *Kiwanuka* (ibid.).)

III. The proportionality principle has been used by the Tribunal as the ultimate criterion of the legality of the measure taken against the wrongdoer, especially because, according to the Tribunal and all contemporary legal systems, the measure imposed upon the staff member must correspond to the wrong done. In Judgement No. 1167, *Olenja* (2004), it decided that there are

“a number of criteria that must be met in order for a disciplinary measure not to be arbitrary, but to be regarded as in conformity with law” (Judgement No. 1011, *Iddi* (2001) referring to ... *Kiwanuka* (ibid.).) One of the criteria is the proportionality of the penalty imposed. In reaching its decision, the Tribunal has to balance the conflicting considerations in the Applicant’s case. Having considered all the issues of this case, and having noted the conclusions reached in this matter by both the JRB and the JDC, the Tribunal finds that the Respondent’s decision to dismiss the Applicant from service was disproportionate to the acts of insubordination with which he was charged. The Tribunal, however, is of the opinion that, under the present circumstances, reinstatement of the Applicant in service would not be a practical solution and that compensation is the appropriate remedy in the Applicant’s case.”

IV. In the present case, the Secretary-General did not follow the advice of the JDC. He noted that only the majority of the JDC recommended the disciplinary measure of the loss of one step in grade. The

Secretary-General was of the view that the misconduct involved “dishonesty for potential financial gain”, which he considered a “serious violation of the standards of conduct and integrity expected of staff members of the Organization ... incompatible with continued service”. Thus, he decided to separate the Applicant from service with compensation in lieu of notice, however, allowing him to submit a claim for compensation for the loss of personal effects.

The Tribunal has always respected the principle that the Secretary-General establishes the standards of conduct required of staff members. This was made clear in Judgement No. 993, *Munansangu* (2001), para. IV:

“Article 100, paragraph 1, and Article 101, paragraph 1, of the Charter set forth the basic obligations of the Secretary-General and staff to the Organization and the Organization’s responsibility for appointment of staff. The Tribunal has repeatedly affirmed that the Charter and the Staff Regulations vest in the Secretary-General the authority to determine whether a staff member has met the required standards of conduct. The choice of disciplinary measure to be imposed pursuant to staff regulation 10.2 falls within the Secretary-General’s discretionary powers. (Judgements No. 515, *Khan* (1991); No. 542, *Pennacchi* (1991); No. 941, *Kiwanuka* (1999).)”

V. The question to be answered, then, is whether the sanction as determined by the Secretary-General was a lawful exercise of his discretion, or whether it was disproportionate to the offense, amounting to an abuse of power. In making his decision, the Secretary-General was entitled to take into account all the facts of the case and determine whether the actions of the Applicant were compatible with further service.

The Tribunal notes that, in June 2002, the Applicant sold to his landlord certain items for a total amount of US\$ 2,000, to be incrementally set off against his rent and that, following the last installment paid in January 2003, the landlord became the lawful owner of these items. However, on the day following the 3 June 2004 riots - and thus well after the sale became final - the Applicant filed an incident report which included the items sold to his landlord. The Tribunal cannot but agree with the JDC’s conclusion that the Applicant misrepresented the facts in his incident report and that this misrepresentation was not consistent with the standards of integrity and conduct expected of staff members of the United Nations. Thus, there is no question that the Applicant had engaged in misconduct for which the majority of the JDC found that the disciplinary measure of loss of one step in grade was warranted.

The Tribunal notes that the Secretary-General did not consider “credible or persuasive [the Applicant’s] explanation that [he] included the disputed items in the list because [he] considered [himself] responsible for them, even though they no longer belonged to [him]” and determined that the Applicant’s misconduct involved “dishonesty for potential financial gain”, amounting to a serious violation of the standards of conduct and integrity expected of staff members of the Organization, incompatible with continued service. The Tribunal is of the view that the Secretary-General’s decision not to agree with the JDC’s recommendation for a lenient disciplinary measure but to apply a more severe sanction fell within his discretionary authority and was not disproportionate to the offence. Moreover, the Tribunal is satisfied that there is nothing in the file to indicate that the decision of the Secretary-General was tainted by

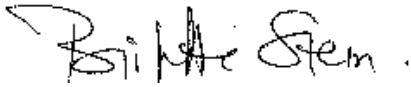
prejudice or other extraneous factors and, therefore, it will not interfere in the decision to separate the Applicant from service.

VI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

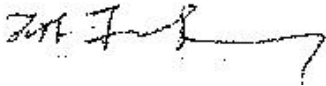
(Signatures)



Spyridon Flogaitis
President



Brigitte Stern
Member



Goh Joon Seng
Member

New York, 26 November 2008



Maritza Struyvenberg
Executive Secretary