



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1428

Case No. 1494

Against: The Secretary-General  
of the United Nations

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

Whereas, on 25 August 2006, a former staff member of the United Nations, filed an Application  
requesting the Tribunal, inter alia :

“7. ...

...

(c) *to decide* to hold oral proceedings on the present application ...

8. On the merits ...

(a) *to rescind* the decision of the Secretary-General rejecting the unanimous  
recommendations of the Joint Disciplinary Committee [(JDC)] and imposing the  
disciplinary penalty of separation from service on the Applicant;

(b) *to find and rule* that the decision of the Secretary-General is based on errors of  
fact and law and improperly motivated by extraneous considerations;

(c) *to order* that the disciplinary action imposed on the Applicant be rescinded, that  
the Applicant be re-instated in service with effect from 2 June 2006, and that all  
adverse material dealing with this matter be removed from his official file;

(d) *to order* that a letter confirming the Applicant’s complete exoneration from any  
wrongdoing, be provided to the Applicant by the Respondent;

- (e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (f) *to fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (g) *to award* the Applicant as cost, the sum of [US\$ 7,500.00] in legal fees and [US\$ 500.00] 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 11 February 2007, and once thereafter until 12 March;

Whereas the Respondent filed his Answer on 15 February 2007;

Whereas the Applicant filed Written Observations on 23 August 2007;

Whereas, on 3 November 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***

... [The Applicant] was deployed to [the United Nations Mission in the Democratic Republic of Congo (MONUC)], the Congo, as a Contracts Management Officer on 27 April 2001 at the P2 level. He was appointed Field Administration Officer (FAO) and transferred to MONUC/Mbandaka, the Congo, in March 2004[, on a 300 Series appointment of limited duration. He separated from service on 2 June 2006].

***Summary of the relevant facts***

... The alleged misconduct took place in Mbandaka between October and November 2004.

***[PIO] Report***

... During a general staff meeting held on 25 October 2004, [the] Public Information Officer, MONUC/Mbandaka, [(PIO)] criticized [the Applicant] ...

... According to the Administration, on 27 October 2004, [the Applicant] called [the] Regional Security Officer (RSO) ... to his office to view a report in English on his computer screen. The report, dated 25 October 2004, accused [the PIO], who had joined MONUC/Mbandaka approximately a week earlier on 19 October ..., of having picked up local females in his [United Nations] vehicle ... from the main street in Mbandaka and brought them to the 'Afric Hotel' on 21 and 24 October ...

... Again according to the Administration, later on 27 October, after he had allegedly seen the [PIO] Report in English on [the Applicant]'s computer screen, [the RSO] received from an optical digital sender an email containing that report now in French in PDF form, under his [RSO's] name and with his signature, entitled 'Agissez mal sur les femmes locales dans Mbandaka par [le PIO] ...' ...

... At 8:59 a.m., 27 October, [the RSO] sent the [PIO] Report in PDF form to [the] Chief Security Officer (CSO), with a warning that ... the [PIO] Report was false. ... [On the same date, the report was forwarded to the Director of Administration, who asked the CSO to conduct an immediate investigation.]

... [The PIO] was thereafter called to Kinshasa and an investigation was conducted. It was found that the allegations contained in the [PIO] Report were false and fabricated.

...

... A second investigation followed. In a report dated 20 January 2005, ... the Investigator, concluded that [the Applicant] was the prime suspect author of the false report. However, he was unable to prove it 'without a doubt,' as 'no substantial evidence was found and/or provided connecting [the Applicant] to the mentioned report'. ...

... In the course of that follow-up investigation, [the RSO] gave [the Investigator] a report dated 29 November 2004. That report ('[Building Maintenance Service Assistant (BMSA)] Report') contained the finding of another investigation at the instruction of [the Applicant]. ...

... In a memorandum dated 1 February 2005 ..., [the DOA] requested the assistance of the MONUC Office for Addressing Sexual Exploitation and Abuse (OASEA) in investigating the circumstances leading to the [PIO] Report, among other things. [The DOA] stated that ... he would 'issue a severe reprimand to the [Applicant] and ... relieve him of his responsibilities as an area coordinator, with immediate effect. ...

...

... In a report dated 27 May 2005 on the matter of the [PIO] Report, OASEA concluded that 'on a balance of probability, [the Applicant] could be the author and initiator' of the report. Factors that supported OASEA's conclusion included [the PIO]'s criticism of [the Applicant] at the general staff meeting of 25 October 2004, the lack of known dispute or disagreement between [the RSO] and [the PIO], the poor quality of the French language used in the report and the undue hurry in which [the Applicant] had forwarded the [PIO] Report to the MONUC Administration. In addition, OASEA could not rule out the possibility of collusion between [the Applicant] and [the RSO].

#### *[BMSA] Report*

... On 27 November 2004, a generator supplying electricity to MONUC/Mbandaka broke down. [The Applicant] told [the BMSA] ... to restore the generator within a fixed timeframe. [The BMSA] responded by saying that he would not work under deadlines.

... In an email dated 29 November 2004, [the Applicant] asked [a Staff Security Assistant ... (the SSA)] to '[i]nvestigate what is the relationship between [a female Casual Worker (CW) in the Engineering Section (ES)] ... and [the BMSA] ...' [The female CW] was a daily worker at the ES under [the BMSA]'s supervision.

... [The SSA] conducted two interviews ... In an unsigned report also dated 29 November 2004 to [the Applicant, the SSA] stated that [the BMSA] maintained an 'illicit sexual relationship' with [the female CW] since 2002. ...

... No follow-up action was taken by [the Applicant] on the [BMSA] Report. [The female CW] left MONUC/Mbandaka in November 2004.

... On 1 February 2005, [the DOA requested] ... OASEA's assistance in investigating the circumstances leading to the investigation against [the BMSA] ...

...

... In a report dated 12 May 2005 on the matter of [the BMSA], OASEA concluded that it was not able to prove the existence of the intimate relationship between [the BMSA] and [the female CW]. In its view, '[the Applicant] appeared to want an investigation into the relationship between [the BMSA] and [the female CW] to satisfy his desire to revenge. He was not happy about the generator breakdown and did not like [the BMSA]'s response to his ultimatum.'

...."

On 3 November 2005, the case was referred to the JDC in New York. The JDC adopted its report on 12 May 2006. Its considerations, conclusions and recommendation read, in part, as follows:

*“Considerations*

...

45. At issue for the Panel is whether the Administration has carried its initial burden of proof by providing adequate evidence to substantiate the two allegations of misconduct against [the Applicant] and if so, whether [the Applicant] has provided satisfactory evidence to justify his questioned conduct.

...

*[PIO] Report*

47. In the view of the Panel, the Administration failed to present adequate evidence to substantiate the allegation that [the Applicant] was the prime suspect author of the said report.

...

50. The Panel was sure that the misconduct of fabricating the malicious and unfounded SEA allegations against a newly arrived staff member occurred in October 2004. However, it was not sure, as [the Investigator] and the OASEA team, that [the Applicant] had committed it. ...

51. As there was no adequate evidence linking [the Applicant] to the [PIO] Report, it could not be concluded, as alleged, that [the Applicant] was involved in fabricating the said report. Neither could it be concluded, as alleged, that he was involved in disseminating the false report, as there was no adequate evidence indicating that [the Applicant] was aware of the false nature of the [PIO] Report when he forwarded it to [the CCPO]. ...

...

53. While it did not believe that [the Applicant]'s forwarding or disseminating the [PIO] Report under the circumstance constituted misconduct, the Panel wished to endorse [the DOA]'s decision to issue a severe reprimand to [the Applicant] over the manner in which he had handled the [PIO] Report. ...

*[BMSA] Report*

54. On the basis of its review of the presented materials and its interviews of the key witnesses, the Panel concluded that the Administration had produced adequate evidence in support of the allegation that [the Applicant] had abused his authority by improperly initiating an SEA

investigation against [the BMSA], and that [the Applicant] had failed to rebut the charge or adequately explain his conduct in question.

...

56. The Panel noted that the following facts were not in dispute. In March 2004, [the Applicant] was transferred to MONUC/Mbandaka ... On 27 November 2004, he and [the BMSA] engaged in a heated exchange of words over the breakdown of an electric generator. [The Applicant] was not pleased at the “disrespectful” manner in which [the BMSA] had responded to his demand to repair the generator within a fixed time frame. ... On 1 and 2 December, [the BMSA] apologized to [the Applicant] both in person and in writing for his behavior. [The Applicant] then ‘considered the matter closed’ ...

57. The Panel learnt during the proceedings that from February 2004 onwards several incidents of theft had occurred to the property of the ES. Witness testimonies suggested that the relationship between [the BMSA] and [the female CW] was a common knowledge within MONUC/Mbandaka.

58. The Panel was persuaded that [the Applicant] had directed [the SSA] to launch an investigation into [the BMSA]’s personal relationship with [the female CW], not because he had become concerned about the thefts occurring in the ES or [the BMSA]’s favoritism towards [the female CW] or his possible violation of the daily worker policy, as he ostensibly claimed, but because he wanted to use the investigation as a way to retaliate against [the BMSA].

...

60. The Panel observed the haste with which [the Applicant] wanted the investigation to be completed. It was ordered, conducted and finished on the same day.

61. Nevertheless, [the Applicant] took no subsequent action to pursue the serious issues raised in the [BMSA] report. ...

62. In summary, (i) the nature and speed of the investigation, (ii) the failure to follow up on the results of the investigation, (iii) the fact of the other thefts dating back ten months prior to the investigation, (iv) the long-standing common knowledge of the apparent relationship between [the BMSA] and [the female CW], and (v) the proximity in time between the argument over the generator and the investigation all led the Panel to conclude that [the Applicant] had launched an investigation into [the BMSA]’s personal relationship with [the female CW] for no legitimate purposes, except in retaliation against [the BMSA] and as a way to pressure him into submission. By so doing, [the Applicant] had abused his authority and caused the Organization to incur the unnecessary expenses associated with the subsequent investigations.

63. The Panel did not find the explanations proffered by [the Applicant] that his investigation had nothing to do with SEA or that he had expected the Security Section to follow up reasonable or adequate to justify his conduct in question.

#### ***Conclusions and recommendations***

64. The Panel thus agreed that the Administration had failed to provide adequate evidence to substantiate its allegation of misconduct with respect to [the Applicant]’s role in the fabrication and dissemination of the [PIO] Report.

65. However, the Panel agreed that the Administration had made *a prima facie* case to show that [the Applicant] had abused his authority by improperly initiating an SEA-related investigation against [the BMSA]. In its view, such abuse of authority constituted misconduct.

66. Considering that [the Applicant]’s abuse of authority had caused unnecessary expenses, the Panel believed that [the Applicant] should pay to the Administration a lump sum of five thousand (5,000) US dollars as partial reimbursement of the costs in connection with the investigation that he had ordered and the subsequent investigations that the MONUC Administration had conducted.

67. In light of the foregoing, the Panel *unanimously recommends* that the charge with respect to the [PIO] Report against [the Applicant] be dropped herewith. It also *unanimously recommends* that [the Applicant] be found to have committed misconduct in connection with the [BMSA] Report, and that a fine of five thousand US dollars be imposed on [the Applicant] as the disciplinary measure for that misconduct.”

On 2 June 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General ... agrees with the JDC’s conclusions and notes that your actions constitute misconduct within the meaning of staff rule 110.1. In light of the serious consequences that your actions may have on the reputation of the staff member against whom you improperly initiated the investigation, the Secretary-General is not able to accept the JDC’s recommendation for a lenient disciplinary measure. The Secretary-General is of the view that your actions are inconsistent with the standard of integrity required for international civil servants and that the severity of your misconduct is incompatible with continued service in the Organization. Accordingly, pursuant to his discretionary authority in disciplinary matters, the Secretary-General has decided that you be separated from service with compensation in lieu of notice in accordance with staff rule 110.3 (a) (vii).”

On 25 August 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The decision of the Secretary-General is based on errors of fact and law and improperly motivated by extraneous considerations.
2. The sanction of separation from service is disproportionate to the alleged misconduct.
3. His due process rights were violated.
4. He lost eight years of career benefits and future income and should be awarded appropriate compensation.

Whereas the Respondent’s principal contentions are:

1. The Applicant failed to meet the standards of conduct required of international civil servants .
2. The Applicant’s separation from service constitutes a proper exercise of the Respondent’s authority.
3. The Applicant failed to provide any substantive basis for his allegations of prejudice.
4. The JDC report was based on established facts and is legally sound.
5. The Applicant was accorded due process.

The Tribunal, having deliberated from 3 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant was deployed to MONUC, Congo, as a Contracts Management Officer on 27 April 2001 at the P-2 level. He was appointed FAO and transferred to MONUC/Mbandaka, the Congo, in March 2004. His 300 Series appointment of limited duration was extended pending the completion of the disciplinary proceedings and the Applicant was suspended from duty with full pay as of 20 August 2005. He was advised of the decision to separate him from service on 2 June 2006.

In a letter dated 27 July 2005, the Applicant was charged with “being involved in fabricating and disseminating a false report on allegations of sexual exploitation and abuse against [the PIO] which allegedly resulted in the waste of investigative and administrative resources of the United Nations”, and with “abuse of authority by improperly initiating an investigation into allegations of sexual exploitation and abuse against [the BMSA] without informing the proper authorities”. He was informed of the decision to suspend him from duty with full pay for a period of three months or until the completion of disciplinary proceedings.

On 3 November 2005, the case was referred to the JDC in New York. The JDC adopted its report on 12 May 2006. The Panel agreed that the Administration “had failed to provide adequate evidence to substantiate its allegation of misconduct with respect to [the Applicant’s] role in the fabrication and dissemination of the [PIO] report”. However, the Panel “agreed that the Administration had made *a prima facie* case to show that [the Applicant] had abused his authority by improperly initiating an SEA-related investigation against [the BMSA].” The Panel concluded that said abuse of authority constituted misconduct and that a fine US\$ 5,000 be imposed on him for said misconduct.

On 2 June 2006, the Applicant was advised that the Secretary-General did not agree with the recommendation of the JDC, and had decided to separate him from service with compensation in lieu of notice under staff rule 110.3 (a) (vii).

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 it 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 Judgement No. 941, *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, as he was of the view that the Applicant's actions were "inconsistent with the standard of integrity required for international civil servants" and that the severity of his misconduct was "incompatible with continued service in the Organization". 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).)"

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 the JDC concluded that the Applicant had "launched an investigation into the [BMSA's personal relationship with a female colleague] for no legitimate purposes, except in retaliation against that staff member and as a way to pressure him into submission" and that, by so doing, "[the Applicant] had abused his authority and caused the Organization to incur the unnecessary expenses associated with the subsequent investigations". The Secretary-General, in determining the appropriate sanction, took into account the "serious consequences" of the Applicant's actions "on the reputation of the staff member against whom [he] improperly initiated the investigation" and, therefore, was not able to "accept the JDC's recommendation for a lenient disciplinary measure". There is no evidence in the file which would indicate that the decision of the Secretary-General to separate the Applicant from service was tainted by prejudice or other extraneous factors. Thus, the Tribunal is satisfied that the sanction imposed upon the Applicant did not amount to abuse of discretion or abuse of power. (See generally, Judgement No. 1310 (2006).)

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

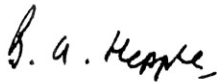
(Signatures)



Spyridon **Flogaitis**  
President



Jacqueline R. **Scott**  
Vice-President



Bob **Hepple**  
Member

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary