UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/055/ JAB/2008/104
Judgment No.: UNDT/2010/001
Date: 6 January 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ABBOUD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Susan Maddox, ALU

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The applicant was interviewed for a position as a P-5 in the Department for General Assembly and Conference Management (DGACM) by an interview panel, but complained to the Under-Secretary-General of the Department about the conduct of one of the panelists, namely his Special Assistant (SA). Section 2 of ST/AI/371 of 2 August 1991 ("Revised Disciplinary Measures and Procedures") required the USG/DGACM to undertake an initial inquiry to determine whether there was "reason to believe" that the SA had "engaged in an unsatisfactory conduct for which a disciplinary measure may be imposed". (I use the term "initial inquiry to distinguish this stage of the process from the "preliminary investigation".) The USG/DGACM obtained certain limited information and decided that a preliminary investigation was not called for. It is this decision which the applicant has appealed.

2. In this case the important questions appear to be: first, whether there is reason to believe that the allegations about the SA's conduct made by the applicant are true and, if so, whether they might amount to misconduct, secondly, whether the USG/DGACM made adequate enquiries to ascertain these matters; and thirdly, whether the USG/DGACM brought a fair and unbiased mind to these questions.

The nature of an initial inquiry and the issues in this case

3. By an earlier motion in these proceedings, the respondent sought summary dismissal of the application under art 9 of the Rules of Procedure. In dismissing the motion I discussed the requirements of sec 2 of ST/AI/371, the relevant administrative instruction dealing with disciplinary measures and procedures. I will not repeat what I set out in that judgment but it might be useful to clarify some possible obscurities.

4. As per sec 2 of ST/AI/371, the crucial question for the USG/DGACM to determine was whether "there is reason to believe…[that the SA] has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". The

"reason to believe" must be more than mere speculation or suspicion: it must be reasonable and based on facts sufficiently well founded – though of course not necessarily proved – to rationally incline the mind of an objective and reasonable decision-maker to the belief that the staff member has engaged in the relevant conduct. This is a question of fact and degree. It is a question of judgment, however, and not of discretion. Whether there is "reason to believe" the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation. The official does not ask, "Do *I* have reason to believe?", let alone, "Do *I* believe?" He or she must ask, "Is there material that would give an objective and reasonable decision-maker reason to believe?" It is not necessary that the official actually believes that the particular impugned conduct occurred or that it amounts to misconduct. The necessary and sufficient criterion is simply whether there is reason to believe that conduct amounting to misconduct occurred. Indeed, there might well be reason to believe that the relevant facts had occurred even if the official was personally convinced that they had not. Whether in fact improper conduct has taken place is a matter for later determination and, essentially, the task of the official is to determine whether, in substance, there are circumstances which give rise to a reason to believe (or expect) that a succeeding "formal" investigation might, not necessarily will, disclose relevant misconduct.

5. The official must make adequate enquiries for the purpose of ascertaining whether there is reason to believe the relevant facts occurred. What is adequate will vary according to the circumstances and again, is a matter of objective judgment and not managerial discretion. However, the usual requirements affecting managerial discretion apply, in particular, the requirement that the official must bring a fair and unbiased mind to the question, consider relevant matters and disregard irrelevant ones, and make no mistake of significant fact. Both the person making the complaint and the person who is subject of the complaint must be given a reasonable opportunity to influence the decision. The official is not conducting a trial and is not obliged to follow any particular procedure. The mere fact that otherwise apparently

reliable witnesses give completely contradictory accounts about the relevant facts will not mean that there is no reason to believe that the impugned conduct did not occur. To the contrary, if there is an apparently reliable witness who says that it did occur, there will almost invariably be reason to believe that it did, even though, because he or she is contradicted, there is also reason to believe that it did not occur. The resolution of this contradiction would be a matter for the preliminary investigation and it may be for the Tribunal to determine if there is an adverse decision by the Administration and the staff member has appealed. Of course, the necessity that the material forming the basis for the belief should be sufficiently reliable to rationally justify the relevant inclination of mind will require at least some enquiries of potentially contradictory material (or contradictory witnesses) as a test of reliability or credibility. Finally, it is necessary for the official to record his or her decision in a way that indicates the factual matters he or she considered sufficient to provide reason to believe that the relevant conduct occurred.

6. Whether this procedure still applies in light of ST/SGB/2009/7 is uncertain. I refer to this issue in the conclusion to this judgment.

The facts and evaluation

7. On 8 July 2008 the applicant was interviewed by a five-member panel for a P-5 post in DGACM. In addition to SA the panel also included a Program Case Officer (PCO) and three other panel members (PM1, PM2 and PM3). On 9 July 2008 the applicant submitted a written complaint to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) requesting an investigation into the conduct of the SA. On 10 July 2008 the applicant was informed that the matter should be referred to his Head of Department (USG) which the applicant immediately did.

8. In his complaint to the USG/DGACM, the applicant alleged that during the interview, and in a way that was not repeated by the other panel members, the SA's behaviour had been "unprofessional, unethical and inappropriate" for the following nine reasons:

1 use of inappropriate language

2 making sarcastic observations about my answers

3 questioning my answers

4 questioning OHRM rationale of including specific competencies in the VA and their relevancy

5 arguing with other members of the panel

6 showing an intimidating posture

7 creating a tense and unsettling atmosphere

8 asking hypothetical questions

9 asking investigation-like questions about issues that have already been answered on

Describing this conduct as "flagrant and blatant indifference and disregard … towards the most basic principles and guidelines of conducting interviews in the United Nations Secretariat", the applicant questioned whether the SA was a suitable person to sit on an interview panel, whether he behaved in the same way to other candidates and "whether he had a hidden agenda in undermining [the applicant's] performance in the interview".

9. On the face of it, if the SA had indeed conducted himself as described by the applicant, he had acted inappropriately and had quite possibly engaged in unsatisfactory conduct justifying the imposition of a disciplinary measure. Much would depend on the degree of inappropriate conduct and the SA's motive. It was not disputed that it was necessary for the USG/DGACM to undertake the initial inquiry to which sec 2 of ST/AI/371 referred.

10. It appears that, as an initial step, the USG/DGACM on 10 July 2008 asked the PCO about what had transpired during the interview of the applicant. He showed him the applicant's allegations. According to the USG/DGACM, the PCO told him that the applicant was tense when the SA followed up on questions about information

technology. On the same day, shortly after this meeting, the USG/DGACM sent the following e-mail to the PCO—

> Further to our discussion this morning, and in the light of the reply of OHRM [advising the applicant that he should refer his complaints to USG/DGACM]…and as PCO for this case, please provide me with your comments on the 8 [sic] allegations [against the SA] cited in the note sent to [ASG/OHRM], as well as whether [the SA] showed the same behaviour and attitude, asked the same questions with the rest of the candidates.
>
> In the light of your comments, and in conformity with ST/AI/371, I will decide whether to initiate a preliminary investigation "if there are reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed"

The PCO replied on the same day—

> Per your instruction, the following are my comments:
>
> Use of inappropriate language: In the sense of choice of words, I did not notice abusive or insulting language.
>
> Making sarcastic observations about my answers: Occasionally [the SA] repeated or summarized [the applicant]'s answer. In a follow up question (such as "So, you would") whether that was sarcasm is a matter of perception. The seating was such that when [SA] was facing the applicant, I had only a side-rear view of [SA] but I didn't feel [SA] was overtly sarcastic.
>
> Questioning my answers: The same as stated above.
>
> Questioning OHRM rationale of including specific competencies in the VA and their relevancy: At one point [SA] did query a point on the VA and sought explanation from [PM1].
>
> Arguing with other members of the Panel: When [PM1] reminded the panel that we should not ask hypothetical questions, [SA] turned and said "Thank you, I know." [PM1] did not respond.
>
> Showing an intimidating posture: There was a tense moment and I was concerned that the conversation was becoming argumentative, whereupon I asked all to keep to the Q&A approach.
>
> Creating a tense and unsettling atmosphere: As stated above.
>
> Asking hypothetical questions: As stated above, [PM1] said we should not ask hypothetical questions. I think [SA] later said something to the effect that although the word hypothetical was used he was not

> pursuing hypothetical questions but just to illustrate. (not in these words).
>
> Asking investigation-like questions about issues that have already been answered on: Same as points two and three.
>
> With regard to the question "whether [SA] showed the same behaviour and attitude, asked the same questions with the rest of the candidates" I report that:
>
> 1. The interview did not strictly adhere to a fixed set of questions. The follow up questions in particular were more often that not based on the candidates' foregoing answers.
>
> 2. [The applicant] was the first to be interviewed. In the middle of that interview I urged the meeting to keep to the Q & A format and not to engage in a discussion, and [PM1] reminded us not to ask hypothetical questions. [SA] didn't do either afterward.
>
> 3. During the panel discussion after the interview, one panel member remarked that [SA] asked the gender question of [the applicant] but not of the other candidates. [SA] responded that the same issue was implicit in his questions with the other candidates; and that [PM2], for example, did not always ask the same follow up questions, either. [PM2] said he had asked additional questions if the candidate omitted what he wanted to know, but hadn't repeated the questions if the candidate had already addressed the points (my recollection, not exact words).
>
> Since [the applicant] did not cite specific examples as to exactly what made him feel as he did on each point, my comments are very tentative and I'm not sure if I'm not amiss. Other panel members may or may not agree with my observations; for the sake of discretion, I'm not discussing with anyone any issue related to this interview.
>
> Sorry for the lengthy report. Please let me know if I can be of further assistance.

11. On the morning of 11 July 2008 the USG/DGACM e-mailed PM1 to provide her with comments on the "8" (a miscount for nine) allegations made by the applicant and also whether SA conducted himself in the same way towards the other candidates. He indicated that in the light of her comments he would decide whether to initiate a preliminary investigation. The USG/DGACM also expressed some sensitivity about the fact that the applicant had addressed him directly as the Head of Department although, of course, this was done pursuant to the direction of the ASG/OHRM.

12. On 14 July 2008 PM1 responded and pointed out that—

> [The applicant] was the first of three candidates to be interviewed. During the interview [the PCO] and I made comments to SA regarding his line of questioning. This was not repeated in the following interviews…

13. Later the same day the USG/DGACM repeated his request to PM1 for comments on the applicant's allegations to which she replied that "to some degree" they were justified. The USG/DGACM did not seek further clarification, though the degree to which the complaints were justified was, as I have pointed out, of critical importance.

14. In the meantime, on the morning of 14 July 2008, the applicant e-mailed the Under-Secretary-General of the Department of Management (USG/DM) (copied to the USG/DGACM) requesting that the entire process of investigation be transferred from DGACM to DM "so as to ensure the highest possible objective and impartial outcome of the investigation", basing this request on "the nature of relationship that exists between any USG/ASG and his/her Special Assistant, and since getting to the bottom of this matter might require widening the scope of staff to be interviewed by the investigation panel".

15. It is a fundamental obligation of all decision-makers to act objectively and fairly, free of bias, favour towards or antipathy against any staff member in respect of whom a decision is to be made. The correspondence of the USG/DGACM reveals a marked inability to satisfy this requirement. The first example of this unfortunate failure is his response to USG/DM of 15 July 2008 (the memorandum) regarding the applicant's e-mail of 14 July. The USG/DGACM described the applicant's reference to the relationship between any USG/ASG and his/her SA as a "blatant slanderous accusation against all USGs/ASGs as it questions their integrity and impartiality, which is objectionable and unacceptable". Of course, the applicant's e-mail was neither slanderous nor accusatory, nor did it question integrity or impartiality except to the extent that removal of the issue was suggested to be optimal in the interests of the integrity and impartiality of the investigation. The USG/DGACM went on to

characterise the request to transfer the process as an "outrageous slur against DGACM since it implies that, if the investigation is conducted by DGACM, it will be neither objective nor impartial". Certainly, the request suggested the highest objectivity and impartiality would be served by transfer but this was not a slur, nor was it outrageous. He then referred to the (irrelevant, but apparently regarded as adverse) fact that the initial complaint made by the applicant was wrongly addressed to OHRM and earlier assistance given by the USG/DGACM to the applicant in respect of consideration by OHRM of the applicant's past experience. Then, returning to the matter under consideration, the USG/DGACM mentioned that he asked the PCO and a member of the interview panel to send him their comments on the allegations. Why he did not ask all members of the panel for their views was not explained. The memorandum goes on to say —

> In light of their responses, and in accordance with Section II, paragraph 2 of ST/AI/371, I have found NO reason to believe that [the SA] has engaged in unsatisfactory conduct, and thus has [sic] decided NOT to undertake a preliminary investigation.

The USG/DGACM, in his evidence, accepted that he had indeed made the decision but asserted that, before making his decision, he had considered more than the information from the PCO and the other panel member (identified from the attachment to the memorandum as PM1). This forms part of a picture of contradiction and confusion which has regrettably required findings seriously adverse to the USG/DGACM's credibility.

The memorandum concludes with the following significant passages —

> In the light of the above comments and clarifications, I request that the case be closed as far as the SM's [ie, staff member's] allegations are concerned.
>
> As for the slanderous accusations and aspersions that the SM casts on all USGs/ASGs and on DGACM, I formally request that you deal with them in accordance with the relevant disciplinary measures and procedures.

16. It is clear that the USG/DGACM's request that the applicant's "case be closed" was based upon two considerations: the first was that, as he had already decided that the prerequisites for a preliminary investigation had not been satisfied, there was nothing to be transferred for decision (which, as mentioned below, was designed to preempt any transfer); and the second was that the request was based on what the USG/DGACM characterized as "unjustified slander". That the "allegations" mentioned in the first of the above paragraphs are those made by the applicant in respect of the conduct of the SA is made very clear by the use of that very term in the first sentence of the memorandum concerning that matter, which is as following: "With reference to Staff Member [the applicant]'s e-mail dated 09/07/2008 to ASG/OHRM in which he makes allegations about the professional conduct of a member of the interview panel, [SA]".

17. The applicant's e-mail of 14 July 2008 to USG/DM was cast in language that was both reasonable and respectful. The response of the USG/DGACM of 15 July to the USG/DM demonstrated not only unseemly arrogance and personal sensitivity but gross exaggeration and lack of judgment. The concluding request that action be taken against the applicant was absurd and retaliatory, demonstrating, together with the comments to which I have already brought attention, that the USG/DGACM was incapable of dealing with the applicant's claims objectively or rationally. It was weakly suggested by counsel for the respondent that the last sentence quoted above was not aimed at the applicant but was a request that the ASGs and USGs against whom the applicant had made implied aspersions, together with him as the DGACM, should be the subjects of an initial inquiry under the disciplinary procedures rather than the applicant. I reject this interpretation but observe that, had it been correct, this would demonstrate an equally irrational overreaction.

18. It was also submitted on behalf of the respondent that, although purportedly sent in the USG/DGACM's name, he may not have been responsible for the language of the memorandum and it may not have been sent on the date it bears. I reject the former submission because of the USG/DGACM's answers which repeatedly both explicitly and implicitly accepted authorship. The USG/DGACM also several times

accepted both that the document was created on 15 July 2008 and that it was sent on that day. The electronic trail would be easily verifiable (for example, from USG/DM's end) and, in the absence of any evidence throwing doubt on the matter, I also reject the latter submission. I would point out, however, that if it was indeed not sent until 17 July, it was significantly misleading in that by that date the USG/DGACM had been e-mailed by PM2 and PM3 with further information that significantly supported the applicant's complaints and would have required any fair-minded decision-maker to reconsider the earlier decision but which was not mentioned.

19. It is necessary that I deal with other inconsistencies before returning to the USG/DGACM's testimony about the memorandum.

20. At trial the USG/DGACM testified that on 14 July 2008 he had been given the matrix containing the candidates' scores, which he considered for the purpose of determining the applicant's complaints. There are two substantial and convincing reasons for doubting the truthfulness of this evidence. The first is that, despite there being every reason to include it as a matter supporting his decision to refuse a preliminary investigation, the memorandum does not mention it; and the second is that it is not mentioned in a witness statement forwarded to the respondent's counsel on 18 September 2009, disclosed pursuant to case management directions and tendered in the proceedings. That statement is as follows —

> Having taken immediate action on this matter with all panel members upon receipt of the applicant's complaint, I interviewed [SA] on the 15th of July, and asked him to explain his reasons for the actions described in the accusation. I then requested that he respond in writing to each issue, which he did on 16 July (see attached). As a result of my review of this input, together with a verbal explanations made to me, and the collective input of the other panel members, in particular, the detailed answers of [the PCO], I determined that no improper behaviour had taken place, and that a further investigation into the matter was not warranted.

This statement contains a number of significant inaccuracies with which I later deal. It is sufficient for present purposes to point out that it does not suggest that the matrix

played any part at all, let alone a significant part, in the USG/DGACM's decision-making, with no reason for omitting it unless it had not in fact been considered.

21. In his testimony, the USG/DGACM also pointed out that the applicant's total score (134.5) was the highest (the others were 127 and 92.5). He said that this showed that SA had not attempted to cause the applicant's candidacy to fail. He claimed to have relied on this overall score as evidence that the behaviour of SA had not adversely affected the outcome of the interview and was not motivated by ill-will towards the applicant. I leave aside the obvious illogicality in what the USG/DGACM claimed was his reasoning to point to the individual scores given by SA on the one hand and the other panel members on the other. In that respect the matrix is indeed revealing. So far as each of the categories of professionalism, teamwork, technical, leadership, managing performance and communication were concerned, the SA gave the applicant the *lowest* score of all the panel members. For the remaining subject (planning) he gave the same score as the other panel members. The total score given by SA to the applicant was about 20% less than the average of the other scores. In respect of the other applicants, however, SA gave them significantly *higher* scores on every category than did any of the other panel members, the totals being about 30% and 15% higher than those of the other panel members. These are significant differences. Far from the matrix refuting the applicant's complaints, it gave the suspicion of bias some real support and certainly provided no rational, let alone reasonable, basis for the USG/DGACM's conclusion that there was no bias. These numbers, of course, might well have been explained; without explanation, they should have been a warning signal that something might well have gone awry and explanation would have been sought by any competent and fair minded decision-maker. However, the USG/DGACM nowhere mentioned them and obviously failed, by oversight or worse, to take them into account. Furthermore, the SA's written response (of 16 July) to him does not explain his marks and I infer that he was not asked to do so. The failure to ask such an obvious question indicates that the USG/DGACM either did not think of it or decided that he would not ask it or (overwhelmingly the most likely) that he did not look at the matrix at all at that time.

22. The suggestion in the USG/DGACM's evidence that the ultimate total scores showed that the applicant's complaints were unjustified or that SA was unbiased is a plain *non sequitur*, demonstrating that he either did not give any genuine consideration to the matrix, in which event he should not have relied on it, or, if he did, that he refused to consider the inevitable logic of the numbers, in which event he was dishonest. The relevance of the matrix to the decision was raised for the first time in the USG/DGACM's testimony and, as the document was not in court at the time (it was supplied after the hearing), he could not be cross-examined on it. In fairness, I decline to conclude that he was dishonest.

23. The USG/DGACM said in evidence that he had interviewed the SA on 15 July 2008 and that, in part, he had relied on SA's explanations of what occurred in concluding that there should be no preliminary investigation. Whether indeed the USG/DGACM did speak to the SA on 15 July is uncertain, but he certainly responded in writing by e-mail addressed to the USG/DGACM on 16 July. It is not necessary for present purposes to analyse the SA's response but it is fair to say that, if accepted, it appears that the SA acted reasonably. At the same time, the SA was not an objective observer and was placed in the position of justifying his conduct. This was a factor which the USG/DGACM should have taken into account. Of more immediate significance is that, as will be recalled, no reference is made by the USG/DGACM in his memorandum to having interviewed the SA. Not only is no such reference made but its omission is inconsistent with the necessary implication of his expressly stated basis for his decision, namely that the information he had obtained from the PCO and, implicitly, PM1, was the information he had relied on. The USG/DGACM explained his omitting any reference to the SA as a desire to keep the memorandum brief. This is simply not credible: first, the mention of the name and an interview would add only a few words; secondly, he had every reason to mention the interview in justification of his decision; and, thirdly, as mentioned, the clear implication derived from referring to the other panel members. It is not reasonable to accept the truthfulness of the USG/DGACM's evidence that he

interviewed the SA before he made the decision to refuse the preliminary investigation.

24. On the afternoon of 15 July 2008 the USG/DGACM sent emails to PM2 and PM3, asking them to provide comments by 16 July on the allegations made by the applicant about the conduct of the SA. It could be inferred that these e-mails were sent before the memorandum of 15 July was drafted but it is clear that the USG/DGACM had decided to reject the applicant's complaint before he had obtained the responses, although it is obvious that no sensible decision could be made without obtaining information from all the panel members. The PCO's report, whilst not asserting any misconduct on the SA's part, was in guarded language and in some respects mildly critical and certainly gave SA's behaviour less than unqualified approval. In my opinion, any person in the USG/DGACM's position who examined this report with reasonable care and objectivity could not have been comfortably of the view that nothing untoward had occurred. These doubts would have been confirmed in the mind of any competent examiner by PM1's e-mail of 14 July and emphasized the vital importance of obtaining more precise information from her and the opinions of the remaining panel members before making a decision that there was no reason to believe that unacceptable conduct of the relevant kind had occurred.

25. One naturally asks why the USG/DGACM did not wait to obtain this material before making his decision. Logically, the only possibilities are that it was either done carelessly or deliberately. There are four significant facts to put together. First, the USG/DGACM felt badly insulted by the applicant's request for a transfer and inferred that the applicant had implied that he (the USG/DGACM) was unfit to make the decision; secondly, if the decision were made by him, there was nothing to transfer; thirdly, not only was what the PCO or PM1 had said insufficient to demonstrate that there was no reason to believe that no unsatisfactory conduct had occurred but, if anything, supported to a greater or lesser degree the applicant's allegations; and fourthly, the applicant was a witness to the events and his statement was entitled to some credibility (as was that of the SA), but it was completely left out of account as irrelevant. It is simply impossible to accept that any competent and

objective decision-maker could have decided on this material that there was no reason to believe that SA had not conducted himself unsatisfactorily. It might not have been enough to establish reason to believe that unsatisfactory conduct occurred but it was overwhelmingly enough to establish that further information from the panel members was required. In my view, the only reasonable explanation for the USG/DGACM's decision of 15 July was that he wished to preempt the requested transfer to the Department of Management and decide the matter himself. After all, this was the logical and likely (and actual, as it turned out) consequence of his actions and it is usually reasonable to infer that people intend the logical and likely consequences of their actions. Incompetence is an alternative explanation but I saw no evidence of this.

26. On 16 July 2008 PM2 responded (the numbers refer to the above-listed complaints)—

> 1. Points 1, 2, 3, 4, 8, and 9 have merit.
> 2. Points 5, 6 and 7 are subjective.

This was, of course, critical of the SA's conduct and gave substantial support to the applicant's complaints. PM3 also replied on 16 July 2008 saying—

> I found the interview uncomfortable but am willing to discuss further with the official investigation panel.

The USG/DGACM responded to this email a little over an hour later—

> The four other members of the Panel have sent me their comments. I will decide, in the light of the comments made by all panel members, whether to set up an official investigation panel. So, I ask you to send your comments on the 9 allegations.

The second sentence was untrue since, according to the memorandum, he had already decided on 15 July that there was not going to be a preliminary investigation and had done this on the basis of reports from the PCO and PM1.

27. On 17 December 2008, the Executive Officer of DGACM (the EO) sent to the then acting chief of the Administrative Law Unit what were described as "the updated

comments of DGACM to the statement of appeal made to the Joint Appeals Board". The comments state that the USG/DGACM had sought information from all the panel members "upon receiving the complaint" and "carefully reviewed" the responses of all panel members. This was not true: as at the date of his decision on 15 July 2008 he had reviewed only two. These comments referred to the PCO's detailed account, noting only the assertion that the applicant "did not cite specific examples as to exactly what made him feel as he did on each point". This scarcely was a fair summary of the PCO's statement: the point to which reference was made was taken at the end of the statement by way of explaining the tentative nature of the opinions expressed, some of which gave some support to the applicant, and pointing out that the other panel members might have different observations. In relation to the other panel members the EO stated that —

> …at least one panel member did not support the [applicant's] claims on points 1,2,5,6 and 7, while some panel members did not comment on some or all of the points.

This was a serious misstatement of the effect of the responses. The first reference was plainly to the response of PM2, who in fact did support the applicant's claim in respect of points 1 and 2 (as well as 3,4,8 and 9) whilst, in respect of points 5, 6 and 7 merely stated that they were subjective. The other panel members gave additional support to a greater or lesser extent to the complaints, which was not followed up by the USG/DGACM. The EO denied that the applicant had not received fair consideration for the position, citing the nature of the procedures and commenting that the "PCO confirmed that even if the comments and ratings of the [SA] were excluded from the evaluation exercise, the [applicant] would not have been one of the finally recommended candidates". This also was rather less than frank. The fact is that the applicant was recommended by the interview panel and submitted for appointment by the Head of the Department, ie, the USG/DGACM, to the Central Review Board (CRB), which, however, requested his removal from the roster because of a failure to satisfy one of the formal requirements of the position. The EO's comments on the substance of the appeal went on to refer to a submission in the

applicant's statement of appeal that the USG/DGACM had abused the privileges of his post and acted without transparency and responded —

> Needless to say, the staff member has crossed every ethical principle and all permissible and legal boundaries by leveling such serious allegations against the USG. To call into question the integrity of the USG based upon this decision borders on insubordination.

This was a gross exaggeration and entirely inappropriate personal attack on the staff member, whose allegations had an entirely proper foundation and rather should have led the USG/DGACM to self-reflection and contrition. When cross-examined about the EO's comments, the USG/DGACM denied any authorship and said he was on vacation at the time it was created and sent. Accordingly, I have not taken it into account in respect of assessing his credibility.

28. The memorandum of the EO is discussed as an example of a submission which should not have been made and language should not have been used. It is not the responsibility of an official to take the position of an advocate and make tendentious submissions of this kind in these circumstances. The ALU is entitled to receive and an EO is obliged to provide an objective, fair and balanced discussion of the issues for the purpose of assisting the ALU to understand the true position, not an attempt to spin the facts. A direction, if there be one, from a senior official to do otherwise is grossly improper and should not only be ignored but reported.

29. To resume the narrative of events, PM3 replied to the USG/DGACM's query at 8am on 17 July 2008, again giving some support to the applicant's complaints —

> "Regarding the 9 allegations, it is my opinion that some of them are founded."

The USG/DGACM did not bother to make the obvious enquiry as to which of the allegations were founded and in what particular respects but, some ten minutes later, simply sent the responses of all five panel members to the Officer-in-Charge of OHRM (OIC/OHRM) with a copy to USG/DM, referring to a discussion on 15 July 2008 and his "Note [ie, the memorandum of 15 July] of the same date" – incidentally

establishing its correct place in the chronology of events. In his evidence the USG/DGACM said that the conversation with the SA occurred on 16 July but I prefer the contemporaneous document and infer that it occurred on 15 July.

30. It is evident from the e-mails of PM1, PM2 and PM3 that they were in a position to give further information about SA's behaviour and every reason to believe that the information was likely to be critical rather than supportive. the USG/DGACM, of course, should have sought more specific information – certainly there was more than sufficient to raise a reasonable suspicion that SA's behaviour was not all that it should have been. If, (as he claimed in his evidence), he had decided to make further enquiries in order to assist OHRM, why did he stop at this point?

31. The USG/DGACM said that he made no further enquiries because on 17 July 2008 he signed the submission for filling a vacancy to be considered by the CRB and, as I understand his evidence, he was concerned that any investigation into the propriety of the selection interview might delay the recruitment process beyond the time agreed between him as USG and the Secretary-General, and thus reflect upon his performance. He said that, if it had not been for this time constraint, he would have made the further enquiries. Accordingly, he allowed his own interest to affect the adequacy of the enquiry.

32. The USG/DGACM was asked for his reasons for refusing the applicant's request for a preliminary investigation. He testified that he had three factors in mind when he decided that there was no room for a preliminary investigation: first, the marks given to the applicant during the interview; the second, the PCO's detailed comments; and the third was the SA's response to the questions about his conduct. It will be seen at once that these differ in the first and last respects from his memorandum. Even accepting that the difference is simply a failure of recollection, it is obvious that the more reliable evidence is the contemporaneous written record and accordingly I reject this testimony. I point out also that it leaves out of account

the information from PM1, PM2 and PM3, quite apart from the complaint of the applicant.

33. At trial the USG/DGACM testified that, from his point of view, the initial inquiry was completed on 15 July 2008 but that he thought that, in light of the applicant's request for transfer, it might still be considered by USG/DM. He said that his attitude was that, in light of the applicant's request for a transfer and what he considered to be allegations against his objectivity and impartiality, he had passed the matter on to OHRM for further investigation of the applicant's claims if it was thought to be appropriate. He said that he spoke to the OIC/OHRM on 16 July 2008 about the case and told her that since the applicant wanted the investigation to be conducted in the DM, they could do so if they wished and he agreed to send her the e-mails from the panel members. The USG/DGACM also said that he made the further enquiries after he sent the memorandum in order to assist OHRM in making any preliminary investigation which it might think appropriate to make and that he had passed the matter over. This shows, of course, that he did not regard the information from the other panel members as material to the decision he had already made although, as I have already pointed out, he claimed in his e-mail to PM3 that the information was required for *his* consideration of the question. When it was pointed out to him that, far from passing the matter over, he had, on the contrary, requested that the case be closed, his explanation amounted to confused attempts to rewrite the crucial passages in the memorandum and repetition of his claim. Nor could he give any credible explanation for telling PM3 that the matter was still under consideration by him. In fact, the USG/DGACM made no genuine attempt to deal with these issues.

34. There is in evidence an e-mail dated 17 July sending to OIC/OHRM the comments of all the panel members but it does not refer to any discussion of 16 July. It says—

> Further to our discussion on 15 July, and to my Note dated 15 July on the above-mentioned subject ["Request for Investigation, Interview for

> Vacancy Announcement…"], please find attached the comments of all five interview panel members for this vacancy."

No evidence supported the USG/DGACM's claim that he had indicated to OIC/OHRM that he was transferring responsibility for deciding whether there should be a preliminary investigation of SA's conduct to OHRM and although on the face of it, this email is consistent with such a possibility it cannot be regarded as corroborating ASG/DGACM's evidence. The fact that this e-mail does not refer to a discussion of 16 July strongly suggests that no such discussion occurred although it is possible that the omission is merely an oversight. There is nothing in any correspondence which was tendered in the evidence by the respondent which suggests that there was either a proposal to transfer the matter to OHRM or that OHRM agreed to any such transfer. Indeed, the thrust of the later documents is to the opposite effect. In a "chronology" tendered to the Tribunal, the USG/DGACM stated that on 17 July he informed OHRM (by unstated means) that he had no reason to believe SA had engaged in unsatisfactory conduct and had decided not to undertake a preliminary investigation. Since it is clear that he had made the decision on 15 July, this presumably was a communication of that information, although it was not necessary since his memorandum of 15 July had been copied to OIC/OHRM. Of course, as I mentioned above, if indeed he had made the decision on 17 July, this made it even more unreasonable since by that time he had received two further e-mails from the panel members supporting the applicant's complaints.

35. In the result, although I would not infer positively that no such discussion took place with OIC/OHRM, I am simply not prepared to accept the USG/DGACM's evidence that it did.

36. I regret that I have concluded that the USG/DGACM is an unreliable witness in respect of every important issue of fact that is not independently corroborated, although I do not go so far, I should say in fairness, as to conclude that he was actively dishonest. Having paid close attention to his testimony at the time and carefully reread the transcript I must say, however, that I am left with the powerful impression that he was not concerned to tell the truth but thought, rather than being a

witness obliged to tell the truth, he could enter into a self-justifying negotiation and state as fact what was no more than a mixture of surmise and self-serving argument. At the conclusion of his evidence, I informed counsel for the respondent, in substance, that I did not think the USG/DGACM's honesty was in issue so much as his reliability. After having carefully reviewed the evidence in light of the submissions of both parties, reread the transcript several times and listened again to the way in which he gave evidence, I have reluctantly concluded that my initial inclination to explain away the unsatisfactory aspects of his testimony as mere unreliability was mistaken.

37. Obligations both of common courtesy and legal responsibility required the USG/DGACM to inform the applicant of his decision. The whole scheme of allowing staff members to contest administrative decisions affecting them is that they must be informed of them as soon as practicable. He testified that he did not do so because of the applicant's request for a transfer. However, he made the decision *despite* this request. He was asked why he had not simply informed the applicant that he rejected his reasons for seeking a transfer and had made the decision. The USG/DGACM responded it was "because actually he suspected me, so why should I inform him?". The evidence continued—

> Q: Why didn't you say to him, "Your allegations against me are unfounded and unreasonable and I have anyway made a decision that there was no, in substance, no basis to your allegations against [SA]? Why didn't you tell him that? A: For the simple reason that I asked the USG/DM…to investigate that informally. I would not actually speak to someone my subordinate by far – I am older than him by 14 years perhaps – to tell him that your allegations against me are unfounded.
>
> Q: But why didn't you tell him about the decision you have made. A: For the simple reason, your Honour, that he did not want me to conduct this."

Further questions produced no more sensible answer. This evidence strongly reinforces the conclusion that, throughout, the proper performance by the USG/DGACM of his duties was adversely affected by affronted self-importance. It was obviously his responsibility to ensure that the applicant's complaint was properly

handled but because of his personal pique, still evident at the trial, he did not do so. Indeed, in his evidence, he attempted, in effect, to put the blame on USG/DM and complained that she had still not responded to his memorandum to her.

38. (It is unfortunate that USG/DM did not ensure that the applicant was informed of her decision on his request to transfer consideration of his application to her Department but no evidence has been adduced before me as to what occurred from her point of view and it is therefore not appropriate that I should further comment on this aspect of the case. There may well be a perfectly proper and adequate explanation.)

The administrative review and appeal

39. On 21 July 2008 the applicant e-mailed the USG/DGACM, bringing to his attention his request for an investigation of the conduct of the SA and pointing out that he had received no information as to how far the case had proceeded. The USG/DGACM replied on the same day that "the matter has been referred to USG/DM". This was not only less than frank, it was positively misleading, since it suggested that the complaint had not yet been determined whereas, as the USG/DGACM well knew, he had decided it a week before and had requested USG/DM – in effect, for that reason – to close the file without further action except for taking disciplinary action against the applicant. On 30 July the applicant e-mailed the ASG/OHRM complaining that nothing appeared to have happened with his complaint and wanting an urgent meeting. Some hours later the ASG/OHRM e-mailed the applicant to inform him that the USG/DGACM "has advised OHRM that, in accordance with sec 2 of ST/AI/371, he has found no reasons to believe that the SA has engaged in unsatisfactory conduct, and thus has decided not to undertake a preliminary investigation". It is patent that the decision to which the ASG/OHRM referred was that communicated to USG/DM by the memorandum of 15 July.

40. On 27 August 2008 the applicant requested a suspension of action and a review of the administrative decision to decline an investigation into his complaints

about the SA. The decision was confirmed and the applicant, on 30 November, appealed to the Joint Appeals Board.

Conclusion

41. The applicant's appeal must be upheld. The administrative decision by the USG/DGACM that there was no reason to believe that relevant conduct had occurred followed a seriously inadequate initial inquiry, was tainted by personal pique and the process of the appeal and the hearing itself marred by careless and misleading statements with recurring lack of candour. Accordingly, his decision is rescinded.

42. It is obvious from the above narrative of the facts that an initial inquiry, properly conducted, might well lead to the conclusion that a preliminary investigation should be undertaken into the SA's behaviour. The crucial question, when the facts are sufficiently known for the purpose of the initial inquiry, will likely focus on the SA's motives for his conduct. Those motives, of course, might be completely honourable. But they might not be. There appears to be a substantial basis for concluding that the SA had departed, possibly substantially, from the usual conduct expected of members of selection panels and resulted in the differential and potentially adverse treatment of the applicant. As I have already said, much depends on the degree and nature of departure from the usual procedure. The scores noted in the matrix appear to show some bias against the applicant but they might reflect no more than a personal judgment about his suitability. On the other hand, it may be reasonable to infer, if there is adequate reason to believe that the SA substantially departed from the usual and well recognised mode of conducting selection interviews, that this was intentional and, together with the scores that so markedly differed against the applicant and in favour of the other candidates, that there is reason to believe that this was reflective of a personal bias against the applicant. I refer to the applicant's arguments in this respect in my judgment on the motion for summary dismissal and do not need to repeat them here.

43. In light of the necessity for some more detailed information to be obtained from PM1, PM2 and PM3, it is not appropriate – even if it were desirable, which I doubt – for the Tribunal to consider for itself whether there is reason to believe that SA has engaged in unsatisfactory conduct of the relevant kind and, if it decided that it was, to direct that a preliminary investigation should be undertaken.

44. It is a matter of considerable uncertainty whether ST/SGB/2009/7 (provisional Staff Rules) is consistent with ST/AI/371 or has implicitly repealed it. If ST/AI/371 is still operative, I would have ordered that a responsible officer of at least the rank of Under-Secretary-General should conduct an initial inquiry to ascertain if there is reason to believe that SA has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed and that, depending on this decision, the matter is to proceed in accordance with the administrative instruction. However, because of ST/SGB/2009/7, I am inclined to think that this is not now appropriate. I direct the parties to make written submissions within seven days of today's date on the applicable instrument and the appropriate form of order.

Compensation

45. There is no evidence of any economic loss. However, the applicant had a right under his contract of employment to have his request for an investigation fairly and competently considered. This did not occur. Moreover, his application was treated with unseemly disdain and he was subjected to insult, patronizing comments, and retaliatory threats that disciplinary action should be taken against him. These matters comprise a substantial breach of contract and require payment of an amount of compensation sufficient to vindicate the applicant's rights and demonstrate that the criticism of him was completely unjustified. These matters, as with all non-economic loss, are inherently incommensurable. However, this difficulty has not prevented courts throughout the world, nor for that matter, the former Joint Appeals Boards and the UN Administrative Tribunal from awarding compensation. The Tribunal must simply make the fairest judgment it can. At the same time, it is necessary to be careful to avoid awarding exemplary or punitive damages. The purpose of the award

is to compensate the staff member, not to punish the Organization which, at all events of course, cannot be blamed for the USG/DGACM's actions, although it must pay for them. In my view the appropriate award is USD20,000. I order this amount to be paid within twenty-eight days of today's date.

46. It follows from what I have already said about the USG/DGACM's conduct that a question arises as to whether it should be referred to the Secretary-General for possible action to enforce accountability pursuant to art 10.8 of the Statute of the Tribunal. In fairness such a decision should not be made without hearing from the parties. Accordingly, in due course I will notify the parties of a further date for hearing when this matter can be argued. It might well be appropriate that the USG/DGACM, whose interests are directly affected, should be separately represented and I will give favourable consideration to any application made by him to this effect.

47. Having regard to the general importance of this question, I direct that a copy of this judgment be transmitted to the President of United Nations Staff Union in the Secretariat to consider whether the Union wishes to be heard on the application of art 10.8 of the Statute of the Tribunal and to appear at the hearing.

(*Signed*)

Judge Adams

Dated this 6th day of January 2010

Entered in the Register on this 6th day of January 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York