



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/040

Judgment No.: UNDT/2010/024

Date: 8 February 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DIAKITE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Katya Melliush, OSLA

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. On 9 September 2008, the Secretary-General imposed a disciplinary measure against the Applicant that consisted of a written censure and demotion by one grade from P5 to P4, without a possibility of promotion for two years. These measures were based on charges of “fraudulent use of United Nations Mission in Ethiopia and Eritrea (UNMEE) funds, in particular training funds in the amount of USD 8,210, with the intent of defrauding the Organization”.
2. In coming to that decision, the Respondent rejected the unanimous recommendation of the Joint Disciplinary Committee (JDC) contained in report No. 2007-013 dated 31 July 2008 that the Applicant “be reprimanded for having exercised poor judgment about the nature of his travel to Geneva and for his failure to amend his travel authorization on time” and that the Applicant be “reimbursed for the actual expenses in connection with his Geneva trip in the amount of USD¹ 8,210 linking his officially permissible family visit ticket with said trip as well as for his consultations with the Office of the High Commissioner for Human Rights (OHCHR) officials to improve and expand the human rights programme in the mission area”.
3. The Applicant contests before the Tribunal the validity of the disciplinary measure imposed by the Respondent. He claims that the JDC found no evidence of fraud against him. The Applicant also raises objections to the manner in which the allegations against him were handled, from the initial complaint and investigatory process through to its conclusion.
4. The Applicant is seeking full exoneration from any wrongdoing, accountability in the case of those who violated his due process rights, and

¹ United States Dollars

exceptional compensation representing three years salary for the damage to his career and professional reputation.

The facts

5. The Applicant joined the Organization in 1992, serving in the field of human rights and humanitarian issues in Geneva and across various peacekeeping missions in Cambodia, Bosnia and Herzegovina, Croatia, Democratic Republic of Congo, United Nations Mission in the Central African Republic (MINURCA) and the United Nations Peace-building Office in the Central African Republic (BONUCA) and the UNMEE. The Applicant's contract with UNMEE/the Organization expired in January 2009.
6. In July 2005, while visiting the OHCHR at Headquarters (HQ) in Geneva, the Applicant was informed about the Human Rights Training of Trainers (TOT) session initially planned in August 2005.
7. On 10 October 2005, the Applicant expressed interest in participating in the TOT session. On the same day, OHCHR Training Unit in Geneva queried the Applicant whether his Office would be in a position to fund his travel to and from Geneva, including the Daily Subsistence Allowance (DSA). This information was needed before a decision could be made on the final list of participants. The Applicant replied by email on the same day that he "ha[d] already been planning to be in Geneva during the same period and the trip and DSA w[ould] be funded via UNMEE".
8. By memorandum dated 12 October 2005, the Applicant wrote to the Special Representative of the Secretary-General (SRSG) in UNMEE to seek authorization to attend the Human Rights TOT session in Geneva, scheduled from 13 to 21 December 2005. The memorandum was copied to the Deputy Special Representative of the Secretary-General (SRSG) and the Chief

Administrative Officer (CAO). At the bottom of the memo there is a undated handwritten note that reads “OK, SRSG”.

9. Administrative procedures for the Applicant’s travel were initiated by the Training Unit of UNMEE, which is the competent authority to ascertain the availability of training funds. On 15 October 2005, the Applicant submitted a “Nomination Form” to the Training Unit Coordinator in UNMEE requesting a total of USD 5,050.00 to cover 7 days of training from 13 to 21 December 2005 as per the following details: USD 3,001 for transport costs, USD 1,799 for 7 days of DSA and USD 250 for miscellaneous costs (excluding excess baggage). The form was signed by the SRSG on 19 October 2005.
10. On 25 October 2005, the Nomination Form was also reviewed by the Chief of the Civilian Training Unit who estimated the total cost of the training amounting to USD 6,056 and that 75% advance of the total above amount would be paid to the Applicant prior to his travel to Geneva. The form was also signed by the CAO.
11. On 17 October 2005, the Applicant was informed by email sent to the OHCHR training coordinator at HQ that he had not been selected to attend the TOT session in Geneva. The Applicant challenged that decision as he considered that “it was not final”. He did not inform the SRSG about the fact that he had not been selected to participate in the session.
12. On 28 October 2005, the Applicant submitted a Leave Request for Family Visit from 25 December 2005 to 12 January 2006 inclusive (12 days) to the SRSG. By memorandum dated 16 November 2005, the Applicant wrote to the SRSG urging him to approve his pending leave request. On 17 December 2005, the Applicant’s leave request was approved by the SRSG.

13. On 22 November 2005, the Applicant received a letter from a Non-Governmental Organization (NGO) named “Solidarité sans Frontières” confirming his acceptance to participate, in his private capacity, in their Annual Review Session from 20 to 23 December and 27 and 29 December 2005.
14. On 1 December 2005, based on the SRS²’s approval of the Nomination Form for the TOT, a PT8² numbered 06-06-MEE-00376 was issued and the Applicant received a travel advance of USD 2,715.00. On 1 December 2005, the Applicant through his Office collected the advance travel funds representing a portion of the DSA for the trip.
15. On 11 December 2005, the Under Secretary-General for Peacekeeping Operations (USG/DPKO) arrived at the Mission in Asmara.
16. On 18 December 2005, the Applicant flew out of the mission area in Asmara to Geneva and returned to the Mission area on 16 January 2006.
17. On 17 January 2006, the Applicant submitted a leave report covering the period of 30 December 2005 to 15 January 2006.
18. On 20 January 2006, the Applicant also submitted an F-10³ form indicating in the description of expenses as follows: “Original PT8, Boarding Passes, Ticket stub, DSA for the period of 19 to 31 December 2005 for the total of USD 3289 and 01 to 15 January 2006 for an amount of USD 2205 [representing the remaining portion of the DSA and reimbursement of his travel costs]”. He attached the original PT8 and other relevant documents and signed the PT8. At the bottom of the form, the Applicant indicated that the actual departure date had been postponed by one week due to the visit of the

² Travel Claim

³ Reimbursement of expenses/Travel claim

USG/DPKO to the mission area and that he was on annual leave from 30 December 2005 to 15 January 2006. The PT8 form also indicated that there was a claim for DSA for the period 19 December 2005 to 15 January 2006, inclusive of the period during which the Applicant was on annual leave.

19. On 27 January 2006, the UNMEE Personnel Officer requested the Applicant to submit a new Leave Request Form.
20. On 29 January 2006, the Applicant received a letter from the NGO “Solidarité sans Frontières” thanking him for his participation in the Annual Review Session held in Geneva from 20 to 29 December 2005.
21. In a report dated 31 January 2006, the Applicant stated that he was on mission in Geneva from 19 to 29 December 2005 to conduct meetings with five colleagues at the Headquarters in Geneva as well as to attend a review session of an NGO. The Applicant did not specify the dates on which he met his colleagues.
22. On 9 May 2006, the UNMEE Personnel Officer advised the Applicant to re-submit a leave report for the period 27 to 29 December 2005 as it was missing from the Monthly Attendance Record reflecting the actual days of leave already taken. The Applicant’s Assistant confirmed that the Applicant was still on mission in Geneva during that period.
23. On 23 May 2006, the Chief Finance Officer requested the Applicant to advise him on the number of days he actually attended the TOT in Geneva in order to adjust his DSA payment for official travel. On the same day, the Personnel Assistant advised the Finance Section that the Applicant’s official business had been cancelled and that his period of annual leave should be amended from 30 December 2005 to 15 January 2006 to 19 December 2005 to 15 January 2006.

24. On 24 May 2006, the Chief Finance Officer instructed the recovery from the Applicant's salary the amount of USD 8,210.00, comprising the DSA advance and final F10⁴ claim, for the official business trip.
25. On the same day, the Chairman of the Field Service Union of UNMEE (FSU/UNMEE) wrote to the Secretary-General stating that the Finance Section had discovered that the Applicant had not attended the course in Geneva for which air travel and DSA were raised and he had submitted an F-10 for settlement of travel claims. The Chairman alleged that the Applicant had changed his official ticket to proceed on a private travel itinerary without notifying the Mission, although he was aware that the training course had been cancelled.
26. By memorandum dated 1 June 2006 entitled "Reply to memo on Official Travel to attend UNHCR workshop in Geneva December 2005", the Applicant provided the Chief Finance Officer with the following clarification,

*"Although the PT8 No. 6-606-MEE-00376 prepared on 28 November 2005 indicates that CHRO's training session was initially planned from **11 to 24 December 2005** [emphasis added by the Applicant], however, due to last minute changes from OHCHR the session was concluded on **29 December 2005** [emphasis added by the Applicant]. The information about this change, imposed by various readjustments to the initial programme and/or post evaluation exercise of the overall training package by a group of expert participants, was communicated to CHRO few days before my first date of departure. However, due to a visit of USG/DPKO during that period, I delayed my trip after a verbal approval of DSRDG Asmara, OIC. Unfortunately the amendment to the original PT8 could not be done at that*

⁴ Travel Claim.

time given the state of the Mission following the expulsion of staff members of certain nationalities from Eritrea and their relocation to Addis Ababa.

*Therefore, please note that **27-29 December 2005** [emphasis added by the Applicant] was considered as business for my presence in Geneva and not annual leave.*

Additionally, my presence in Geneva should be read from 18-29 December 2005 (11 days excluding all travel times, i.e. Asmara-Geneva via Frankfurt and return to Geneva after my leave). The amended leave request submitted prior to my departure from Asmara was covering the period from 30 December 2005-15 January 2006.

[...] please take into account the above clarifications to proceed with your readjustment, if any, on the next MSA⁵ June payment.”

27. In a follow-up memorandum dated 15 June 2006 entitled “Reply to your memo on UNHCHR workshop in Geneva 13 to 21 December 2005 to the Chief Finance Office, the Applicant wrote the following:

“Reference to our discussion held at my request on 8 June 2006 in Addis Ababa and your subsequent memo on the same subject dated 9 June 2006, please be advised that I have taken note of all your concluding observations. I would however for the record make the following clarification which was omitted from my initial reaction sent on 01 June 2006.

Though I did not participate in the planned training scheduled from 11 to 24 December 05 due to unforeseen reasons, I however had travelled to Geneva as indicated to attend to other official business related matters. I deeply regret that the latter function could not supersede the initially planned one, to therefore allow the retroactive amendment of the original PT8. All attempts to have such official amendment before my departure on 18

⁵ Mission Subsistence Allowance

December 2005 would have proved fruitless due to the prevailing tense mission situation with the ongoing relocation of UNMEE staff from Eritrea to Ethiopia.

Therefore, I concur with your suggestions to undertake all necessary deductions and re-adjustments regarding the days from 18 December 2005 to 16 January 2006 in order to adjust any undue MSA payments.”

28. On 10 June 2006, the Applicant was requested to submit a new Leave Report to accurately reflect his absence from the Mission. On 16 June 2006, the Applicant submitted a new Leave Report indicating that he was on annual leave from 19 December 2005 to 15 January 2006. Recovery payments for undue MSA started to be deducted from the Applicant's salary in June 2006.
29. On 15 June 2006, the Secretary of the Human Rights Council wrote to the Applicant an email "To Whom it May Concern" stating that the Applicant was in Geneva for meetings at Headquarters from 19 to 20 December 2005.
30. On 18 August 2006, an investigation panel was constituted by the CAO following a request of the Administrative Law Unit (ALU), Office for Human Resources Management (OHRM). The panel consisted of three UNMEE officers. In its report of 28 August 2006, the investigation panel detailed its interview with the Applicant regarding the actions taken prior and subsequent to his trip to Geneva. The investigation panel found that the Applicant had travelled to Geneva on official business and received allowances associated with the travel but that he had not attended the Geneva training workshop. The panel also found that the Applicant did not advise UNMEE of the change in purpose of his trip to Geneva until June 2006.
31. On 29 September 2006, DPKO referred the Applicant's case to OHRM for appropriate action.

32. On 7 November 2006, OHRM charged the Applicant with allegations of misconduct for having “fraudulently used UNMEE funds, in particular training funds, in the amount of USD 8,210.00 with the intent of defrauding the Organization”. Under cover of a memo dated 31 January 2007, the Applicant provided his response to the allegations of misconduct. On 3 August 2007, the case was referred to the JDC for recommendation.
33. On 25 December 2006, the former Deputy SRSG of UNMEE wrote a letter entitled “To Whom it May Concern” stating that the Applicant “was formally authorized to leave the Mission area by the SRSG [...] on 11 December 2005”.
34. On 27 December 2006, the Coordinator for the Africa Unit, Capacity-Building and Field Operation Branch, OHCHR, confirmed that the Applicant met with two colleagues on 13 January 2006, during his annual leave period. He also indicated that according to his understanding the Applicant also met with three other colleagues from OHCHR, without indicating any specific dates.
35. On 5 February 2007, the former Deputy SRSG of UNMEE wrote another letter entitled “To Whom it May Concern” stating that the Applicant “was initially authorized by the SRSG [...] on 11 December 2005 to leave the Mission area to attend a training course to be held in Geneva”. He further stated that “when [he] became the interim Head of the Mission and de facto his immediate reporting officer from November 2005 until 14 December 2005 [the Applicant] thereafter told me that although he would not be attending the planned training session for which he had originally requested the approval to go to Geneva, that due to recent serious problems in the mission, he would depart for Geneva for important official consultations on the future of the UNMEE Human Rights Office”.

36. On 12 February 2007, the Applicant wrote to the Secretary-General to challenge the allegations of misconduct brought by the Chairman of FSU/UNMEE of 24 May 2006.

37. On 31 August 2008, a JDC panel issued a report in which it unanimously recommended to the Secretary-General that the Applicant “be reprimanded for having exercised poor judgment about the nature of his travel to Geneva and for his failure to amend his travel authorization on time. The panel further unanimously recommended that the Applicant “be reimbursed for the actual expenses in connection with his Geneva trip in the amount of USD 8,210 linking his officially permissible family visit ticket with said trip as well as for his consultations with OHCHR officials to improve and expand the human rights programme in the mission area”.

38. On 9 September 2008, the Secretary-General rejected the JDC’s recommendation and instead imposed a written censure in addition to a demotion by one grade, from P5 to P4, without the possibility of promotion for two years. These measures were based on charges of “fraudulent use of United Nations Mission in Ethiopia and Eritrea (UNMEE) funds, in particular training funds in the amount of USD 8,210, with the intent of defrauding the Organization”.

39. On 21 July 2009, the Applicant filed an application dated 15 July 2009 before the United Nations Administrative Tribunal (UNAT). Due to the transitional measures on the new internal justice system (ST/SGB/2009/11), the Applicant was requested to refer his case to the United Nations Dispute Tribunal (UNDT) in Nairobi.

40. On 28 August 2009, the Applicant requested an extension of time to file the matter before the UNDT. By an order dated 10 September 2009, the Applicant was granted an extension of time until 18 September 2009.
41. On 18 September 2009, the Applicant filed his application before the UNDT. The Respondent filed a reply on 21 October 2009 and raised the preliminary issue of receivability *ratione temporis*.
42. A status conference was held on 23 November 2009. The Respondent filed a second reply dated 8 December 2009 in which he addressed the case on its merits.
43. A hearing was held on 19 January 2010 with the parties participating from Nairobi and New York, via video-conference. Counsel for the Applicant called two witnesses, including the Applicant himself, and Counsel for the Respondent called one witness. Counsel for the Applicant submitted a bundle of additional documentary evidence at the beginning of the hearing to which reference was made during the examination of the witnesses.

Applicant's Submissions

44. In support of his Application, the Applicant challenges the discretionary authority of the Secretary-General in rejecting the JDC's recommendation to impose a less stringent disciplinary measure. He alleges that the Secretary-General relied on "confused and contradictory assumptions of facts concerning the Applicant's actions that appear to ignore the factual explanations put forward by the Applicant to justify what occurred".
45. The Applicant explains that he was unable to amend the PT8 due to an emergency situation in the Mission at the time. The misreporting on the number of annual leave days and the DSA claimed for the whole period,

inclusive of his annual leave, was due to a mistake on the part of other colleagues.

46. Furthermore, the Applicant avers that, once the trip to Geneva was already approved by the SRSG and his Principal Deputy/SRSG who was the Officer in Charge/UNMEE during the interim period in Asmara, there was no obligation for him to seek any other additional authorization in accordance with the Memorandum of Understanding (MOU) and the Applicant's Terms of Reference (TOR).

47. The Applicant claims that he verbally informed the Deputy SRSG/UNMEE who during the interim period of the SRSG's absence had become his immediate first supervisor.

48. He further claims that he advised his immediate two deputies, who are Human Rights Officers based in Asmara and Addis Ababa, that he had not been selected. Notwithstanding his non selection, the Applicant viewed his presence in Geneva vital for discussions on pertinent policy issues relating to the future of the Human Rights Office at UNMEE.

49. He further states that he held consultations with colleagues at HQ in Geneva and participated in the NGO meeting from 19 to 29 December 2005. During the remaining time, which was from 30 December to 15 January 2006, he was on annual leave.

50. With regards to due process, the Applicant's rights were violated. In spite of the JDC's findings, the Respondent has done nothing to address the serious violations of due process and emotional harm that occurred by his actions.

51. The Administration failed to carry out a proper independent and neutral internal inquiry at the Mission level prior to submitting its findings to the

ALU. The limited interview record provided of the local investigation panel conducted in August 2006 is inaccurate and biased. The Applicant was not afforded an opportunity to object to the composition of the local investigation panel set up by UNMEE and was never asked to review or sign off on it.

52. Recalling UNAT Judgment No. 1026 *Kiwanuka* (1999), the Applicant stresses that the concept of poor judgment is quite different from misconduct. The JDC panel established that the Applicant's action did not involve falsifying documents or presenting a claim that was designed to defraud the organization by the use of false information.

53. The Applicant finally submits that, in judging intentions, some weight ought to be afforded to the Applicant's record of honesty and integrity over an extended period. It should also give due consideration to the mitigating circumstances as the Administration itself was negligent. In taking all these factors into consideration, the conclusions drawn by the Administration in this case appear unfounded and unduly harsh.

54. The Applicant seeks full exoneration from wrongdoing and compensation for the career and personal damage.

Respondent's Reply

55. In his Reply, the Respondent raised the preliminary issue of receivability *ratione temporis*. It was argued that the case was time barred pursuant to Article 7 of the former United Nations Administrative Tribunal (UNAT)'s Statute, according to which an application is not receivable unless it is filed within ninety days from the date on which a staff member received notification of the contested decision. The Applicant filed his appeal before the former UNAT on 15 July 2009, approximately ten months after the notification of the Secretary-General's decision dated 9 September 2008.

56. On the merits, the Respondent considers that the impugned decision was neither arbitrary, nor based on a mistake of fact or law nor influenced by prejudice, bias or some other extraneous factor, and did not amount to an abuse of discretionary authority in disciplinary matters.

57. First, the Applicant did not inform anyone at the Mission in Asmara that he had not been selected to participate in the training course. Secondly, after being notified of his non selection to the TOT session, he continued to take steps to obtain training funds for the said training course. Thirdly, the Applicant did not inform anyone at the Mission that he did not participate in the training course for which the training funds had been allocated.

58. The Applicant's explanation that he did not inform the SRSG of UNMEE immediately about his non-selection to the TOT session was because "it was not final" is not persuasive. Evidence shows that there was nothing conditional or preliminary about OHCHR's rejection of the Applicant's application, as notified to him on 17 October 2005. Despite the negative reply, the Applicant initiated an UNMEE training Nomination Form on 19 October 2009 for participating in the Geneva training workshop. The Applicant received air travel and DSA advance and flew to Geneva on 18 December 2005.

59. Further, upon his return, the Applicant took steps to obtain further travel funds for the training course that he did not attend, and, in a letter dated 1 June 2006, the Applicant falsely maintained to the Chief Finance Officer that he had participated in the training course from 18 to 29 December 2005 and that he was on annual leave from 30 December 2005 to 15 January 2006.

60. Based on the evidence on the record, the Respondent considered the Applicant's actions to be a serious violation of the standards of conduct and integrity expected of staff members.
61. The disciplinary measures imposed on the Applicant were proportionate and did not constitute an abuse of authority.
62. The Applicant's due process rights were respected throughout the disciplinary process. Recalling former Staff Rule 110.4 governing the disciplinary proceedings, the Applicant was given the opportunity to know and respond to the allegations against him during the course of the investigation. He was also given the opportunity to comment on the charges against him on 31 January 2007.
63. The Applicant's pleas for compensation should be rejected. The decision was proportionate and his due process rights were respected.

Preliminary Issues

Receivability

64. In the present case, an order was issued on 10 September 2009 by UNDT Judge Nkemdilim Izuako to grant an extension of time to the Applicant to enter the matter before the UNDT within seven days. The Application was filed on 18 September 2009 before the UNDT. The issue of receivability therefore does not arise.

Tribunal's Review of the Case

The Role of the Tribunal When Reviewing Disciplinary Matters

65. The role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. The Tribunal is in no way bound by the findings of the JDC or the Secretary- General on the facts disclosed.
66. The Tribunal notes that the current case was governed by the provisions of ST/AI/371 on the *Revised Disciplinary Measures and Procedures* and that, in accordance with paragraph 9(c) of this administrative instruction, OHRM referred the Applicant's case to the JDC for recommendation.
67. When, as in the current case, the Tribunal is in possession of the report of the JDC, which includes its findings and recommendations, its task is to review the facts and determine whether the facts give rise to misconduct and to evaluate the seriousness of that misconduct. If the Tribunal concludes that misconduct has been established it has to determine the gravity of that misconduct and consider whether the sanction imposed is proportionate to the act of misconduct.

Burden and Standard of Proof

68. In disciplinary matters, the Respondent bears both the legal and evidentiary burden to provide evidence that raises a reasonable inference that misconduct has occurred⁶. Once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question⁷. If there is a hearing, as is invariably the case, and given the civil nature of the proceedings, the Applicant will begin by stating his/her version of the case. That procedure in no way impacts on the respective allocations of the burdens of proof.

⁶ See United Nations Administrative Tribunal (UNAT) Judgment No. 897, *Jhuthi* (1998).

⁷ See UNAT Judgment No. 1023, *Sergienko*, referring to Judgments No. 484, *Omosola* (1990) and *Patel*, *Ibid*.

69. The next issue for determination is the standard or degree of proof required in a disciplinary case. In a number of cases decided by the former UNAT terminologies like “supported by cogent evidence” or “ample evidence” (Judgment No. 529); “conclusions supported by evidence” (Judgment No. 756); “allegations are well founded” (Judgment No. 797); “ample evidence to conclude” (Judgment No. 897); “whether the findings of fact are reasonably justifiable and supported by the evidence (Judgment No. 616) have been used to explain and lay down the principle relating to the degree of proof required to prove an act of misconduct. In Judgment No. 1428, the UNAT held that the Respondent “need not establish beyond reasonable doubt a patent intent to commit the alleged irregularities”.
70. It is the view of the Tribunal that the use of terminologies in the abstract without any explanation belong more to the realm of academics. What is required in practice is the formulation of a rule that clearly denotes what the task of the Tribunal is in determining the evidence presented in relation to the charge or charges.
71. The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected *en bloc*. The Tribunal should examine each

piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

72. Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is sufficient to lead to the reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit the conclusion that the burden of proof has been met? The exercise involves a careful scrutiny of the facts, the nature of the charges, the defence put forward and the applicable rules and regulations.

Findings on the allegations of misconduct

73. Notwithstanding the fact that the Applicant had been informed, on 17 October 2005, that he had not been selected for the TOT session in Geneva, the Tribunal notes that the Applicant initiated a Nomination Form on 19 October 2005 for participation in the TOT session in Geneva.
74. The Tribunal further observes that the Applicant did not take appropriate action by informing the SRSG in a timely manner, meaning in October 2005 shortly after he had been notified of his non-selection on 17 October 2005. However, he did not do so as he did not consider the decision not to select him as “final”.
75. It is not clear as to when the Applicant informed the Deputy SRSG of his non-selection to attend the TOT session in Geneva. It is assumed that he verbally informed the Deputy between November 2005 and 14 December 2005 when the Deputy was OIC and his immediate reporting officer.
76. Let alone the fact that the Applicant had verbally informed the Deputy SRSG of his non-selection, the Tribunal notes that he did not prevent, with the full

knowledge of his non selection for the TOT session in Geneva, the issuance of a PT8 on 1 December 2005, based on the SRSG's approval of the Nomination Form for the TOT, and the Applicant received a travel advance of USD 2,715.00. As a result of his silence, the PT8, originally issued for the training in Geneva, was not amended to reflect a change in the purpose of the travel of the Applicant to Geneva. The Tribunal notes that the Applicant explained that he could not do so owing to the tense situation in the Mission at the time.

77. The crux of the matter is that the Applicant had received a negative answer with regards his request to participate in the TOT in Geneva. Nevertheless, the Applicant did not comply with his duty to inform the SRSG in a timely manner nor, most importantly, the administrative staff who raised his PT8 about his non selection in order to ensure that his Nomination Form for the training was not processed or, instead, to have the PT8 amended by the Administration to reflect his new situation.

78. When the Tribunal asked the Applicant why it was so imperative for him to proceed to Geneva, after he had been made aware that he had not been selected, he stated that his presence was needed in Geneva for the purposes of consultations with the HQ in Geneva on the fate of the Mission in Asmara because the Mission was encountering problems with the host country.

79. The Tribunal notes that the Deputy SRSG confirmed in *post-facto* letters having given a verbal approval to the Applicant. However this is not sufficient. The Tribunal is of the view that the Applicant did not provide any evidence that the SRSG, as Head of the Mission in Asmara, had mandated the Applicant to go to Geneva to discuss the future of the Mission. Nor did the Applicant present evidence of any authorisation from the appropriate authorities in the Organisation to justify his presence for consultations.

80. Besides, when the Applicant filled his PT8 form, he claimed DSA for the period he would spend in Geneva for training purposes when he was fully

aware that he was proceeding there to meet with an NGO or to have consultations with colleagues at HQ. As the purpose of his travel had changed he used funds earmarked for training for a different purpose without obtaining prior written authorisation. The Applicant stated that the deputy SRSG who was OIC in the absence of the incumbent had verbally authorised him to proceed to Geneva on a changed purpose. On that issue, the CAO stated during the hearing held on 19 January 2010 that the Deputy SRSG had no power to give such an authorization verbally and that the standard administrative practice is to give such authorisation in writing. Such evidence coming from the CAO, as the Head of Administration in the Mission in Asmara, should be given due weight.

81. Further, on his return from annual leave, after attending meetings with colleagues at the OHCHR and a session with a NGO in Geneva, the Applicant did not amend the PT8 form to reflect the true nature of his travel to Geneva. Additionally, the Tribunal notes that there was a claim for DSA for the period January 2006 when he was on annual leave. Admittedly there was a note on the PT8 that, during January, the Applicant was on leave but this is not sufficient to absolve him. He received the DSA for the period he was away from the mission, including the period when he was on annual leave. He stated that his assistant went to get the DSA and that there was no mistake on his part and that the finance section was to be blamed for the payment of the DSA.

82. It is the Tribunal's view that the Applicant should never have taken that DSA either directly or vicariously as he was simply not entitled to it, especially since no amendment had been made, as it should have been, to the PT8. Even after he had received that money he kept silent for about six months until an investigation was initiated in the case in June 2006. He could not give a satisfactory explanation as to why he kept silent for so long. When questioned by the Tribunal, the Applicant stated that he would have returned that money.

He also added that he had made a mistake. In the view of the Tribunal this was more than a mistake or poor judgment; it was an act of serious misconduct.

Has the Respondent discharged the burden of proof?

83. The Tribunal has evaluated the documentary and oral evidence adduced on both sides. The evidence involves a number of references to the procedures that are applicable to staff members going on training or mission. In that exercise the Tribunal had also the task of interpreting the applicable rules. The Tribunal addressed the following issues: the authorisation that should be obtained by a staff member before leaving his duty station to attend a training or going on an official mission; the person having the authority to give such authorisation; whether the authorisation should be in writing according to the well settled bureaucratic practice of the Organisation; the precise use of funds for training and other missions; the duty of a staff member to alert the Administration about any change in the purpose of a travel; the duty of the staff member to make necessary amendments to any appropriate forms used for travel purposes if the circumstances so warrant. The Tribunal is satisfied that the Respondent discharged its burden of proof.

Did the Respondent make proper use of his discretion?

84. The Tribunal considers that in reviewing the exercise of the discretion of the Respondent the following questions must be addressed. First, were the facts presented to the Respondent credible? Secondly, did the Respondent draw the proper inferences from the facts? Did the Respondent act in defiance of due process? Did the Respondent apply the wrong rules or regulations? Did the Respondent overlook any vital piece of evidence? Did the Respondent consider the defence of the Applicant? Was the decision of the Respondent prompted by any personal motive? Did the Respondent show any bias against

the Applicant? If one or more of the questions is answered in the negative it may be concluded that the discretion vested in the Respondent was not properly exercised.

85. On the issue of the probative value of the evidence the Tribunal has highlighted above that the evidence presented by the Respondent in support of the charge was capable of belief and that there is nothing to indicate that in arriving at this conclusion the Respondent did not consider all the facts for and against the Applicant.

86. On the issue of due process under the relevant provisions of ST/AI/371, the Respondent informed the Applicant of the charges and gave him an opportunity to respond. Under the former system the Applicant had to be informed of the charges and be given an opportunity to respond. That was done. All the materials of the investigation, the response of the Applicant and the proceedings and findings of the JDC were before the Respondent. There is no reason to believe and there is no evidence to conclude that the Respondent has not considered all this evidence before coming to his decision. No complaint can be found on that issue against the Respondent.

87. On the issue whether the Respondent drew the proper inferences from the evidence in concluding that the Applicant had committed a fraudulent act the Tribunal cannot see how the Respondent or any reasonable person or a Tribunal of fact could have come to any other conclusion.

88. The Applicant has made general complaints of bias, improper motives or abuse of process against the Respondent. These are serious allegations that need to be established by persuasive and cogent evidence, and not merely by general statements. The Tribunal was not provided any evidence by the Applicant to establish that the Respondent acted out of improper motive, was biased or had made a wrong application of the relevant rules of regulations.

Nor was there any cogent evidence from which such adverse findings could be reached and inferences could be drawn against the Respondent.

Was the sanction proportionate to the act of misconduct?

91. The Tribunal notes that the Applicant was a senior official in a peace-keeping mission. He did not follow the appropriate procedure to travel. He used funds earmarked for purposes other than attending the TOT session in Geneva. He alleged that the future of the mission in Asmara depended on consultations he should have or had in Geneva. There was no evidence of this fact. He claimed and was paid DSA to which he was not entitled. He kept silent about that fact for about six months. Had not an investigation started in that case he would, given the sequence of events and his attitude, have kept that money.

92. It is a fact that the Applicant has an unblemished record with the Organisation. But an unblemished record is not in itself a gateway to breaching the rules of the Organisation. Nor does an unblemished record automatically qualify for mitigating factors to be applied. The mitigating issue must be analysed in the light of the evidence establishing the misconduct, the manner in which the act was perpetrated, the attitude of the wrongdoer and the need to protect the integrity of the Organisation. Taking all these factors into consideration the Tribunal concludes that the sanction imposed by the Respondent was not disproportionate to the serious misconduct that was established.

93. In view of the foregoing, the Tribunal rejects this application entirely.

Case No. UNDT/NBI/2009/040

Judgment No. UNDT/2010/024



Judge Vinod Boolell

Dated this 8th day of February 2010

Entered in the Register on this 8th day of February 2010



for ABENA KWAKYE-BERKO

Jean-Pelé Fomété, Registrar, UNDT, Nairobi