UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/013/ UNAT/1603
Judgment No.: UNDT/2010/171
Date: 24 September 2010
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Elizabeth Brown, UNHCR

Introduction

1. On 12 November 2007, the United Nations Administrative Tribunal received an appeal against the Secretary-General's decision to impose on the applicant the disciplinary measure of summary dismissal for serious misconduct. The applicant was at the time of the dismissal working in a UN Refuge Agency (UNHCR) country office. The Administrative Tribunal did not consider this appeal which was transferred to the Dispute Tribunal on 1 January 2010 in accordance with sec. IV, para. 45, of United Nations General Assembly Resolution 63/253 and sec. 4 of ST/SGB/2009/11 concerning the transitional measures related to the introduction of the new system of Administration of Justice.

2. The former Administrative Tribunal dealt with appeals against administrative decisions, and in this case the staff member is appealing against the decision of the Secretary-General to impose the disciplinary sanction of summary dismissal. This Tribunal's task and judicial function is similar to that of the Administrative Tribunal albeit under different internal legislative arrangements and procedures. Although there is no judicial hierarchy in that the Dispute Tribunal is not bound by the jurisprudence of the former system, this Tribunal recognizes that the Administrative Tribunal dealt with many similar problems and that the Dispute Tribunal may often derive much assistance in considering their judgments which though not binding are of persuasive authority. However, in discharging its judicial functions this Tribunal also needs to have regard to the underlying reasons for the establishment of the new system of internal justice comprising the current Dispute and Appeals Tribunals.

Applicable principles for the scope of review of this Tribunal in disciplinary cases

3. In reviewing decisions relating to dismissals, the Dispute Tribunal's task is to consider whether the Secretary-General had a reasonable and proper basis to find that the charge of misconduct was proven. If so, the next question is whether, given the broad

discretion enjoyed by the Secretary-General in disciplinary matters, he had sufficient grounds to conclude that the disciplinary offence had been committed. If such an offence had been committed, the Dispute Tribunal will consider whether it was of sufficient seriousness to meet the test of serious misconduct which could attract the ultimate sanction of summary dismissal. In considering the penalty imposed, it would be necessary for this Tribunal to address the question whether, notwithstanding the Secretary-General's wide discretion, how and on what basis was this discretion exercised in the particular case and, in the circumstances, was the disciplinary sanction imposed disproportionate to the severity of the offence.

4. One of the questions the Dispute Tribunal has to address is whether the material used by the Secretary-General was itself obtained by proper means and without violating the staff member's due process rights. If this test is satisfied, the Tribunal has to remind itself that the proportionality of a disciplinary penalty is a matter of judgment. In exercising such judgment, it would be necessary to ensure that, amongst other matters, the principle of consistency is applied. This means that where staff members commit the same or broadly similar offences, in general, the penalty should be the same; not necessarily identical but within a very narrow range of appropriateness. This does not mean that the Tribunal is seeking to challenge the Secretary-General's broad discretion but to assert the principle that decisions and the reasons for them should meet the test of rationality, transparency, consistency and proportionality. On the question of rationality, one has to ask whether any reasonable decision-maker ignored, disregarded or overlooked any significant material factor which explained the reasons for the act of misconduct, for example, whether there was there any duress operating in the mind of the wrongdoer that was substantially causative of the act in question. Further weight must be given not only to the actual act of misconduct but to the underlying reason for it, which may fairly and rationally amount to mitigation of the severity of the offence, such as to justify a sanction falling short of summary dismissal.

5. In *Kouka* UNDT/2009/009, the Dispute Tribunal quoted with approval the Administrative Tribunal's Judgment No. 941 *Kiwanuka* (1999) which sets out certain

requirements which comply broadly with the principles of natural justice and internationally recognised standards for reviewing administrative actions in relation to disciplinary matters in an employment context. These requirements are wholly consistent with the principles enshrined in the UN Charter guaranteeing fundamental rights and recognizing duties and responsibilities of both staff members and managers. The following list of applicable principles, enunciated in *Kouka*, is not exhaustive but constitutes the core requirements underpinning the system of internal justice in disciplinary cases:

a. Whether the facts upon which the disciplinary measures were based have been established, i.e., whether the findings made are reasonably justifiable and supported by the evidence.

b. Whether the facts established legally amount to misconduct or serious misconduct.

c. Whether there has been any substantive irregularity, for example, a failure to consider relevant facts or whether irrelevant facts have been considered.

d. Whether there has been any significant procedural irregularity.

e. Whether there has been any improper motive or abuse of process.

f. Whether the disciplinary measure imposed is lawful.

g. Whether the disciplinary measure is proportionate to the proven misconduct.

h. Whether the Administration acted in an arbitrary manner in its exercise of discretionary power.

Relevant legal instruments

Misconduct

6. Article 101.3 of the United Nations Charter provides that in exercising responsibility for the appointment of staff the Secretary-General shall give paramount consideration to employing staff of "*the highest standards* of efficiency, competence and *integrity*" (emphasis added).

7. Staff regulation 1.2 (basic rights and obligations of staff) elaborates on the duties and obligations of staff members as international civil servants and includes the following:

> …
>
> (b) Staff members shall uphold the highest standards of ... integrity. *The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;*
>
> …
>
> (e) … Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants;
>
> (f) … [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations.
>
> (g) *Staff members shall not use their office* or knowledge gained in their official functions … *for the private gain of any third party* …
>
> …
>
> [emphasis added]

8. At the material time (3 December 2003), the power of the Secretary-General to dismiss a staff member for serious misconduct was provided for in former staff regulation 10.2, which stipulates that:

> The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.
>
> The Secretary-General may summarily dismiss a member of the staff for serious misconduct.

9. Former staff rule 101.2 (basic rights and obligations of staff) states that:

> (d) Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

10. Former staff rule 110.1 concerning unsatisfactory misconduct provides as follows:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

11. Former staff rule 110.3(a) concerning disciplinary measures provides for the following sanctions:

> (a) Disciplinary measures *may* take one or more of the following forms:
>
> (i) Written censure by the Secretary-General;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for within-grade increment;
>
> (iv) Suspension without pay;
>
> (v) Fine;

> (vi) Demotion;
>
> (vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;
>
> (viii) Summary dismissal.
>
> …
>
> [emphasis added]

Disciplinary proceedings

12. The rights of staff members to due process in the investigation of alleged disciplinary offences is provided for under former staff rule 110.4(a) concerning due process which states that:

> (a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations.
>
> (b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate ...
>
> …
>
> (d) An appeal in respect of a disciplinary measure considered by a Joint Disciplinary Committee pursuant to either paragraph (b) or (c) may be submitted directly to the United Nations Administrative Tribunal.

13. Section II, paragraph 7, of ST/A1/371 provides:

> The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take into account the seriousness and complexity of the matter. …

Events leading to the disciplinary charges

14. After a series of previous short-term appointments, from August 1996, the applicant was employed on a fixed-term appointment. At the time of her dismissal, she was a senior protection assistant. The events in question took place in 1998 when, as part of her duties, the applicant conducted interviews and took basic information for the registration of individual cases of persons who were seeking resettlement in other countries as refugees. In relation to one of those cases, it was alleged that a person, who was brought by an Afghan refugee-seeker as an interpreter, subsequently obtained employment as a "protection clerk" in the same UNHCR office. The refugee was resettled abroad after her case was put before a resettlement selection committee. The committee was not informed of a relationship between the protection clerk and the refugee-seeker. Had the committee been aware of that relationship, it would appear that it could have affected the application of the refugee. During the committee's deliberations both the applicant and the protection clerk were present. The applicant's assertions, which seem credible, were that the refugee-seeker's case was put before the committee by the senior protection officer and the head of the UNHCR office at the time ("the head of office"). It would be reasonable to infer from the evidence that both of them probably knew, or, alternatively, had reasonable grounds to believe, that there may have been a relationship between the refugee-seeker and the protection clerk.

15. The evidence relating to the breach of conduct on the part of the applicant within the refugee protection and resettlement program came to light as a result of the applicant voluntarily revealing, in the course of an enquiry into the actions of the protection clerk, that she had altered the data on the original registration form ("the form").

16. The applicant accepts that she modified the individual case file of the Afghan refugee-seeker by deleting the protection clerk's name from the form. This had the effect of concealing the relationship between the refugee-seeker and the protection clerk. Furthermore, when the refugee-seeker's application came before the resettlement selection committee, neither the applicant nor the protection clerk revealed the fact that

the form had been altered. In the course of the disciplinary proceedings, she provided two explanations for not having done so: 1) not to get the protection clerk into trouble, and 2) she was instructed by the head of office to make the alteration. In her evidence to the investigation and in subsequent written responses, she described a whole series of what could only be categorised as gross violations of proper procedures in the refugee resettlement programme. In addition, she described an extremely oppressive working environment with the head of office behaving in a high-handed manner instilling fear of reprisals on the part of junior staff.

17. The applicant's detailed allegations, which have a remarkable degree of coherence and credibility, caused the Joint Disciplinary Committee (JDC) to conclude their Report with the following recommendation at para. 45:

> … the panel unanimously concludes that the detail and breadth of the allegations the applicant raises in her request for review merited further enquiry. It therefore unanimously recommends that an investigation be conducted by a neutral investigative body outside UNHCR such as OIOS.

Due process

18. The applicant was given notice of the charges against her, she was provided with a copy of the preliminary investigation report. She was informed that she had the right to obtain the assistance of counsel, and, finally, she was given a reasonable opportunity to respond to the allegations against her.

19. However, the principles affecting due process rights do not start and end with the procedural requirements of the investigation alone. In considering appropriate sanctions certain other due process principles would also apply. It is questionable whether her due process rights were respected in the course of disciplinary proceedings, when the focus of the investigation was in every sense solely on her behaviour. Insufficient weight was given to the context of the oppressive working environment created by the head of office, whose conduct was described not only by the applicant, but also by a former resettlement consultant, whose role at the UNHCR duty station at the time was to conduct independent

investigations into activities relating to refuge-seekers. The resettlement consultant's views are recorded in the exchange of e-mails attached to the preliminary investigation report, which was appended to the applicant's statement of appeal to the Administrative Tribunal with a handwritten notation describing it as "Annex 5(g)".

20. The applicant complained that proper attention was not given to the information provided regarding the way in which the system operated. It is clear from the JDC report that the JDC panel did look into these allegations and, in fact, recommended that the applicant's allegations about the conduct of certain individuals including the head of office and the protection clerk, in relation to resettlement matters, fell short of the standards expected of them as international civil servants and needed to be investigated. According to the respondent, the protection clerk, who was particular implicated in the misconduct issue and other matters, were dismissed, while it appears that no disciplinary proceedings were initiated against the head of office.

21. The applicant made allegations against named individuals at the UNHCR duty station describing conduct which fell short of what is expected of international civil servants and providing names and details of the alleged misconduct. She asserts that there has been a disparity of treatment in that those individuals appeared to have been protected, particularly the head of office, whereas she paid the penalty for an inadvertent transgression which was not intended or designed to benefit her in any way. The respondent submits that the decision was proper and that the burden of proving an improper motive rests with the applicant. Whilst this may be a correct statement of principle in a long line of cases from the former Administrative Tribunal, the question that has to be addressed is how precisely should this burden be discharged bearing in mind the need to discourage frivolous and mischievious allegations but at the same time recognizing the difficulties faced by a staff member who is unable to produce the kind of hard evidence that is expected by an investigating body. It would be wholly inimicable to the principles enshrined in the UN Charter to ignore a coherent and consistent account of violations of the fundamental principles of the Charter, particularly where these allegations resonate with the concerns expressed by an independent external expert, i.e.,

the resettlement consultant. Whilst a proper enquiry into the alleged misdeeds of others, in this case particularly those of the head of office, should not excuse liability for the commission of the actual offence by an individual, it will explain the circumstances in which it took place. This would be important in order to assess whether there was any duress which caused or contributed, in any significant way, to the commission of the offence. It will almost certainly have a direct relevance to an assessment of the appropriate penalty.

22. In circumstances such as those that existed in the workplace at the UNHCR duty station at the time, it was extremely difficult for a junior member of staff to be in a position to produce the hard factual evidence that would be required. Accordingly, where the allegations made by the staff member concerned appear to be credible, consistent and corroborated, there should be an expectation that the management concerned will conduct a thorough investigation. There are no indications that in this case such an investigation had been conducted notwithstanding the abovementioned unanimous recommendation of the JDC, the observations of the resettlement consultant, and the applicant's detailed comments. Such a failure amounts to a substantive irregularity in that there was a failure to consider and to take into account material facts and factors that would enable a fair decision to be taken in relation to the severity of the misconduct and the assessment of the appropriate sanction, it being accepted by the applicant that she had acted wrongly in altering the form.

Mitigation

23. In mitigation, the applicant points out that there was a lack of transparency and good governance in the refugee resettlement programme at the UNHCR duty station and that the head of office was particularly at fault in bending the rules and in generally bullying the staff. When asked why she did not initially say to the investigators that she altered the refugee's form upon instructions by the head of office, she said she was afraid of the consequences of doing so because she would have been retaliated against. In commenting on this particular aspect, the respondent has expressed the view that, as a

lawyer, the applicant should have known the seriousness of altering a form and she ought to have stood up to the head of office. Whilst this is a statement of principle which is difficult to challenge, it nevertheless fails to take into account the practical realities of the workplace and how acts of bullying and harassment by those in power could have such a deleterious effect on junior members of staff that they would comply with unlawful instructions until such time as they are enabled to report them in circumstances of safety. In fact, the applicant made a full disclosure of all these matters after the head of office left the UNHCR duty station. The Tribunal takes judicial notice that such behaviour is consistent with the well recognised pattern of conduct in working establishments that are run by bullying and harassment which undermines the individuals' self-esteem and confidence. To expect a junior staff member to stand up to a bullying manager is, in the circumstances of this case, to expect too much and fails to recognize the phenomenon so well articulated in the UN's policy on bullying and harassment as expressed in former staff rule 101.2(d), as recited above, and the Information Circular, "Our core values prohibit discrimination and harassment" (ST/IC/2003/17), para. 3, which states that, "The Organization cannot tolerate discrimination and harassment in any form. Any infraction will be taken very seriously". Furthermore, the allegations against the head of office, if proven, would have contravened the principles of the Charter.

24. It is, nevertheless, important to emphasise that none of this excuses the act of tampering with a refugee-seekers's original registration form to conceal vital data. However, it seems plain that neither the majority members of the JDC panel, nor those advising the Secretary-General, gave sufficient credence to what appears to be legitimate complaints and concerns of bullying and harassment in the workplace by way of mitigating the failure on the part of the applicant to refuse to carry out an instruction of the head of office or to speak up at the meeting of the refugee research resettlement selection committee. It is clear that had she done so, it would have constituted persuasive mitigation in relation to her earlier act of altering the form.

25. The applicant makes much of the point that she did not alter the form for personal gain or to harm UNHCR, and it is accepted by the respondent that the applicant did not

alter the form as a result of attempting to gain personally. Whilst a benign motive may, in appropriate circumstances, constitute mitigation in relation to penalty, it does not affect the fact that the act in question had been done and that it was in breach of the terms of her appointment and the duty to carry out her day to day tasks with integrity. The same point applies to her assertions that her past good service record was not taken into account. A good service record is not an irrelevant consideration as mitigation of the severity of an offence. However, each case has to be looked at on its own merits. In this case there are two issues to be considered. In the first place, the need to safeguard the integrity of the UN's systems and procedures in relation to the resettlement of refugees has to be given significant weight. UNHCR has carefully devised protocols with various member states in relation to their receipt of refugees for resettlement. As an organization, UNHCR cannot afford to countenance any attack on the integrity of those systems. There was a sufficiency of information, based primarily on the applicant's admission that was supported by documentation, that she breached an important procedural requirement closely connected with her duties and which concerned the essence of the aims, objectives and functions of UNHCR to protect refugees. In those circumstances, the finding of misconduct is justified. It is questionable in the absence of proper enquiries and consideration of the element of duress that the misconduct could properly be categorised as "serious misconduct" albeit the act of altering the application form of a refuge-seeker is serious.

26. However, the extreme sanction of separation from service by summary dismissal is not an inevitable consequence given the staff regulation and rules, which provide for a range of sanctions (see former staff regulation 10.2 as well as former staff rule 110.1 and 110.3(a), recited above). Were there sufficient mitigating or other factors of significance that ought to have been taken into account but were not? What is the norm set by UNHCR in relation to findings of serious misconduct that strike at the very integrity of the organization? Is UNHCR consistent in the manner in which it imposes disciplinary sanctions for serious breaches? Finally, is there evidence of a failure or reluctance to tackle or enquire into information or evidence which could reasonably suggest that the

issue of individual misconduct has taken place within a structure of systemic abuse and mismanagement undermining the very ethos and principles found in art. 101.3 of the UN Charter and staff regulation 1.2?

27. The appropriateness of the sanction is a matter for the discretion of the Secretary-General. However, the exercise of the discretionary power vested in the Secretary-General to determine the appropriate level of the sanction for serious misconduct is also subject to the overriding requirements to do justice and to have as its guiding principle the principles and values enshrined in the Charter of the United Nations. All the facts and circumstances have to be considered, including mitigating factors. In this case, sufficient weight should be given to both the majority and the minority views of the JDC Panel members. The unanimous recommendation, at para. 45 of the JDC report (recited above in para. 15), that a full enquiry should be conducted into the serious allegations of misconduct made by the applicant has not been acted upon. Those advising the Secretary-General had a duty to draw attention to this recommendation as well as to the comments of the dissenting panel member on the issue of disparity of disciplinary sanctions imposed by UNHCR for proven cases of serious misconduct. This member referred to a case involving thirty-two staff members who had submitted fraudulent claims. Ten of them were summarily dismissed and twenty-two remained in service because they had submitted fewer fraudulent claims.

28. By Order No. 230 (NY/2010), the respondent was asked to state what steps, if any, they took to investigate the applicant's allegations that the head of office instructed her to remove from the refugee-seeker's form information indicating that she was related to the protection clerk and what steps did they take to give effect to para. 45 of the JDC's report recommending that an investigation be undertaken by a neutral body.

29. In answer to this question, the respondent stated that enquiry made with the Inspector General's office of UNHCR indicated that none of the senior staff of the Inspector General's office at the time that the JDC issued its report are currently in the office, in particular, the Inspector General and Head of Investigations Service. Therefore,

an intensive search was made of the investigation service database and case files with the result that no follow-up action in the form of an investigation in relation to the head of office or in relation to the JDC recommendation could be found. Former staff in the Inspector General's office were also contacted, but could not recall any follow-up action.

30. From this it may be inferred that notwithstanding the very serious allegations that emerged in the course of the JDC panel's investigation and the detailed information provided by the applicant supported by the independent resettlement consultant, no disciplinary enquiry was instituted into the various shortcomings in the way in which the refugee resettlement programme was being conducted at the time at the UNHCR duty station. It is no surprise that the applicant should express the view that malpractices on the part of more senior personnel were being overlooked. In justifying the disciplinary sanction against the applicant, the respondent relies on the fact that altering the form of a refuge-seeker struck at the very core of UNHCR's functions. What then of fraud perpetuated on UNHCR? Is this a less serious offense? Furthermore, do the serious allegations made by the independent resettlement consultant, the unanimous recommendation of the JDC and the applicant's allegations not strike similarly at the very integrity of UNHCR as a humanitarian agency reliant on public funds?

31. The applicant has admitted altering the form of the refugee-seeker in order to delete references to her relationship with the staff member. This admission was made in the course of the investigations into allegations of misconduct on the part of the protection clerk. The respondent accepts that the evidence provided by the applicant was a key factor in the decision regarding the staff member who was subsequently dismissed for a breach of staff regulation 1.2.

Conclusion

32. The respondent had sufficient grounds to believe that the applicant had, by altering the form, breached a fundamental requirement safeguarding the integrity of the

refugee resettlement programme of UNHCR. This amounts to serious misconduct and is in breach of staff regulation 1.2.

33. However, the failure to have due regard to the evidence that the misconduct took place in an oppressive work environment and by not giving effect to the unanimous recommendation at para. 45 of the JDC report, the SG effectively deprived himself of material which would have placed the misconduct in its proper perspective and context so as to arrive at a proper assessment as to where to pitch the appropriate sanction.

34. Whilst a benign motive does not necessarily absolve a person from liability for misconduct it could, in certain circumstances, together with other factors which have been identified in this Judgment affect choice of appropriate penalty under former staff rule 110.3(a) which provides for a range of eight different measures.

35. In all circumstances, the Tribunal finds that the penalty of summary dismissal was disproportionate. The parties are invited to make submissions on the appropriate remedy to be awarded to the applicant, including on what possible sanction(s) should be imposed on the applicant.

IT IS ORDERED THAT—

1. The decision to summarily dismiss the applicant be rescinded.

2. The parties are to file and serve submissions in the following sequence:

    a. The applicant is to file and serve her submission on remedy by 22 October 2010.

    b. The respondent is to file and serve a response on 12 November 2010.

    c. The applicant is to file and serve her observations to this response by 19 November 2010.

3. Alternatively, if the parties consider that, in the circumstances of this particular case, they should discuss and agree the remedy they are at liberty to do so and inform the Tribunal so that an appropriate consent Order may be issued.

(*Signed*)

Judge Goolam Meeran

Dated this 24th day of September 2010

Entered in the Register on this 24th day of September 2010

(*Signed*)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry