UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/070/ JAB/2009/020
Judgment No.: UNDT/2010/069/ Corr.2
Date: 26 April 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Rose Marie Dennis, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Notice: This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. This case concerns the placement, after his separation from the Organization, of a note adverse to the applicant on his personnel file. The applicant, under former staff rule 111.2(a) requested an administrati

4. This judgment repeats some but not all of the earlier discussion for the purpose of placing the legal and factual questions in context.

Applicant's submissions

5. The note implies that the applicant may have committed misconduct, and he is therefore entitled to require the Secretary-General to consider whether he had in fact misconducted himself, in effect to charge him with misconduct or not and, in the former event, complete the disciplinary process prescribed by the rules or, in the latter event, to regard the matter as closed and remove the note. This obligation derives from the contractual entitlement of the applicant that the Secretary-General act in accordance with the requirements of good faith and fair dealing, so that the applicant has an opportunity to clear his name and vindicate his good reputation.

Respondent's submissions

6. The Secretary-General does not, at present, intend to continue any investigative process, whether disciplinary or not, against the applicant. Consideration may be given to such a possibility if the applicant seeks to or rejoins the Organization. The note does not itself make any allegations and the applicant's file does not contain any. No issue of clearing the applicant's name therefore arises. Nor, even if the file did contain a note of the investigators' allegations, is there a right to anything more than to make a comment in accordance with sec 2 of ST/AI/292.

7. At all events, a staff member, *a fortiori* a former staff member, has no contractual right to require the Secretary-General to undertake disciplinary proceedings although the Secretary-General may do so, even if the staff member has been separated, if it is in the interests of the Organization to do so: *Mason* (1995) UNAT 742.

Facts

8. In substance, these are not in dispute. The applicant, then a senior official with International Civil Service Commission (ICSC), retired in October 2005. In January 2006 he returned to work as a consultant for the ICSC. In 2006 the Procurement Task Force of the Office of Internal Oversight Services (PTF/OIOS) commenced an investigation into procurement at ICSC. The applicant was notified in April 2007 of the proposed adverse findings, reviewed the documents in June 2007, and met with investigators in July 2007. In October 2008 a note was posted on the official status file of the applicant as follows –

> [The applicant] was separated from service with the Organization effective 1 October 2005. A matter was pending which had not been resolved due to his separation.
>
> In the event that [the applicant] should seek fu

completed was a "preliminary investigation" within the meaning of sec 3 of ST/AI/371. Certainly the requirement of sec 3 that the head of office or responsible officer should immediately report the matter to the Assistant-Secretary-General, OHRM, appears to have been engaged, and it may be that this was done, although the evidence does not go quite so far. However, it seems clear that, not surprisingly, no consideration was given pursuant to sec 4 or 5 to the issue of suspension and, in so far as sec 6 is concerned, the only decision made must have been that the case was *not* to be pursued, although this may have been intended and possibly expressed (the evidence does not say) as a decision not to pursue the matter, unless the applicant were to attempt to rejoin the Organization. In that sense, the decision not to pursue the matter was conditional but, in my view, the possibility that the decision might change was necessarily so indefinite and speculative that it could not be described as *pending*. It would, I think, have been correct to describe the matter as incomplete or unresolved since, although the investigation had in fact been completed, the course of action prescribed by ST/AI/371 (either to charge the applicant and undertake the ensuing disciplinary proceedings or decide that the case should be closed) had not been completed. The correct description of the position was that allegations had been made against the applicant as the result of a preliminary investigation, which had not been considered pursuant to ST/AI/371 because the applicant had left the Organization. I cannot see that there is a proper basis for anything other than an accurate note to be placed on a staff member's file, although obviously the note does not need to be comprehensive.

11. Although this does not strictly concern the content of the note, it is important to acknowledge the context in which the question arises. The Administration must be able to deal with its files in any reasonable way thought to be necessary or desirable. They comprise the records of its affairs. Placing notes of relevant matters on files is a vital part of the management of any undertaking and it is necessary, in most cases, that the records be comprehensive to avoid the risk of including irrelevant or inconsequential matter, since it is not always possible to know what will be required in the future. The records, for obvious reasons, need to be as accurate as the

measures that can be imposed following an adverse decision resulting from a disciplinary process assume subsisting employment (though it might be terminated). Although the recovery of monies owed to the Organization does not assume continued employment, nor does it assume misconduct and, hence, disciplinary proceedings – the Organization can identify debts and proceed to recovery by conventional procedures. The only possible exception to the requirement that the

16. It follows that the applicant is not entitled to require the Secretary-General to institute disciplinary proceedings against him, whether to give him an opportunity to clear his name or for any other reason.

17. The situation may be different where proceedings have been instituted but, before completion, the staff member is separated. Again, this question must depend upon the proper construction of the relevant rules. Leaving aside the possibility of reimbursement for losses incurred by misconduct, it seems to me that the nature of the potential outcomes requires the construction that the proceedings are ended by the separation. It has been said that there exists some interest, sometimes described as "compelling", in the Organization might justify the continuation of disciplinary proceedings after the separation of the staff member (see *Mason* (1995) UNAT 742 (which, it might be noted, does not suggest any legally – as distinct from a possibly administratively – significant outcome). In my view, since the contract is at an end, the staff member cannot be compelled to be involved, let alone cooperate, in any way and the continuation of the proceeding cannot have any legal effect, whatever other purpose it might conceivably serve. I have been unable to envisage, as at present informed, any possible "compelling" reason that might necessitate or make it desirable that there be a power to continue

inevitably to be the case) to an investigation report and, by extension the findings and recommendations of the investigators. Any other conclusion would be so unrealistic as to be fanciful. Accordingly,