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Introduction

1. These cases concern the imposition, on 8 July 2009, of disciplinary measures for misconduct. The applicants, all staff members of the United Nations Development Programme (UNDP) Country Office in the Philippines, filed complaints of harassment and abuse of authority by Ms. Noble, the UNDP Resident Representative. They also reported the details of their complaint to the Department of Foreign Affairs (DFA) in the Philippines. They considered that in the special circumstances of their cases it was appropriate to have done so and that they had acted in accordance with the UNDP Legal Framework for addressing non-compliance with UN standards of conduct of 6 November 2007 (UNDP Legal Framework) for reporting wrongdoing.

2. In their applications filed on 9 October 2009, the applicants claim that the respondent did not have reasonable grounds to conclude that each of them committed the misconduct in question because this conclusion was based on evidence that had been improperly obtained in breach of their rights to due process. They argue in the alternative that even if the respondent had reasons to believe that they had committed the acts in question their disclosure of the relevant allegations against the Resident Representative to an external body was justified and in accordance with the UNDP Legal Framework. According to the applicants, in the circumstances, the decision to impose disciplinary measures should be rescinded and they should be appropriately compensated.

3. The respondent asserts that at all times the applicants' due process rights were respected, that the evidence against them supported the findings of misconduct and that the disciplinary measures imposed were appropriate and proportionate.

Order for combined proceedings

4. These cases raise common questions of law and fact. Accordingly, by Order No. 184 (NY/2010), dated 27 July 2010, the Tribunal ordered that the cases be combined and considered together. However, any significant difference in relation to each applicant will be identified and distinguished in this Judgment, as appropriate.

Findings of fact

5. In July 2007, five of the applicants (Mr. Buendia, Mr. Francisco, Ms. Montebon, Ms. Navarro and Ms. Supetran) met a Ms. Opal who runs *Blas Opal*, a labour policy centre, and is also a columnist for *Panorama* magazine, a Sunday magazine of a Manila newspaper. Following the visit by the five applicants, the 20 July 2007 edition of this newspaper published an article referring to their visit without identifying them and containing details regarding their complaints against the way in which their office was managed and the allegations that had been made against the Resident Representative in the UNDP office in the Philippines.

6. On 23 July 2007, all the applicants, together with six former staff members, sent a letter to the UNDP Administrator making a number of complaints against the Resident Representative, including complaints of abuse of authority, harassment and retaliation.

7. On 26 July 2007, a document signed by 28 staff members expressed support for the Resident Representative.

8. On the same date, the applicants allegedly jointly signed and sent a letter to the Secretary of the DFA of the Philippines which stated:

We are formally lodging this complaint with the Department of Foreign Affairs as Filipinos, in particular, since [the Resident Representative]'s unilateral and abusive actions are already adversely affecting the operations of UNDP in this country, as detailed in the attached set of documentation, in addition to our letter. We are afraid that if she continues to serve in the Philippines, the development support that the UNDP is providing to this country will be seriously impaired. To this end, we hope that you can grant us an audience to shed further light on this matter.

We are confident that your office can intervene and help alleviate this untenable situation which is an affront to the dignity of Filipinos.

They attached their letter dated 23 July 2007 to the Administrator of UNDP.

9. [REDACTED] [REDACTED]

investigative mission, it is clear that on 16 August 2007 they had in their possession, prior to the commencement of their investigation, sufficient material from which a reasonable belief could and must have been

UNDP Administration should have considered whether to charge the staff members with disciplinary offences.

13. By letters dated 19 February 2008, the applicants were charged with misconduct under staff regulations 1.1(b) and 1.2(i), staff rule 101.2(h) and chapter 1, sec. 3, paras. 23(a) and (p) of the UNDP Legal Framework. The first charge was formulated as follows:

You intentionally sought the intervention of the government of a Member State to influence the administration and management of the Country Office.

The great importance attached to preserving the international status of staff members independent of influence by national governments is such that the UN Charter itself, under Article 100, requires that:

“[i]n the performance of their duties the Secretary-General and the staff members shall not seek or receive instructions from any government or any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.”

Under the same Article of the UN Charter, Member States undertake a complimentary obligation not to seek to influence staff members in joining the UN. This obligation upon staff members not to seek or receive instruction from governments is further reflected in the Staff Regulations and Rules. Upon joining the UN, staff members sign a declaration mandated in Staff Regulation 1.1(b) not to seek or accept instructions from any government in the performance of their duties. This obligation is again reiterated in Staff Regulation 1.2(d). Staff Regulation 1.2(i) further obligates staff members to exercise the utmost discretion with regard to all matters of official business, and in particular, not to communicate to any government any information known to them by reason of their position that they know or ought to have known has not been made public. This restriction is amplified by Staff Rule 101.2(h), which provides mores specifically that:

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information was obtained by the applicants in their role as staff members and that they should have known that the making of such information public would result in bringing the Organization into disrepute. Reference was made to staff regulations 1.1(b) and 1.2(i).

17. The applicants who approached Ms. Opal were not subjected to a separate charge because they were given the benefit of the doubt and management accepted that they went to see Ms. Opal for the purpose of obtaining advice. This was consistent with what Ms. Opal stated in her editorial column.

18. The applicants were given the opportunity to respond to the charges and they did so. They all responded through their legal representative denying misconduct and asserting that the evidence that was gathered against them was inadmissible because it had been obtained in violation of their rights to due process in that they were not warned in advance in any way that they were being treated as suspects or subjects and not merely as persons participating in an investigation into a complaint of harassment against the Resident Representative. Alternatively, the applicants argued that in any event any act which they had been engaged in fell within the scope of permissible disclosure of misconduct to entities external to UNDP. They asserted that they acted in good faith in reporting the harassment and abuse of authority in order to avoid the substantive damage to UNDP's operations in the Philippines. They added that at the time of any such disclosure internal mechanisms for resolving grievances within UNDP were wholly ineffective.

19. The Disciplinary Committee (DC) Panel found that the applicants' due process rights had been violated and that the Administration did not meet its burden of showing that it had afforded due process to the staff members at the investigation stage. The DC Panel nevertheless found that the outcome of the case did not depend

on questions relating to the admissibility of any admissions made by them given the fact that there existed the letter of complaint to the DFA.

20. The DC Panel concluded that “the procedural irregularity was retroactively cured”. As to the outcome, they said that it would have been the same given the facts which in the opinion of the DC Panel were undisputed.

21. By letter dated 8 July 2009, the Associate Administrator of UNDP wrote to

22. Following an Order of the Tribunal for an explanation of the apparent difference in treatment between Ms. Montebon and Ms. Arida, both of whom were no longer employed by the UN when the charge letters were sent, the respondent stated:

With respect to the apparent difference in treatment, the Respondent notes that Ms. Arida was not charged with the disclosure of confidential information to an external source, namely Ms. Opel; the Respondent did not have evidence that she participated in this activity. The Respondent notes, however, that such evidence did exist as

Note on applicability of UNDP Legal Framework of 6 November 2007

24. The Tribunal notes that the UNDP Legal Framework is dated 6 November 2007 and was not in force at the time that the investigation was carried out and the applicants were interviewed. The UNDP Legal Framework is relevant as far as the disciplinary process which was initiated in 2008, but was incorrectly relied upon by

d. whether the disclosure of the allegations against the Resident Representative to external sources was justified in the circumstances.

26. The respondent raised the following three issues:

a. whether the applicants' due process rights were respected in the investigation process;

b. whether the applicants' actions constituted a permissible disclosure to parties outside UNDP's internal grievance system; and

c. whether the imposition of disciplinary measures on the applicants was appropriate and proportionate.

Applicable rules

27. Article 100.1 of the UN Charter provides (emphasis added):

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. *They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.*

28. Former staff regulation 1.2(d) provides:

In the performance of their duties staff members shall neither seek nor accept instructions from any Government or from any other source external to the Organization;

29. Former staff regulation 1.2(i) provides (emphasis added):

Staff members shall exercise the utmost discretion with regard to all matters of official business. *They shall not communicate to any Government, entity, person or any other source any information*

known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service.

30. Former staff rule 101.2(h) provides (emphasis added):

Staff members shall not seek to influence Member States, principal or subsidiary organs of the United Nations or expert groups in order to obtain a change from a position or decision taken by the Secretary-General, including decisions relating to the financing of Secretariat programmes or units, or in order to secure support for improving their personal situation or the personal situation of other staff members or for blocking or reversing unfavourable decisions regarding their status or their colleagues' status.

31. Former staff rule 110.1 defines misconduct 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.

32. Paragraph 2.2 of UNDP/ADM/97/17 provides (emphasis added):

All procedures and actions relating to investigation must respect the rights and interests of the Organization and potential victims, as well as of any staff member subject to or implicated by an allegation of misconduct If an allegation of misconduct is made, an affected staff member shall be notified in writing of all allegations/and of his her right to respond, provided with copies of all documentary evidence of the misconduct and advised of his/her right to the advice of another staff member or retired staff member as consul to assist in preparing his or her responses.

33. The Administrative Tribunal said in its Judgment No. 1058, *Ch'ng* (2002):

The Tribunal does not agree with the position ... that the lack of due process during the period leading to the decision of summary dismissal was “cured” by the “full due process” the Applicant received in the [Joint Disciplinary Committee] proceedings. This is one of those cases where the lack of due process at an early stage has an inevitable direct impact on the decisions in the following stages.

34. Mr. Nadelson for the respondent made it clear that the respondent is not submitting that any defects were cured, as suggested by the DC Panel, but that there was in fact no failure to accord to the applicants their due process rights.

35. In Judgment No. 1246, *Sokoloff* (2005), the Administrative Tribunal underlined the importance to be placed on respecting due process rights, adding that protection under the provisions of UNDP/ADM/97/17 begins as soon as a person is identified as a possible wrongdoer, he is to be accorded due process which includes being notified of the allegations in writing. The Administrative Tribunal endorsed the judgment in *Ch’ng* that, in some cases, where procedural irregularities occurred at an early stage they have a direct impact on the decisions in the following stages and may not be retroactively cured.

36. In *Sokoloff*, the Administrative Tribunal further stated at para. V that:

[T]he assurances of due process and fairness, as outlined by the General Assembly and further developed in the rules of the UNDP, mean that, as soon as a person is identified, as a possible wrongdoer in any investigation procedure, and at any stage he has the right to invoke due process with everything that this guarantees. Moreover, the Administrative Tribunal found that there is a general principle of law according to which, in modern times it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests ...

37. UNDP/ADM/97/17 contained the guidelines and procedures adopted by UNDP on the application of disciplinary measures and procedures including an

outline of the basic requirements of due process to be afforded to a staff member who is the subject of allegations of unsatisfactory conduct. The circular recognises the need to guarantee due process and balances this with the need of the Administration to keep itself informed on any matter of impropriety or unsatisfactory conduct and to gather information in this regard as needed.

38. Paragraph 2.2 of UNDP/ADM/97/17 provided:

Due Process

All procedures and actions relating to investigation must respect the rights and interest of the Organization and potential victims, as well as of any staff member subject to or implicated by an allegation of misconduct. Allegations, investigative activities and all documents relating to the action shall be handle

on the admissibility of the statements given by the applicants to the investigators. It was the respondent's case that there was independent existence of the letter sent to the DFA. The DC Panel concluded that whilst the staff members would have been more cautious in their statements to the investigators, they would not have escaped disciplinary proceedings given the documentary evidence. This is of course a central issue in this case. Where is the independent documentary evidence? The applicants' counsel challenged the respondent to produce the evidence rather than relying on hearsay that somebody had informed them that the letter sent to the DFA was signed by the applicants. The respondent accepts that they are unable to produce it.

41. The Tribunal finds that the disciplinary charges and findings were based on

and just system of dealing with and resolving disputes. This Tribunal has been established to give effect to principles enshrined in the Charter of the United Nations, highlighted in various decisions and utterances of appropriate organs of the United Nations System and further emphasised and developed by the case law of the former Administrative Tribunal. In paragraph XIV of Judgment No. 815, *Calin* (1997), the Administrative Tribunal stated with regard to due process:

The Tribunal ... respects the Secretary-General's authority to exercise his discretion in defining serious misconduct and in determining appropriate penalties. However, the Tribunal will affirm the Respondent's exercise of discretionary authority only when satisfied that the underlying allegation of misconduct has been proven through a procedure that respects due process and that is not tainted by prejudice, arbitrariness, or other extraneous factors.

43. Transparency and the upholding of due process rights are fundamental core values to be respected by all concerned. However, there arises in this case a difficult question as to whether information obtained in breach of the applicants' due process rights could nevertheless still be used to find the disciplinary charges proven. The respondent does not rely on the questionable concept of any breach of due process being cured. It is the respondent's case that there was no such breach and even if there was such a breach there were in existence independent items of evidence distinct from any admissions obtained during the course of the investigation that were sufficient to find the disciplinary charges proven. The respondent also regards as an admission of misconduct the applicants' secondary argument that they were justified in approaching the Philippines' government.

44. However, this argument does not address the principal question that the applicants' due process rights were breached and that it was on the basis of the investigation report that disciplinary charges were preferred and the tainted evidence was subsequently accepted by the DC Panel. The report of the DC Panel does not

cannot be regarded as fair. A breach of the right to due process is both procedurally and substantively unfair.

Conclusion

48. The Tribunal cannot uphold the findings

d. by close of business 3 December 2010, counsel for the applicant is to file and serve submissions, if any, in response to the respondent's submissions.

51. 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 are ordered to inform the Tribunal by 22 October 2010, so that appropriate consent Orders may be issued.

(Signed)

Judge Goolam Meeran

Dated this 8th