



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/052/
UNAT/1660

Judgment No.: UNDT/2011/018

Date: 25 January 2011

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Santiago Villalpando

BRIDGEMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bernard Adams, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. This is an appeal against the imposition of disciplinary measures against the Applicant following consideration by an investigation panel and a report of the Joint Disciplinary Committee (“JDC”) into certain allegations relating to his conduct in the workplace. In addition, the Applicant complains that the Joint Appeals Board (“JAB”) rejected his appeal against the Administration sequestering his computer hard drive contrary to the provisions of ST/SGB/2004/15 (Use of information and communication technology resources and data) of 29 November 2004.

The JAB

2. The Applicant contended, before the JAB, that his computer hard drive had been improperly and unlawfully removed from his office. In the absence of a response to his request for administrative review, the Applicant submitted a grievance to the JAB. The JAB panel deferred its consideration pending the disciplinary investigation and report by the JDC. Thereafter, the JAB dismissed the Applicant’s appeal.

The JDC

3. Before the JDC, the Applicant was formally charged with the following three disciplinary offences:

- a. sexual harassment;
- b. acting in a manner unbecoming of his status as an international civil servant; and
- c. misusing the assets and property of the Organization.

4. The unanimous finding of the JDC panel in its Report No. 194 of 18 September 2007 was that, whilst the Applicant displayed inappropriate behaviour, the charge of sexual harassment was not established. The charge of misuse of United Nations resources was established in relation to him saving and viewing pornographic materials on his office computer. The panel recommended that the sexual harassment charge should be dropped, but that the Applicant should receive a written reprimand to avoid inappropriate behaviour in the future, that he should be given “gender sensitivity training” and that he should receive a written censure for not observing the provisions of ST/SGB/2004/15.

5. The Respondent accepted the findings of the JDC, but decided to impose a harsher penalty in relation to the charge of misusing United Nations resources. The disciplinary penalty imposed on the Applicant was a loss of two steps in grade and a two-year deferment of within-grade salary increments.

The appeal before the Dispute Tribunal

The Applicant’s case

6. On 6 January 2009, the Applicant filed his appeal before the former United Nations Administrative Tribunal. He formulated the issues as follows:

- a. “that the Respondent’s actions were improperly motivated and procedurally flawed and that the proceedings before the JDC were unduly influenced by this bias”;
- b. “that the Respondent’s decision to reject the unanimous recommendations of the JDC as to penalty was unduly harsh and unwarranted by the findings of the JDC panel”; and
- c. “that the Respondent’s final decision on his appeal as well as the findings and conclusions of the [JAB] on which it is based, are based on mistakes of fact and law”.

The Respondent's case

7. It is the Respondent's case that each of the Applicant's claims be dismissed in that the Secretary-General acted reasonably and fairly in exercising his discretionary authority with regard to the disciplinary matters and that:

- a. the decision to reprimand the Applicant for conduct unbecoming of an international civil servant, in accordance with former staff rule 110.3(b), was justified;
- b. the decision to impose the disciplinary sanction for misconduct, in accordance with former staff rule 110.3(a), was justified and proportionate to the misconduct that had been proven; and
- c.

- b. In relation to the JAB review and report: whether there were any procedural flaws for which the Respondent should be held responsible?

- c. In relation to the JDC panel report and recommendation: did the Respondent have reasonable grounds to form a reasonable belief, after a proper and fair investigation, that the Applicant had acted in a

limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

12. Former staff rule 101.2 (Basic rights and obligations of staff), at subpara. (d), states that:

Specific instances of prohibited conduct

(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.

13. Former staff rule 110.3 (Disciplinary measures) reads as follows:

(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.

(b) (i) *Whenever practicable, physical investigations involving ICT resources or ICT data shall be performed in the presence of the staff member, his or her supervisor and a representative from the requesting office;*

(ii) *If necessary to ensure the integrity of the investigation, the staff member may be denied access to the ICT resources and ICT data under investigation, including computers, electronic files and email accounts;*

Findings of facts

16. On 24 November 2005, whilst serving on full-time duty as Vice President of

19. The Applicant went on annual leave on 24 March 2006. During his absence, allegations of workplace harassment were made against him by his female assistant. She first sought guidance on or about 7 April 2006 about the proper procedure to follow. She made a complaint orally on 10 April 2006. Her written complaint was made on 20 April 2010.

20. On 10 April 2006, the Chief Administrative Officer (“CAO”) at UNLB, Mr. Stephen Lieberman, directed the removal of the Applicant’s hard drive from the FSU office. The Applicant contends that the hard drive was removed after working hours when no one was in the office. The Respondent’s explanations as to the precise circumstances of the removal of the hard drive are not entirely clear in that his Reply to the JAB, dated 27 November 2006, indicates, at para. 13, that “the operation was witnessed by several persons” and, at para. 27, it states that only the UNLB Security Officer, Mr. Pompeo Leopardi, and “a UNLB IT technician entered the office and secured the hard drive...”. It is clear that Mr. Lieberman was aware of ST/SGB/2004/15, which emphasises the importance of ensuring that proper procedures must be followed when a staff member’s hard drive is removed. However, did he comply with ST/SGB/2004/15? The unexplained distinction between “entering the office of the FSU” to secure the hard drive and “witnessing the operation” appears to be a distinction without a difference. The fact is that under Mr. Lieberman’s instruction the individuals entered the locked office of the Vice President of the FSU in his absence and without informing the President of the FSU or other responsible union official as required by 8.5(a) of ST/SGB/2004/15. The Respondent has not explained who these witnesses were.

21. In response to Orders No. 243 and 288 (NY/2010) of 14 September and 6 December 2010, respectively, the Respondent makes it clear that Mr. Lieberman reported to Mr. Hayde of the Conduct and Discipline Unit (“CDU”) of UNHQ that a complaint of sexual harassment had been made against the Applicant and that he was concerned to prevent destruction or tampering of material stored on the computer. At the time, the Applicant’s position as Vice President of the FSU was known and the

27. If Mr. Lieberman saw this as a serious issue, which constituted an exceptional case so that action had to be taken immediately in the absence of the staff member, on what basis did he do so? Did Mr. Lieberman take into account the fact that the Applicant was Vice President of the FSU and that the hard drive was in a locked office used by the FSU? Given the absence of a written complaint together with the fact that there must be an obligation on the part of managers to tread carefully in respecting the confidentiality of staff unions' offices and business, the Tribunal considered it necessary to explore the question whether Mr. Lieberman's actions were high handed or were legitimate and in accordance with the applicable rules.

28. In order to test the Respondent's assertion that the requirements of sec. 8.4(a) of ST/SGB/2004/15 were complied with, the Tribunal, by Order No. 243 (UNDT/NY/2010) of 14 September 2010, ordered the Respondent to produce relevant information as follows:

The Respondent is to provide a copy of the written request for investigation under ST/SGB/2004/15, sect. 8.4(a) or, if under 8.4(b), to state, in addition, what made this an exceptional case.

29. The Respondent explained that, in the unique circumstances relating to DPKO, UNLB had no reporting line to the Department of Management, and the duty station (Brindisi) had no Special Representative of the Secretary-General and the CAO is the de facto Head of Mission:

Mr. Lieberman was the [CAO] so he was the correct person to whom a request under section 8.4(a) of ST/SGB/2004/15 should have been directed. Once Mr. Lieberman, as CAO, was aware of the complaint it was appropriate for him to provide the details to Mr. Odia in his [i.e., Mr. Odia's] capacity as Chief of the Conduct and Discipline Unit.

30. This explanation is accepted in relation to the issue of compliance with sec. 8.4(a) of ST/SGB/2004/15.

31. The next question is whether the requirements of sec. 8.5(a) of ST/SGB/2004/15 were complied with. In response to an Order from the Tribunal, the

Respondent provided a copy of a Memorandum of 10 April 2006 from Mr.

- b. An interoffice memorandum from Ms. Georgette Miller, Officer-in-Charge, Office of Human Resources Management, to the Applicant, dated on 8 June 2006, in which she informs him that an investigation panel had been appointed to look into allegations of work place and sexual harassment. It is noted that no mention is made of the need to investigate the icon.
- c. An interoffice memorandum from Ms. Miller to Ms. Jane Hall Lute, Assistant Secretary-General, DPKO, titled “Report to access and analyze UNLB computer and email data”, dated 8 June 2006. This memorandum is principally about the sexual harassment complaint, though, reference is made to the “irregularity” to investigate and determine whether “the hard drive and/or email account have been tampered with in any way, starting from the period of the alleged harassment and up to present”.

34. It should be noted that the Applicant reported the irregularity of the icon on 24 November 2005, long before the complainant (the Applicant’s assistant) started working in the office of the FSU. I infer from the above facts that the principal, if not sole, reason or justification for investigating the data of

- b. Shortly thereafter Ms. Taylor brought the complainant to his office whereupon she informed, in Ms. Taylor's presence, him about the allegation of harassment;
- c. Mr. Lieberman said that he recalled the complainant being nervous and afraid of retribution; and
- d. Mr. Lieberman said that he kept a detailed record of these meetings and telephone calls to UNHQ that he could not locate in the records.

36. This account is contradicted by the Respondent's further response to Order No. 288 (NY/2010) in that when asked when and by what means was Mr. Lieberman notified of the allegations:

- a. The Respondent produced a copy of an email from Ms. Taylor to Mr. Lieberman, dated 10 April 2006, attaching a draft facsimile, which constituted the report of the allegations to Mr. Lieberman. It is noted that:
 - i. this draft facsimile, slightly amended, was sent by Mr. Lieberman to Ms. Odia (Chief of CDU) on 10 April 2006;
 - ii. no mention is made of the meeting which Mr. Lieberman said took place between himself and the complainant;
 - iii. the formal request to Ms. Odia for an investigation makes no mention of the icon; and
 - iv. Mr. Lieberman has not yet produced the detailed record of this

without conducting a proper independent enquiry, as to the basis upon which it was not practicable. It also erroneously relied upon and interpreted sec. 8.5(b)(i) of ST/SGB/2004/15 as being applicable to the act of removal of the hard drive.

43. The correct section that the JAB panel ought to have looked at was sec. 8.5(a), the terms of which are mandatory: “[s]taff members and their supervisors *shall* be informed immediately preceding access to their ICT resources” (emphasis added). The ICT resource in this case was the computer hard drive. The provision regarding practicability is dealt with in section 8(5)(b)(i) and relates to the physical investigations involving ICT resources or data. It does not relate to “access to” the ICT resource or ICT data, which is dealt with separately under section 8.5(a).

44. The annex to ST/SGB/2004/15 has a commentary section which is useful in understanding the underlying purpose of the Bulletin. Section F.6 states that (emphasis added):

Provision 8.5 sets forth the specific procedures applicable to monitoring and investigations of st

grievances, and the Applicant is to be compensated for any proven loss or damage arising from the shortcomings of the JAB (see the United Nations Appeals Tribunal in *Antaki* 2010-UNAT-095, para. 20).

50. It must also be a matter of grave concern to the staff unions that an office that has been set aside for the conduct of important union business in the interests of all staff members should have been invaded in the manner in which it was in this case. It seems to me, on the basis of all the documentary evidence before me, that this was not an exceptional case nor were there any exceptional circumstances that justified this action. Whilst it was necessary to take appropriate steps on receipt of a formal complaint, it could be argued that in certain circumstances such steps may need to be taken in anticipation of a formal complaint. However, this is not such a case. The justification of urgency to preserve evidence rings hollow upon examining the history and context of events. However, I note that no appropriate provisions in the relevant legal instruments appear to address the specific issue of protecting confidential staff union materials in situations as in the instant case.

Considerations on the JDC report and findings

51. The JDC panel found that the incidents complained of "probably took place", but the conduct itself was not proven with sufficient specificity for the panel to find

of employees outside the United Nations and in different sectors of public and private enterprise. That any staff member should consider that the storage and distribution of pornography in the workplace using the equipment provided for workplace purposes would be condoned by the employer is beyond belief. It is clear that such behaviour is inconsistent with the highest standards of conduct expected of international civil servants.

58. The reasons given by Mr. Lieberman for issuing his instruction to sequester the computer hard drive were not wholly transparent or correct. I find that it was not for the purposes of further investigating the appearance of the icon. It was primarily for the purpose of securing evidence in relation to what was reported as constituting a complaint of sexual harassment yet to be formally presented.

59. The Applicant's complaints that there was a failure on the part of the JDC panel to review his case impartially are not accepted.

60.

that the JDC's recommendation was in the circumstances lenient. Accordingly, he decided to impose a harsher disciplinary measure of a loss of two steps in grade and two years deferment of eligibility for within grade salary increments in accordance with former staff rules 110.3(a)(ii) and (iii). Was this a permissible exercise of the wide discretion given to the Secretary-General in determining the appropriate disciplinary sanction based on the findings of the JDC report and its recommendations? Were the disciplinary measures permissible options that were not disproportionate given the factual findings and the underlying United Nations policy regarding the storage and sending of pornographic images and sexually explicit material? It is important to bear in mind that the charge of sexual harassment was dismissed. According to the investigation report of 22 September 2006, para. 10(b), an examination from the Applicant's hard drive indicated that 82 sexually explicit multimedia files, including pornographic movies, were stored on the Applicant's hard drive and network storage resources. Furthermore, according to the investigation report, para. 10(b), an examination of the "available e-mail resources" found that the Applicant had used the UNLB email system to send sexually explicit material and jokes to his female assistant, who had also sent him "jokes, including some with a sexual connotation".

62. The question whether the disciplinary measures imposed on the Applicant by the Secretary-General for proven misconduct within the meaning of former staff rule 110.1, and sec. 4.1(a) of ST/SGB/2004/15 was a permissible option or whether it was disproportionate in all the circumstances has to be considered giving due weight to the Secretary-General's wide discretion in imposing disciplinary sanctions. An important aid to an assessment of penalty is to consider what the Organization itself regards as the norm for such or similar conduct. The available evidence may lie in an examination of similar cases or in policy guidelines or similar formal issuances.

63. In this regard, the Tribunal considered the contents of the Code Cable No. 0638 from DPKO/UNHQ issued on 9 March 2007, which is reproduced in full and which states as follows:

SUBJECT: Allegations of Pornographic Materials on UN Information and Communication Technology Resources

Summary: To provide guidance to Field Missions on procedures for handling violations of the Secretary-General's Bulletin on the use of information and communication technology resources and data (ST/SGB/2004/15).

1. Reference is made to a recent report by the Investigations Division of the Office of Internal Oversight Services (ID/OIOS), which indicates that there is widespread violation of Section 4.1 (a) of the Secretary-General's Bulletin on the use of information and communication technology resources and data (ICT) by United Nations personnel (ST/SGB/2004/15). The report revealed that personnel are storing pornographic materials on the Public Drive of United Nations owned computer operating systems.

2. DPKO wishes to remind all missions that the Secretary-General's Bulletin authorizes limited personal use of United Nations ICT resources. However, such "shall be consistent with the highest standard of conduct for international civil servants. Among the uses which would clearly not meet this standard are the use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled."

3. With immediate effect, violations of ST/SGB/2004/15 will be dealt with in accordance with the procedure set out below:

- a. All allegations deemed to be in gross violation of Section 4.1(b) (i.e. child pornography) will be investigated by ID/OIOS in accordance with Sections 8 and 9 of ST/SGB/2004/15 and General Assembly Resolution A/Res/59/287.
- b. Other allegations and/or violations reported to ID/OIOS will be referred to DPKO for transmission to the respective ICT office for the following actions:
 - i. Confirmation of the authorized misuse.
 - ii. Subsequent disconnection of authorized access to ICT computer resources for the assigned operator in accordance with Section 6.1(b).

iii. Notification to the appropriate Director of the alleged violation with the requirement to provide: 1) written justification as to why the ICT services are required for the staff member in question; and 2) written assurances that the inappropriate use of ICT services will not recur.

iv. Notification of action taken to be provided to ID/OIOS.

v. If the staff member denies the allegations or request further assessment, the allegations are to be referred to ID/OIOS for investigation.

vi. Any subsequent allegation involving the same staff member to be referred to ID/OIOS for investigation and, where it is established that the staff member has violated ST/SGB/2004/15, the matter will be referred to the Programme Manager for appropriate action.

4. It is requested that the contents of this Code Cable be disseminated to all staff members.

64. If the provisions in the Code Cable No. 0638 are to be taken as the normative penalty for a first transgression, the penalty imposed on the Applicant is disproportionate, since it follows from the case record that it was the first time that the Applicant had been charged with “other allegations and/or violations” in accordance with para 3(b) of Code Cable. The Tribunal observes that even though the Code Cable is later in time than the relevant events of the present case, it must be viewed upon as a codification of the standard practices for dealing with the offences such as those with which the Applicant were charged. It is also noted that both the JDC panel’s recommendations and the Respondent’s subsequent decision to increase the Applicant’s recommended disciplinary sanction were, nevertheless, later in time than the Code Cable.

Conclusions

65. The Tribunal finds that:

- a. The Applicant's due process rights were violated when his computer hard drive was seized in violation of sec. 8.5(a) of ST/STGB/2004/15. However, by giving him notice and inviting him to be present when the ICT data were being accessed the Administration accorded him his due process rights in accordance with sec. 8.5(b)(i) of ST/STGB/2004/15;
- b. the JAB's review of his case was unconscionably delayed and procedurally flawed. The Respondent bears responsibility for this;
- c. The JDC process was proper and fair. The consideration by the investigation panel and the Report of the JDC were soundly based on the available evidence, and the recommendation as to appropriate sanction was not disproportionate;
- d. The disciplinary sanction imposed on the Applicant was disproportionate. The Tribunal rescinds the decision to impose a loss of two steps in grade and a two year deferment of within grade salary increments; and
- e. a hearing on remedy is to take place on 10 February 2011.

Recommendation

66. Since the matter of protecting the confidentiality of staff union materials in situations such as in the instant case has apparently not been regulated anywhere in the relevant legal instruments, I recommend that this be addressed by the Secretary-General. It is important for good employment relations that appropriate arrangements be made with staff unions to safeguard staff members' rights to freedom of

association and speech and for staff union premises and equipment to be sacrosanct, whilst at the same time recognising that union officials are still as staff members subject to discipline as any other staff member in accordance with the appropriate instruments.

Comment

67. It is a matter of concern that in breach of the core values of integrity, probity and truthfulness (former staff regulation 1.2) a senior manager should have misled not only the Applicant but also the JAB regarding the reason for removing the Applicant's hard drive. It is even more disturbing to find that this false justification also found itself being repeated in the Respondent's answer to the appeal to the former Administrative Tribunal, dated 1 July 2009. Legal officers, who are entrusted with the task and responsibility representing the Respondent in proceedings before the Tribunal, are entitled to be given honest and factual instructions from the managers who are at the receiving end of complaints. Failure to do so will bring the internal justice system into disrepute. The Tribunal acknowledges the cooperation of both Counsel, who appear before the Tribunal in this matter, for their cooperation in dealing with this difficult and sensitive case.

Further case management orders

68. The Parties are ordered to file and serve succinct submissions on remedy in the following sequence:

- a. On or before 1 February 2011, the Applicant is to file and serve a concise submission indicating:
 - i. the basis upon which he is claiming, by way of remedy, any additional award to the rescission of the administrative decision imposing a loss of two steps in grade and a two year deferment of within salary grade increments;

- ii. the basis upon which he claims compensation for “financial loss and emotional harm”; and
 - iii. any other claim which the Applicant considers appropriate.
- b. The Respondent is to file and serve a succinct submission in response within seven days of receipt of the Applicant’s submission.
69. In the absence of agreement on remedy between the Parties, they are to attend a hearing on remedy on 10 February 2011 with the Applicant being called to give evidence to prove his losses.

(Signed)

Judge Goolam Meeran

Dated this 25th day of January 2011

Entered in the Register on this 25th day of January 2011

(Signed)

Santiago Villalpando, Registrar, New York