



Introduction

1. The Applicant is a former staff member of the United Nations Economic Commission for Africa (ECA), who occupied the post of Chief of the Facilities Management Section in the Division of Administration. He filed a claim with the Tribunal contesting the decision of the Re

6. The Applicant also employed a company called Elmi Olindo & Co, PLC (Elmi) to do some work on his property. This company was also carrying out work on United Nations contracts. He did not receive any discount.

7. Construction of the Applicant's property took place between January 2005 and December 2005. The Applicant informed all of his work colleagues, including his director of the construction of his property and the companies employed by him to carry out the work. His colleagues visited the construction site to see the progress being made.

8. Between 24 February 2007 and 6 March 2007, the Applicant exchanged several emails with the financial disclosure office at the United Nations in which

violation of the United Nations Procurement Manual, specifically sections 1.1(9), 4.1.5(3) and 4.2.1(4).

Issues

12. Based on the parties' written and oral submissions, the Tribunal deems the

14. Section 1.1(9) of the 2004 Procurement Manual reads: “All staff members of the UN are required to comply with the provisions of this Manual. This includes Procurement Officers as well as staff members of the Requisitioning Offices, at HQ³ departments, OAH⁴ and Missions”.

15. Section 4.1.5(3) reads:

The UN procurement process, which includes the generation of specifications and scope of work, certification of funds, identification of potential Vendors, evaluation of Submissions received, receipt & inspection and payment, is intended to allow Vendors to compete for UN business on a fair basis. Staff associated with the procurement function, therefore, are responsible for protecting the integrity of the procurement process and maintaining fairness in the UN’s treatment of all Vendors.

16. Section 4.2.1(4) reads:

(1) It is of overriding importance that the staff member acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as reflecting favourable treatment to an individual or entity by accepting offers of gifts and hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to have been influenced, but to the impression that their action will create on others”.

(4) Advance disclosure is a primary guiding principle for any real or perceived conflict of interest”.

17. Rule 5.12 of the Financial Rules reads:

Procurement functions include all actions necessary for the acquisition, by purchase or lease, of property, including products and real property, and of services, including works. The following general principles shall be given due consideration when exercising the procurement functions of the United Nations:

- (a) Best value for money;
- (b) Fairness, integrity and transparency;
- (c) Effective international competition;
- (d) The interest of the United Nations.

³ UN Headquarters

⁴ Office away from Headquarters

18. Former staff regulation 1.2 (e) reads:

By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. 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.

19. Former staff regulation 1.2 (f) reads:

While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United

24. In the procurement process, there are two main actors at the initial stage of a bidding process - the requisitioner and the procurement officer who, in the fulfilment of their duties and obligations, have to comply strictly with the Procurement Manual as provided by section 1.1(9) of the Manual. They also have to abide by all the relevant staff rules referred to above.

25. The Procurement Manual defines “requisitioner” as a:

UN official, who is responsible for submitting to UN/Procurement Services (UN/PS) or Chief Procurement Officer (CPO), through the Certifying Officer, for their action, an approved IMIS pre-encumbrance document, or similar document from the local requisitioning system. The requisitioner shall develop an acquisition plan in cooperation with the UN/PS or CPO and upon identifying a future need and conduct market research, shall develop the scope of the requirement through generic technical specifications.

Were the Applicant’s due process rights respected?

26. The Applicant submitted that his due process rights had been violated for the reasons that: the PTF never informed him of the allegations; never instructed him that he had a right to counsel and never told him how the statements he would make to the PTF would be used against him. The Applicant also submitted that he was not provided with copies of all evidence gathered during the investigation. In particular, he was not given copies of several witness interviews, which were potentially exculpatory. The exculpatory evidence was not considered by the PTF. The Applicant also alleged that the PTF was biased and used inflammatory language in its findings regarding him.

27. The Respondent submitted that at every stage of the investigation: the Applicant was informed of the issues, provided all relevant documentation, was invited to comment and given ample opportunity to defend himself. He was informed of the scope of the allegations and was furnished with copies of the records of the interviews. Relying on the testimony of Mr. Jose Luis Martinez, PTF Investigator, the Respondent submitted that at no time did the investigators tell the Applicant that he was not entitled to have the assistance of counsel and that at any rate he never asked for counsel.

July 1994. The PTF was tasked with investigating cases of procurement fraud, corruption, and violations of the Organisation's rules, regulations and procedures⁶.

32. Paragraph 18 of ST/SGB/273 recognizes the need for the Organization to put in place mechanisms to protect individual rights, the anonymity of staff and others, due process for all parties concerned and fairness during any investigation.

33. A "Manual of Investigation Practices and Policies" (the Manual) was drafted for the guidance of investigators. The Manual that is relevant to the present case was prepared on 4 April 2005 under the hands of the then Under-Secretary-General of OIOS, Mr. Dileep Nair.

34. The authors of the Manual were fully alive to the stark reality that the concepts of due process and fairness are not elaborated on either in the General Assembly resolution or ST/SGB/273. This omission is clearly pointed out at paragraph 47 of the Manual. Given that fact, the authors have set out what, they no doubt, genuinely believe due process and fairness should encompass for the purposes of an investigation. This is set out at paragraph 48 of the Manual:

36. Further, paragraph 39 of the Manual stipulates that confidentiality is a basic principle of investigative methodology and fairness. Exceptions to the rule of confidentiality do exist where there is a need for a translator, or the release of information to prevent fraud or to protect staff or to counteract misleading press accounts. Information may also be released on-going investigations into criminal activity to obtain cooperation from appropriate authorities of a Member State.⁹

37. The investigative standards applicable to witnesses are: (i) a witness will be informed of the general nature of the matter under investigation but not the identity of the person being investigated;¹⁰ (ii) the questions put to a witness should be clear and the witness must have a full opportunity to respond in his/her own words; (iii) witness interviews must be documented with full regard to confidentiality;¹¹ (v) confidentiality means that only the witness and the investigators are present at the interview.¹² Exceptionally translators may be present at the discretion of the investigators;¹³ and (vi) a witness may be informed that information supplied by him/her may be used to confront the individual under investigation.¹⁴

38. Paragraph 49 encompasses a broad rule that presumably applies to all staff including a staff member under suspicion. The rights listed at that paragraph are: (i) an obligation of the staff member to answer questions; (ii) no right to counsel during the fact finding exercise; and (iii) refusal to supply information may result in a case of misconduct. Paragraph 50 deals more specifically with the rights and obligations of a staff member under investigation. These rights or obligations are: (i) that a staff member is to be given a reasonable opportunity to present his/her version of the facts and to present evidence or witnesses (ii) the staff member must be made aware of the allegations; and (iii) the staff member may be questioned further to explain inconsistencies between his/her version and that of witnesses.

⁹ Ibid, paragraphs 38-46.

¹⁰ Ibid, paragraph 59.

¹¹ Ibid, paragraph 57.

¹² Ibid, paragraph 60.

¹³ Ibid.

¹⁴ Ibid, paragraph 61.

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wide powers of questioning, search and seizure that they have. In the pursuit of its mandate in the investigative process, the Organization needs to reconcile its duty and obligation with the rights of staff members under investigation.

43. However inconvenient or cumbersome this exercise may be, the Tribunal cannot subscribe to the proposition that, when a staff member may run the risk of losing his/her job, human rights should be subservient to administrative convenience in seeing the culprits being sanctioned. The right to work is guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and as such, the Tribunal cannot remain content to accept the due process and fairness rules that OIOS has formulated in the Manual for the use of investigators as the norm that should be applied in the course of an investigation when clear allegations of misconduct or impropriety have been formulated against the staff member. At that stage the process has left the realm of a preliminary investigation. While the investigators may be bound to comply with the rules in the OIOS Manual, the Tribunal is of the firm view that they do not constitute the norms that are binding on a court of law.

44. In *Johnson* UNDT/2011/123, Kaman J. noted that there are two distinct investigatory procedures set out in ST/AI/371 (Revised disciplinary measures and procedures) in that section 2 deals with preliminary investigations while section 6 deals with formal investigations. The Tribunal opined that:

For an investigation to be regarded as merely preliminary in nature, some ‘reason to believe’ must exist that a staff member has engaged in unsatisfactory conduct, but the investigation must not have reached the stage where the reports of misconduct are “well founded” and where a decision already has been made that the matter is of such gravity that it should be pursued further, through a decision of the [Assistant Secretary-General, Office of Human Resources Management]. Where the latter threshold has been reached, the investigation at that point ceases to be preliminary and in substance converts to a formal investigation with a focus on a specific staff member [...gestigationt8(o)-4.he 44.y(io5ngtf)-5.3-9.4(n)(m)(ly)-11(be prel)1atooiaa

45. Firstly, a staff member who is under investigation or who has been charged enjoys the presumption of innocence. Secondly, under the present system of investigating and charging, a staff member is denied the right to confront witnesses. Once the investigation is completed and the staff member is charged there is no hearing and therefore no chance to be heard.¹⁷ All that the staff member is entitled to is to provide comments to the charges.

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52. Under the former Staff Rules if the matter was referred to the JDC, the Applicant would invariably be represented by counsel and would be given latitude to cross examine witnesses and to present evidence and submit himself to cross examination. Under the new Staff Rules a referral to the JDC is no longer possible and the whole process boils down to: (i) a preliminary investigation, during which the staff member is compelled to collaborate; (ii) the filing of charges; and (iii) the review of all materials, including the response of the staff member, by the Administration. It is then decided on paper, without the staff member having had an opportunity to question witnesses, whether to impose a disciplinary measure on that staff member. All that the individual is allowed is to comment on the charges in writing.

53. Under both the former and new Staff Rules, the right to counsel would be afforded after the charge or charges have been notified to the staff member that is, when disciplinary proceedings as opposed to investigations are under way. The logic of that system is hard to grasp especially under the new system, which does not allow a hearing as the JDC has been abolished. Counsel's role would be only of an advisory nature as there would not be any adversarial proceedings.

54. Should the investigators have informed the Applicant that he had a right to legal assistance before they questioned him? There is nothing in the Staff Regulations and Rules that imposes such an obligation on the investigators. Equally there is nothing in the rules and regulations that prohibit the investigators from informing a suspected staff member that he/she can be assisted by counsel. And if a staff member requests counsel or asks to consult counsel before answering questions put by the investigators this should not be denied. Such a denial, unless reasonably explained, would amount to a breach of the due process right of a staff member. In the present case, the Tribunal notes the Resonant's submission that the Applicant did not ask for counsel and also notes that the Applicant stated that he could not recall when giving testimony whether he specifically asked for the assistance of counsel. Thus, the Tribunal cannot find that the Applicant's due process rights were breached in this respect.

Use of the Applicant's record of interview as a basis for the disciplinary charges

55. Should confessions or self-incriminating answers obtained in the course of an investigation, where the individual is not warned about the consequences that his/her answers may have, be used against the maker of such statements and would such use be compliant with due process principles? Should such statements be used against an individual in the absence of any other evidence? Admittedly, a disciplinary case is not a criminal case and the high and strict standards that are applicable in a criminal case would not necessarily be applicable in a disciplinary case.

56. On major issues that subsequently formed the basis of the charges the Applicant gave incriminating answers. He conceded that he contracted with United Nations vendors to build a private house. He allowed his brother access to his office to use email facilities. He confessed that emails were sent from his office and that it was a mistake. He helped his wife and brother to run a company and agreed that such action was inappropriate. When asked why he put himself in a position of conflict by contracting with United Nations vendors in a private capacity he stated that he instinctively felt that something was wrong and he understood that the “dual relationship with these vendors was wrong”.

57. He was subsequently charged for failing to uphold the highest standards of efficiency, competence and integrity in the discharge of his functions and not conducting himself in a manner befitting an international civil servant. He was also charged with having accepted a gift or favour without the authorisation of the Secretary-General; with being associated with a profit-making business or other concern; with engaging in an outside occupation; with failing to comply with the rules regarding the use of assets of the Organisation and for being in breach of the Financial Rules and Regulations of the Organisation.

58. A glance at the recommendations of the PTF indicates clearly that the PTF recommended that the Administration pursue disciplinary action against the Applicant as a result of the findings in its report. It is significant that reference was constantly being made by OIOS to the answers he had given during that preliminary investigation.

59. What appears to have taken place here is that the Applicant was part of the

Effect of the breach of due process rights, if any, at the stage of the investigation

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66. In the case of *Masri* 2010-UNAT-098, UNAT held that in disciplinary matters “the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.

67. This would require a scrutiny of the evidence and this Tribunal endorses the approach it had taken in the case of *Diakite* UNDT/2010/024:

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.

68. In the present case the Applicant was informed that some of the charges had been established against him in the following terms: “after a thorough review of the PTF Report, supporting documentation, your comments, and the documentation you have provided, the Secretary-General has concluded that the totality of the evidence indicates that, **on a balance of probabilities, it is more likely than not**, that the charges had been established”. [*Emphasis added*]. This was clearly a wrong approach as the standard of proof is higher than a balance of probabilities, a matter that will be addressed below. Notwithstanding a wrong approach adopted by the Secretary-General matters do not end there and that wrong approach cannot automatically work in favour of the individual concerned. The Tribunal still has to exercise its discretion and examine the facts by adopting the correct burden and standard of proof and reach the appropriate conclusion in the light of the evidence and overall proceedings.

69. In *Diakite* the Tribunal adopted the following reasoning:

The Tribunal has first to determine whether the evidence in support of the charge is credible and capable of being 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

74. The Applicant stated that BG Trading was established in August 2001. The main object of the company was to deal with bridal clothing and he had nothing to do with the business of the company except that he was helping his wife to establish it financially. He never received any remuneration from BG Trading. That company never did any business with ECA. Rila Construction was established by his brother and the object of the company was to manufacture concrete tiles. At the time of the hearing the company was still in existence. He never received any remuneration from that company and that company never did business with ECA¹⁹.

75. The Applicant explained that his role was limited to sending and receiving mails on behalf of these companies, a matter which is the subject of a separate charge. The PTF uncovered a number of mails sent from the official email account of the Applicant that relate to the activities of BG Trading²⁰. Emails showing an alleged involvement of the Applicant with BG Trading were obtained independently of any assistance of the Applicant²¹.

76. The evidence establishes that the Applicant used his official United Nations email account to send and receive mails on behalf of the BG Trading and Rila Construction. It can be inferred that this was a private use of an official email account. The Applicant stated that he was doing that to help his wife and his brother who at that time had no access to email accounts. But there is no evidence that establishes clearly and convincingly that he obtained any gain of any nature by so doing or that his wife or brother obtained any such gain through his instrumentality. This finding is farfetched and does not rest on any credible factual foundation.

77. Under former staff regulation 1.2(q) staff members were required to use the property and assets of the Organisation only for official purposes and to exercise care when using such property.

¹⁹ Hearing 21 March 2011

²⁰ See paragraphs 124, 125 and 126 of PTF report

²¹ See paragraph 127 of PTF report.

78. The Secretary-General's bulletin on the use of Information and Communication Technology Resources and Data²² qualifies the former staff regulation 1.2 (q) under the title "Use of property and assets" that allowed staff members to use property and assets of the Organisation for official purposes only and to exercise care when using the property and assets. What exactly was meant by the exercise of care? The immediate conclusion would be that a staff member should not damage the property or assets of the Organisation. But that would be too simple an approach. In the view of this Tribunal the duty of care would also encompass a duty on the part of a staff member not to make an abuse of the use of any assets of the Organisation. There may be different forms of abuse that can only be determined on a case to case basis. In the present case using the United Nations email account on behalf of business companies was certainly not a judicious exercise of care.

79. In the light of the evidence and applying the proper standard of proof and approach to evidence the Tribunal is unable to say that any of these companies had or intended to contract any business with ECA or the United Nations. The object of BG Trading was to deal with bridal clothes and the Tribunal fails to see any congruence between the activities of that company and the official responsibilities of the Applicant in the ECA.

80. In *R v Exall*²³, Pollock CB described circumstantial evidence in the following manner:

One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that

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vague terms. It was also incumbent on him to strive to avoid perceptions of conflicts of interest, or of undue influence for the sake of the confidence that bidders should have in the procurement process and in the interest of the ethical and financial implications for the Organisation. The duty of an officer who is involved in the procurement process is not only to avoid any actual conflict of interest but perhaps more importantly to avoid a perception of a conflict of interest.

89. Although the Applicant denied he was a requisitioner and insisted that his role was very limited, the Tribunal finds that he occupied an important position in the procurement process at the ECA and as such, he has to be held to the same high standard of integrity as was the applicant in *Streb* 2010-UNAT-080 who accepted “lavish hospitality” from a vendor. UNAT held that though the misconduct was based on a single incident,

[I]t would have been inappropriate if the Secretary General were to have taken the view that so long as there was no evidence of the applicants’ impartiality actually being compromised they would not have committed misconduct or serious misconduct. Any such construction ignores the importance that must properly be attached to ensuring public confidence in the integrity of the UN Procurement Division.³¹

90. The Tribunal finds that the sanction of summary dismissal was fully justified in view of: (i) the status of the Applicant in the procurement process of ECA; (ii) the fact that he contracted with United Nations vendors without disclosing that fact in clear terms; and (iii) the fact that he was engaged to some extent in the activities of BG Trading and Rila Construction without obtaining the appropriate authorisation from the Secretary General.

³¹ *Cabrera and Streb* UNDT/2010/034.

(Signed)

Judge Vinod Boolell

Dated this 23rd day of April 2013

Entered in the Register on this 23rd day of April 2013

(Signed)