



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-440

**Stoykov
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

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| Before: | Judge Inés Weinberg de Roca, Presiding Judge Mary Faherty Judge Richard Lussick |
| Case No.: | 2013-504 |
| Date: | 27 June 2014 |
| Registrar: | Weicheng Lin |

Counsel for Appellant: Gavin Irwin

Counsel for Respondent: Wambui Mwangi

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Ventsislav Stoykov against Judgment No. UNDT/2013/070, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 23 April 2013, in the case of *Stoykov v. Secretary-General of the United Nations*. Mr. Stoykov submitted his appeal on 24 June 2013, and the Secretary-General filed his answer on 26 August 2013.

Facts and Procedure

2. The UNDT made the following findings of fact, which are not contested as to veracity by the parties, although the Appellant argues they are “wholly inadequate” to his case: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 [Dispute] Tribunal contesting the decision of the Respondent to summarily dismiss him on the ground of misconduct and is praying that he be reinstated in his post.

Background facts

... The Applicant entered the service of the United Nations in February 1995 as Officer-in-Charge (OIC) of ECA’s Building Management Unit at the P4 level. In June 2004 he was promoted to Chief of the Facilities Management Section at the P5 level.

... In August 2001 the Applicant’s wife established a company called BG Trading. The company remained in her name until her death in July 2004 when the Applicant, along with his two children, inherited a 95% share in the company.

... The Applicant’s brother, Mitko Stoykov, was the owner of a company called Rila Constructions. The Applicant sent a number of emails on behalf of both BG Trading and Rila Constructions from his United Nations email account ... mainly during 2002.

... In December 2004 the Applicant conducted a bidding exercise for his private residence. He obtained four offers and decided to employ a company called Geom Luigi Varnero Impreza Costruzioni PLC (Varnero) to carry out some work on his property. Varnero was also a company which carried out contractual work for the United Nations and due to his role as Chief of the Facilities Management Section the Applicant had dealt with this company. The Applicant received a volume discount of 6.5% from Varnero for the work carried out on his residence.

¹ The following text is taken from Judgment No. UNDT/2013/070, paras. 1 – 11.

... 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.

... 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.

... Between 24 February 2007 and 6 March 2007, the Applicant exchanged several emails with the financial disclosure office at the United Nations in which he disclosed the existence of BG Trading and the nature of its business. On 24 October 2007, the Applicant informed the Ethics Office in writing of a potential conflict with companies that he had retained for the construction of his building in 2005.

... In March 2008 the Applicant's computer hard disk was taken by the Procurement Task Force (PTF) in commencement of the investigation against him. During the investigation process the Applicant was interviewed on 8 and 9 October 2008. The Applicant responded to a voluntary information disclosure request on 23 October 2008. He was provided with a notice of findings letter on 3 November 2008 to which he responded on 17 November 2008 providing additional information to the PTF on 2 and 3 December 2008.

... The Applicant was informed by memorandum dated 26 March 2009 that he was charged with 10 counts of misconduct. He responded to those charges on 15 May 2009.

... The Applicant was informed by letter dated 5 February 2010 that he was summarily dismissed following findings of misconduct against him as his conduct constituted a violation of staff regulations 1.2 (g)[,] (m), (o) and (q). He was also informed that his conduct: (i) demonstrated a failure to discharge his functions with the highest standards of fairness, integrity and transparency, in violation of Financial Rule 5.12 and staff regulations 1.2 (a), (e) and (f); and (ii) constituted a violation of the United Nations Procurement Manual, specifically sections 1.1(9), 4.1.5(3) and 4.2.1(4).

3. The Dispute Tribunal conducted an extensive trial in Addis Ababa between March and May 2011.

4. In its Judgment, dated 23 April 2013, the UNDT registered its serious disquietude regarding due process violations in the PTF investigation, during which Mr. Stoykov was not aware of the seriousness or the potential consequences of the allegations against him; was induced into making self-incriminating statements as he was compelled to answer the

investigators' questions; and was not advised that he could have the assistance of a current or former staff member or the representation of counsel.

5. Nonetheless, it determined that such flaws had been rectified by the proceedings before the Dispute Tribunal itself:

... No doubt that the Applicant was denied some of his due process rights at the investigation stage. The question that needs to be addressed is whether these basic flaws notwithstanding the decision of the Respondent, which is based on the findings of the investigators, can still be upheld.

... The Applicant appealed the decision of the Respondent. He was given a full opportunity and latitude of presenting his case before the [Dispute] Tribunal and of confronting the same witnesses who had given evidence before the investigators. He himself testified and was cross examined. The evidence that transpired during the trial did not materially depart from what the investigators found. In addition to the incriminating answers given by the Applicant there was independent evidence in the form of testimony of witnesses and documents that substantiated the charges against him. Had this not been the case and had the incriminating answers given by the Applicant at the investigation stood alone the [Dispute] Tribunal would not have accepted any decision based on incriminating answers and would have held that there was no evidence to substantiate the charges.

... Based on the circumstances of this case, the [Dispute] Tribunal finds therefore that the breach of the Applicant's due process rights was cured by the subsequent court proceedings.²

6. The Dispute Tribunal was also concerned with the burden of proof utilized by the Respondent, which did not meet the standard established by the Appeals Tribunal in *Molari*,³ when the Administration based its dismissal decision on the standard of a balance of probabilities, and not that of clear and convincing evidence.

7. Ultimately, however, the Dispute Tribunal concluded:

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

² *Ibid.*, paras. 62-64.

³ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

Rila Construction without obtaining the appropriate authorisation from the Secretary-General.⁴

Submissions

Mr. Stoykov's Appeal

8. Mr. Stoykov submits that he did not receive a fair trial before the UNDT: the Judgment was seriously delayed; it makes no mention of the majority of his witnesses and evidence; and it mis-states the evidence of one witness. Moreover, he was denied access to the full case record of the UNDT. As the Judgment states general conclusions without explaining how they were reached, Mr. Stoykov claims he could not properly prepare his appeal and nor can the Appeals Tribunal adequately review the case.

9. With respect to the charges against him relating to his connection with BG Trading and Rila Construction, and his use of United Nations IT facilities in sending e-mails on their behalf (either from himself or his relatives), Mr. Stoykov submits that his role with the companies was marginal at best and was disclosed. Moreover, he contends that his IT use was extremely limited (27 e-mails over seven years) and within "permitted personal use", and did not interfere with his performance.

10. With respect to the charges concerning the construction of his residence, and the conflict of interest given his employment of vendors who also contracted with the United Nations, Mr. Stoykov contends that no conflict of interest arose in his contracting with two of Ethiopia's few large construction companies as his role in their United Nations contracting was limited. In fact, his department had, at times, either no influence, expressed no preference and even recommended against these companies in the award of the Organization's contracts. No conflict of interest – or perception of same – could have arisen under the circumstances.

11. Mr. Stoykov argues that the UNDT made such errors of fact and of law that its decision is manifestly unreasonable.

⁴ Judgment No. UNDT/2013/070, para. 90.

12. He requests that the Appeals Tribunal reverse the Judgment of the UNDT and remand the case to be heard, on an expedited basis, by a different Judge of the Dispute Tribunal. In the alternative, he seeks the relief he considers the UNDT ought to have granted, namely rescission of the impugned decision and reinstatement (or compensation in lieu thereof in the amount of two years' net base salary), as well as three months' net base salary for moral damages.

The Secretary-General's Answer

13. The Secretary-General argues that Mr. Stoykov has shown no reversible error in his appeal.

14. With respect to the facts of the case, he submits that the UNDT was correct in finding that Mr. Stoykov engaged in unauthorised outside activities, in view of his admitted association with BG Trading and Rila Construction. The fact that he inherited and wound down BG Trading did not extinguish the fact that he had been actively associated with both companies, and had used United Nations resources on their behalf by sending e-mails. Moreover, although he subsequently disclosed his participation, he did not do so in a timely manner or obtain the necessary authorisation from the Secretary-General.

15. The Secretary-General further submits the UNDT correctly found Mr. Stoykov's actions with respect to the construction of his house amounted to misconduct and justified the termination of his employment. By contracting with, and receiving favourable terms from, United Nations vendors, he was in clear conflict of interest and acted "utterly unethical[ly]".

16. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

17. Mr. Stoykov appeals the Judgment and requests a new trial by a different Judge because there are no transcripts available for the evidence of seven witnesses who testified by telephone on 24 March 2011.

18. He also submits that he was unable to confirm the remaining contents of the court file.

19. On 31 May 2013, Mr. Hastie of the Office of Staff Legal Assistance (OSLA), Counsel for Mr. Stoykov, requested from the UNDT the case file for the purpose of a possible appeal. He added that the full case file, including the parties' trial bundles, did not appear to be available from the eFiling Portal.⁵ He requested confirmation of the list of documents filed by the parties that were in the possession of the Dispute Tribunal during deliberations and asked whether the documents not available in the eFiling Portal could be uploaded.

20. The appellate review of facts, with which we are charged, requires a record. Article 2(1)(e) of our Statute requires that we decide, in some cases, whether the UNDT "[e]rr[or]red on a question of fact, resulting in a manifestly unreasonable decision". Further, Article 2(7) of the same Statute provides that "[f]or the purposes of the present article, 'written record' means anything that has been entered in the formal record of the Dispute Tribunal, including submissions, evidence, testimony, motions, objections, rulings and the judgment, and any evidence received in accordance with paragraph 5 of the present article".

21. Obviously, in a case with oral evidence, we cannot review the UNDT's findings unless we have a transcript of that testimony. In a case that turns on disputed facts, we would have no choice, in the absence of a written transcript, but to remand to the trial court for a new and recorded hearing.⁶

22. This Tribunal has held that while the representatives of the parties were present at the oral proceedings, they are entitled to the record of the testimonies made at those proceedings from the relevant UNDT Registry. This record is critical to the preparation of the appeal case.⁷

23. The transcripts of the testimonies of seven out of 17 witnesses are missing. The e-mail of 11 July 2011 by the UNDT Nairobi Registry notes that it was not possible to produce transcripts for most of the witnesses whose testimony was given over the phone as the sound

⁵ The Court Case Management System (CCMS), an eFiling portal maintained by the Office of Administration of Justice.

⁶ *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130.

⁷ *Finniss v. Secretary-General of the United Nations*, Order No. 49 (2011).

quality was very poor and that the transcripts of 24 March 2011 could not be produced. The record was thus not complete because the transcripts of witness testimonies were missing and the UNDT Nairobi Registry could not certify that all the documents of both parties had been entered.

24. Further, the case file has not been uploaded in its entirety. When the Counsel for Mr. Stoykov requested a list of the parties' documents the UNDT Nairobi Registry informed him that, according to the Judge, the facts as recorded in the Judgment did not present any insurmountable complexity and should be sufficient for the preparation of an appeal.

25. It appears that neither party filed electronically. The Secretary-General was correct when affirming that the Appellant was in possession of his own bundle and the additional documents tendered. Mr. Stoykov alleges that some evidence may not have been considered by the Judge. In this context, the correspondence from the UNDT Nairobi Registry to Counsel for Mr. Stoykov that it would endeavor to upload the Respondent's bundle onto CCMS by 13 June 2011 is worrying.

26. In the *Finniss* case, quoted by the Secretary-General, it was he who raised his entitlement to the record of the testimonies critical to the preparation of the appeal case. The same applies to Mr. Stoykov in the instant case.

27. In view of the above, we remand the case for retrial by a different Judge.

Judgment

28. The Judgment is vacated and the case remanded for retrial by a different Judge.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar