UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/055/ JAB/2008/104

Judgment No. UNDT/2009/015

Date: 31 August 2009

Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

ABBOUD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant: Bart Willemsen, OSLA

Counsel for Respondent: Susan Maddox, ALU/OHRM

Judgment

The application is dismissed.

Note

1. At the conclusion of the argument on the Motion, I gave an *ex tempore* judgment. The following is an edited version of that judgment, in which I have corrected various grammatical solecisms and tidied up other editorial slips. On further reflection, I consider that my initial view, as expressed in the *ex tempore* judgment, that the expression "reason to believe" is tantamount to a "reasonable suspicion" was wrong and I have corrected my judgment in that respect, inserting references to the speech of Lord Devlin in *Hussein v Chong Fook Kam* (1970) AC 942 and the judgment of the High Court of Australia in *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 which, in part, explain my change of opinion. This change is immaterial to and does not affect the outcome of the Motion.

Introduction

2. This matter arises from an appeal by the Applicant to the Joint Appeals Board concerning a decision made on 15 July 2008 by the relevant Under Secretary-General (USG) not to undertake a preliminary investigation into allegations of improper behaviour and abuse of authority made by the Applicant against another staff member. The alleged misconduct was said by the Applicant to have occurred during an interview conducted by a panel, which included the staff member, convened for the purpose of evaluating the Applicant's suitability for promotion.

3. Following the Applicant's complaint about this conduct, the USG made certain enquiries about what transpired at the interview. He decided that there was no reason to believe that the other staff member had engaged in unsatisfactory conduct warranting a preliminary investigation, declined to conduct one and informed the Applicant accordingly on 30 July 2008. On 27 August 2008 the Applicant submitted a request for the review of this decision and, on 29 September 2008, was informed that the decision was upheld. Hence his appeal.

The legal issues: "reason to believe"

4. On 4 March 2009 the Administrative Law Unit, on behalf of the Secretary-General, responded to the appeal. Although the preliminary point was taken that the appeal was time barred, the Tribunal was informed at a directions hearing on 16 July 2009, that this was not pressed. The substantive response to the appeal relied on the provisions of ST/AI/371 prescribing the procedures applicable to the consideration of allegations of misconduct, pointing out that the USG was obliged, in accordance with sec 2, to undertake "a preliminary investigation" where "there is reason to believe that a

staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". Certain specified conduct warranting such a measure is listed and includes, so far as is presently relevant, misuse of office and abuse of authority (sec 2(f)). Other unspecified conduct comprising a failure by a staff member to comply with obligations imposed by the Charter, the Staff Rules and Regulations or "to observe the standards of conduct expected of an international civil servant" (Staff Rule 110.1) may also warrant disciplinary measures but, as I understand it, this is not alleged in the present case.

5. Where the preliminary investigation "*appears to indicate* that the report of misconduct is well founded" (my italics) a full report is made to the Assistant Secretary-General, Office of Human Resources Management and certain steps then must be taken, ultimately leading, where it appears that the allegation "should be pursued", to the charging of the staff member with misconduct, possible suspension and a hearing (as it then was) before the Joint Disciplinary Committee or summary dismissal: sec 3 *ff*. The test constituted by the italicized phrase is undemanding: there needs only to be the appearance of an indication "that the report of misconduct is well-founded" to trigger a preliminary investigation. The test, however, is helpful I think in considering the meaning of the phrase "reason to believe" in sec 2 and suggests that, although mere suspicion is not enough, not a great deal more is necessary. (I discuss this issue briefly below.) Quite what is involved will depend on the circumstances, of course, and this may well be an issue that needs to be determined in disposing of the present motion but it need not be discussed at present. It is enough to note that the preliminary investigation must be adequate to enable a proper judgment to be made as to whether there is such an appearance. The point is that it appears to be incongruous that the test for initiating a preliminary investigation would be more demanding than the test for taking the next step, following the investigation, of deciding that the matter is to be pursued (under sec 3, sec 4, sec 5) to suspension or charge.

6. The existence of a reason to believe that unsatisfactory conduct occurred is insufficient, in itself, to trigger the requirement that a preliminary investigation should be conducted. The alleged conduct must not only be unsatisfactory, it must also be such that imposition of a disciplinary measure might be warranted. As I have mentioned, the enquiries made by the USG in this case led him to conclude that there was no reason to believe that the staff member whose conduct was impugned had engaged in unsatisfactory conduct of this requisite kind. It does not appear whether the USG thought that there was no reason to believe that any unsatisfactory conduct occurred or if he considered that, the impugned conduct, if it did occur, would not warrant the imposition of a disciplinary measure and, hence, that a preliminary investigation was not warranted. It is not necessary to determine this issue for present purposes.

7. It is unfortunate that the phrase "reason to believe" is used in the administrative instruction, since it is both a colloquial English expression and one widely used in various regulatory and statutory instruments (relating, for example, to search warrants, bankruptcy, breach of patents and taxation enforcement) where its incidents vary with the context. Its components, logically considered, do not yield its true meaning and are

apt to mislead. Considered logically, it refers to facts or circumstances that would be sufficient to lead to or justify the posited belief, here of the actual existence of the relevant conduct. But it is obvious that this is not what is meant – and, indeed, as an English expression, what it does not mean. Certainly, suspicion and belief are different states of mind. It was said by Lord Devlin in *Hussein v Chong Fook Kam* (1970) AC 941 (at 948) that suspicion "is a state of conjecture or surmise where proof is lacking". It will frequently be the case that facts which can reasonably ground a suspicion may be insufficient to reasonably ground a belief. In *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104, the High Court of Australia said –

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief [than a suspicion], but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

George v Rockett was a case concerning the requirements for the issue of a search warrant, the effect of which, of course, would be a significant interference with the property and privacy rights of the citizen, in short, substantive and actual consequences. Here, the "reason to believe" is a prerequisite to a mere preliminary as distinct from a final investigation, with no substantive consequences. Accordingly, the extent of "surmise and conjecture" could be quite substantial though, of course, it must be reasonable. There is and can be no bright line. It can be said with confidence, however, that it is not necessary that the reason should establish more probably than not that the misconduct occurred. That this is so is also obvious from the context, since it could scarcely be the case that the decision maker would need to be in command of sufficient facts to justify a positive belief (or conclusion) that the unsatisfactory conduct occurred before initiating a preliminary investigation, the more so when the outcome of the preliminary investigation may justify further actions with serious consequences on the basis of what must be seen as the very undemanding test required by sec 3.

8. Thus, the "reason to believe" must be more than mere speculation or suspicion: it must be reasonable and hence based on facts sufficiently well founded – though of course, not necessarily proved – to rationally incline the mind of the decision maker to the belief. It is clear that the question is one of fact and degree in which the decision maker is bound to act reasonably but which necessarily involves the exercise of judgment. It is inaccurate to refer to such a judgment as the exercise of a discretion. If the USG in this case had in fact decided that there was "reason to believe" that the relevant misconduct had occurred, he was left with no residual discretion to refuse to conduct a preliminary investigation but was bound to conduct one. Of course, if there is a reasonable basis for a judgment and the decision is not affected by impropriety, bias or mistake of fact, merely that another person – or, for that matter, the Tribunal – might independently make a different judgment is immaterial. In that sense, such a judgment

is treated for the purposes of judicial review in the same way as the exercise of a discretion reposed in a decision maker.

9. It may also be worth noting that there might well be "reason to believe" that a certain fact occurred without there being any actual belief that it did. Moreover, there might be "reason to believe" the fact occurred even if the decision maker was subjectively of the positive belief that it had not occurred, *a fortiori* if he or she had no belief one way or the other. The question is not whether the decision maker has a subjective belief one way or another; the question is whether there is, objectively, reason for the belief that the relevant conduct occurred. It is not for the decision maker to determine the facts and his or her personal belief about whether the posited misconduct occurred is completely irrelevant: his or her sole task is to ascertain whether there is a "reason to believe" that the misconduct occurred and then to initiate a preliminary investigation, whatever his or her opinion might be about whether it had occurred.

10. Of course, it is necessary for the decision maker to make sufficient preliminary enquiries to allow him or her to make the relevant decision and, in this respect, there is accorded a substantial degree of administrative discretion. What is sufficient will depend on the circumstances. A failure to make enquiries that, objectively speaking, were reasonably required in order to determine whether or not there was a reason to believe that the relevant misconduct occurred will, for obvious reasons, mean that the administrative discretion has miscarried.

The issues in the case

11. Here, the Applicant wishes to contend that any reasonable enquiries undertaken by the USG would have persuaded any objective and reasonable decision maker that, indeed, there was reason to believe in the occurrence of the requisite conduct and therefore, the decision not to conduct or initiate a preliminary investigation was wrong. Essentially, this case depends, in an evidentiary sense, upon what was said by the Applicant about what happened at the interview, what the members of the panel disclosed and the inferences that reasonably follow from that material.

12. The case to be made by the Secretary-General is, as I understand it, that the decision not to initiate an investigation was within the discretion of the USG and that, absent some mistake of fact or some vitiating impropriety, his decision cannot be gainsaid.

The motion for summary judgment

13. The Respondent moves for dismissal of the Application under Art 9 of the Rules of Procedure of the Tribunal. It is submitted in substance by Ms Maddox, counsel for the Respondent, that accepting for the sake of the present application the facts alleged by the Applicant concerning the staff member's conduct at the interview are true, they could not warrant any disciplinary measure being taken against him. The basis for this submission is the language used by the Applicant himself to describe what occurred. It

is contended that what he alleged could not, on any view, involve such moral turpitude as to constitute misconduct, even if it might have been ill-mannered and ill-judged – though that this was so is not admitted. Accordingly, it is argued, the Applicant must inevitably lose and the application should be summarily dismissed.

14. Art 9 provides that a party –
> "may move for summary judgment where there is no dispute as to the material facts of the case and a party is entitled to judgment as a matter of law…"

The Respondent contends that, having regard to the way in which its argument is put, there is no relevant dispute. The point of the article is to permit summary disposal of a case where there is no useful purpose capable of being served by a trial. That would certainly be so where the facts alleged by an Applicant, accepted at their highest, must result in an adverse judgment.

15. It was initially submitted by Mr Willemsen, counsel for the Applicant, that since there will or is very likely to be a dispute as to the facts should the matter proceed to trial, there is no jurisdiction in the Tribunal to hear the motion for dismissal. Mr. Willemsen brought to my attention the decision of Laker J in *Matacic* (UNDT/GVA/2009/42) in which his Honour rejected an application for summary judgment where the parties disagreed as to whether there was a dispute as to material facts. When the Motion came on for hearing, Mr Willemsen withdrew his objection and was content to limit his arguments to the substantive question whether the Application should be summarily dismissed. However, it seems to me that I am independently bound to consider the question whether the Motion can be maintained in the present circumstances.

16. Whilst, of course, according every respect to the judgment of another Judge of the Tribunal and accepting the importance of the principles of judicial comity, the question as formulated in *Matacic* differs from that with which I am dealing. One can easily surmise that the issue there – whether the decision in question in the application was an "administrative decision" within the meaning of Art 2 (i) of the Statute – might well involve quite difficult and controversial factual questions depending, for example, on the nature of the subject matter of the alleged misconduct, the determination of which was necessary before any question of dismissal could be decided. As it happened, Laker J – no doubt correctly – did not think it was necessary to descend to this level of detail, but it follows that *Matacic* is not a useful guide in this case.

17. Ms Maddox conceded that, if this matter were to go to trial, there will be a dispute as to certain facts, or, merely likely perhaps, a dispute as to the inferences properly to be drawn from the facts. However, she submitted that the question is whether the motion can be decided without the need to resolve any factual controversies in this hearing and that this is the instant position. In this sense, there is no relevant dispute as to the fact for the purposes of the motion.

18. If this submission were wrong, then many trials (subject to the use that might be made of Art 19 of the Rules of Procedure) might be a complete waste of time, where the outcome of the case is inevitable for legal reasons, even if the allegations made by the Applicant or, for that matter, by the Respondent, were accepted as truthful. In my view, the requirement of Art 9 is satisfied where there is no dispute as to the facts for the purposes of the motion, in other words where there is no need to determine any factual controversy in order to decide whether the moving party is entitled to judgment as a matter of law. The mere fact that, if the matter were to proceed to trial, there could or even would be a dispute as to the facts is thus immaterial. It is perhaps worth noting that a procedure of this kind is commonplace in many legal systems which, given its obvious common sense advantages to the efficient administration of justice, is scarcely surprising. The purpose of such a provision is to avoid unnecessary trials, with their concomitant expense and inconvenience.

19. Art 19 of the Rules of Procedure gives jurisdiction to the Tribunal to give "any direction which appears…to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties". Under this article it is plainly permissible for a judge of the Tribunal to direct that any question of law or fact be determined as a preliminary question if that would permit the more expeditious disposal of a case, providing, of course, that it is fair to do so. It would be almost certainly appropriate to do so in a case where the case was one in which the facts, if they were to be accepted as alleged by either the Applicant or the Respondent, must result as a matter of law in judgment for the other side. The undertaking of an unnecessary trial is clearly neither expeditious nor just.

20. Accordingly, I propose to entertain the Respondent's application.

Should the application be dismissed?

21. As I have already mentioned, this case concerns the conduct of a member of a panel convened to interview the Applicant for a promotion. The Applicant alleges that during the interview, and in a way that was not repeated by the other panel members, the staff member's behaviour was -

> "unprofessional, unethical and inappropriate for the following reasons:
> - Use of inappropriate language;
> - Making sarcastic observations about my answers;
> - Questioning my answers;
> - Questioning OHRM rationale of including specific competencies in the VA and their relevancy;
> - Arguing with other members of the panel;
> - Showing an intimidating posture;
> - Creating a tense and unsettling atmosphere;
> - Asking hypothetical questions; and
> - Asking investigation-like questions about issues that have already been answered on."

22. The USG sent these complaints to the other members of the panel. It is sufficient to say for present purposes that, broadly speaking, they supported (to a greater or lesser extent of particularity) most, if not all, of the allegations made by the Applicant. Their answers, however, were brief and it is clear that further enquiry would have elicited more detailed responses. It appears that the USG also interviewed the staff member but what the staff member said is not the subject of evidence in the present application.

23. Ms Maddox contended that, even accepting that all the allegations made by the Applicant are true, they could not amount to misconduct and, accordingly, the USG was right not to initiate a preliminary investigation. Mr Willemsen contended that whilst, of itself, the conduct was not on its face evidence of moral turpitude that would have justified disciplinary measures being taken against the staff member, this conclusion depended upon an assumption about the staff member's motive. He pointed to the fact that more than one kind of behaviour allegedly occurred – that it appears that the alleged inappropriate conduct reflected the staff member's adverse attitude to the Applicant and was evident throughout the interview: it was not an isolated act. Moreover, it constituted a substantial departure from the ordinary and expected conduct at interviews, a part of which is the asking of questions (usually agreed on before the interview) which are paralleled in interviews of other applicants so that each applicant has, in substance, to move along the same path for the purposes of assessment. He submits that such a radical departure from self-evident good practice requires some investigation. It may have been the result of mere incompetence or egotism, but it gives rise to the reasonable belief in the circumstances that it was more likely motivated by some ill-will or animosity towards the Applicant, given its adversarial character. After all, Mr Willemsen asked rhetorically, why would someone who was the member of such a panel with no personal interest in the outcome, deal with the Applicant in such a markedly inappropriate way and furthermore, not deal with another Applicant in the same way? This, it is contended, gives reason to believe that the staff member used the interview as an opportunity to injure the Applicant's promotion prospects, which must be misconduct. In brief, Mr Willemsen argued that the impugned behaviour itself was reflective of the staff member's animosity to the Applicant, i.e., cogent evidence of his wrongful motive, and that its expression in the context of such an interview was misconduct. Or, if the USG thought that these facts did not give rise to this conclusion, they at least required him to enquire about the staff member's motives for behaving as it is alleged that he did, and he did not do so.

24. Ms Maddox submitted there is no evidence about the staff member's motives and hence no evidence of misconduct.

25. For myself, I have no doubt that, were a staff member to use the interview of the kind undertaken here for the purpose of satisfying some personal animosity or grievance against a candidate for promotion, that could well amount to an abuse of office and constitute serious misconduct. It would amount to a gross breach of trust and could have incalculable adverse consequences for the candidate. The presence of such

feelings mandated withdrawal from the panel. In this case, there is, of course, except for the allegations of the conduct itself, no evidence of the staff member's motive but it is reasonable to believe that his actions did have a motive as distinct from merely being the expression of an unpleasant personality. Since the conduct was adverse to the Applicant, it is reasonable to infer that it expressed an inappropriate attitude towards him since, by and large, persons intend the natural consequences of their acts.

26. It is important to note that I do not need to make and refrain from making any findings on, firstly, whether the conduct actually occurred and secondly, what motivated it; I am concerned only with the allegations and the inferences that may fairly and reasonably be drawn from them.

27. It is evident from what I have already said that, if the USG failed to enquire about the motives for the staff member's alleged actions, then his enquiries were insufficient to establish whether it was "reasonable to believe" that misconduct occurred. In order for him to have obtained sufficient information for the purpose of making the relevant administrative decision, namely whether to initiate a preliminary decision, it is at least arguable that he needed to enquire more of the panel members to ascertain in greater detail, while memories were fresh, how it was that the staff member conducted himself and what he said and also to enquire about the staff member's reasons for acting as he did. An off-hand sarcastic remark might have been harmless and the adverse questioning of the Applicant might have been trivial, but they might well not have been. Moreover, if the USG failed to consider what motivated the staff member to act as he did, he failed to consider a material fact and his decision cannot stand for that reason.

28. It is important to bear in mind that this conduct did not occur in the course of idle conversation or even an official meeting. It was alleged to have occurred during a promotion process in which equality of treatment of the applicants is rigorously to be maintained and is not only a fundamental part of the propriety of the entire procedure but self-evidently so, and the surmise that a member of the panel might not have known the importance of equal treatment can be dismissed out of hand.

29. In my view, there is sufficient merit in the Applicant's case to warrant a full hearing. Put otherwise, the acts alleged by the Applicant, if accepted, do not lead to the conclusion that as a matter of law the Respondent is entitled to judgment.

(*Signed*)

Judge Michael Adams

Dated this 31st day of August 2009

Entered in the Register on this 16th day of September 2009

(*Signed*)

Hafida Lahiouel, Registrar, UNDT, New York