



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/071

Judgment No.: UNDT/2010/053

Date: 31 March 2010

Original: English

Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MMATA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Katya Melliush, OSLA

Counsel for respondent:

Tamara Shockley, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund (UNICEF), contests the decision by UNICEF, dated 31 August 2009, to impose on him the disciplinary measure of separation from service without notice pursuant to former UN Staff Regulation 10.2.

2. Following a case management discussion and a hearing on the merits, the respective contentions of the parties has been narrowed to the following:

Applicant's submissions

3. It is the Applicant's case that the allegation of misconduct, which led to his separation from service, was the culmination of a series of attempts on the part of the new Country Representative who took office in July 2008. The Applicant provided various examples in support of his allegation that there was a "witch hunt" on the part of the Country Representative.

4. During his 17 years experience with UNICEF, the Applicant was supervised and assessed by seven previous supervisors who rated his performance from satisfactory to excellent. However, on the new Country Representative's arrival, the Applicant was subjected to a series of criticisms which he interpreted as an attempt to remove him from office. However, the Respondents have denied that such a witch hunt had taken place. They pointed out a number of shortcomings in the Applicant's day-to-day management of financial matters.

Respondents' submissions

5. It is the Respondents case that the Applicant was found to have committed serious misconduct in that after having failed to surrender his and his spouse's United Nations Office at Nairobi (UNON) identification card (ID), these cards were used to

make duty and tax-free purchases in the UNON commissary store without authorisation. They state that having considered the results of a thorough investigation, and taking into account his experience in Human Resources (HR), they concluded that he had abused UN privileges and immunities. The Respondents consider that this constituted serious misconduct. It was not an attempt to unfairly remove him from office. They respected his due process rights and the sanction of dismissal without notice was proportionate to the offence.

Applicable legal principles

6. Staff Regulation 1.2(b) provides that “staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.”

7. Former Staff Regulation 10.2 provides that the “Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.”

8. Former Staff Rule 110.1 defines misconduct as:

“Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.”

9. UNICEF’s Administrative Instruction CF/AI/2009-004 sets out the basic mechanism and authorities for disciplinary action in UNICEF and outlines the basic requirements of due process to be afforded to a staff member who is the subject of allegations of misconduct.

UNICEF's Human Resources Policy and Procedure Manual

10. The relevant provisions in this manual are at Chapter 15, which provides details on UNICEF's disciplinary procedures.

Rules and Regulations Governing the UN Commissary

11. The UN Commissary, which is established at UNON, is operated for the benefit of the staff of the UN Organization and other eligible persons, with a view to facilitating the purchase of goods imported duty free.

Relevant factual findings

12. The Applicant is a Kenyan national. He started employment with UNICEF on 19 February 1990. His first appointment was as an Administrative and Finance Officer with the UNICEF regional office in Nairobi. His next appointment was as Human Resources Officer (HRO) in the Kenya UNICEF country office. In 2001, he was on mission assignment as an HRO with UNICEF Tanzania. In 2002, he was again on mission assignment to Afghanistan as an Operations Officer. In January 2003, he was assigned as an Operations Manager at UNICEF in Windhoek in Namibia, at the P-3 level, under the supervision of the Country Representative, until his contract was terminated on 1 September 2009 on the basis of alleged serious misconduct.

13. In September 2008, whilst the Applicant was serving in Namibia, he visited the UN complex in Nairobi. On producing his UNON ID card, he was stopped and questioned by a security guard who denied him access to the premises on the basis that the card was not valid. The Applicant asked to speak to a senior officer who explained that since his duty station was no longer Kenya, he could not use the UNON ID card to gain access to the premises. The ID card was confiscated and the

Applicant was issued with a temporary visitor's pass. The security officers clearly did not regard this as a serious matter since they did not report the incident.

14. Prior to September 2008, the Applicant and his wife made visits to the UN Commissary on 11 occasions. Their purchases over a period of approximately 5 years amounted to \$933.29¹. On no occasion during this period were they challenged either on gaining entry to the UN premises or the Commissary. After his card was confiscated, the Applicant heard nothing more until 6 April 2009 when he was called to Nairobi to discuss performance issues. It is not surprising that in these circumstances he concluded that the matter had been closed.

15. The Applicant had been summoned to the Kenya regional office of UNICEF to meet senior managers to discuss UNICEF's concerns about financial losses already incurred in the Windhoek office, and how such losses could be prevented in the future. There would appear to be nothing wrong in principle for senior managers to discuss such concerns with a staff member so long as the purpose of these discussions was intended to be constructive, supportive, developmental and with a view to putting in place appropriate procedures, including identifying and meeting training requirements, designed to avoid a recurrence of the problem. Three meetings took place on 6 April 2009.

16. The first two meetings conducted by the Deputy Regional Director and the Acting Regional Operations Officer concentrated on a peer-review and an audit report which highlighted the lack of proper financial controls and the Applicant's performance failures. Although the Tribunal was not given a great deal of information about these meetings it would appear that the managers concerned had given the Applicant a clear indication that there were serious concerns about his performance to such an extent that they were not optimistic about his capacity and

¹ This includes a sum of \$304.32 for purchases that the Applicant is disputing. Without this, the total is \$628.97.

ability to address the shortcomings.

17. The third meeting was conducted by the Regional Human Resources Officer (Regional HRO). The Regional HRO informed the Tribunal that earlier that morning he was in intensive care. He was asked to discuss with the Applicant various options for the future. In reality these options, following on from the two earlier meetings that day, were clearly designed with a single purpose in mind; namely to explore the options or alternative ways in which separation from service could take place. The managers involved in the two earlier meetings had formed the view that it was in UNICEF's interest to persuade the Applicant that separation from service was desirable. This was the clear instruction given to the Regional HRO. It is a highly questionable management decision to have required the Regional HRO to carry out such a challenging task when he had, barely a few hours earlier, been in intensive care.

18. The Regional HRO discussed the following options with the Applicant:

- i. That if the Applicant was willing to accept voluntary severance terms a suitable package would be negotiated to include 18 months pay, a termination payment and other benefits.
- ii. The second option was to use the Performance Evaluation Report (PER) procedures with a view to separation on the basis of poor performance. However, this process was time-consuming and would require a minimum of two adverse PER reports. At this stage they only had one. The rebuttal process would mean being involved in a lengthy process which was best avoided.
- iii. The third alternative was for him to simply resign.

19. The Applicant informed the Tribunal that when he indicated that he was not prepared to resign and that he was prepared to go down the performance rebuttal route, the Regional HRO stated that it had been reported to him that he, the Applicant, had been caught with an invalid UNON ID card and this could be used

against him as a charge of misconduct. The Applicant responded by stating that he had been given to understand that he could use the card and that upon its confiscation and having heard nothing since September 2008 he thought that the matter had ended. The meeting ended inconclusively with the Applicant stating that he would think about the options that were offered.

20. The Regional HRO admitted to having mentioned the incident with the Applicant's UNON ID card during the 6 April 2009 discussion. There was no conceivable reason for the Regional HRO to have mentioned the incident when, according to him, the purpose of the 6 April 2009 meeting was to discuss the Applicant's serious performance shortcomings in the Windhoek office and to offer him some options. Furthermore, he said that the possibility of disciplinary action was not in his mind at that time.

21. A month later, on 7 May 2009, the Senior Investigations Specialist (OIA Investigator) with UNICEF's Office of Internal Audit (OIA) contacted the Applicant to arrange an interview on 8 May 2009. This date, however, was not convenient and the interview took place on 12 May 2009.

22. On 24 June 2009, the Director of OIA sent his report to various senior officers in UNICEF. This report was produced to the Tribunal as part of the response to the claim. The report begins with a statement that "on 6 April 2009 the Regional Chief of Human Resources, ESARO, [...] contacted OIA saying that he had discovered that the Operations Officer in Namibia, [the Applicant] who left his position in Nairobi in 2003, had wrongfully retained his United Nations office at Nairobi (UNON) ID card and had been using it to purchase duty free goods from the UN Commissary ever since."

23. This statement is at odds with the Regional HRO's evidence that on 6 April 2009 he had no knowledge of the Applicant using his UNON ID card to purchase duty-free goods from the UN commissary. It was his evidence that the issue of the

unauthorized use of the Commissary facilities did not occur to him until much later when it was suggested to him by the UNON Security Officer that an enquiry should be made with the Commissary. He said that all he knew at that time was that the Applicant had been caught using an ID card without authorisation and that when challenged he was rude to the security officer. Yet the OIA investigation report clearly states that the Regional HRO reported on 6 April 2009 that the Applicant had wrongfully retained his UNON ID card and had been using it to purchase duty free goods from the UN Commissary ever since. The Regional HRO gave his evidence in response to the suggestion that he had unfairly pressurized the Applicant by saying that if he did not agree to voluntary severance terms, an option available to UNICEF was a disciplinary investigation into his unauthorised use of the ID card. The Tribunal accepts the Applicant's contention that after he refused to accept a severance package or to resign the Regional HRO proceeded to tell him, as a means of pressurizing him, that the incident with his UNON ID card could be used against him as a charge of misconduct.

24. The report describes the formalities to be completed when a staff member leaves a duty station to take up a post at another duty station. The details regarding the procedure are common ground between the parties. In essence, a checkout list has to be completed, itemising a number of steps to be taken. At item G is a requirement that UN passes for staff members and their spouses should be returned to UNON Security. Once the checkout list is completed it is submitted to the HRO at the UNICEF Kenya office who then forwards it to the Country Office's Operations Officer. If the list is satisfactorily completed a staff member will be paid all his entitlements in full otherwise there would be a deduction of 20% from his/her final clearance pay.

25. The Applicant agreed that he was fully aware of this rule. He said that he had completed the checkout list in accordance with normal procedures. He had every intention of surrendering his UNON card but was told by the security officer, to whom he had gone to hand in his card, that since he had a permanent contract and

was still a UN employee they did not need to take his card. The officer appended his signature to item G and the checkout procedures were processed. This list was missing from the Applicant's Official Status File (OSF), which was in the archives.

26. It was the OIA Investigator's evidence, corroborated by the Regional HRO, that the Regional HRO had conducted a number of enquiries on instructions from the OIA Investigator. From the OIA Investigator's point of view it was necessary for him to secure the cooperation of staff in the Nairobi office since he himself was stationed in New York at the time. However, as the manager who commissioned the investigation he should not have been personally involved in carrying out any enquiries or searches, which could have been done by others.

Preliminary Issues

Issue 1: The UN Commissary rules

27. As an annex to their response the Respondents provided a copy of the Rules and Regulations Governing the UN Commissary in Nairobi dated 27 July 2006. It is assumed that these are the rules applicable at the time when the Applicant and his wife made use of the Commissary facilities. Included in the various clauses are the requirements regarding access to the Commissary. Pursuant to paragraph 2.1 (a), staff members must have a valid UN site access card in order to enter the Commissary. Those who do not have a valid card may be asked to leave the premises. Further, in paragraph 2.1 (b), Commissary staff have been instructed not to serve anyone who cannot physically display a valid UN site access card.

28. Paragraph 2.1 (d) states that Commissary cashiers have been instructed to type in the staff member's index number and to disallow swiping of the card in front of the scanner. It would appear that this provision was not being enforced as the Applicant informed the Tribunal that when he paid for his goods at the Commissary, the cashiers would take his card and swipe it. The Tribunal considers that as long as the

Applicant's card worked when it was swiped by the Commissary cashiers, he had no apparent reason to doubt that he was authorized to use it.

29. Paragraph 2.2 identifies those who are authorized to enjoy the Commissary services. Further, paragraph 2.4 states that a non-transferable Commissary card shall be issued to participants. This card is required to be produced upon request and access to the Commissary would be limited to holders of a valid Commissary card. No purchase shall be made unless the card is presented.

30. It would appear that this particular provision is not being enforced and that the UNON ID card suffices for purposes of access and purchase of goods. The Applicant and his wife were at no time challenged by Commissary staff. This lack of challenge to the UN site in Gigiri, and the Commissary, confirmed further the Applicant's belief that the security officer who informed him that he could continue using the card was correct.

31. Given the seriousness with which UNICEF management regarded the unauthorised use of Commissary facilities, which they described as an abuse of privileges and immunities, it is necessary to see what provision exists in the Commissary rules for a violation of the rules and regulations.

32. Paragraph 5.1 states that any infringement of the Commissary rules and regulations shall result in a temporary or permanent withdrawal of the Commissary card and the right of access to the UN Commissary. In case of serious infringement, such as sale of purchased items to non-participants or fraud by Commissary users, disciplinary measures will be taken in conformity with the United Nations staff rules and regulations and where necessary under the laws of Kenya.

33. The penalty applicable to violations of the Commissary rules and regulations, which were agreed to at the meeting of the Commercial Operations Advisory Board

(COAB)² on 17th February 2005, are as follows:

- i. 1st incident – 3 months suspension of his/her commissary privilege.
- ii. 2nd incident – 1 year suspension of his/her commissary privilege.
- iii. 3rd incident – complete withdrawal of commissary privilege.

34. Paragraph 5.5 provides as follows:

“In case of infringement referred to in the second sentence of paragraph 4.1 above, the Commissary Manager shall advise the participant concerned and the Commercial Operations Unit (COU), who will raise the matter with the COAB. The Administration of that participant’s organization shall be advised of the decision reached.”

35. It would appear that the reference to paragraph 4.1 is incorrect and should be read as a reference to paragraph 5.1.

36. Paragraph 2.8 states that the validity period of each Commissary card is to be clearly indicated thereon and also states that cards will be issued with a maximum duration of 4 years, including staff members holding a permanent appointment. In this case, the Commissary staff should have but failed to question the Applicant on his use of a UNON ID card, which apparently did not have an expiry date on it.

Issue 2: The charge letter

37. On 14 July 2009 the applicant was given written notice of the disciplinary charge and brief facts of the alleged offence. The specific charge was put as follows:

“You are charged with abuse of privileges and immunities for having failed to

² The COAB is comprised of members and alternates from UN System Organizations accredited to Kenya, as well as representatives from the Staff Union and UNIASC.

surrender your and your spouse's UNON ID cards when you transferred out of Nairobi at the end of 2002; and for having subsequently used these cards to make duty and tax free purchases in the UNON Commissary store without authorization. At the same time, you are charged with abuse of authority for having retained your UNON ID cards even though you were responsible for ensuring that such passes were returned."

38. Whilst the charge of abuse of privileges and immunities is understood, the reference to "abuse of authority" under paragraph 15.2.2(f) is difficult to understand. The Tribunal also finds it difficult to understand a reference, on page 3 of the charge letter, to paragraph 2.8 of the Commissary Rules regarding the return of Commissary cards to SSS/UNON when such Commissary cards are not, in fact, issued.

39. In any event, the substance of the charge was put to the Applicant who would not have been misled by these minor errors. In essence the charge was in using the UNON ID cards issued to himself and his wife without authority to gain access to the UNON site in Gigiri, Nairobi, and for using those cards to purchase duty-free items at the Commissary when they lacked authority to do so. The conclusion section of the charge letter states "Your actions demonstrate conduct not befitting an international civil servant. They are in violation of 'the highest standards of efficiency, competence and integrity' expected of you as an international civil servant, as set forth in Article 101 of the United Nations Charter and staff regulation 1.2(b)."

40. The Applicant was informed that his "actions constitute serious misconduct within the meaning of staff rule 110.1". The charge letter invites the Applicant to respond and informs him of his right to seek assistance from the Office of Staff Legal Assistance or outside counsel. However, the language used, in significant parts of the charge letter, is inappropriate in that it states as a fact that the Applicant's actions constituted serious misconduct rather than to use language that will clearly indicate that whilst it would appear that such misconduct may have occurred the Applicant was being given a fair opportunity to defend himself. The Respondents would be

well advised to reconsider the terms of such charge letters so as to avoid the impression of a pre-judgment having been made, unless of course that that is precisely the meaning that is intended, which would be a matter of surprise.

Issue 3: Delay in bringing the disciplinary charge

41. One of the important issues for the Tribunal to resolve was the reason for the delay in bringing the charges from September 2008 to 14 July 2009 or alternatively the delay from September 2008 to 6 April 2009 when it was first mentioned to the Applicant and reported to OIA.

42. The Regional HRO informed the Tribunal that he had no knowledge of the Applicant's unauthorized use of his ID card prior to 6 April 2009 when, in a casual conversation with the UNICEF Kenya Country Office Representative, she informed him that the Applicant was rude to a security guard who challenged him about the unauthorized use of his UNON ID card. At that stage, the Regional HRO told the Tribunal that his principal concern was the allegation of rudeness. At that time the issue of any disciplinary action had not occurred to him. He agreed that he may well have mentioned the matter in the course of the meeting with the Applicant on 6 April. He also accepted that that was the date on which he informed OIA that there was an issue to investigate.

43. The UNICEF Kenya Country Office Representative corroborated the Regional HRO's evidence to the effect that she happened to be in the same building as the Regional HRO when she saw the Applicant. Seeing him jogged her memory about the conversation she had with the security officer who challenged the Applicant. She said that it was a casual conversation and her only concern following that conversation was to impress upon Human Resources that they should tighten up the procedures relating to check out and, in particular the return of ID cards. She thought no more about it until she saw the Applicant on 6 April. In mentioning the incident to the Regional HRO it seems that she was simply passing on some gossip

with no intention of reporting any possible disciplinary offence.

44. She accepted that the security officer had mentioned the incident to her soon after it had occurred. That would have been towards the end of 2008, probably in October. She said that had she not seen the Applicant on 6 April it would not have occurred to her to mention the incident at all since she had taken whatever action she considered appropriate in asking Human Resources to tighten up procedures. In her opinion the retention of the ID card was not in itself a misconduct issue given that the Applicant was still a staff member with UNICEF. She said that the Regional HRO wanted to confirm the security officer's name because he wished to apologize on behalf of UNICEF for the Applicant's alleged rudeness. She had no further involvement in this matter until she was approached by UNICEF to attend the Tribunal as a witness.

Issue 4: The investigation by OIA

45. It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred.

46. In this respect, the Tribunal notes that even though the Applicant was insistent that the checkout procedures were properly completed, OIA failed to pursue two areas of investigation that could have shed some light on the veracity of the Applicant's assertion. The OIA should have made an enquiry as to the procedure for filing the checkout list. The Tribunal heard evidence that two separate copies are filed; one in the staff member's OSF in Administration (i.e. HR office) and one in the archives. No enquiries were made in relation to the latter. Additionally, the OIA Investigator admitted that no enquiries were made to find out whether the Applicant,

as a result of an incomplete check out list, had forfeited 20% of his final clearance pay as indicated in the check out list.

47. Further, whilst the Applicant could not remember the name of the security officer who informed him that as a permanent staff member he could keep his UNON ID card it is surprising that during the investigation, the investigator did not ask him to describe the individual concerned. Furthermore, given that the period when he would have been required to complete the checkout procedure would have covered a matter of a day or two no enquiries were made to check the duty roster for those days in the expectation of identifying the individuals who were on duty at the time.

48. Whilst it is understandable that the Applicant may not be able to recall the identity of the individual given the lapse of six years it would have been valuable for the OIA Investigator to have explored these avenues to test the Applicant's credibility. This was particularly important given the possible serious consequences of an adverse finding against him. At all times the Applicant made it clear that he knew the rules and followed them and that he acted in good faith on what the security officer had told him when he had gone to surrender his ID card.

49. Paragraph 4.4 (c) of CF/AI/2009-004 allows UNICEF managers to conduct or assist in investigations if so requested by the Director of OIA or by authorized investigators and in paragraph 8.2 (e), the Director of OIA may task other staff to assist in particular aspects of an investigation under the guidance of an Officer of OIA. The OIA Investigator informed the Tribunal that since he was conducting the investigation remotely from New York, he relied on the Regional HRO, who had reported the incident to OIA, to obtain documents for him from the Commissary and the Kenya Country Office. The Regional HRO confirmed the OIA Investigator's testimony and also informed the Tribunal that, upon the directions of the OIA Investigator, he had also made inquiries about the number of times the Applicant had used his card in the Commissary.

50. Having taken careful note of paragraphs 4.4 (c) and 8.2 (e) of CF/AI/2009-004, the Tribunal considers that it is highly questionable and arguably not consistent with the highest standards of impartial investigations by the OIA to ask the very manager who referred the alleged disciplinary offence to them to assist in the conduct of that investigation. Without casting aspersions on the integrity of either individual it is my view that this is bad practice, particularly where it would have been possible to seek the information in question from individuals other than the referring officer. Not surprisingly this defect in the investigative procedure was seized upon by the Applicant's representative to cast serious doubt on the quality of the investigation and the Regional HRO's role in it.

Assessment

51. The charge relating to the unauthorized use of the UNON ID card to gain access to the UN premises in Nairobi was correctly brought. The more serious charge of abuse of privileges and immunities relating to duty and tax-free purchases in the UN Commissary is worthy of closer examination. Whilst it is correct that abusing the duty free privileges amounts to behaviour which falls short of the standards expected of the staff member as an international civil servant, the Respondents' use of the catchall phrase that particular conduct is "in violation of the highest standards of efficiency, competence and integrity" is in my view overstating the disciplinary issue.

52. According to UNICEF's Human Resources Manual on Policy and Procedure, chapter 15, section 2, paragraph 15.2.2(g), "abuse of UN privileges and immunities" may amount to misconduct. This is clearly not a case of strict liability. The use of the discretionary power indicates that before reaching a conclusion in this case, the decision maker is required not simply to ask whether, as a question of fact, tax and duty free purchases were made by the staff member but also whether by doing so the staff member intended to abuse UN privileges and immunities. In other words, did he have the "*mens rea*"?

53. The question that has to be addressed, where a disciplinary charge is brought against such a background, is the staff member's state of mind. Did he knowingly misuse the Commissary facilities? Did he have the intention to abuse the privileges and immunities of the Organization as alleged and charged? Did he genuinely believe, on reasonable grounds that he was entitled to have access to the Commissary?

54. The conduct in question in this case has nothing to do with efficiency and competence. Arguably it has something to do with integrity. The Respondents have relied on the Applicant's previous position in Human Resources and his current position as an operations officer in support of their contention that he was aware of the applicable rules and was in willful breach of them. The Respondents, however, did not provide the Tribunal with a specific Organizational rule or regulation governing the return of ID cards during the check out process. It appears therefore that this was a practice requirement. It was not an issue of dispute. Further, the Respondents would require cogent evidence to support their contention that the Applicant had the necessary knowledge or *mens rea* to commit the disciplinary offences in question.

55. There is no doubt that as a matter of fact he should not have retained his UNON ID card. Have the Respondents proved that he did so intentionally? Assuming in their favour that they were not required to prove beyond all reasonable doubt but only to satisfy the test of whether it was more probable than not that he had the requisite intention, it is necessary for the Tribunal to examine the evidence pointing to the existence of such an intention.

56. The Applicant accepted that he was fully aware of the checkout procedure and the need to return his UNON ID card. When he reported to the security desk to return the card he was told that he was a permanent member of staff continuing in employment with UNICEF and in the circumstances it was appropriate for him to

retain the card. At some point the design of the card changed, which would explain why the security officer who denied the Applicant access in September 2008 was able to challenge him. The Applicant's subsequent conduct in openly using the card is consistent with his belief formed as a result of what the security officer told him that he could continue using the card. Furthermore an examination of his purchases over a five-year period shows a total expenditure of \$933.29³. Whilst the amount of such purchases do not affect the question of whether such purchases were authorized or not or whether there was any loss to the Kenyan Exchequer, such amount may conceivably be taken into account in assessing whether or not an individual had the intention deliberately to defraud.

57. Study of the actual purchases together with the intervals between purchases and the manner in which they had been completed are entirely consistent with moderate purchases for personal use as described by the Applicant.

58. The Applicant told the Tribunal that in the years that he carried out these duties, at no time had he been responsible for the checkout of a permanent member of staff being transferred out of Nairobi. Therefore he would have had no personal knowledge of any deviation from the usual practice of surrendering the card. He went to the security desk precisely for the purpose of handing in his card but was told that it was not necessary. The fact that he could not recall the identity of the individual is not in itself consistent with entertaining a fraudulent intent. There was a duty on the Respondents in carrying out an investigation into this matter, in the full knowledge that it could lead to dismissal, to pursue all appropriate lines of enquiry.

59. As previously indicated, they could have done more to test the Applicant's evidence but did not do so. The evidence would appear to suggest that the Respondents did not believe the Applicant from the outset and concluded on the basis of his experience in HR that he had deliberately flouted the rules and retained his

³ See comment in footnote 1 at paragraph 14 above.

card. More damaging, however, is the implied suggestion that he might have had something to do with the absence of the checkout list in his OSF. Again in relation to this matter they could have pursued further enquiries but failed to do so.

60. It is clear from the evidence relating to the meetings that took place on 6 April 2009 that the Respondents had come to a considered view that it was in the interests of the Organization to part company with the Applicant. When they failed to secure his agreement to a consensual termination of the contract, pressure was applied to him to force a decision to accept severance terms. The Respondents knew that the alternative would have been to go down the performance assessment route, which would have taken a considerable length of time. Whilst it was suggested to him that as an alternative to an agreed voluntary severance package, he could resign it would have been clear to the managers concerned that no reasonable employee would voluntarily resign as an alternative to agreeing to a severance package.

61. Given the evidence suggesting on balance that the Applicant did not have the intention to defraud, I find that the Respondents did not have the necessary evidential basis to prove a charge of serious misconduct within the meaning of staff rule 110.1.

62. The disciplinary rules cater for a range of penalties in misconduct cases. Even if the Respondents believed that misconduct had occurred in this case, it did not constitute serious misconduct given the absence of intent.

63. In all the circumstances, the penalty of separation from service without notice is disproportionate to the offence.

Judgment

64. The Respondents unfairly dismissed the Applicant. The charge of serious misconduct is not well-founded.

65. The Tribunal orders rescission of the administrative decision and orders the Respondents to reinstate the Applicant and to make good all his lost earnings from the date of his separation from service to the date of his reinstatement with interest at 8%.

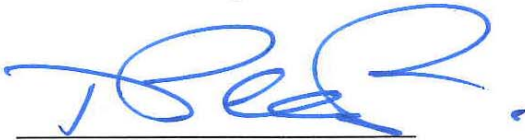
66. In the exceptional circumstances of this case, the Respondents are further ordered, in the event that reinstatement is not possible, to compensate the Applicant for loss of earnings from the date of his separation from service to the date of this Judgment with interest at 8% thereon. Additionally, the Respondents are ordered to compensate the Applicant in the amount of two years' net base salary at the rate in effect on the date of the Applicant's separation from service with UNICEF with interest thereon at 8% after 45 days from the date of this Judgment.



Judge Goolam Meeran

Dated this 31st day of March 2010

Entered in the Register on this 31st day of March 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi