



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/052/
UNAT/1660
Judgment No.: UNDT/2011/018
Date: 25 January 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Santiago Villalpando

BRIDGEMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bernard Adams, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

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

The JAB

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

The JDC

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

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

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

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

The appeal before the Dispute Tribunal

The Applicant’s case

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

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

The Respondent's case

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

- a. the decision to reprimand the Applicant for conduct unbecoming of an international civil servant, in accordance with former staff rule 110.3(b), was justified;
- b. the decision to impose the disciplinary sanction for misconduct, in accordance with former staff rule 110.3(a), was justified and proportionate to the misconduct that had been proven; and
- c. there was no prejudice or malicious intent and the decision was not motivated by other extraneous factors.

The case before the United Nations Dispute Tribunal

8. This appeal was not considered by the Administrative Tribunal. It was transferred to the Dispute Tribunal on 1 January 2010 in accordance with Chapter IV, para. 45, of General Assembly resolution 63/253 (Administration of justice at the United Nations) and sec. 4 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice).

9. Taking into account the way in which the Parties have put their respective contentions, the task of the Tribunal was to distil the essence of the appeal. The Tribunal determined that the questions for decision are:

- a. Was the Applicant's rights to due process violated when his computer hard drive was removed?

- b. In relation to the JAB review and report: whether there were any procedural flaws for which the Respondent should be held responsible?
- c. In relation to the JDC panel report and recommendation: did the Respondent have reasonable grounds to form a reasonable belief, after a proper and fair investigation, that the Applicant had acted in a manner unbecoming of an international civil servant and that he had misused the assets of the Organization?
- d. Was the penalty imposed on the Applicant proportionate to the gravity of the disciplinary offences, which were proved?

Relevant legal instruments

10. Former staff regulation 1.1 (Status of staff) provides in subpara. (c) as follows:

The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.

11. Former staff regulation 1.2 (Basic rights and obligations of staff) provides as follows (emphasis added):

Core values

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

(b) 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.

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

Specific instances of prohibited conduct

(d) Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

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

(a) Disciplinary measures may take one or more of the following forms:

- (i) Written censure by the Secretary-General;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for within-grade increment;
- (iv) Suspension without pay;
- (v) Fine;
- (vi) Demotion;
- (vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;
- (viii) Summary dismissal.

(b) The following measures shall not be considered to be disciplinary measures, within the meaning of this rule:

(i) Reprimand, written or oral, by a supervisory official;

...

14. ST/SGB/2004/15 includes provisions concerning information and communication technology (“ICT”) resources and data. It provides for limited personal use under sec. 4 (emphasis added):

4.1 Authorized users shall be permitted *limited personal use* of ICT resources, provided such use:

(a) *Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access);*

...

15. Section 8 of ST/SGB/2004/15 deals with monitoring and investigations conducted into the use of ICT resources and ICT data. The relevant provisions are secs. 8.4(a) and 8.5 (emphasis added):

8.4 (a) Except as provided in section 9.1, *requests for investigation under ST/AI/371 of the use of ICT resources shall be addressed to the Under-Secretary-General for Management or the Chief of Administration at offices away from Headquarters.* Such requests shall be made in writing and provide a brief description of the data required, the name of the staff member or other individual to be investigated and the name of the authorized official from the requesting office to whom the records are to be delivered;

...

8.5 The following procedures shall apply in cases of such investigations:

(a) *Staff members and their supervisors shall be informed immediately preceding access to their ICT resources or ICT data, including electronic files, email and Intranet/Internet access records, by the office conducting the investigation;*

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

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

Findings of facts

16. On 24 November 2005, whilst serving on full-time duty as Vice President of the Field Staff Union (“FSU”) at United Nations Logistics Base (“UNLB”) in Brindisi, Italy, the Applicant reported to the Administration of the Department of Peacekeeping Operations (“DPKO”) that a strange icon (“the icon”) appeared on his Lotus Notes profile providing him with access to the emails of another staff member who was serving with DPKO at United Nations Headquarters (“UNHQ”), New York. The initial investigation ascertained that the access to the staff member’s emails did not originate either from UNLB or the staff member’s computer. The staff member concerned was a candidate, who was standing in opposition to the Applicant in the pending elections for President of the FSU. The Applicant was troubled and asked for an investigation into this irregularity.

17. On 17 March 2006, the Applicant wrote to DPKO/UNHQ explaining that he had received neither an explanation nor redress for his complaint regarding the appearance of the icon and the access it provided to the other staff member’s email account. He said that he would be considering seeking redress outside of DPKO.

18. On 21 March 2006, the Chief of Communication Information Technology Services (“CITS”) reported to the Chief of Personnel at DPKO that the results of the investigation showed that the “bizarre irregularity” was because of an erroneous setting on the other staff member’s calendar file.

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

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

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

Respondent was aware that the FSU may have sensitive material stored on the hard drive.

The sequestration of the Applicant's hard drive

22. On 8 May 2006, upon the Applicant's return from annual leave, he received a letter from Mr. Lieberman informing him that he had directed the removal of the hard drive on 10 April 2006. Mr. Lieberman gave as the reason the Applicant's report, on 24 November 2005, of the "bizarre irregularity" of the icon on his Lotus Notes and the possibility of "other irregularities" that might require further investigation. He added that the intention was to protect the Applicant's computer from unauthorised tampering. He also stated that the hard drive had not "been activated" and had been "securely locked in a safe to protect it from tampering". The Applicant is understandably concerned and suspicious at the fact that notwithstanding the report of the Chief of CITS on 21 March 2006 (see para. 18 above), which suggested to him that the issue regarding the icon had been dealt with, there should, nevertheless, have been an instruction from Mr. Lieberman, on 10 April 2006, to sequester his hard drive.

23. This is the first reference to the icon in relation to the sequestration of the hard drive. The contemporaneous documentary evidence in the form of an outgoing fax, dated 10 April 2006, from Mr. Lieberman to Ms. Yewande Odia, Chief of CDU, asking for an investigation to be conducted, makes no mention of the icon. It relies solely on the oral complaint of sexual harassment and states at para. 5: "UNLB has confiscated the computer of the alleged offender and has secured email back-up tapes".

24. Given the absence of evidence that the issue of the icon was further investigated, consequent upon the confiscation of the hard drive, and given the clear evidence that the hard drive was confiscated solely pursuant to the complaint of sexual harassment, Mr. Lieberman's letter to the Applicant of 8 May 2006 was less

than truthful and grossly misleading. It would appear that the reference to “other irregularities” was a reference to the possibility of a formal complaint of workplace harassment being made against him. It should be further noted that, at the time that the instruction was given to sequester the Applicant’s hard drive, there was, in fact, no written complaint against the Applicant. Such a written complaint was only made 10 days after the removal of the hard drive, on 20 April 2006

25. The fact that the same false explanation that the Applicant’s hard drive was sequestered because of the need to investigate the phenomenon of the icon was offered to the JAB and the JDC, and accepted by them in the course of their consideration of the issues, calls seriously into question the integrity of the manager or managers concerned as well as the effectiveness of the procedures before the JAB and the JDC in that they were misled on an important issue.

26. No satisfactory and persuasive explanation was offered as to the basis upon which Mr. Lieberman had reasonable grounds to believe that there might be a risk of unauthorised tampering and by whom. It should be noted that the Applicant was on leave and had no knowledge that a verbal complaint of workplace harassment had been made against him. Furthermore, if the reason or the principal reason was the need to investigate the issue of the icon, the Applicant would have had no desire to obstruct an investigation into a matter that he himself had raised. In the Reply to the JAB (para. 26), the Respondent stated that “there was no one in the FSU offices at the UNLB compound in Brindisi” in that the Applicant was on extended absence, the President of the FSU was travelling and not in Brindisi and the resident administrative assistant was on temporary duty away from the office. Why could Mr. Lieberman not have waited until the Applicant and/or the President of the FSU returned to the office? In any event, the attendance record for this period indicates that the resident administrative assistant was not away from the office as asserted by the Respondent. Furthermore, the contact details of both the Applicant and the President of the FSU were available to the Respondent.

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

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

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

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

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

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

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

Respondent provided a copy of a Memorandum of 10 April 2006 from Mr. Lieberman to Ms. Kim Taylor, CCPO (Chief Civilian Personnel Officer) of UNLB, Mr. Leopardi, and Mr. Michel Bergeron, CITS (Communications and Information Technology Services) of UNLB, in which under the heading “Seizure of Computer and E-mail back-up tapes” it was stated that:

1. You are hereby directed to immediately seize the UN computer in the office of Mr. Hamilton Bridgeman.
2. CITS is directed to seize backups of e-mail and all other data from Mr. Bridgeman’s computer since June 2005.
3. These actions are to be done with discretion and no information about this action is to be revealed to anyone except me and the action addressees on this memorandum.

32. The JDC correctly found, as is clear from this instruction, that Mr. Lieberman did not inform the Applicant or his supervisors immediately preceding access to his ICT resource as required by sec. 8.5(a) of ST/SGB/2004/15.

33. There are a number of unsatisfactory aspects to the Administration’s justifications for removal of the hard drive. In response to Order No. 206 (NY/2010) of 2 September 2010, the Respondent did not accept the Applicant’s allegations of a breach of sec. 8.5(a) of ST/SGB/2004/15. The Respondent justified the removal of the hard drive and the email back-up tapes by relying on paras. 3-7 and 9-28 of the Reply to the Applicant’s appeal to the JAB, dated 27 November 2006. The Respondent also relied on the Reply of 1 July 2009 to the former UN Administrative Tribunal and attached the three annexes as set out below—what matters is not what is said in response to an appeal to the JAB, but the factual basis upon which such a response is based:

- a. The letter from Mr. Lieberman to the Applicant, dated 8 May 2006 (see para. 22 above), in which he informs him that he had directed that the hard drive be removed under supervision of one UNLB Security Officer, because the Applicant had reported a “bizarre irregularity” and because of possible “other irregularities”.

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

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

35. The Administration’s account of the circumstances under which the complaint of sexual harassment came to Mr. Lieberman’s attention is contradictory in that in response to Order No. 243 (NY/2010), the Respondent states that Mr. Lieberman (the CAO of UNLB) informed the Respondent that:

- a. Ms. Taylor, CCPO, told him that the complainant (the Applicant’s assistant) came to her with serious allegations;

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

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

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

with the complainant, it is not credible to suppose that this fact would not have been mentioned to Ms. Odia.

The grievance lodged with the JAB

37. The Dispute Tribunal is, in effect, exercising an appellate jurisdiction in substitution for the former Administrative Tribunal in relation to appeals against the administrative decisions of the Secretary-General. However, it is not the function of the Dispute Tribunal to carry out a comprehensive investigation into the substantive complaints made before the JAB. The Tribunal's task is to consider whether there were any procedural errors that call into question the legitimacy of the findings and/or recommendation of the JAB. Did the JAB misinterpret or misapply the relevant legal principles or ignore material evidence such that a manifest injustice may have been caused to the staff member? If so, the JAB's failure to make any recommendation in favour of the Applicant and the Respondent's failure to provide any relief to the Applicant, in reliance on a flawed report, must constitute a material irregularity in the proceedings.

38. The first concern regarding the JAB report is that there had been a delay of almost two years from the filing of the appeal, on 31 August 2006, to the release of the Report on 22 July 2008. The explanation for such delay, in so far as one can infer from the factual background, is that the JAB panel was awaiting the conclusion of the JDC panel's Report. Even if such an inference cannot be drawn from the factual background, I am bound to conclude, in the absence of a satisfactory explanation, that the delay was unconscionable.

39. The second issue of concern is the apparent lack of impartiality in the way in which the JAB panel carried out its task. The JAB was required to consider the Applicant's grievance against the decision of the Administration to remove his hard drive from the FSU offices which he was occupying in his role as Vice President.

That was a discrete matter that could and should have been dealt with independently of the disciplinary issues which were before the JDC.

40. Before considering the merits of the complaint, the JAB panel instructed its Secretary to obtain from the JDC copies of its Report and decision relating to the seizure of the Applicant's hard drive. This was precisely the issue before the JAB and it was distinct from the disciplinary issue before the JDC. It is clear that the essential prerequisite of an independent examination of the issues relating to the grievance before the JAB were missing. The JAB should have carried out its own independent investigation into the Applicant's grievance. It is significant that para. 43 of the JAB report states that "the panel observed that since a JDC had already dealt with that issue it would confine itself to the matter of the icon". The issue being referred to is the removal of the hard drive. Therefore, it is surprising that the JAB panel should have failed to note that the JDC report indicates that the Administration had breached the notification requirements under sec. 8.5(a) of ST/SGB/2005/14 when they confiscated the hard drive. The JAB panel clearly failed to deal with the task that it was entrusted with.

41. At para. 44 of its Report, the JAB panel commented by way of clear speculation as to the reasons why the Administration removed the hard drive. Its Report states: "the panel also noted that because some lingering doubt remained as to the exact cause of the irregularity concerning the icon it may have been for that reason that the Administration had taken the precaution of removing and sequestering the computer's hard-drive". Such speculation, together with the JAB's reliance on the JDC report, casts serious doubt on the JAB's independence and impartiality. In any event, the JAB panel was misled by being given a false account of the reason why the Applicant's hard drive was confiscated (see para. 26 above).

42. At para. 45 of its Report, the JAB panel concluded that the Administration was justified in not finding it practicable to postpone the removal of the hard drive in the Applicant's absence. It seems to have accepted the Respondent's explanation,

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

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

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

Provision 8.5 sets forth the specific procedures applicable to monitoring and investigations of staff members’ use of ICT resources and ICT data *and sets forth a number of rights of staff members who are the subject of monitoring or investigation, including the right to be notified in advance that ICT resources or ICT data used by them will be accessed.*

45. The distinction between “ICT resources and ICT data” is clear and serves a specific purpose, which does not appear to have been appreciated or understood by the JAB.

Considerations on the JAB report

46. Reading the JAB report paragraph by paragraph and then considering it as a whole, there is an inescapable inference that the JAB panel had allowed itself to be unduly influenced by having read the JDC report. The panel failed to demonstrate that a rigorous analysis of the facts was carried out or that any such analysis was

carried out independently and impartially. There seems to have been an overeagerness to accept the Respondent's explanation without subjecting those explanations to independent analysis. I find that there was a failure to accord to the Applicant his rights as a staff member to have his grievance considered independently of the disciplinary charges that were being investigated.

47. There has been a failure to appreciate that there were two distinct facets to these events, each requiring separate consideration under the administrative arrangements established by the Secretary-General. First in time was the sequestration of the Applicant's hard drive, which formed the subject matter of his grievance before the JAB. The second matter was the disciplinary proceedings initiated by the Respondent. Each required separate consideration under separate administrative arrangements and procedures. The Applicant was entitled to a timeous and unbiased consideration of his grievance. He received neither. The Applicant was denied his due process rights to a timeous, independent and impartial consideration of his grievance by the JAB as described above in paras. 31 to 42.

48. Former staff regulation 11.1 (applicable in 2006) stated as follows:

The Secretary-General shall establish administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules.

On this basis, the Respondent, in former staff rule 111.1, established the JAB and set out the general provisions regarding its composition and procedures. The former UN Administrative Tribunal in Judgment No. 1047, *Helke* (2002), held the Respondent liable for procedural irregularities committed by the JAB and ordered the payment of compensation in the sum of USD1,000.

49. The Applicant lodged a grievance against the administrative decision to sequester his hard drive in breach of procedures. The Respondent must assume liability for the failure of the machinery that he had established to deal with such

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

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

Considerations on the JDC report and findings

51. The JDC panel found that the incidents complained of "probably took place", but the conduct itself was not proven with sufficient specificity for the panel to find that the Applicant knew or should have known that the conduct was unwelcome or intimidating. The panel did not find that a charge of sexual harassment as defined under the now abandoned ST/AI/379 (Procedures for dealing with sexual harassment) was established. Although no disciplinary sanction was appropriate in relation to this charge, the panel concluded that administrative action would seem appropriate. The panel recommended that the Applicant should receive a written reprimand to avoid inappropriate behaviour in the future in addition to gender sensitivity training.

52. The charge of sexual harassment having been dismissed, the question of an appeal by the Applicant against this decision does not arise. However, there remain

other disciplinary charges. The Applicant was further charged with violating the provisions of staff regulation 1.2.

53. The Applicant attacks the procedures adopted by the JDC panel in considering these disciplinary charges. In particular he alleges that the panel:

- a. failed to review the case impartially;
- b. failed to recognise that the complainant (i.e., the Applicant's assistant) was not a staff member but an individual contractor;
- c. failed to inform him of details of the allegations prior to the preliminary investigation;
- d. failed to resolve the issue by informal means;
- e. engaged in deliberately deceptive communication;
- f. failed to observe his right to confront the complainant; and
- g. failed to allow him to participate in the composition of the panel.

54. Although the Applicant had reasonable grounds to be aggrieved by the manner in which the hard drive was removed from the FSU office prior to a formal complaint having been lodged and without observing the strict requirements of sec. 8.5(a) of ST/SGB/2004/15, his criticisms of alleged procedural errors on the part of the JDC panel are insubstantial. From a careful reading of the sixty-four paragraphs of the JDC report individually and as a whole, it is clear that the panel carried out a thorough and impartial investigation into the actual disciplinary charges. It should be noted that the most serious charge of sexual misconduct was dismissed by the panel, although it found that the Applicant had displayed inappropriate behaviour towards his female colleague. The only charge which the JDC found proven was the misuse of United Nations resources. The Applicant did not dispute that pornographic material was stored on the computer that was allocated to him. His

defence that he thought that the storage and sending of such material was permissible so long as it was not otherwise prohibited for being illegal is wholly misconceived. Under sec. 8.5(a) of ST/SGB/2004/15, the panel found that while the Administration had properly notified the Applicant prior to accessing the data stored on his hard drive, it had clearly failed to notify him immediately pending access to the actual hard drive. The panel therefore found that the Administration had breached the notification requirement under the provision. The Tribunal agrees.

55. There is a sufficiency of evidence to support the finding that the Applicant had displayed inappropriate behaviour and that he misused United Nations resources. Was the JDC entitled to rely on such evidence given the Applicant's concern that the evidence was obtained in breach of procedure and in particular sec. 8.5(a) of ST/SGB/2004/15? Did the failure to accord to the Applicant his rights to due process so infect the disciplinary findings that it should be set aside?

56. A distinction needs to be drawn between the actual sequestration of the hard drive and the access to ICT data. It is clear from an email, dated 7 March 2006, in which Mr. Lieberman wrote to the Applicant saying: "[p]lease advise by 1000 Brindisi time, 4 July if you wish to be present when the original drive is accessed" that the data was not accessed without informing the Applicant and inviting him to witness the process. Accordingly, his due process rights were observed at that point, notwithstanding the fact that they were violated in the act of removing the hard drive in breach of sec. 8.5(a) of ST/SGB/2004/15. The Applicant decided not to be present when the data was accessed. In the circumstances, I consider that it was permissible for the Respondent to access the appropriate data and for the data to be used by the JDC panel in the course of its Report.

57. Section 4.1 of ST/SGB/2004/15, which prohibits the use of ICT resources for the purpose of obtaining or distributing pornography, is in such clear terms as to be incapable of any misunderstanding or misinterpretation. This requirement is not unique for the United Nations. It frequently appears in codes to govern the behaviour

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

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

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

60. The recommendation made by the JDC panel that the sexual harassment charge should be dropped, but that the Applicant should receive a written reprimand against a repetition of inappropriate behaviour and that he should receive sensitivity training, is a recommendation that is appropriate in the circumstances. Furthermore, the recommendation that the Applicant should receive a written censure for non-observance of ST/SGB/2004/15 is more than amply justified by the evidence.

61. The Secretary-General accepted the findings in the JDC report, but he did not agree fully with the JDC panel's recommendation. He agreed with the panel's recommendation that the Applicant should receive gender sensitivity training as well as a written reprimand recorded on his official status file. The Tribunal accepts that this was not disproportionate in the circumstances relating to inappropriate behaviour towards his female colleague. In relation to the misuse of United Nations resources, the Secretary-General agreed with the JDC report and findings and considered that the Applicant's actions constituted misconduct within the meaning of former staff rule 110.1. However, he took a more serious view of the misconduct and considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

65. The Tribunal finds that:

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

Recommendation

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

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

Comment

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

Further case management orders

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

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

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

(Signed)

Judge Goolam Meeran

Dated this 25th day of January 2011

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

(Signed)

Santiago Villalpando, Registrar, New York