



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/30/
UNAT/1688
Judgment No.: UNDT/2011/086
Date: 20 May 2011
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SOW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bart Willemsen, OSLA

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. At the time of the contested decision, the Applicant was a Principal Officer of the United Nations Mission in the Democratic Republic of Congo (MONUC).
2. According to a Joint Disciplinary Committee ((hereinafter referred to as “the JDC”) Report dated 3 October 2007, an email was sent to the Applicant, on 19 May 2006, notifying him that he was required to file a financial disclosure statement in accordance with sec. 2.1 of ST/SGB/2006. He was required to comply by 30 June 2006, which was an extension of a previous deadline of 31 May 2006 granted to field staff of the Department of Peacekeeping Operations (DPKO).
3. By a letter dated 31 August 2006, the Ethics Office informed the Applicant that he had not complied with the financial disclosure requirements and requested his immediate compliance.
4. By a memorandum dated 5 January 2007 from the Ethics Office to the Under-Secretary-General for Peacekeeping Operations, DPKO was requested to bring to the Applicant’s attention that he had not as of that date complied with the financial disclosure requirements.
5. On 9 March 2007, the Ethics Office sent the Applicant an email with a final notice to discharge his financial disclosure statement for 2005.
6. By a memorandum dated 5 April 2007, the Ethics Office requested that the Assistant Secretary-General (ASG) for Human Resources Management initiate the appropriate disciplinary action against staff members who had failed to comply with their obligations under the Staff Rules. The Applicant was among those listed by the Ethics Office.

Charges and Applicant’s comments on the charges

7. By a memorandum dated 18 October 2007 from the Director, Division for Organizational Development, Office of Human Resources Management (OHRM), the

Applicant was charged with failing to file a financial disclosure statement for 2005 and, in particular, violating Staff Regulations 1.2(b), 1.2(n), sec. 10.1 of ST/SGB/2006/6 (Financial disclosure and declaration of interest statements) (implementing staff regulation 1.2(n)) and staff rule 101.2(b). The Applicant submitted a response to the charges on 3 November 2007.

8. In his response to the charge letter, the Applicant stated that he did not meet the requirements due to the pressure of work and technical difficulties in submitting the financial disclosure form online and that he had submitted a complete financial disclosure for 2005 as well as disclosures for 2006 and 2007. By a memorandum dated 25 March 2008, the Officer-in-Charge for OHRM referred the case to the *ad hoc* JDC.

JDC Review

9. The JDC Panel was established on 13 July 2008 and held its hearing on 6 August 2008. The Panel transmitted its Report to the Secretary-General on 3 October 2008. The Panel unanimously found that the Applicant failed to comply with his obligations under the Staff Regulations and that he failed to present convincing evidence of his good faith efforts to comply with his obligations. Taking into account the fact that the Applicant accepted responsibility for this failure and that he worked in one of the most hazardous field missions, the Panel unanimously recommended that the Applicant: receive a written censure from the Secretary-General for his failure to fulfil his obligations under the Staff Rules; that the Administration instruct him to file his 2005 disclosure statement by any available means within one week of his documented receipt of the letter notifying him of the decision of the Secretary-General; and should the Applicant fail to fulfil the above-mentioned requirements, that his employment with the Organization be terminated.

10. On 30 January 2009, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined his case in light of the JDC's findings, conclusions and recommendations, as well as the entire record and the totality of the

circumstances. The Secretary-General accepted the findings of the JDC, with respect to the Applicant's obligation to file a 2005 financial disclosure form, that he had failed to comply with his obligations under the Staff Regulations and that he failed to present convincing evidence of his good faith efforts to comply with those obligations.

11. The Secretary-General noted that it would not serve any purpose to file a financial disclosure form for 2005 at that point. The Secretary-General considered that he should receive an appropriate sanction and that a censure, as recommended by the JDC, was not sufficient but that in view of the existence of a number of mitigating factors in his case, separation from service would be disproportionate. Pursuant to his discretionary authority in disciplinary matters, the Secretary-General decided that pursuant to staff rule 110.3(a)(v), the Applicant would be fined two months' net base salary.

12. The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the former UN Administrative Tribunal.

13. On 6 May 2009, the Applicant submitted the present Application to the former UN Administrative Tribunal. The Respondent filed his Reply on 2 November 2009. On 24 November 2009, the Applicant filed "Observations on the Respondent's Reply". As a result of the transitional measures related to the introduction of the new system of administration of justice, the case was transferred from the former UN Administrative Tribunal to the United Nations Dispute Tribunal ("the Tribunal").

Applicant's Case

14. The Applicant frames his case as follows:

15. In his decision, the Secretary-General, *inter alia*, states that "in view of the existence of a number of mitigating circumstances in this case, separation from service would be disproportionate". The Applicant submits that this demonstrates an error of law invalidating the decision, which is not affected by the observation of the

JDC suggesting separation should the Applicant fail to submit the financial disclosure statement within one week of receipt of the Secretary-General's decision.

16. In effect, the Secretary-General suggests that any and all forms of misconduct should by that fact itself lead to a separation from service, unless “mitigating circumstances” can be identified that would make such separation be disproportionate and that this suggestion goes beyond the discretionary authority of the Secretary-General.

17. If indeed it was the default position that any and all findings of misconduct should lead to separation from service but for mitigating circumstances, this would dispense with the distinction between simple and serious misconduct. The Applicant’s failure to submit a financial disclosure statement does not fall within the terms “serious misconduct”.

18. This default position - in the absence of mitigating circumstances – would also render meaningless any findings of aggravating circumstances where separation from service forms the most severe of disciplinary sanctions stipulated in staff rule 110.3(a).

19. If any and all findings of misconduct are tantamount to separation from service save for mitigating circumstances, such could lead to the conclusion that a staff member can be separated from service for the most minor of infractions if he or she cannot produce or proffer mitigating circumstances.

20. The former UN Administrative Tribunal had consistently held that the Secretary-General has wide discretionary powers in disciplinary matters, including the determination of what constitutes misconduct. However, the Tribunal has reiterated that this discretionary power is not unfettered and is subject to the Tribunal’s review.

21. The disciplinary measure imposed in this case does not correspond to the wrong done. From the outset of the disciplinary proceedings, the Applicant took full responsibility for the situation; he admitted his failure to submit the financial disclosure form and expressed regret in having done so. In turn, the JDC found that he had failed to present convincing evidence of his good faith efforts to comply with his obligations, a finding which he does not accept as accurate as he did in fact make good faith efforts but failed to secure direct evidence of the same. His compliance with the financial disclosure obligations for the reporting periods of 2006 and 2007 adds considerable weight to the veracity of his claim that he did in fact make good faith efforts to submit the required disclosure statement for the reporting period of 2005.

22. The purpose of staff regulation 1.2(n) is to certify that the assets and economic activities of the staff members, their spouses and their dependent children do not pose a conflict of interest with their official duties or interests of the United Nations. No such conflict of interest has been alleged in the instant matter nor does the Administration allege that the Applicant's failure to submit the financial statement prevented them from verifying whether or not there was such a conflict of interest.

23. The Applicant submits that he fails to understand the Secretary-General's statement that "it would now not serve any purpose to file a financial disclosure form for 2005". The Applicant submits that sec. 2.1 of ST/SGB/2006/6 stipulates that the submission of such statement is retroactive by definition. He was given until 31 March 2007, more than 15 (fifteen) months after the conclusion of reporting period, to submit his financial disclosure statement and there was nothing to suggest that at this stage he was no longer in a physical position to present relevant information over the 2005 reporting period.

24. The Applicant contends that the only issue was his failure to properly comply with the obligations stipulated in staff regulation 1.2(n) within the given time-limit.

This failure does not correspond to the disciplinary sanction imposed. A lesser sanction or even an administrative reprimand would have been appropriate and proportionate considering the mitigating circumstances identified, including his full compliance with his disclosure obligations in 2006 and 2007.

25. When looking at the list of mitigating circumstances, in paragraph 24(c)(iii) of the Respondent's pleading of 30 July 2010, it is noted that there were problems and technical difficulties with the electronic filing system for financial disclosure statements in the relevant period and the fact that these difficulties were prevalent was confirmed by the Respondent during the JDC's proceedings at paragraph 14 of the JDC Report.

26. As stated at paragraph 15 of the JDC Report, he had produced several e-mails that confirmed that he had inconclusive exchanges with the Ethics Office regarding the difficulties in preparing his disclosure statement for 2005. It therefore cannot be maintained that he did not make good faith efforts as these email exchanges with the Ethics Office demonstrate the opposite, namely, that he did in fact attempt to submit his financial disclosure statement but there were technical difficulties. There were no other reasons for the Applicant to contact the Ethics Office. In this respect the Applicant referred the Tribunal to paragraph 15 of the JDC Report which provides, *inter alia*, as follows:

In response, the staff member produced copies of several emails that confirm that he had inconclusive exchanges with the Ethics Office regarding difficulties in preparing his disclosure statement. In addition, the staff member submitted a copy of his email to the Ethics Office dated 4 December 2007 in which he complained that "after completing the list of wives and children and responding to subsequent questions regarding revenues, it [the process] stopped".

27. On 28 August 2009, prior to the Respondent's Reply, the Assistant Secretary-General for Human Resources Management decided that as a result of another staff member's failure to act in compliance with his obligations under sec. 2.1 of

ST/SGB/2006/6 for two consecutive periods despite repeated reminders, that the said staff member be reprimanded. The Applicant further claims that within a week from the date of the decision that he be reprimanded, the staff member was promoted to the level of Assistant Secretary-General. Considering this decision, the Applicant does not consider that the position taken by the Respondent in respect to his case was entirely correct and wholly proportionate.

28. In Judgment No. UNDT/2010/171 of 24 September 2010, Meeran J held that in exercising judgment on the proportionality of a disciplinary sanction, it would be necessary to ensure that the principle of consistency is applied and that where staff members commit the same or broadly similar offences, in general, the penalty should be the same, not necessarily identical, but with a very narrow range of appropriateness.

29. The Applicant requests the Tribunal to find that the Secretary-General erred in law and in exercising his discretionary authority in imposing a fine of two months' net base salary for his failure to submit a financial disclosure statement for the reporting period of 2005 and rescind the impugned decision.

Respondent's Case

30. The Respondent's submissions are summarized as follows:

31. The Secretary-General has broad discretion with regard to disciplinary matters and this includes determination of what constitutes misconduct warranting a fine. The United Nations Charter and the Staff Regulations vest the Secretary-General the authority to determine whether a staff member has met the required standards of conduct.

32. It is within the Secretary-General's discretionary power to determine what behaviour constitutes misconduct as well as the disciplinary measure to be imposed.

33. Regarding the Applicant's arguments that the Secretary-General's decision erred in law, the Respondent submits that the Applicant has put forward a wholly inaccurate representation of the Secretary-General's decision and that the decision states in relevant part as follows:

the Secretary-General considers that you should receive an appropriate sanction and considers a censure as recommended by the JDC is not sufficient but that in view of the existence of a number of mitigating factors in this case, separation from service would be disproportionate.

34. The Secretary-General's decision does not reflect the presumption that all forms of misconduct lead to dismissal unless mitigating circumstances can be identified. It simply sets out the parameters used by the Secretary-General in the present case only, in determining the appropriate disciplinary measure to be imposed for the misconduct found - specifically that, in the Applicant's case, a censure was not sufficient and separation from service was too severe in view of the mitigating factors. Accordingly, the Respondent submits that the Secretary-General's decision was not an error in law but a fully valid exercise of his discretionary authority.

35. The Applicant failed to submit a 2005 financial disclosure form (with an initial submission deadline of 30 June 2006) even by April 2008, after referral of his case to the JDC. This is a time lapse of almost two years. Such failure was despite: repeated reminders from the Ethics Office; the Applicant being under threat of disciplinary action for a year and a half and, by the Applicant's own admission that the form would have taken five to ten minutes to produce. Such failure by the Applicant to comply with his obligations demonstrates a blatant, conscious and repeated violation of the Staff Regulations and Rules. Accordingly, the Respondent submits that the Secretary-General's decision to impose on the Applicant a fine of two months' net base salary, rather than the written censure recommended by the JDC, was entirely correct, wholly proportionate to the Applicant's offence and a fully valid exercise of his discretionary authority.

36. At the time of the sanctioning of the Applicant, there was in existence the decision of the Secretary-General in 2010 which dealt with a senior official of two steps above the Applicant, an Assistant Secretary-General (ASG) level appointee, who amongst other things failed to file or comply with his financial disclosure obligations and who received a demotion and a fine of 2 months' net base salary. The said decision also dealt with that ASG's failure to cooperate with a Procurement Task Force (PTF) investigation. That case is a comparator in that it dealt with financial disclosure obligations and the failure to comply with them.

37. In *Sanwidi*¹ the Appeals Tribunal held that in reviewing decisions, the Dispute Tribunal was not to conduct merit based review or to consider the correctness of the decision but was to look at whether or not there was a legally challengeable problem with the decision and that this involves a delicate task of conducting a judicial review. There is a fine line between considering whether or not something is legal. The Tribunal may determine whether the decision is legal, rational, procedurally correct or proportionate.

38. The Appeals Tribunal in *Sanwidi* set out the considerations to be taken into account in determining whether a decision is proportionate. The three factors that the Appeals Tribunal considered are: the proportionality test which is satisfied if a cause of action is unreasonable but not if the cause of action is excessive, this involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective and the action goes beyond what is necessary to achieve the objective.

39. In this case the imposition of the disciplinary measure is sufficiently important. In the context of imposition of a disciplinary measure, the objective is to sanction the staff member for his or her failure to comply with the Staff Regulations. It is the Respondent's position that it is clear from staff regulation 10.2 that the Secretary-General has the power to sanction staff in cases of unsatisfactory conduct.

¹ 2010-UNAT-084.

In the case of financial disclosure obligations, the Secretary-General has a real interest in ensuring compliance with the financial disclosure requirements. This interest serves not only to ensure the lack of a conflict of interest for a given individual but also to ensure the perception of the United Nations as a place where senior officials as a matter of course disclose their financial interest.

40. The second consideration as stated by the Appeals Tribunal in *Sanwidi* is that the action must be rationally connected to the objective. In the case of a disciplinary measure, the Respondent's position is that almost any sanction short of dismissal would have been appropriate. In this case, the JDC suggested that the staff member receive a written censure and if he failed to file the financial disclosure statement that his employment be terminated.

41. In *Doleh*² the Appeals Tribunal overturned a decision of the Commissioner General of the United Nations Relief and Works Agency (UNRWA) on the ground of proportionality and they said that in that case the Commissioner General's decision was the equivalent of using "a sledgehammer to crack a nut"³.

42. In the present case, a fine of two months is not a sledgehammer, it is not an excessive sanction, it is an entirely appropriate sanction and is therefore an entirely appropriate sanction in the case of a failure by a very senior official as stipulated in former staff regulation 1.2(n) as being required to file the financial disclosure statement. In the year that the Applicant did not comply, 1700 of his fellow staff members did comply with that obligation and it was entirely a rational sanction to impose a fine of two months in this case.

43. The third consideration, as stated by the Appeals Tribunal in *Sanwidi*, is that the action should not go beyond what is necessary to achieve the objective and this is

² 2010-UNAT-025.

³ *Id.* p.6 para 20.

again very close to the idea of ‘rationally connected’. In *Aqel*⁴, the Appeals Tribunal held that it having established misconduct and the seriousness of the incident, it could not review the level of the sanction imposed. Such a decision falls within the remit of the Commissioner General and can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness.

44. The Respondent’s submission is that two months’ net base salary is a decision that was within the power of the Secretary-General to impose and there was no obvious absurdity or flagrant arbitrariness. It was in keeping with the only case in existence at the time of the sanctioning of the Applicant and where the Applicant received a sanction of demotion and two months’ net base salary fine. In January 2009, future cases were not relevant for consideration so the Applicant’s submission of a sanction that was imposed on another staff member in July or August 2009 should not be taken into account by the Tribunal.

45. The Respondent, therefore, requests the Tribunal to dismiss all of the Applicant’s pleas and to dismiss the Application in its entirety.

Consideration

46. The issues arising for determination in this case are:

- a. Whether the sanction imposed on the Applicant for failing to file his financial disclosure on time was proportionate;
- b. Whether there were any mitigating factors in existence that prevented the Applicant from filing his financial disclosure on time;
- c. What the practice of the Secretary-General is or has been in cases of non-compliance with the financial disclosure rules; and

⁴ 2010-UNAT-040.

d. Whether, in comparing the practice of the Secretary-General in cases of non-compliance with the financial disclosure rules, the Applicant was treated equally with other staff members.

Rationale for Financial Disclosure Program

47. In her oral submissions, Counsel for the Respondent submitted that the rationale for filing financial disclosures is: to ensure that potential or actual conflicts of interest are prevented and managed at the outset without consequent need for intervention; to contribute to enhancing accountability efforts and the ethical mind set of the Organization; and to aid increased confidence in the UN. In view of this rationale, the Tribunal finds the Secretary-General's conclusion that "it would now not serve any purpose to file a financial disclosure form for 2005" to be disingenuous. If the Applicant had engaged in fraud, for example, this could still be evident years later when the financial records were reviewed.

Need for Proportionality of Disciplinary Sanctions

48. In *Sanwidi*, the Appeals Tribunal held, *inter alia*, that in the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if an administrative action is reasonable, but not if it is excessive. This involves considering: whether the objective of the administrative action is sufficiently important; that the action is rationally connected to the objective and that the action does not go beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take.

49. The Appeals Tribunal further held that in exercising judicial review, the role of the Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. During the process of judicial consideration of an administrative action, the Tribunal is not

conducting a merit-based review. Such judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision.

50. In *Aqel*, the Appeals Tribunal held that, having established misconduct and the seriousness of the incident, it could not review the level of sanction imposed. Such a decision, which falls within the remit of the Commissioner-General [in that case], could only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness, which have to be established.

51. It is not in dispute that the Applicant failed to file his financial disclosure forms at the required time, therefore, the Tribunal finds that this misconduct has been established. The Tribunal will therefore consider whether the level of sanction imposed was proportional to the established misconduct.

Mitigating Factors

52. At paragraph 15 of its report, the JDC Panel stated that the Applicant produced copied of several emails that confirmed that he had inconclusive exchanges with the Ethics Office regarding difficulties in preparing his disclosure statement. The JDC Panel also concluded that a copy of an email dated 4 December 2007 from the Applicant to the Ethics Office in which he complained that the disclosure process appeared to have stopped referred to the Applicant's 2005 financial disclosure statement.

53. Contrary to these findings, the JDC Panel went on to conclude that the Applicant "admittedly failed to comply with his obligations under the Staff Regulations and that he failed to present convincing evidence of his good faith efforts to comply with his obligations". The Tribunal finds that the JDC's conclusions totally contradict each other. How could the JDC Panel in one breath make findings of fact that the Applicant had made *bona fide* attempts to comply with his obligations and in the second breath conclude that the evidence was not convincing?

54. In view of the foregoing, the Tribunal finds that the Respondent's averment that the "failure by the Applicant to comply with his obligations demonstrates a blatant, conscious and repeated violation of the Staff Regulations and Rules" to be without basis. The Tribunal finds that the Applicant had indeed made good faith efforts to comply with his financial disclosure obligations for 2005. This is further evidenced by the Applicant's compliance with his financial disclosure obligations in 2006 and 2007.

Practice of the Secretary-General

55. In her oral submissions, Counsel for the Respondent used former UN Administrative Tribunal Judgment No. 1490 and an Information Circular titled, "Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2007-30 June 2008" as comparators for the practice of the Secretary General in cases such as the Applicant's. The Applicant in that case was charged with failing to file financial disclosure statements, failing to respond fully to requests for information from staff members and other officials in the Organization authorized to conduct investigations and for failing to follow directions and instructions from his supervisors. The Secretary-General decided that for failing to cooperate with PTF Investigators, by not following the Secretary-General's directions and for failing to provide full financial records, he would be demoted by two grades from the level of Assistant Secretary-General to the D2 level and that he would be fined two months' net base salary.

56. With respect to the case of the staff member whom the Applicant contends failed to act in compliance with his obligations under sec. 2.1 of ST/SGB/2006/6 for two consecutive periods despite repeated reminders, and in which case the Secretary-General decided that the said staff member be reprimanded, the Respondent submitted that there must have been "various mitigating factors, one assumes, in that case".

57. The Tribunal finds that the misconduct established in former UN Administrative Tribunal Judgment No. 1490 was far much graver than in the present case. The facts in the two cases are neither analogous nor comparable. The said case is not a proper comparator to the present case. The Tribunal further finds that, in the present case, the Secretary-General failed to take into account the various mitigating factors in favour of the Applicant when determining the sanction against him. The disciplinary sanction imposed on the Applicant was much more excessive than was necessary for obtaining the desired purposes of the financial disclosure program in this case.

Equality of Treatment of all United Nations Staff Members

58. In *Sanwidi*⁵, the Tribunal recalled the principle of equality of treatment which should be applied to all UN employees in conformity with the Staff Regulations and Rules, with previous decisions of the Appeals Tribunal and the fact that equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. Simply presented, the principle of equality requires that those in like cases should be treated alike. In UNDT Judgment No. 171 of 2010, it was held that the proportionality of a disciplinary penalty is a matter of judgment. In exercising such judgment, it would be necessary to ensure that, amongst other matters, the principle of consistency is applied. This means that where staff members commit the same or broadly similar offences, in general, the penalty should be the same; not necessarily identical but within a very narrow range of appropriateness.

59. In the present case, the Tribunal finds that the disciplinary measure that would fall within a “very narrow range of appropriateness” would be a reprimand.

Findings

60. In view of the foregoing, a summary of the Tribunal’s findings are as follows:

⁵ UNDT/2010/036.

- a. The Applicant made good faith efforts to comply with his financial disclosure obligations for 2005.
- b. The Secretary-General failed to take into account the various mitigating factors in favour of the Applicant when determining the sanction against him.
- c. The disciplinary sanction imposed on the Applicant was far more excessive than was necessary for obtaining the desired purposes of the financial disclosure program.
- d. The appropriate disciplinary measure in the present case should be a reprimand.

Conclusion

61 In view of its findings, the Tribunal:

- a. Rescinds the impugned decision.
- b. Awards the Applicant two months' net base salary at the rate applicable at the date when the impugned decision was taken.

(Signed)

Judge Nkemdilim Izuako

Dated this 20th day of May 2010

Entered in the Register on this 20th day of May 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi