Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

MOKBEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edwin Nhliziyo

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On 30 April 2010, the Applicant filed an application challenging the failure to address his request for damages and compensation consequent upon the dismissal of disciplinary charges against him.

2. In late February 2012, the case was assigned to the undersigned Judge. At a case management discussion on 28 March 2012, the parties agreed to have the case determined on the papers before the Tribunal in relation to liability. It was agreed that in the event of the Applicant succeeding, a hearing will take place to decide if he should be compensated for any loss or damage and, if so, to determine the amount. The respective contentions of the parties were agreed and summarised as set out in Order No. 76 (NY/2012) dated 5 April 2012.

Scope of the case

3. The case concerns allegations about the manner in which the Applicant was treated, including the lengthy delay, before the disciplinary charges were dismissed and whether any compensation should be paid to the Applicant for the delay and the anxiety and distress he says he suffered. It should be noted that no disciplinary measures were imposed on him. The evidence on record has to be scrutinized to see if it is consistent with due process being accorded to the Applicant in the manner in which he was treated from the beginning of the disciplinary process to dismissal of all charges against him.

4. Insofar as specific complaint has been made alleging any procedural impropriety, it is to be found in allegations casting doubts about the competence and objectivity of the Office of Internal Oversight Services ("OIOS") investigators and their alleged failure to understand and appreciate the complexity of procurement. In the event the Tribunal considers that it is unhelpful to cast aspersions on the competence of the investigators but more productive to deal instead on an examination of the factual basis of their findings and conclusions and any

shortcomings which appear to be demonstrated by the evidence on record. It is understood from part of the Applicant's comments in the joint response to Order No. 76 (NY/2012) that he complained to the chairman of the Procurement Task Force ("PTF") about what he regarded as the "unprofessional behaviour of the investigators". However, whether the PTF investigators were incompetent or unprofessional, as alleged, is not a matter that is before the Tribunal in this case.

5. However, the Tribunal is required to examine the PTF report and findings as well as the Applicant's rebuttal of the report and the further response of the PTF/OIOS. This will enable the Tribunal to assess whether the PTF gave fair and unbiased consideration to the Applicant's rebuttal of the PTF report. A further issue is whether the decision-making managers' consideration and evaluation of the investigation report of the PTF dated 16 July 2007 ("the PTF Report") and its recommendations, the Applicant's rebuttal, and the PTF's response thereto were examined as a whole in an objective and dispassionate manner before a decision was made to lay a formal disciplinary charge against the Applicant. In this regard, the Tribunal refers to ST/SGB/273 (Establishment of the [OIOS]) dated 7 September 1994 in relation to the duty on programme managers on receipt of a report from OIOS: "The programme managers concerned shall have an opportunity to consider, evaluate and respond to such reports on a timely basis as determined by the [OIOS]" (para. 20). The ultimate decision is that of the programme managers. A mere endorsement or "rubber stamping" of the recommendations of OIOS will not do.

Findings of fact

6. On 2 March 1998, the Applicant commenced his employment with the United Nations. On 19 June 2004, he was assigned to the United Nations Stabilization Mission in Haiti ("MINUSTAH") as a Procurement Assistant at the G-6 level.

7. The PTF was created on 12 January 2006 to address all procurement matters referred to the OIOS. On 20 January 2006, the Internal Audit Division ("lAD"), OIOS, issued an audit review addressing particular concerns regarding fuel

procurements in MINUSTAH. A subsequent audit of fuel management in missions was issued and also made findings regarding the procurement of ground fuel at MINUSTAH, which included both breaches of the procurement rules and the procurement exercise overall. Subsequent to the IAD audit, the PTF conducted an investigation into allegations of impropriety in relation to two competitive bidding exercises, which were held to procure a short-term and then a long-term supply of ground fuel for MINUSTAH.

8. With respect to the first procurement exercise, the PTF made no findings against the Applicant as he did not participate in that process.

9. During the second procurement exercise, namely, the 2005 long-term ground fuel procurement exercise, the Applicant was serving as a Procurement Assistant, FS-5, within the Procurement Section at MINUSTAH.

10. The PTF report was issued on 16 July 2007. In this Report, the PTF concluded that the Applicant had colluded with others to steer the technical and commercial evaluations in favour of a specific vendor. As a result, it was said that the procurement exercise was not conducted in compliance with the applicable rules and regulations nor was it undertaken in a fair and transparent manner. The PTF Report went on to enumerate a number of areas in which they concluded that the Applicant had breached procedures, including the serious allegation that he attempted to solicit a bribe from a vendor (in fact, the PTF Report stated that he attempted to bribe a vendor. However, in the subsequent letter of charges dated 20 September 2007, see para. 10 below, this was corrected to him soliciting a bribe).

11. It is understood that several staff members involved in this procurement exercise, including the Applicant, were subsequently charged with having committed disciplinary offences. The Applicant was a junior member of the team having been assigned to MINUSTAH as Procurement Assistant barely three months prior to the events in question. It is not disputed that he was inexperienced and received minimal training in the complicated task of procurement. The Tribunal does not express a

view, one way or the other, as to the appropriateness of the disciplinary charges brought against other more senior colleagues or with the question whether the evidence of culpability is or is not more persuasive in their cases. The Tribunal is concerned solely with issues relating to the manner in which the Applicant had been treated in the course of disciplinary proceedings, including, for example, whether due consideration was given to his position as an inexperienced junior member of the team subject to supervision, direction and control of more senior colleagues.

12. By a letter dated 20 September 2007, Ms. Georgette Miller, Director of the Division for Organisational Development, OHRM, sent the Applicant a copy of the PTF Report. This letter provided full and detailed particulars in support of the charge of misconduct. The Applicant was requested to provide a response to the allegations. He was advised of his right to receive assistance from a serving or former member of the Panel of Counsel or alternatively from any serving or former staff member or other counsel. The Tribunal concludes that this letter, listing in full the case that the Applicant had to meet, was appropriate, necessary and in compliance with due process. He was left in no doubt as to the charges he had to meet and advised of his rights and given a full and fair opportunity to respond. The remaining key question is whether the detailed and carefully formulated charges were supported by a sufficiency of evidence.

13. By letter dated 19 October 2007, through his counsel, Mr. Nhliziyo, the Applicant put forward a strongly worded and detailed rebuttal of the allegations and the findings in the PTF Report. This was forwarded to the PTF for comments. A letter dated 6 November 2007 from Mr. Robert Appleton, chairman of the PTF, in an equally strong rebuttal, concluded that the Applicant's response did not substantively alter the factual findings and conclusions of the PTF Report.

14. On 11 January 2008, Ms. Sandra Haji-Ahmed, Officer-in-Charge, OHRM, forwarded the relevant documents to the Joint Disciplinary Committee ("JDC") under the procedures applicable at the time. Ms. Haji-Ahmed requested the JDC to establish the facts of the case and to advise the Secretary-General on the totality of the

evidence as to whether misconduct occurred and, if it did, what disciplinary measure should be imposed. In making up this reference to the JDC, did Ms. Haji-Ahmed consider both the Applicant's comments and the PTF report so as to satisfy herself that there was a case to answer?

15. A JDC panel ("the Panel") considered the documentation and submitted its Report no. 259 dated 29 June 2009 ("the JDC Report") to the Deputy Secretary-General. At para. 36 of the JDC Report, the JDC panel recorded their findings in the following terms:

> The Panel concurred with the Administration's view that in certain circumstances, significant lapses on performance could be so serious as to rise to the level of misconduct. However, after reviewing the totality of evidence, the Panel could not find adequate evidence warranting the institution of disciplinary proceedings against [the Applicant]. … [T]he Panel felt that some mistakes had been made by various MINUSTAH staff as well as [Procurement Service/New York] staff. However, these were bona fide lapses that did not rise to the level of misconduct and could have been addressed through the performance appraisal of the concerned staff members.

16. In the Applicant's case, the JDC panel found "no evidence that [he] had a wrongful intent to favour a particular vendor, or that he colluded with others to award the fuel contract to [name redacted]" (para. 36 of the JDC Report).

17. As to the flaws in the procurement exercise, at para. 37 of the JDC Report, the JDC panel stated that:

> The Panel's analysis of the evidence indicated that there were certain minor deficiencies in the procurement process, but such deficiencies were not so serious as to compromise the integrity of the procurement exercise. In the Panel's view there was no evidence that these lapses had prejudiced the chances of the other vendors to be awarded the contract. …

18. The JDC panel's conclusions and recommendations were recorded as follows (para. 38 of the JDC Report):

> Based on the foregoing findings the panel unanimously concluded that there was no evidence of misconduct on the part of [the Applicant] in connection with this procurement exercise. Therefore, the Panel unanimously recommended to the Secretary-General that the charges against [the Applicant] be dismissed in their entirety.

19. By a letter dated 2 February 2010, Ms. Haji-Ahmed wrote to the Applicant following a consideration of the JDC Report and its recommendations. She referred to the disciplinary charge dated 20 September 2007 and to the various alleged violations and succinctly recorded the various procedural steps taken in this matter. She pointed out that the Respondent had not been able to consider the JDC Report and its recommendations prior to 30 June. Nevertheless, it was said that, under the new arrangements for the formal system of justice, notwithstanding there being no obligation on the Respondent to be guided by the JDC Report, he did, in fact, take it into account in making the decision. She attached the JDC Report for the consideration of the Applicant and the letter concluded as follows (emphasis added):

> I have reviewed all the circumstances of your case, including the conclusions of the JDC. *Having considered the matter in its entirety I agree with the conclusion of the JDC that the evidence on the record is not sufficient to support the charges against you,* and I have decided, therefore, that all the charges against you shall be dropped and that no further action be taken in this matter.

Applicant's submissions

20. The Applicant's principal contention may be summarised as follows:

a. There was insufficient evidence to support the charges of misconduct;

b. His claim for damages and compensation for what he described as "unfounded allegations and damage to his reputation" were not addressed;

c. He was entitled to compensation for the manner in which he was treated and the mental anguish he suffered from the date the allegations were first made until his receipt of the letter of 2 February 2010, informing him that the charges against him were dropped.

Respondent's submissions

21. The Respondent's principal contention may be summarised as follows:

a. The Applicant was not entitled to any damages or compensation as the investigation and disciplinary proceeding were carried out in accordance with the Organization's rules and procedures, particularly para. 2 of ST/AI/371 (Revised disciplinary measures and procedures);

b. The Applicant had not produced evidence in support of his contention that this was an exceptional case and that he was entitled to be compensated for "moral damage, unnecessary stress and mental anxiety".

Considerations

Introduction

22. It is clear from the application that there are three component parts to the Applicant's claim:

a. The manner of treatment of the Applicant;

b. Unjustified delay in the disciplinary process; and

c. Mental anguish suffered by the Applicant.

The manner of treatment of the Applicant

23. At the case management discussion on 28 March 2012, the parties agreed that there cannot be an immutable principle of law conferring an automatic entitlement to compensation to staff members who may have been acquitted of disciplinary charges. However, it must be unarguable, in principle, that where the disciplinary charges would appear to have been brought for improper motives, were baseless, devoid of merit, unnecessary, irrational, or for that matter negligently brought, the decision-makers must be held to account on the grounds that such conduct could amount to an

abuse of power or the arbitrary exercise of power that is inconsistent with the highest standards of conduct required of staff members as international civil servants, as set out in former staff regulation 1.2, which was applicable at the relevant time:

> Basic rights and obligations of staff
>
> Core values
>
> (a) Staff members … 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.

24. The question is whether, in this case, the charges against the Applicant were irrational or brought negligently. Even though both Ms. Miller and Ms. Haji-Ahmed followed the proper steps in dealing with the procedural aspects of the matter, there remains a concern as to whether they had cast a critical eye over the PTF Report, and the Applicant's comments, or whether they simply accepted the PTF Report in good faith and acted upon it. Whilst staff members in their position, who have the responsibility of instituting disciplinary investigations, have a duty to exercise their own independent judgment in assessing the material before them, it may well be a step too far to expect them to second guess a specialised office such as OIOS, which has, within the Organization, a prime responsibility for investigating alleged misconduct. In this case, the PTF was created on 12 January 2006 to address all procurement matters referred to the OIOS. It was charged with the responsibility of conducting an investigation into allegations of impropriety in relation to the bidding exercises for fuel procurement. The Organization is entitled to assume that these investigations are conducted rigorously and fairly and that the conclusions and recommendations are properly based on the evidence that has been elicited in the course of the investigations. It is not for the Tribunal to conduct its own investigation into the allegations of misconduct. However, it is very much the duty of the Tribunal to consider the investigation reports and conclusions and to ask if a balanced and objective consideration was given to the question whether the PTF report, the

Applicant's rebuttal and the PTF's letter of response, all taken together, could reasonably justify the serious charges that were brought against the Applicant. In this respect, the Tribunal takes note that the Respondent accepted fully the Report and recommendations of the JDC panel.

25. The charge letter dated the 20 September 2007 comprising 13 pages itemises in detail the case against the Applicant so that he would have been in no doubt as to the charges and the evidence being relied upon in support of those charges. To this extent, the letter complied, partially, with the requirements of due process in that the Applicant knew the case he had to meet. However, due process requirements do not stop there; not only must the individual charged with a disciplinary offence be given full particulars of the case he has to meet, but there is a duty on those bringing the charges to ensure that the charges themselves stand up to scrutiny and are fully justified by the evidence available. An examination of the charge letter clearly reveals a fundamental failure to draw a distinction between the role of the Applicant from that of those senior to him. He was an inexperienced junior member of staff subject to direction and control by senior colleagues in relation to the entire procurement exercise. The letter is clearly based almost wholly on the PTF Report and the weight given to their rebuttal of the Applicant's detailed representations. Minimal regard appears to have been given to the Applicant's criticisms comments and observations. It may be said that the referral to the JDC was a proper exercise of management power and discretion placing reliance on the JDC panel to investigate and report on whether any misconduct had taken place. It is the Tribunal's view that any such approach would involve not only a dereliction of responsibility by "the programme managers" mentioned in ST/SGB/273 but an utter disregard for the consequences on the staff member who would thereby be subject to unnecessary anxiety and stress. The Tribunal does not consider it necessary to conduct a step-by-step analysis of the charge letter. However, a simple example will illustrate the point. Arguably one of the most serious charges against the Applicant is that he attempted to solicit a bribe from one of the vendors. The seriousness of this allegation, which amounts to the commission of a criminal offence, would leave the Applicant open not only to

dismissal from employment, but to the risk of prosecution by the competent national authorities. In the circumstances, it behoves the Respondent's decision-makers to take particular care in examining the quality of the evidence. It is trite law that the more serious the allegation the more cogent must the evidence be. The standard of proof has to be more than mere conjecture based on the subjective perception of those from whom the Applicant allegedly sought a bribe. As the Appeal Tribunal stated in *Molari* 2011-UNAT-164 (para. 2 and 30):

> Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

26. *Molari* was also a case which exposed the applicant to potential criminal prosecution, although her alleged offense (fraud with sales tax) was possibly less severe than that of the Applicant (including fraud, corruption and bribery), and the Appeals Tribunal considered that clear and convincing proof in such a case requires more than a preponderance of evidence. In the present case, it should be borne in mind that the chairman of the PTF, Mr. Appleton, in his letter dated 6 November 2007, in response to Counsel for the Applicant's comments on the PTF report, in describing the actions of the Applicant, used statements such as "intentionally manipulating a competitive bidding exercise is outright fraud" and "[b]ribery is not an exclusive crime; there was nothing that prevented [the Applicant] from soliciting one vendor for money while favoring another". These are allegations of criminal activity, which could expose the Applicant to the risk of criminal prosecution by national prosecuting authorities.

27. The failure to distinguish the culpability of a junior officer from that of more senior colleagues exposes the former to an increased and unjustified risk that his role, including errors made, will be given disproportionately adverse weight in the disciplinary process. In such circumstances, the individual is likely to experience an

increased level of stress and anxiety. In relation, for example, to the charge of bribery it could involve not only loss of employment but also a criminal conviction. To bring such a charge would require a far higher standard in the quality of evidence than was adduced in this case. This is not to say that the Applicant did not have some explaining to do, but that is quite a different matter to making what can only be considered as a quantum leap to prefer the charge of bribery on the basis of evidence that was not properly tested or dispassionately evaluated.

28. The Tribunal concurs with the finding of the JDC panel that there were shortcomings in the Applicant's conduct and, in the particular circumstances, these should have been dealt with as performance issues rather than as misconduct. The Tribunal finds itself in agreement with the JDC panel and Ms. Haji-Ahmed, the then Officer-in-Charge of OHRM, that there was lacking a sufficiency of evidence to support the disciplinary charges. However, the Tribunal goes further to find that the quality of the evidence, if properly and fairly reviewed at the time the decision was made to charge the Applicant would not, and could not, reasonably have resulted in formal disciplinary charges being preferred.

29. The manner in which the Applicant was treated in the course of the disciplinary process fell far short of the standards expected of international civil servants applying the rule of law and fundamental principles of due process. Whilst the charges put to the Applicant were clear and precise, they were deficient in that they lacked the necessary evidential underpinning to the requisite standard of proof for the particular charges. In addition, the Applicant's detailed rebuttal was worthy of more serious consideration than it was given. The Tribunal is not surprised that the JDC panel apparently gave the disciplinary charges short shrift and dismissed the case.

30. It is instructive that, whilst not obliged to do so, the Respondent accepted the JDC report, including its recommendations, and dismissed the disciplinary charges against the Applicant. It is, in the circumstances, not surprising that the Applicant

should ask why it took so long and why he was left in suspense for almost three years, with the proverbial sword of Damocles hanging over his head.

Unjustified delay of the disciplinary process

31. Decisions on disciplinary matters, particularly relating to allegations of serious misconduct, must be taken within a reasonable time. The Applicant complains that the proceedings were unduly prolonged. In Order No. 76 (NY/2012), the Tribunal ordered the Respondent to provide statistical data in the expectation that it would help to determine whether the delays were within the range for comparable cases. Insofar as the statistics are helpful, they confirm that the length of time taken in the disciplinary proceedings appears to be excessive or at the extreme top end of the scale.

32. The Applicant's first interview by OIOS was on 30 March 2006. The formal disciplinary charges were notified to him by letter dated 20 September 2007. The referral to the JDC was on 11 January 2008. The Respondent received the JDC Report on 29 June 2009. There was then a further delay of seven months, when on 2 February 2010, the Applicant was informed that the disciplinary charges were dismissed. The length of time taken to conclude these proceedings, notwithstanding the complexity, amounts in the Tribunal's view to unconscionable delay.

Mental anguish suffered by the Applicant

33. Although the disciplinary charges were dismissed in their entirety, the Applicant's request that he be compensated for "the mental anguish" he suffered went unanswered. The Tribunal finds that the manner in which the Applicant was dealt with fell far short of the standards to be expected in such cases.

34. The Applicant's substantive claim succeeds. As to the mental anguish which the Applicant says he suffered, this is a matter for evidence and submissions at a hearing. Accordingly, the parties are invited to such hearing on 7 May 2012 to deal with the issue of remedy as per Order No. 76 (NY/2012).

(*Signed*)

Judge Goolam Meeran

Dated this 1st day of May 2012

Entered in the Register on this 1st day of May 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York