



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

MAKWAKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is seeking the rescission of the imposition of the disciplinary sanctions of a written censure and demotion of one grade with deferment, for three years, of his eligibility for consideration for promotion.

Agreed facts from the parties' joint submission

2. On 7 May 2008, the Investigations Division of the United Nations Office of Internal Oversight Services ("OIOS") obtained information that the Applicant was allegedly engaged in activities that, as a result of his use of the United Nations information and communication technology ("ICT") resources, did not meet the standard of an international civil servant and were in breach of the staff rules.

3. On 10 July 2008, the Applicant was interviewed as part of an OIOS investigation into the Applicant's use of the ICT resources. During the interview, the Applicant was shown a copy of ST/SGB/2004/15 (Use of information and communication technology resources and data) and a sample of 53 emails that he either received or transmitted via his United Nations Lotus Notes account and which were pornographic in nature. During the interview the Applicant admitted that he had received numerous pornographic images through his United Nations Lotus Notes account, including images of violent pornography, portraying murder and cannibalism. The Applicant further admitted that he had personally forwarded some of these pornographic images, including an image reflecting child pornography, to other United Nations staff members.

4. On 11 September 2008 and 23 September 2008, the Applicant was provided with the opportunity to comment on the evidence before OIOS following which, on 26 September 2008, OIOS provided its investigation report to the Under-Secretary-General, Department of General Assembly and Conference Management ("DGACM") in which it reflected that it had "identified 67 e-mail messages in [the Applicant's] Lotus [N]otes inbox that contained pornographic images" as well as

“63 e-mail messages with pornographic images that [the Applicant] sent to other persons (including United Nations staff members)”.

5. On 13 October 2008, DGACM referred the investigation report to the Assistant Secretary-General, Office of Human Resources Management (“OHRM”) for her “review and determination of the appropriate disciplinary action to be taken”.

6. On 4 November 2008, the Chief, Human Resources Policy Service, OHRM, charged the Applicant with misconduct, namely “improperly using [his] [United Nations] computer to knowingly and willfully receive and store pornographic material, and to disseminate imaged of a pornographic nature to other [United Nations] staff members”. The Applicant provided comments on the charges on both 15 December 2008 and 7 January 2009.

7. On 13 April 2010, “the Under-Secretary-General for Management [(“USG”)], on behalf of the [Respondent]”, imposed the disciplinary measures of a written censure and demotion of one grade with deferment, for three years, of his eligibility for consideration for promotion.

8. On 12 July 2010, the Applicant filed the present application and the Respondent submitted his reply on 13 August 2010.

9. On 19 March 2012, as a result of the decision by the United Nations Appeals Tribunal (“UNAT”) in the case of *Yapa* 2011-UNAT-168, the Respondent revised the disciplinary measure imposed on the Applicant by removing the three-year ban on promotion.

10. On 4 June 2012, the undersigned judge was assigned to the present case.

11. On 27 July 2012, the parties, in response to Order No. 147 (NY/2012), submitted a joint statement agreeing to the above facts as well as on the legal issues in the present the case. The parties further stated that, even though this was a

disciplinary case, it was their belief that “the matter could be considered on the papers so that there is no need for an oral hearing since no witnesses are on offer”. The Tribunal agrees with the parties’ position and will decide the case on the papers before it.

Legal issues

12. The following legal issues, which were agreed upon by the parties as part of their joint statement, will be assessed by the Tribunal:

- a. Did the USG have authority to take the disciplinary decision?
- b. Did the Applicant’s actions amount to misconduct?
- c. Were the allegations against the Applicant sufficiently particularized?
- d. Did the Respondent have due regard to the mitigating circumstances?
- e. Were the Applicant’s due process rights respected?
- f. Were the disciplinary measures imposed upon the Applicant proportionate?
- g. Does the Applicant identify that he suffered any harm as a result of the pending disciplinary process?

Applicant’s submissions

13. The Applicant’s principal contentions may be summarized as follows:

- a. The USG did not have, under provisional staff rule 10.1(c), the authority to impose the contested disciplinary sanctions;
- b. The disciplinary sanctions imposed on the Applicant were not in place at the time of the alleged misconduct and were therefore unlawful. Alternatively, former staff rule 110.3 did not contemplate the sanction of

prohibiting a staff member from becoming eligible for consideration for promotion and the sanction was therefore disproportionate;

c. The Applicant did not store, as contrasted to receive and distribute, contested data using ICT resources. ST/SGB/2004/15, does not make any express reference to “storage” and he can therefore not be charged for breaching a provision that was not known to him and for which he never took a pro-active step to perform, namely saving the contested images so that they could be accessed at a later date versus just failing to delete them upon receipt;

d. The Organization failed to take into account any of the mitigating circumstances put forward by the Applicant when determining the level of sanctions to be imposed against him;

e. The Applicant’s due process rights were breached as a result of the inordinate delay that occurred between the date on which he was charged with the alleged misconduct and the date on which the sanctions were imposed. Furthermore, the Applicant, invoking the jurisprudence of the European Court for Human Rights, was not afforded a right to counsel during OIOS’ investigation.

Respondent’s submissions

14. The Respondent’s principal contentions may be summarized as follows:

a. It is not the practice of the Dispute Tribunal to interfere with the Respondent’s broad discretionary authority with regard to disciplinary matters;

b. The Under-Secretary-General, under provisional staff rule 10.1(c), did not lack the authority to impose disciplinary sanctions on behalf of the Respondent;

c. The Respondent was within his rights to apply sanctions that were in force at the time the disciplinary process was concluded rather than at the time of the contested events as his letter of appointment stated that “he was subject to [the Staff] Regulations and Rules, together with such amendments that may be made from time to time”;

d. The record of the investigation indicates that the Applicant was fully aware of all the claims held against him and the allegations were sufficiently particularized. Whether or not the Tribunal considers that the Applicant stored contested data on his computer does not alter the gravity of his conduct;

e. The Applicant’s due process rights were respected during both the OIOS investigation as well as during the ensuing disciplinary process. The Applicant does not put forward any evidence that would indicate that the time that elapsed between being charged and being sanctioned impacted his rights in any way. Similarly, all of the Applicant’s mitigating circumstances were taken into account when determining the applicable sanctions.

Consideration

Applicable law

15. Staff regulation 1.2(b) states that:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

16. Staff rule 10.1, ST/SGB/2009/7, regarding misconduct, states in part:

Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may

amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

...

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

17. ST/SGB/2004/15 states in part:

Section 4

Limited personal use

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);

(b) Would not reasonably be expected to compromise the interests or the reputation of the Organization;

...

(f) Does not interfere with the activities or operations of the Organization or adversely affect the performance of ICT resources.

...

Section 5

Prohibited activities

5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:

...

(c) Knowingly, or through gross negligence, using ICT resource or ICT data in a manner contrary to the rights and obligations of staff members.

Receivability

18. The present case meets all of the receivability requirements identified by art. 8 of the Tribunal's Statute.

Decisional authority

19. Staff rule 10.1(c) provides that the imposition of disciplinary measures lies within the "discretionary authority of the Secretary-General or officials with delegated authority".

20. On 17 August 2009, following the implementation of the reforms to the system of administration of justice at the United Nations, the Secretary-General transferred the responsibility for imposing disciplinary measures from himself to the USG. Consequently, in imposing the contested measures in the present case on 13 October 2010, the USG acted as an official who benefited from the Secretary-General's delegated authority as authorized by staff rule 10.1(c) and had the right to take and apply the impugned decision.

Misconduct

21. ST/SGB/2004/15, sec. 4.1(a) states that activities that do not meet the standard of an international civil servant, and which would therefore result in a breach of the staff rules, include the "use of ICT resources for purposes of obtaining or distributing pornography". Similarly, staff rule 10.1(a) states that a staff member's failure to comply with his obligations, including the United Nations Staff Regulations and Rules, may amount to misconduct and result in the imposition of disciplinary measures.

22. During the course of the investigation conducted by OIOS, the Applicant recognized that he received, as well as sent, emails which were pornographic in nature. Furthermore, while he contests that he "stored" any such images on his computer, the Applicant stated that he was aware of ST/SGB/2004/15 and that he had

“read the top part, but not the whole gist of it”. The Applicant further expressed that his understanding of the proper use of the ICT resources consisted of usage that was limited to “official work and not to use it in an offensive manner”. Consequently, the Applicant’s actions, by his own recognition, breached the applicable rules governing the use of ICT resources, as well as staff rule 10.1(a), resulting in the Applicant’s actions amounting to misconduct.

23. Upon a staff member’s misconduct having been established, the Respondent has broad discretion in deciding on the appropriate and most proportionate disciplinary measure(s) to apply even though this discretion is not without limit. In *Mahdi* 2010-UNAT-018, the Appeals Tribunal stated that in reviewing disciplinary cases it has to examine:

- i. Whether the facts on which the disciplinary measure was based have been established;
- ii. Whether the established facts legally amount to misconduct under the Regulations and Rules; and
- iii. Whether the disciplinary measure applied is proportionate to the offence.

24. The Applicant’s submission that he was not aware of some of the applicable regulations and rules bears no relevance as to whether he could be charged as having breached the said rules. In *Diagne et al.* 2010-UNAT-067, the Appeals Tribunal, in affirming the judgment of the Dispute Tribunal, stated that “ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules”.

Particularity of the charges

25. A review of the case record, including but not limited to the interview of the Applicant conducted by OIOS and the parties joint submission of 27 July 2012, indicates that the Applicant was appraised of, and stated that he fully understood, the allegations against him, including that of “receiving and distributing pornographic images through the United Nations Lotus Notes email system”. The Applicant agreed

to the fact that he had distributed and deleted some, but not all, the contentious emails he received though he denied that any of his actions amounted to the storage of such data and alleged that this allegation was not part of the investigation's findings.

26. Even if the Tribunal was to consider that the Applicant was not aware of the specific charge of storing pornographic images on his computer, his conduct with regard to the use of ICT resources was still in breach of ST/SGB/2004/15. More importantly, sec. 4.1(a) of ST/SGB/2004/15, which states that pornography was "*among* the uses which would clearly not meet this standard" (emphasis added), should not be read as providing an exhaustive list of any and all of the actions which could be considered as constituting prohibitive usage of the ICT resources in breach of the applicable rules.

27. The Applicant submits that he did not take any proactive steps to save contentious emails to his computer for the purpose of storing them for future use. Nevertheless, a counter argument can also be made that he did not take any proactive steps of deleting them from his United Nations Lotus Notes email account thereby resulting in the said emails being preserved, which is akin to say stored, within his Lotus Notes email account.

28. Nevertheless, the charge that the Applicant stored pornographic images is but one of the specific charges held against him as part of the larger charge of improperly using his United Nations computer in breach of staff regulation 1.2(b) and sec. 4.1(a) of ST/SGB/2004/15. The Applicant was fully aware of the particular nature of the main charges against him, as is evidenced by his statements to OIOS. Regardless of whether or not OIOS made the Applicant aware of the particular nature of the charge of storing prohibited data on his computer, the remaining charges, once established, are still sufficient to establish that his actions amounted to misconduct and that those charges were sufficiently particularized.

Proportionality of sanctions

29. The record in this case indicates that the Applicant was provided with several opportunities to submit comments and evidence at each stage of the investigative and disciplinary process in conformity with the applicable rules. More importantly, in reviewing the record of the case, there is nothing before the Tribunal that would indicate that the Respondent omitted to take into account any of the evidence or mitigating circumstances that were put forward by the Applicant, including the notion that he did not store the data on his computer or that the nature of some of the images was contested.

30. The imposition of disciplinary measures falls within the discretion of the Organization and the Tribunal will limit its review as to whether this discretion was applied correctly, including whether the actual disciplinary measures of a written censure and demotion of one grade with deferment, for three years, of his eligibility for consideration for promotion imposed on the Applicant were proportionate. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held that

... the requirement of proportionality is satisfied if a course of action is reasonable, but not if the course 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 ... However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

31. In using the steps identified by the Appeals Tribunal in *Mahdi*, the Tribunal finds that the facts on which the disciplinary measures were established amounted to misconduct. The Applicant has not put forward any evidence that any improper motive or abuse of purpose was present during either the investigation or in the application of the relevant sanctions. As held by the Appeals Tribunal in *Aqel* 2010-UNAT-040, “[t]he important thing is that there was misconduct and this fact alone is a sufficient basis for the decision”.

32. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138, “[w]here an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered (*See Sanwidi* 2010-UNAT-084; *Abu Hamda* 2010-UNAT-022)”. The Applicant has not put forth any evidence that the referenced mitigating circumstances were not taken into consideration by the Respondent or that he acted in an unlawful manner. As such, it is not sufficient to disagree with a result for it to be contestable. *Meyo* further stated that

[a] factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

...

Although comparisons between other, even similar, cases should be treated with caution as every case turns on its own facts, in this case the facts speak for themselves.

33. The Tribunal notes that when taking the above into account, in conjunction with the gravity of the facts and a review of the information circulars from the USG regarding the “Practice of the Secretary-General in disciplinary matters and possible criminal behaviour”, for the relevant period of 2009–2011, further identifies that the sanctions applied to the Applicant are consistent with those from other cases stemming from the use and distribution of pornographic materials through the United Nations ICT resources.

Due process rights

34. The Applicant also submits that his due process rights were breached during the investigative process as well as a result of the over one year delay between the date on which he was charged with misconduct and the date upon which he was notified of the applicable sanctions. Consequently, the Tribunal needs to consider whether there were any procedural irregularities leading to the application of the contested disciplinary sanctions, bearing in mind that the Applicant does not seek either damages or a modification of the sanction imposed upon him but rather solely the rescission of the contested decision.

35. In considering whether the Applicant's due process rights were respected there are two separate aspects of the case that the Tribunal needs to take into consideration: the investigative phase conducted by OIOS and the disciplinary process undertaken by OHRM upon receiving OIOS' investigation report.

36. The Applicant was interviewed by OIOS on 10 July 2008 following which he was provided with the opportunity to provide comments on both the written record of the interview as well as the draft investigation report prior to its finalization. On 26 September 2008, OIOS transmitted its final investigation report to DGACM.

37. The purpose of OIOS is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to OHRM being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must still be conducted in accordance with the rules and regulations of the Organization and it must respect a staff member's rights to due process.

38. In the present case, the Applicant, by being able to review the interview record and investigation report, as well as submit any and all evidence in his favor, including mitigating evidence, prior to the finalization of the report, was provided with the opportunity to defend himself during this preliminary stage of

the disciplinary process. The right to defend oneself and present evidence in one's own support, as proclaimed by art. 14 of the International Covenant on Civil and Political Rights, which is a general legal instrument on human rights, and which is also mirrored in the regional instrument of the European Convention on Human Rights (art. 6), whose scope has expanded from the realm of criminal law to that of civil law, including labor law, was therefore respected.

39. In addition to being able to defend himself in person during the investigation, at no time prior to his 15 December 2008 response to the 4 November 2008 charges of misconduct presented by OHRM, did the Applicant raise the issue of his lack of legal representation during the prior stage conducted by OIOS. There is no evidence before the Tribunal that the Applicant requested, and was denied, either access to counsel or further opportunities to defend himself during either the investigation conducted by OIOS or the ensuing disciplinary process in front of OHRM.

40. A review of the evidence indicates that the Applicant was made aware of the allegations that served as a basis for the investigation. Furthermore, the Applicant agreed to cooperate with the investigative process and was further provided with the opportunity to review and provide comments on the investigation report prior to its finalization. The time line of events further indicates that there were no unreasonable delays in the investigation conducted by OIOS. Consequently, the Applicant's due process rights were not breached during OIOS' investigation.

41. Upon being charged by OHRM with misconduct on 4 November 2008, the Applicant was provided with the opportunity to provide comments on the charges against him, which he did on 15 December 2008 and 7 January 2009. However, there were no further communications between the Administration and the Applicant regarding this matter until 13 April 2010. This resulted in a nearly 16 months delay between the last communication between the parties, and just over 17 months delay from the date on which the Applicant was charged, and the day on which the USG imposed the contested disciplinary measures.

42. As the Tribunal stated in *Mokbel* UNDT/2012/061, “[d]ecisions on disciplinary matters, particularly relating to allegations of serious misconduct, must be taken within a reasonable time”. It is the responsibility of the organization to conduct disciplinary matters in a timely manner to avoid a breach of the staff member’s due process rights. Nevertheless, as stated in *Simmons* UNDT/2012/163, it is also “for the Applicant to substantiate any [injury] which [he] alleges to have suffered resulting from the excessive delay (*Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-095)”.

43. The Applicant submits that the inordinate delay it took the Administration to complete its disciplinary process resulted in him being put “in a prolonged state of anxiety, honestly fearing for his career, which affected him both on a professional and private level”. However, he does not submit any evidence to substantiate this claim whether it be at the medical or professional level. Accordingly, no compensation is warranted.

44. Aside from the fact that not every injury will result in an award of damages, in the present case the Applicant solely requested the rescission of the contested decision. As such, while taking nearly a year and half following the final communication between the parties to impose a disciplinary measure cannot be considered reasonable, it is not for the Tribunal to entertain the award of a remedy that was not requested by the Applicant.

Level of disciplinary measure

45. The Tribunal notes that the Applicant submits that former staff rule 110.3, which was in force at the time of the misconduct, did not contemplate the type of disciplinary sanctions that were applied against the Applicant. The Applicant’s position is further supported by *Yapa* whereby the Appeals Tribunal held that former staff rule 110.3(a) did not provide for the imposition of a ban on promotion for a specified period of time as well as the resulting decision of 19 March 2012 by which the Respondent modified the disciplinary measures imposed on the Applicant.

46. The Applicant has not provided any evidence that the imposition of this ban resulted in any loss of professional opportunities. Consequently, notwithstanding the fact that the ban on promotion has since been removed, the Tribunal will not award a remedy for the time period during which the Applicant had to perform his duties under such a ban.

47. In the present case the Applicant has not requested any damages or a modification of the contested sanctions but rather only their rescission. As stated by the Appeals Tribunal in *James* 2010-UNAT-009, the “applicable law governing compensation precludes the award of compensation” when “[f]irst, no compensation was requested; [and] second, there was no evidence of damages or injuries”.

48. The Tribunal considers that the disciplinary measures of a written censure and a demotion of one grade, that were finally applied against the Applicant, were lawful, proportional and were taken in accordance with the regulations and rules and, therefore, there are no rescindable decisions.

Conclusion

49. The application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 11 day of January 2013

Entered in the Register on this 11 day of January 2013

(Signed)

Hafida Lahiouel, Registrar, New York