



Before: Judge Thomas Laker
Registry: Geneva
Registrar: Anne Coutin, Officer-in-Charge

ISRABHAKDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for Applicant:

Jay Wormus

Counsel for Respondent:

Myriam Foucher, UNOG
Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. On 15 April 2011, the Applicant filed an application with the Dispute Tribunal against the decision dated 10 January 2011 to impose on him the disciplinary measures of a written censure and demotion of one grade with deferment, for three years, of eligibility for consideration for promotion.

2. By Order No. 172 (GVA/2011) of 14 October 2011, the Tribunal instructed the Respondent to, *inter alia*, produce information and documents related to the decision to impose on the Applicant the disciplinary measure of demotion with a three-year ban on promotion.

3. On 21 October 2011, the Respondent filed under seal a memorandum dated 10 January 2011 from the Assistant Secretary-General for Human Resources Management to the Under-Secretary-General for Management, entitled “Recommendation to impose disciplinary measures ...” concerning the Applicant’s case.

4. The Respondent submitted that “the Organization’s interests in maintaining the confidentiality of the 10 January 2011 memorandum should prevail over the Applicant’s interest in having the document disclosed to him” and that “[t]he disclosure of the document to the Applicant is not necessary for the fair and expeditious disposal of the proceedings before the Tribunal”. He added that “[t]he memorandum provides a candid and open internal discussion of the case” and its disclosure “would negatively impact future advice provided to senior officials and the completeness of internal communications” as “counsel for the Respondent would be hindered from providing a full and frank review of disciplinary cases”.

Consideration

5. The aforementioned memorandum, over which the Respondent asserts legal professional privilege, consists of a detailed 13-page analysis of the case and sets out, *inter alia*, the reasons for recommending the disciplinary measures that

were eventually imposed on the Applicant. It contains additional information and evidence in support of the charges retained against the Applicant.

6. While the Respondent claims that the disclosure of the document to the Applicant is not necessary for the fair and expeditious disposal of the case, the Tribunal finds on the contrary that it is necessary to do justice to the Applicant to share this memorandum with him and to give him sufficient time to comment thereon.

7. In addition, the Tribunal fails to see how its disclosure could negatively impact future advice provided to senior officials or hinder Counsel for the Respondent from providing a full and frank review of disciplinary cases.

8. One of the main issues raised by this case is whether the sanctions imposed on the Applicant are proportionate to the alleged misconduct. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal stated (emphasis added):

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate ... During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. *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.

9. The Tribunal finds that the memorandum in question is relevant to the Applicant's case and for the Tribunal to determine how the Respondent reached the impugned decision. It shall therefore be shared with the Applicant.

10. Pursuant to articles 18 and 19 of its Rules of Procedure, the Tribunal makes the following orders.

IT IS ORDERED THAT:

11. The Respondent's motion for confidentiality of the memorandum dated 10 January 2011 from the Assistant Secretary-General for Human Resources Management to the Under-Secretary-General for Management is denied.

12. The Registry will transmit to the Applicant a copy of the aforementioned memorandum.

13. The time limit for the Applicant to file and serve observations, if any, on the Respondent's submission of 21 October 2011 and on the aforementioned memorandum is extended until **Wednesday, 2 November 2011**.

(Signed)

Judge Thomas Laker

Dated this 25th day of October 2011

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

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry