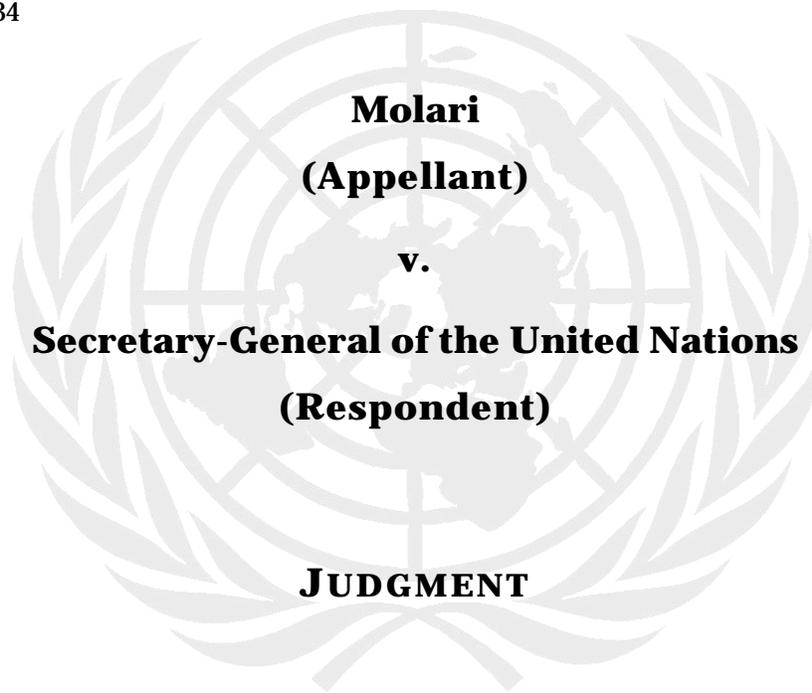




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-134



Before: Judge Mark P. Painter, Presiding
Judge Sophia Adinyira
Judge Luis María Simón

Judgment No.: 2011-UNAT-164

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Appellant: Edward Patrick Flaherty

Counsel for Respondent: John Stompor

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. We will not follow the Administrative Tribunal of the International Labour Organization (ILOAT) in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT,¹ this has never been the standard at the United Nations.² In disciplinary cases we have required that when a disciplinary sanction is imposed by the Administration, “the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.³ But we have not as yet set an exact standard for the quantum of proof required.

2. 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.⁴ 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.

3. Whatever the standard, the evidence against this former staff member met it. The Judgment of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) is affirmed.

Facts and Procedure

4. Ms. Elisabetta Molari joined the United Nations Office for Project Support (UNOPS) in Copenhagen in July 2007, as a Senior Procurement Specialist at the L-5 level.

¹ ILOAT Judgment No. 969, *in re Navarro* (1989). See also ILOAT Judgment No. 2699 (2008) and ILOAT Judgment No. 2849 (2009).

² Former Administrative Tribunal Judgment No. 941, *Kiwanuka* (1999); *Elbadawi v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/073; *Borhom v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/067.

³ *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098.

⁴ See eg. *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 27.

5. In June 2008, Ms. Molari submitted to the Danish Ministry of Foreign Affairs (MoFA), through UNOPS, a number of receipts relating to purchases of grocery items including milk, fruits, vegetables, and bread, for reimbursement of the value-added tax (VAT, or MOMS in Danish). The purchases were made in August, November, December 2007 and February 2008, at two local supermarkets (“Super Best” and “Netto”). As an L-5 UNOPS staff member, Ms. Molari enjoyed diplomatic status, which entitled her to VAT reimbursement.

6. Following a routine review of the receipts attached to the VAT reimbursement claim, the MoFA officials found the purchases made by Ms. Molari “very unusual”. For instance, 13 of the purchases were made on the same day (20 February 2008) at the same supermarket (Netto), with 13 different credit or debit cards.

7. On 10 July 2008, MoFA asked UNOPS to have Ms. Molari submit her bank statements for the relevant months for an “audit”. Ms. Molari did not comply, first questioning the basis of the MoFA’s request, then citing her busy work schedule and her need for time to go through her and her husband’s accounts and to reconcile her payments with her help-lady, and then declaring that those purchases had been made by family members, friends, and others who had made purchases on her behalf and whom she had reimbursed in cash based on the receipt value, but that she had no access to their bank statements. Eventually, Ms. Molari stated that she could not provide more information or devote more time to the matter and requested that MoFA disregard the receipts in question if they were not satisfactory.

8. After MoFA expressed concern through a “*Pro Memoria*” to UNOPS about Ms. Molari’s VAT reimbursement claim, the Executive Director of UNOPS decided to establish an enquiry panel to investigate the matter. The Enquiry Panel submitted its report to the UNOPS Executive Director on 8 October 2008. It found MoFA’s concern in respect of Ms. Molari to be valid. It determined that the receipts that Ms. Molari had submitted to MoFA for VAT reimbursement reflected 42 purchases made on seven different days in two local supermarkets. It noted that, of the 42 purchases, 39 were paid for with 39 different credit or debit cards, no single card number being used twice. It also noted that several receipts had footprints on the back and many Super Best receipts were “severely wrinkled”. The Enquiry Panel found that the items purchased were basic foodstuffs such as milk, bread, fruit and vegetables. Nine different bank cards had been

used on a single day to buy a total of 19 litres of milk from seven different brands and containing four different levels of fat content, for example.

9. The Enquiry Panel determined that the purchases resembled everyday shopping rather than that for parties or gatherings, as Ms. Molari had claimed. It concluded that it was most likely that those purchases had been made by others not known to Ms. Molari for their own purposes. The Enquiry Panel recommended the institution of disciplinary proceedings against Ms. Molari, during which Ms. Molari would have an opportunity to respond to the charges with countervailing evidence.

10. On 15 November 2008, Ms. Molari was charged with professional misconduct, i.e., that she had not abided by the standards of conduct expected of an international civil servant in submitting for VAT reimbursement receipts for purchases which she had not made or asked others to make for her, and had thus attempted fraud.

11. In January 2009, the UNOPS Executive Director formally referred Ms. Molari's case to the Joint Disciplinary Committee (DC) for UNOPS, the United Nations Development Programme and the United Nations Population Fund in New York. He explained that he could have summarily dismissed Ms. Molari as there appeared to be enough evidence to warrant such an action, but he decided to refer the matter to the DC, in part to allow Ms. Molari to reconsider her decision not to disclose certain information that it could have been in her interest to divulge.

12. In June 2009, the DC submitted its report to the UNOPS Executive Director. It concluded that (1) Ms. Molari had been afforded due process, (2) the Administration had made a prima facie case against Ms. Molari, (3) there was evidence showing that Ms. Molari had falsely certified store receipts as being eligible for VAT reimbursement, and (4) Ms. Molari had failed to provide any countervailing evidence to disprove the charges against her. The DC recommended that, in view of the serious nature of the misconduct, Ms. Molari be separated from service with one month's termination notice and with termination indemnity. The DC felt that Ms. Molari's case should not have been referred to the DC as there was strong evidence supporting a summary dismissal.

13. At a meeting on 7 July 2009, the UNOPS Executive Director informed Ms. Molari of the DC's recommendation and offered her an opportunity to escape the disciplinary measure

of termination if she would produce the names and bank-card numbers of the people who had allegedly made purchases on her behalf. Ms. Molari declined to do so.

14. On 17 July 2009, the UNOPS Executive Director informed Ms. Molari of his decision to accept the DC's recommendation to separate her from service with one month's notice and payment of termination indemnity.

15. On 15 October 2009, Ms. Molari filed an application with the UNDT in Geneva challenging the decision to terminate her service. The UNDT ruled on a myriad of procedural matters and objections before it held a hearing on 24 March 2010. The hearing was conducted in French, with interpretation provided.

16. On 7 April 2010, Judge Cousin issued Judgment No. UNDT/2010/058 on Ms. Molari's application. The UNDT considered that, contrary to her assertions, Ms. Molari had at her disposal all material documents and all the information that she needed to prepare her defense. Judge Cousin rejected Ms. Molari's contention that the Administration was under an obligation to prove her guilt beyond a reasonable doubt. Judge Cousin saw no reason to depart from the jurisprudence of the former Administrative Tribunal or the emerging jurisprudence of the UNDT that the Administration is not required to prove its case beyond a reasonable doubt. Given Ms. Molari's repeated refusal to disclose the identities of the third parties who had allegedly done shopping on her behalf, Judge Cousin concluded that Ms. Molari had either willfully refused to, or was unable to, produce the only evidence that might have cast doubt upon her fraudulent intent. Judge Cousin further concluded that Ms. Molari's behaviour amounted to professional misconduct, and that the penalty of termination was not disproportionate to the gravity of the offence.

17. In Order No. 11 (2010) issued on 30 September 2010, Judge Courtial, the President of the United Nations Appeals Tribunal (Appeals Tribunal), rejected Ms. Molari's request of 17 September 2010 to suspend the deadline to appeal the UNDT Judgment until 30 days after she received a reply from the Danish Parliamentary Ombudsman whom she had seized in parallel to her appeal to the Appeals Tribunal.

18. Ms. Molari appealed the UNDT Judgment on 1 November 2010. The Secretary-General answered on 4 January 2011.

19. On 26 January 2011, Ms. Molari filed another request to this Court for suspension of the proceedings sine die pending her receipt of a decision from the Danish Parliamentary Ombudsman expected in the “middle of 2011” and to permit her to file a rejoinder to the Secretary-General’s answer. Ms. Molari’s request was forwarded to the Secretary-General on 7 February 2011. On 14 February 2011 the Secretary-General filed his observations on Ms. Molari’s request.

20. In an email dated 2 September 2011, the Registrar informed the parties of his intention to place Ms. Molari’s case on the docket for the 2011 fall session. On 3 October 2011, Ms. Molari again requested that her case be suspended pending the Danish Parliamentary Ombudsman’s report now “expected by the end of October 2011”, which she would then seek to introduce (we assume only if it were favourable to her position) as “new” evidence. The Secretary-General opposes this suspension on many grounds, two of which are: (i) there are no “exceptional circumstances” justifying new evidence under Article 2(5) of the Statute of this Court; and (ii) any report by the Danish Parliamentary Ombudsman would be irrelevant, as the decision impugned here was not based on any facts found by the Danish authorities, but on the clear evidence that the VAT reimbursement claim was fraudulent.

Submissions

Ms. Molari’s Appeal

21. Ms. Molari requests that this Court order the Respondent to produce a “complete, unedited, signed and dated copy of the *Pro Memoria* and copy of the 17 September 2008 minutes of the meeting between UNOPS’s [Executive Director] and MoFA, upon which the Administration relied in charging the Appellant with misconduct and upon which it relied in ultimately terminating the Appellant from service”. (Underline in original)

22. The UNDT Judgment must be vitiated because the Judge applied the incorrect burden of proof (“sufficient evidence”) and shifted the burden of proof to Ms. Molari to provide evidence to the contrary, essentially making her prove her own innocence. Citing a judgment by the ILOAT, Ms. Molari maintains that under the case law of the international civil service, the Administration must prove its case against her beyond a reasonable doubt due to the seriousness of the charges and concomitant penalty.

23. The UNDT failed to give Ms. Molari the benefit of the doubt, as the Judge refused to accept her verbal and written proof and explanations. The UNDT Judge was only satisfied with one particular form of evidence (the names and credit card numbers of her friends and family) but not others, thus requiring her to prove her own innocence in violation of her right to due process.

24. The UNDT erred in law by refusing to grant Ms. Molari her requested discovery of the full text of the *Pro Memoria* and the meeting minutes; by conducting the hearing in French when she and her counsel are Anglophone, and where the probity and truthfulness of Ms. Molari were at issue; by refusing to accept the evidence proffered by Ms. Molari under the condition of confidentiality; and by reaching a determination that Ms. Molari's behaviour constituted misconduct on the basis of mere speculation without one piece of probative and demonstrative evidence that the receipts were false or fraudulent.

Secretary-General's Answer

25. The UNDT correctly upheld the decision to separate Ms. Molari from service with one month's notice and payment of a termination indemnity, after it had examined Ms. Molari's case, in accordance with the principles set forth by former Administrative Tribunal Judgment No. 941, *Kiwanuka* (1999), and found that there was sufficient evidence to support a reasonable inference that misconduct had occurred, that Ms. Molari had failed to provide a credible explanation or contrary evidence sufficient to rebut the Administration's case, and that the established facts legally amounted to misconduct.

26. Ms. Molari's reliance on the ILOAT jurisprudence was not warranted. A standard of proof beyond a reasonable doubt is inconsistent with the long-established jurisprudence of the former Administrative Tribunal and several judgments of the UNDT.

27. Ms. Molari's assertions of errors in law are without merit. The fact that the UNDT recognized an opportunity for her to provide evidence to rebut the Administration's case was no shifting of any burden of proof to her. The fact that the UNDT found Ms. Molari's explanations to be inconsistent and lacking credible support does not mean that the UNDT did not give her the benefit of the doubt or required her to prove her innocence.

Considerations

28. First, we deny the suspension request, for both reasons proffered by the Secretary-General and set out in paragraph 20 above. The case arose in 2008. It should be, and now will be, over.

29. We will not follow the ILOAT in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations. In disciplinary cases we have required that when a disciplinary sanction is imposed by the Administration, “the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.⁵ But we have not as yet set an exact standard for the quantum of proof required.

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.

31. In Ms. Molari’s case the facts are so clear as to be irrefutable. No matter what the standard, the Administration has met the burden. *Who buys 19 litres of milk from seven different brands containing four different levels of fat content in one day with nine different bank cards?*

32. Ms. Molari contends that the trial judge “shifted the burden” to her to refute misconduct. Not so. The trial judge did of course allow her opportunities to present any evidence she wished. And all along, she was afforded opportunities to justify the receipts. But granting an opportunity to present evidence was not burden-shifting. Anyone accused of misconduct is permitted to produce evidence. Of course there *was* no innocent explanation, so the opportunity to present non-existent evidence was simply exemplifying that situation.

⁵ *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098.

33. Ms. Molari also contends that it was unfair for the trial judge to hold a hearing in French (though interpretation was provided) when both she and her counsel spoke English and not French. It is not always possible to conduct hearings in an applicant's language. Judges are required to speak one of the United Nations Secretariat's working languages—French is one of those two languages. If interpretation is provided, there can be no error in conducting a hearing in either English or French.

Judgment

34. We affirm the UNDT Judgment.

Original and authoritative version: English

Done this 21st day of October 2011 in New York, United States.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar